

# ARTICLES

## STATUTORY INTERPRETATION OR PUBLIC ADMINISTRATION: HOW *CHEVRON* MISCONCEIVES THE FUNCTION OF AGENCIES AND WHY IT MATTERS

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### ABSTRACT

*By its Chevron doctrines, the Supreme Court reconceived the core function of administrative agencies as statutory construction, modeled on the judicial process, instead of the actual legal function of public administration, which is operational implementation of statutory programs. Since statutory construction by tradition lies within the domain of the courts, the Court's reconception of administrative work transferred sources of law on judicial review and administrative procedure from institutionally savvy statutes, principally the Administrative Procedure Act (APA) and enabling acts, to the Court's own judge-made canons. Because those canons are founded on a false paradigm of public administration as statutory construction, they have had pernicious effects, including reshaping agency procedures in ways that frustrate values of public administration, promoting excessive amounts of judge-made law on the meaning of regulatory statutes, and minimizing judicial oversight of administrative work for basic rationality. After decades of relentlessly using Chevron's tests designed for "statutory construction" to supervise*

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*the operational acts of public bureaucracies that are charged with the substantially different task of “carrying out” statutory programs, the Supreme Court last Term decided several cases that break from Chevron’s misconception. The Court revived the framework of judicial review from the formative, pre-Chevron era, when the APA dominated judicial review. That development is heartening. The earlier framework is more attuned to the actual legal function of public administration and it relies on the comparative institutional strengths of agencies and courts. The statutory framework of the APA works better than the judge-made Chevron canons of the Supreme Court, and it is, after all, the scheme that Congress enacted into law. Statutes are the way out.*

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#### INTRODUCTION

Through its *Chevron* doctrines, the Supreme Court reconceived the core function of administrative agencies as statutory construction, modeled on the judicial process, instead of the actual legal function of public administration, which is operational implementation of statutory programs. Because statutory interpretation traditionally lies within the domain of the judiciary, that category error led the Court to displace institutionally savvy

statutes, chiefly the Administrative Procedure Act (APA), in favor of the Court's own judge-made norms about standards of judicial review and administrative procedures for that court-sounding work. *Chevron* marks a tipping point in the history of judicial review, not just for the standard by which it is best known—the degree of deference it affords administrative actions—but also for its seismic shift from statutes to judge-made canons as the authoritative sources of law on administrative review and administrative procedure.

Beginning with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> in 1984 and continuing steadily for over two decades through *National Cable & Telecommunications Ass'n v. Brand X Internet Services* in 2005,<sup>2</sup> the Supreme Court has used a paradigm that typical, mainstream public administration is the same activity as statutory construction. Unlike courts, however, agencies do not exist to issue disinterested and authoritative interpretations of statutes based on strictly legal processes. As organizations of public administration, agencies are charged with *carrying out* statutory provisions—that is, with implementing public policies through operational programs. Administrative rules represent interstitial, provisional, operational applications that can be, and often are, altered as agency expertise evolves and political currents shift. Accordingly, agencies by law use institutional processes that involve controls by the political branches. They have mechanisms for public input and accountability that advance bureaucratic and management objectives and rely on technical expertise. While statutory factors are part of the administrative process, the business of public bureaucracies is not the same as the business of the courts to interpret statutes in cases or controversies.

The statutory standards of review that Congress enacted in the APA and various enabling acts, which were the dominant sources of law in the pre-*Chevron* era, treat the administrative function as substantially different from the judicial role, not as essentially equivalent. Rather than merging the distinct roles of courts and agencies into a universe of judicial review that is all statutory construction all the time, those statutes facilitate review that is more attuned to the sometimes overlapping, but fundamentally different, missions and processes of those two types of governmental institutions when they work with statutes. Before *Chevron*, courts tended to use the statutory standard of arbitrary and capricious review and its close kin, the substantial evidence test, for oversight of most agency “carrying out” actions—that is, for review of quintessential administrative implementation of statutory programs. This standard of review emphasized

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1. 467 U.S. 837 (1984).

2. 545 U.S. 967 (2005).

judicial techniques of oversight that suited the administrative, implementing function, such as assessing the fullness of an agency's administrative record, its consideration of statutory factors, and the quality of its reasoning. The pre-*Chevron* courts did not assess administrative action as if it were a judicial-style exercise in text-parsing and a neutral perusal of legislative history. Indeed, in express terms, the APA and enabling acts counsel against overzealous framing of issues as so-called questions of law or questions of statutory interpretation. Yet this is precisely what the judge-made canons of *Chevron* relentlessly promoted for over two decades.

The doctrines of *Chevron*, applicable when an agency "construes a statute," effected a kind of mission creep as courts came to use them in virtually all cases of judicial review of agency action. This confusing paradigm—that agency implementation is synonymous with statutory construction—was the springboard by which the Supreme Court came to fashion its own doctrines on standards of review and its own norms about agency procedures, irrespective of the statutory requirements of the APA and various organic acts. Under the Court's false syllogism in its *Chevron* doctrine, administrative actions are "statutory interpretation"; statutory interpretation ultimately lies within the domain of the judiciary; and therefore, the Court may determine what administrative or judicial processes govern those binding administrative "interpretations."

The displacement of statutes as the source of law is now nearly complete for standards of judicial review, and it is moving along apace with respect to administrative procedures. Perpetuation of the *Chevron* regime threatens to unravel the framework of the APA, which prescribed a distinct institutional process for public administration, such as: advance notice of bureaucratic action through publication; broad rights of participation for affected interests; the development of a full, technical administrative record on which agencies base their actions; and agenda-setting by the contemporaneous occupants of the political branches. Far from being a counter-*Marbury v. Madison*,<sup>3</sup> the *Chevron* case and its progeny are at root a *Marbury* in administrative law. While these cases counsel deference to the agencies in some circumstances, they are firm in the view that the

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3. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); see, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2580, 2583-84 (2006) [hereinafter Sunstein, *Beyond Marbury*] (describing *Chevron* as even more than a "'counter-*Marbury*' for the Executive Branch"); see also Elizabeth Garrett, *Step One of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 56 (John F. Duffy & Michael Herz eds., 2005) (explaining that *Chevron* served as a "'counter-*Marbury*' for the regulatory state").

Court, not statutes, determines the nature of judicial oversight of public administration, including the standards of review and requisite administrative procedures.

Founded on a misconception that administrative work is statutory construction, the judge-made *Chevron* doctrines have had pernicious effects. First, by turning nearly every challenge on judicial review into a question of law as a matter of “statutory interpretation,” the Supreme Court’s *Chevron* doctrines likely generate more, not less, judge-made ossification of statutes than the APA regime that they displaced. Second and conversely, the distorted paradigm that agency action is statutory construction makes it difficult for the courts to review and assess agency action for the qualities expected of sound administration, that is, for rational and reasonable decision-making based on a full administrative record and on the inputs that are characteristic of public administration, not of neutral and independent courts. Third, the view that developed under *Chevron*—that agencies and courts are involved in an equivalent and shared project of statutory construction—makes it harder for the courts to allocate decision-making responsibilities between courts and agencies based on their comparative institutional strengths. The Court is blinded to its own important institutional role in the complex web of government institutions that comprise the regulatory state. Certain types of challenges to administrative work, albeit a narrow category, require resolution by the distinct features of the constitutional courts.

After decades mired in the Court’s increasingly elaborate and confusing *Chevron* canons, last Term the Supreme Court broke from *Chevron*’s methodology in several key administrative law decisions, including *Zuni Public School District No. 89 v. Department of Education*,<sup>4</sup> *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*,<sup>5</sup> *Long Island Care at Home, Ltd. v. Coke*,<sup>6</sup> and *Massachusetts v. EPA*.<sup>7</sup> These recent decisions may well signal a return to the APA’s more institutionally-attuned approach to judicial review. They build upon a recent practice in the lower federal courts of using something like the arbitrary and capricious test in a hybrid formulation of *Chevron* and the

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4. 127 S. Ct. 1534, 1541 (2007) (deferring to the agency largely on the grounds that the issue was a “specialized interstitial matter” for the agency and that the rule was reasonable, hence lawful, eschewing *Chevron*’s classic methodology).

5. 127 S. Ct. 1513, 1520 (2007) (finding that an agency “implementation” is reasonable, hence lawful, instead of formally following *Chevron*’s two step approach).

6. 127 S. Ct. 2339 (2007) (finding a Labor Department rule lawful because the statutory gap was one for the agency to fill, and the rule was not unreasonable).

7. 127 S. Ct. 1438, 1444 (2007) (using the arbitrary and capricious test to assess an agency’s denial of a petition for rulemaking); *see also* *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572-73 (2007) (deciding the preemptive effect of the National Bank Act without using *Chevron*’s framework).

APA.<sup>8</sup> The APA is based on a fundamentally sound paradigm of public administration, and it has the added virtue that it was enacted into law. A return to the APA's framework of comparative institutional competence would help rescue the law on judicial review from its current *Chevron* morass.

Part I of this Article describes the core legal function of administrative agencies to "carry out" statutory responsibilities. It explains how the legally established carrying-out function of public administration differs from "statutory interpretation." It traces the evolution of the Court's understanding of the administrative function from the formative decades of the APA, when the carrying-out model dominated judicial review, to the *Chevron* era, when the model became one of statutory construction. Part II describes how that misunderstanding of the administrative function creates dysfunctions in the legal doctrines. Judge-made norms displaced statutes as sources of law, and those judge-made canons are both overly intrusive in declaring the meaning of statutes and overly indifferent to the administrative reasonableness of operational programs by public bureaucracies. Part III describes the superiority of the APA's scheme of judicial review, which seeks to separate and not to merge the institutional roles of court and agency, and to assign responsibilities to one or the other based on comparative institutional strengths. Governing statutes assign agencies and courts different constituent roles in the overall regulatory enterprise. Finally, this Article sees recent decisions of the Supreme Court as breaking with *Chevron's* methodology in ways that may presage a return to the earlier, more institutionally savvy approach.

#### I. *CHEVRON'S* FALSE PARADIGM OF ADMINISTRATIVE WORK

Agencies are bureaucracies of public administration. They are charged with implementing statutes and with running and planning the policies that stem from those statutes. Their operational mission is to carry out statutory programs, not to perform judicial-style statutory interpretation.<sup>9</sup> While

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8. See, e.g., M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 93-96 (John F. Duffy & Michael Herz eds., 2005) (stating that courts sometimes conduct *Chevron's* step two analysis in a way similar to the APA's arbitrary and capricious review); Richard Murphy et al., *Judicial Review in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2004-2005* 101 (Jeffrey S. Lubbers ed., 2006); Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197, 201 (2007) (citing circuit court demands for reasonable administrative decision-making).

9. While legal doctrines of judicial review necessarily rely on paradigms of administrative functions, agencies are not monolithic. They have varying legal structures and different kinds of tasks, as well as varying internal cultures and historic practices.

similarities exist between public administration and the exercise of judicial power—both types of work give meaning to statutes—agencies have a distinctly different function than courts.

*A. The Legal Function of Public Administration to “Carry Out”  
Statutory Programs*

Authorizing language in enabling acts typically grants an agency authority to take administrative action “for the purpose of *carrying out the provisions of*” the enabling act;<sup>10</sup> “to *carry out the purposes*” of a particular statute;<sup>11</sup> “for *carrying into effect* of the various provisions” of an act;<sup>12</sup> or “as public convenience, interest, or necessity requires[,] . . . [m]ake such regulations *not inconsistent with law* as it may deem necessary . . . *to carry out the provisions*” of the relevant Act.<sup>13</sup> Other enabling acts describe the administrative function with slightly different formulations, but to the same effect: authorizing the administrator to “*carry[] out his functions*”<sup>14</sup> or to “issue appropriate rules and regulations to govern the *carrying out* of the *agency’s responsibilities* under [the] Act.”<sup>15</sup> Those carrying-out responsibilities centrally include execution and enforcement,<sup>16</sup> as well as planning, implementing, and managing regulatory programs. The essentially *operational* character of public administration is especially clear in the enabling act at issue in *Zuni Public School District*.<sup>17</sup> There, the authorizing statute provides that the Secretary of Education, “in order to *carry out* functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law[,] . . . is authorized to make . . . rules and regulations *governing the manner of operation of, and governing the applicable programs administered by, the Department.*”<sup>18</sup>

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10. 15 U.S.C. § 46(g) (2000) (emphasis added) (Federal Trade Commission); *see also* 16 U.S.C. §§ 669i, 777i (2000) (Secretary of the Interior) (“for carrying out the provisions”); 23 U.S.C. § 315 (2000) (Secretary of Transportation); 47 U.S.C. § 201(b) (2000) (Federal Communications Commission).

11. 16 U.S.C. § 701 (2000) (emphasis added) (Department of Interior).

12. 25 U.S.C. § 9 (2000) (emphasis added) (Bureau of Indian Affairs); *see also* 30 U.S.C. § 75 (2000) (Bureau of Land Management) (“for carrying into effect the provisions”).

13. 47 U.S.C. § 303(f) (2000) (emphasis added) (radio); *see also* 19 U.S.C. § 66 (2000) (Secretary of Treasury) (“in carrying out the provisions”).

14. *See, e.g.*, 19 U.S.C. § 1336(i) (2000) (emphasis added) (Presidential Customs classifications).

15. 42 U.S.C. § 4128 (2000) (emphasis added) (federal financial assistance agencies); *see also* 8 U.S.C. § 1103(a)(3) (2000) (Attorney General) (“for carrying out his authority”).

16. *See, e.g.*, 47 U.S.C. § 151 (2000) (“[T]he Federal Communications Commission . . . shall execute and enforce the provisions of this chapter.”) (internal quotations omitted).

17. 127 S. Ct. 1534 (2007).

18. 20 U.S.C. § 1221e-3 (2000) (emphasis added).

The administrative function is an operational, policy-implementing role, in which an agency typically chooses from among a variety of possible solutions to a particular set of specialized problems or challenges. The agency may set bureaucratic implementing standards of a type quite foreign to the work product of a court when it interprets a statute in a case or controversy. That policy-implementing function of agencies often produces actions or rules—like the bubble rule in the *Chevron* case itself—that have qualities essential to interstitial bureaucratic application and enforcement, such as multiple part tests, specific performance standards, and detailed compliance commands. These are characteristic of the carrying-out function of a public bureaucracy and not of a judicial holding about the meaning of a statute.

*B. The Administrative Function as Policy Implementation in the  
Formative Years of the APA*

In the formative years of the APA, judicial review doctrines tended to respect the policy or technical implementing function that was distinctly the work product of institutions of public administration. Landmark cases of judicial review in the pre-*Chevron* era, such as *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>19</sup> *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>20</sup> and the pre-APA case of *NLRB v. Hearst Publications, Inc.*,<sup>21</sup> all involved agency actions that implemented statutory provisions in operational ways that are classic for public administrative bodies. Courts generally called this administrative work mixed law and policy, or application of law to facts, or policy development. In *Overton Park*, the Department of Transportation issued an informal order that its routing of a highway through a park was the only “feasible and prudent” option.<sup>22</sup> In *State Farm*, the National Highway Traffic Safety Administration revoked, by rulemaking, passive automobile restraints under an act that authorized the agency to make standards that are “practicable” and “meet the need for motor vehicle safety.”<sup>23</sup> In *Hearst*,

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19. 401 U.S. 402, 405, 421 (1971) (remanding where Secretary of Transportation’s proposed highway running through a park conflicted with statute that required routing around parks where “feasible and prudent”).

20. 463 U.S. 29, 33-34 (1983) (involving a judgment by the National Highway Traffic Safety Administration that its revocation of passive occupant restraints was consistent with the National Traffic and Motor Vehicle Safety Act’s mandate that safety standards “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms”). National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, 1392(a) (repealed 1994).

21. 322 U.S. 111, 131 (1944) (“[T]he Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”).

22. *Overton Park*, 401 U.S. at 405.

23. *State Farm*, 463 U.S. at 33-34.



the National Labor Relations Board determined by adjudication that the statutory term “employee” in a federal labor law applied to newsboys, who in other contexts were deemed independent contractors.<sup>24</sup> In each case, the agency undertook some form of quintessentially administrative action in order to effectuate a statutory program, through evolving, iterative, or practical applications based on inputs that are characteristic of public administration. Those inputs included: technical assessments of on-the-ground facts; expert predictions; the policy views of administrators and staff; input from the public, especially from affected interests; political influence and control from the White House and the current Congress; the agency’s own understanding of the statutory provisions of its organic act; and the practical needs of the bureaucracy to manage and enforce a statutory program.

While those agency actions were similar to the countless actions that now fall under *Chevron*’s spell, the courts did not call those earlier actions “statutory construction.” The courts sometimes labeled the actions policy implementations, applications of law to fact, mixed questions of fact and law, or mixed policy and law matters. The standard of judicial review that the courts applied to those commonplace actions of public administration was the arbitrary and capricious test of § 706 of the APA, or its close kin, the substantial evidence test.<sup>25</sup> Those APA standards provide that courts shall review agency actions for their basic rationality and reasonableness, and not de novo, because the work is entitled to respect as the actions of other lawfully established government bodies and because agencies have a different mission and process from the courts.<sup>26</sup> Section 706, as applied by courts, thus tended to focus on features relevant to the soundness of an agency’s work as a government institution of administration and enforcement—not as an institution whose job matches that of a court. Judicial review in that formative era tended to examine such factors as: whether the administrative record was adequately developed with technical and expert materials; whether the agency engaged in an act of reasoned decision-making; and whether the agency considered all of the relevant factors, including but not limited to, whether the agency gave a proper meaning to the statutory text.

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24. *Hearst Publ’ns*, 322 U.S. at 114; see also *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 529-30 (1981) (using the substantial evidence test to assess whether OSHA’s cottondust standard properly implemented the statutory word “feasible” in the Occupational Safety and Health Act).

25. 5 U.S.C. § 706(2)(A), (E) (2000).

26. See *United States v. Bean*, 537 U.S. 71, 77 (2002) (“[T]he ‘arbitrary and capricious’ test in its nature contemplates review of some action by another entity, rather than initial judgment of the court itself.”).

To the extent that administrative agencies necessarily work with statutory text when taking bureaucratic action, the courts tended to use the arbitrary and capricious test to assess whether an agency's application of its statutory terms in a particular matter was lawful. That is to say, courts treated a broader range of issues on review in the pre-*Chevron* world—even some that in a sense are administrative interpretations of statutes as administrative implementation—and courts subjected them to the standard of the APA that ensures rational administrative decision-making. Courts did not cabin those typical administrative actions into a special realm of so-called questions of law or statutory construction.<sup>27</sup> For example, in restating the practice of arbitrary and capricious review in the mid-1980s, the Section of Administrative Law of the American Bar Association noted that courts would set aside and find an abuse of discretion in any agency action in which the agency failed to consider factors that the federal statute required it to consider.<sup>28</sup> The ABA's accompanying report acknowledged that this is “a *kind* of statutory construction,”<sup>29</sup> but courts tended not to treat mixed matters of agency implementation as “pure” questions of law or pure statutory interpretation. Likewise, when summing up the Supreme Court's 1983 Term, the *Harvard Law Review* noted that courts had tended to use the APA's § 706's standard of arbitrary and capricious review “in closely scrutinizing agency reasoning, records, and *interpretation of statutes*.”<sup>30</sup>

Administrative law casebooks and treatises of the 1960s and 1970s, and most of the major Supreme Court cases of that era reveal the prevalence of the arbitrary and capricious, abuse of discretion standard, or the similar substantial evidence test of the APA for reviewing administrative action. In 1980, Professor Kenneth Culp Davis observed that the federal courts had established “a consensus in favor of the arbitrary-capricious test for review of informal action, including rulemaking.”<sup>31</sup> Indeed, in *State Farm*, the

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27. See Section of Administrative Law, American Bar Association, *A Restatement of Scope-of-Review Doctrine*, 38 ADMIN. L. REV. 235, 235 (1986) (stating that the grounds for reversal includes when “the agency has relied on factors that may not be taken into account under, or has ignored factors that must be taken into account under,” a federal statute, and when “[t]he action rests upon a policy judgment that is so unacceptable as to render the action arbitrary”); Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 250, 252 (1986) [hereinafter Levin, *Scope-of-Review*] (“The ‘relevant factors’ test of *Overton Park* should be understood as referring to factors that the agency is required to consider by virtue of a statute . . .”); see also *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981) (stating that the issue was “whether the federal regulations that permit States to ‘deem’ income in this manner are arbitrary, capricious, or otherwise unlawful,” and using statutory factors as part of that inquiry).

28. *A Restatement of Scope-of-Review Doctrine*, *supra* note 27, at 235; see also *Am. Textile Mfrs. Inst.*, 452 U.S. at 540 (“We must measure the validity of the Secretary's actions against the requirements of that Act.”).

29. Levin, *Scope-of-Review*, *supra* note 27, at 250 (emphasis added).

30. *Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 247 (1984) (emphasis added).

31. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2, at 284 (Supp. 1980) (observing that federal courts tend to use arbitrary and capricious test

Supreme Court equated the universe of informal notice-and-comment rulemaking under § 553 of the APA with judicial review pursuant to an arbitrary and capricious standard.<sup>32</sup>

To be sure, § 706 does envision a realm of issues that are questions of law, including questions of statutory construction.<sup>33</sup> Yet the textual command of § 706 clearly indicates that issues of statutory interpretation comprise a mere subset of the range of possible administrative matters on review. They are not the whole universe as later reframed in the *Chevron* era. Section 706 provides that only “to the extent necessary” and only “when presented” shall a court decide issues of statutory construction, questions of constitutional interpretation, or questions of law.<sup>34</sup> That phrasing counsels the judiciary to exercise restraint and to avoid a broad sweep for so-called issues of statutory construction. A similarly restrained approach to judicial review is also apparent in the provisions of many enabling acts that authorize agencies to “carry out” their statutory responsibilities so long as they do so in a manner “not inconsistent” with law.<sup>35</sup> In both contexts, the statutory texts counsel against review that would foster needless declarations about the meaning of statutes. Instead, the focus of judicial oversight under the APA is on review of administrative actions for their reasonableness, that is, for whether acts of public bureaucracies are arbitrary and capricious or lacking in substantial evidence as acts of operational implementation by public administrators.

In cases that truly present questions of law necessary to decision within the meaning of the APA, whether a canon of binding deference to agencies would ever be appropriate under the APA is something that the academic literature has debated elsewhere.<sup>36</sup> Such a canon might well be unwise,

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for review of informal rulemaking); see also KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2, at 665 (1976).

32. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (stating that the relevant statute indicated that the agency was to promulgate the motor vehicle standards at issue using informal rulemaking procedures and concluding that the Court could only set aside the standards if they were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

33. See 5 U.S.C. § 706 (2000) (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”).

34. 5 U.S.C. § 706.

35. See *supra* notes 10-18 and accompanying text.

36. For certain kinds of questions of law, the courts used a rational basis test, similar to an unreasonableness test, that asked whether the agency’s action—its manner of executing the law—had a rational basis or was reasonable. See DAVIS, *supra* note 31, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2, at 289 (Supp. 1980) (“In many or most cases, a statement that courts set aside administrative interpretations of law only for unreasonableness is fairly accurate. . . .”); see also *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 272 (1968) (stating an agency’s statutory interpretation is entitled to the Court’s deference, “and will be affirmed if it has a ‘reasonable basis in

even if not contrary to the APA's express text. The point here is that in the formative decades of the APA, most agency work was treated as operational, implementing work subject to judicial review for reasonableness. It was not treated as if it were statutory construction.

C. *Chevron: The Administrative Function Becomes  
"Statutory Interpretation"*

*Chevron* and its progeny moved the category of so-called "questions of law" or statutory construction deep into the domain of the mainstream policy implementation and operational work of administrative institutions. Like the rulemakings in *State Farm*,<sup>37</sup> *Sierra Club v. Costle*,<sup>38</sup> and others of that era, the Environmental Protection Agency's (EPA) rule in *Chevron* was quintessentially administrative in its substance and function. The bubble rule was an iterative, evolving bureaucratic implementation of policy under the Clean Air Act, using that distinctly administrative mixture of law, politics, expertise, and management that is characteristic of so many administrative rulemakings. In its rule, the EPA did not find a fixed, permanent legal meaning in statutory text, nor did it use orthodox legal materials or judicial-style methodology. Under instructions from newly-elected President Reagan to reduce regulatory burdens and complexities, the EPA changed its view about the types of new sources that would trigger federal permitting requirements in areas of the country where air quality fell below federal standards.<sup>39</sup> The EPA's new bubble rule allowed the states, somewhat at their option, to treat all pollution-emitting devices within a plant located in a non-attainment area as if a single "bubble" encased the plant.<sup>40</sup> The EPA's reasons and basis for the rule, published in the Federal Register, are typical of the administrative implementing function. The EPA described the rule's objectives in bureaucratic terms: to reduce the complexity of the regulatory program (consistent with the instructions of the incumbent Administration) by shifting from a dual

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law") (quoting *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944)); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (reviewing a Department of Treasury regulation implementing statutory definition with an unreasonableness standard); *Gray v. Powell*, 314 U.S. 402, 413 (1941) (holding in a pre-APA case that when a court reviews an agency's application of a statutory term to undisputed facts, it should review for rationality); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 558 (1985); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 4 (1983) (discussing how courts frequently deferred to agencies in statutory interpretation where there was a rational basis).

37. *State Farm*, 463 U.S. 29 (1983).

38. 657 F.2d 298, 410 (D.C. Cir. 1981) (holding that an EPA rule under the Clean Air Act was reasonable and not arbitrary and thus was lawful).

39. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 712 (codified as amended at 42 U.S.C. §§ 7401-7671 (2000)).

40. 46 Fed. Reg. 50,766, 50,766-67 (Oct. 14, 1981) (codified at 10 C.F.R. pts. 51-52).

definition of source to the new bubble concept in the non-attainment program and to promote intra-agency coordination with related programs that the EPA administered under the Clean Air Act.<sup>41</sup> The agency's published statement also described the EPA's scientific and technical conclusions that the bubble rule would promote modernization of plants and thereby reduce emissions of pollutants. It included expert predictions by the agency about the rule's impact on progress toward attainment of air quality standards, and it described the agency's public policy concerns about the impact of federal mandates on the states, as well as the EPA's "legal argument" about the outside parameters of the Act.<sup>42</sup> The legal argument was largely a rebuttal to various commenters' arguments that the EPA lacked discretion to issue the rule based on the statutory structure and legislative history of the Clean Air Act.<sup>43</sup> In addition, the EPA's statement noted that the content of the rule reflected the views of interested persons gleaned during the comment period, and that the rule had gone through regulatory review at the Office of Management and Budget, the office that supervises administrative action for its compatibility with White House policies.

The administrative process for setting the bubble rule was one of bureaucratic implementation to meet administrative goals. It was not an exercise in statutory construction as practiced by the courts, nor did it function as such. The bubble rule was not a permanent, fixed declaration of statutory meaning based on the text of the Clean Air Act or the intent of the Congress that had enacted the legislation. Like most administrative action, the agency had changed course in the past, and with proper process, might do so again in the future.<sup>44</sup>

If the Court in *Chevron* had treated the agency's action as administrative implementation subject to the arbitrary and capricious standard like so many other judicial review cases of the time, the Court might well have concluded that materials in the administrative record were sufficient for the Court to find that the EPA had engaged in a reasonable, accountable, non-arbitrary decision-making process and, therefore, that its action should

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41. *Id.* at 50,767.

42. *Id.* at 50,767-70.

43. *Id.* at 50,769-70.

44. Because of the Clean Air Act's State Implementation Plans (SIPS) process, in which each state agency designs a mix of pollution controls to satisfy the EPA that local regions are making appropriate progress toward attainment of federal air quality standards, the EPA stated that the states had discretion in choosing whether or not to adopt the bubble rule in current or future SIPS. *Id.* at 50,769; *see also id.* at 50,767.

not be set aside. But as others have noted, the *Chevron* opinion did not even mention the APA's standards of review for agency rulemaking or the analogous scope of review provisions of the Clean Air Act.<sup>45</sup>

Instead, the Court started what was to become its consistent practice of ignoring the standards of applicable statutes in favor of its own version of judicial review. The Court called this bubble rule an exercise in "statutory construction,"<sup>46</sup> suggestive of a legal process for affixing permanent meaning to statutory text based on judicial-style methodologies. It established a new two-part test for judicial review premised on its categorization of the administrative work as statutory construction. The Court wrote that when a court reviews an agency's construction of a statute, the first question the court must answer is whether Congress has addressed "the precise question at issue."<sup>47</sup> At step one, the court determines whether there is clear congressional intent on the precise question by using traditional tools of the judicial process. Then, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>48</sup> At this second step, if the agency's construction is reasonable, the court should defer to it.

The Supreme Court's *Chevron* opinion collapsed an understanding of the administrative action at issue in *Chevron*, a provisional policy rule for the future with operational, political, and technical purposes and effects, into a misleading rubric of agency "statutory interpretation" or "construction of the statute." In so framing the issue on review, the majority opinion (like many post-*Chevron* cases) relied in part on mere dictum from an outlier case that the Court decided in 1974, *Morton v. Ruiz*.<sup>49</sup> There, the Bureau of Indian Affairs (BIA) relied upon an unpublished sheaf of bureaucratic guidance when it refused to give welfare benefits to an unassimilated Indian who was living near, but not on, a Navajo reservation.<sup>50</sup> In an opinion by Justice Blackmun that was long on the equities but short on specific holdings, the *Ruiz* Court disapproved of the agency's order, either

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45. 42 U.S.C. § 7607(d)(9)(A) (2000); see *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

46. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (presenting the issue as whether the EPA's decision to allow states to treat pollution emitting sources within the same industrial complex as within a single bubble is based on a permissible interpretation of the statutory term "stationary source").

47. *Id.* at 842.

48. *Id.* at 843. For interesting behind-the-scenes accounts of how the *Chevron* decision came to pass, see Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 399-428 (Peter L. Strauss ed., Foundation Press 2006); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993).

49. 415 U.S. 199 (1974).

50. See *id.* at 213.

because it did not like the agency's ad hoc process of denying benefits to Mr. Ruiz without using notice-and-comment rulemaking to set benefits criteria, or because the guidance document that the agency had relied upon was not even published, or perhaps substantively, because the majority thought that the agency's view of its statutory mandate might be arbitrary.<sup>51</sup> The *Ruiz* Court's opining about statutory "gap filling" by agencies<sup>52</sup> was a mere mention in a long opinion principally devoted to critiquing irregularities in the BIA's efforts to bind Mr. Ruiz absent proper procedures.<sup>53</sup> It did not, as *Chevron* did some ten years later, convert review of the substance of an agency's administrative work into a simple conceit that the administrative action was statutory construction and should be reviewed as such by the Court.

When the decision was announced in 1984, *Chevron* did not immediately register as a watershed case on judicial review.<sup>54</sup> In successive Terms, however, the Supreme Court signaled *Chevron*'s importance by invoking its methodology in other major decisions.<sup>55</sup> Then for several years the *Chevron* test germinated uneasily alongside the APA's arbitrary and capricious test in the lower federal courts. Which standard of review governed? Were there now two parts to judicial review of mainstream agency action (as well as two parts to *Chevron*): one test for those "statutory construction" aspects that are present to a greater or lesser extent in virtually all administrative implementation, and another test of arbitrariness, to be applied to all those other inputs and outputs that make up public administration?

*Chevron*'s methodology proved highly seductive. Welcomed by the courts and the government, it soon displaced the prevailing methods of judicial review. By the early 1990s, *Chevron*'s *sub silentio* premise—that agency implementation should be reviewed as statutory construction—had

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51. See *id.* at 232-35.

52. See *id.* at 231 ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

53. See *id.* ("Assuming, *arguendo*, that the Secretary rationally could limit the 'on or near' appropriation to include only the smaller class of Indians who lived directly 'on' the reservation plus those in Alaska and Oklahoma, the question that remains is whether this has been validly accomplished."). To the extent that the Court's dictum implies anything about the scope of review, it seems to suggest that review for arbitrariness would be appropriate.

54. See, e.g., Ronald M. Levin, *Administrative Discretion, Judicial Review, and the Gloomy World of Judge Smith*, 1986 DUKE L.J. 258, 270 (1986) [hereinafter Levin, *Administrative Discretion*] (mentioning *Chevron* for the proposition that Presidential policymaking is entitled to deference).

55. E.g., *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985) (citing *Chevron* to support deference based on rational statutory construction); see Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288-89 (1986) (noting that the Supreme Court applied the *Chevron* analytical framework to three significant cases in the two years following *Chevron*).

spread to infect judicial review of a wide range of multifarious, bread-and-butter agency actions, from very particular applications in informal orders to broad exercises of policy-making in agency rulemakings. Counsel, especially at the Justice Department,<sup>56</sup> pitched their arguments more and more on the prongs of that judicial canon, most likely, as others have suggested, because *Chevron's* mechanical, two-step formula seemed to promise better outcomes for the government (a promise that has not been fully realized).<sup>57</sup> It is easy to surmise that appellate judges, Justices, and their law clerks were tiring of the sometimes tedious and often far flung review of large and technical administrative records for reasonable and sound decision-making under arbitrary and capricious review. In any event, judicial review departed from the APA as the source of law and came to rest almost exclusively on the judge-made canons for statutory construction that the Court developed in the *Chevron* case and its progeny.

Nearly twenty years after *Chevron*, judicial review under the APA's standard of arbitrariness practically vanished. In four recent periods, 1998-1999, 2000-2001, 2002-2003, and 2004-2005, the chapter on judicial review in the American Bar Association's Annual Developments in Administrative Law did not highlight a single administrative action that the Supreme Court reviewed under the arbitrary and capricious standard of the APA or an enabling act. All of its notable Supreme Court cases on scope of review related to *Chevron's* canons for so-called agency interpretations of statutes.<sup>58</sup> In their recent empirical study, Professors Thomas J. Miles and Cass R. Sunstein collected sixty-nine Supreme Court cases decided between 1989 and 2005 in which the Supreme Court applied the *Chevron* framework to agency "interpretations of law."<sup>59</sup> By contrast, during that

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56. See Merrill, *supra* note 48, at 422 (positing that "Justice Department lawyers, perceiving the advantages of *Chevron's* expanded rule of deference to administrative interpretation, became persistent and eventually successful proselytizers for use of the *Chevron* standard").

57. See *infra* note 91 (finding that the government's success rates are not significantly affected by a court's application of *Chevron's* doctrines).

58. See Michael Herz, *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1998-1999 45-68 (Jeffrey S. Lubbers ed., 2000); William S. Jordan III et al., *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2000-2001 65-85 (Jeffrey S. Lubbers ed., 2002); Mark Seidenfeld et al., *Judicial Review*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2002-2003 93-114 (Jeffrey S. Lubbers ed., 2004); Murphy et al., *supra* note 8, at 77-106.

59. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825 (2006) (concluding that of the eighty-four cases in the Supreme Court that reviewed "agency interpretations of law" between 1989 and 2005, the Court used the *Chevron* framework to decide sixty-nine of those cases). Professors Miles and Sunstein also surveyed cases from 1990 to 2004 in the federal courts of appeals in which judges reviewed interpretations of law by two agencies—the EPA and the NLRB. They collected 253 cases that met these criteria. The courts of appeals used a *Chevron* framework in all but twenty-six of those cases. Similarly, for the



same fifteen to twenty year post-*Chevron* period, the number of cases in which the Supreme Court treated agency action as administrative implementation and applied the APA's arbitrary and capricious test was markedly low, likely no more than two or three.<sup>60</sup>

In the dozens of *Chevron* cases that the Supreme Court decided in recent decades, the underlying administrative actions comprise a wide range of distinctly administrative work. Many, if not most, of the actions on review comprise the same mixture of fact, policy, and law application that in pre-*Chevron* days the courts treated as agency implementation and reviewed under the APA's default arbitrariness standard. That range is illustrated by the nitpicking administrative application in *United States v. Mead Corp.*<sup>61</sup> to the robust policy rulemaking of *Brand X*.<sup>62</sup> In *Mead*, the Supreme Court treated an informal order of the Customs Service as an "exercise of statutory construction" subject to judge-made canons of review for statutory interpretation and not to the arbitrary and capricious standard of the APA for administrative action,<sup>63</sup> even though, as the Court acknowledged, the agency there did not "ever set out with a lawmaking pretense."<sup>64</sup> In administering tariff statutes, the Customs Service in *Mead* issued an informal letter order to the Mead Corp., one of roughly 10,000 to 15,000 informal letter rulings issued per year by Customs Headquarters and forty-six regional offices, which applied the tariff schedule's category of "diaries . . . bound" to Mead's ring-fastened day planners, instead of the

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fifteen year period between 1985 and 2000, the Supreme Court itself has noted that it decided over twenty-five cases of judicial review under *Chevron* and the framework of "statutory construction." *United States v. Mead Corp.*, 533 U.S. 218, 230 nn.11-12 (2001).

60. An interesting and more recent example is the Court's use of the Clean Air Act's standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 42 U.S.C. § 7607(d) (9)(A) (2000), to review an agency's denial of a petition for rulemaking in *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459 (2007). There the majority concluded, the "EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change." *Id.* at 1463. The arbitrary and capricious standard has also survived for a narrow category of cases in which an agency has reversed policy. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005), the Court wrote that the arbitrary and capricious test of the APA is the standard courts use for situations in which an agency changes course, in conjunction with application of the *Chevron* test. An unexplained inconsistency may be grounds for setting aside agency action. This is a somewhat strange relic for the arbitrary and capricious test, as the *Chevron* case itself involved a change of policy because of the election of a new President, and the Court did not require any special scrutiny of that reversal. The Court also used an arbitrary and capricious standard to decide the lawfulness of an EPA stop work order countermanding a state permit in *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 496-502 (2004).

61. 533 U.S. 218 (2001).

62. *Brand X*, 545 U.S. 967 (2005).

63. 533 U.S. at 221 (declining to give the action binding *Chevron* deference, but invoking deference according to the factors in *Skidmore v. Swift*, 323 U.S. 134 (1944), a pre-APA case that involved a private right of action, not judicial review of agency action).

64. *Id.* at 233.

tariff category, “other.”<sup>65</sup> By the Customs Service’s regulations, its informal letter rulings applied only to the specific, identified articles to which it was addressed, they were revocable without notice, and “no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.”<sup>66</sup> This particular agency action was a classic example of a bureaucratic “carrying out” of the statutory tariffs; it was as specific and iterative as the orders of the agencies in *Overton Park* and *Hearst*. The action did not affix a permanent meaning to the statute; it was an incremental, one-off application of a narrow statutory category to a named party’s product. Yet consistent with the *Chevron* rhetoric and oblivious to the APA, the Court treated this action as “statutory construction” and applied the Court’s own judge-made doctrines for reviewing questions of law.<sup>67</sup>

Near the other end of the spectrum of administrative action, the Supreme Court in *Brand X* reviewed a broad deregulatory ruling of the Federal Communications Commission (FCC) as “statutory construction” under *Chevron*.<sup>68</sup> The declaratory ruling in *Brand X* was complex, highly technical, and based on the same administrative factors as those in *State Farm* and other typical agency rulemakings. The ruling was a product of the agency’s view of its statutory mandate, its evolving expert judgment about current, highly complex communications issues, input from affected interests, and new policy at the Commission on account of recent Presidential appointments.<sup>69</sup> Not only did the *Brand X* majority label this deeply administrative action “statutory construction,” but the Supreme Court also reached back and affixed that misnomer to the National Highway Traffic Safety Administration’s (NHTSA) rulemaking in *State Farm*, calling that rulemaking on passive restraints an “agency interpretation”<sup>70</sup> of the statute, although the *State Farm* majority had not.

The treatment of agency actions as questions of law in *Mead* and *Brand X* illustrates the remarkable transformation of the paradigm of agency work from the pre-*Chevron* years—when the Court would have treated analogous acts of public administration as informal administrative policy implementation subject to review under the APA’s standard of arbitrariness<sup>71</sup>—to the distorted reality of *Chevron* where the Court deems interstitial administrative applications to be questions of law subject to the

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65. *Id.* at 224-25.

66. 19 C.F.R. § 177.9(c) (2000).

67. *See Mead*, 533 U.S. at 227-28, 234-35 (applying the factors of *Skidmore*).

68. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

69. *See infra* note 83 and accompanying text.

70. *Brand X*, 545 U.S. at 981.

71. *See supra* notes 25-32 and accompanying text.

Court's own norms of judicial review.<sup>72</sup> This mislabeling of administrative work now pervades cases and commentary.<sup>73</sup> Professor Jerry Mashaw, in a nuanced article, refers to agencies as "the primary official interpreters of federal statutes."<sup>74</sup> He describes many different types of agency work as statutory construction, from major policy action like the passive restraint rulemaking in *State Farm* to the highly particular implementations of the Clean Air Act in State Implementation Plans (SIPS), even as he identifies distinctly administrative norms and practices in those tasks.<sup>75</sup> Only recently have there been any significant efforts to critique this false paradigm of the basic administrative function. Professor Richard Pierce objected to the terminology in a recent article,<sup>76</sup> and this past Term's administrative law cases use it less often,<sup>77</sup> as discussed below in Part III.

#### *D. Fallacies of Chevron's Vision of Public Administration as Statutory Construction*

The Court's labeling of administrative work as statutory construction has obscured the distinct carrying-out role of public bureaucracies.<sup>78</sup> Unlike the judiciary, agencies implement their enabling acts with a combination of expertise, practicality, interest-group input, and political will—not with a strictly legal, neutral, judicial-style methodology that would be principally attentive to the text and structure of the legislation as well as the views of the enacting Congress.

The structure and features of agencies match their carrying-out function. As bureaucratic organizations, agencies are designed to have a "will," an agenda that guides their actions, including their actions to implement

72. *Brand X's* revisionist description of the agency's action in *State Farm* is consistent with a dominant trend. The Supreme Court now describes the Wage and Hour Division's action in the early case of *Skidmore v. Swift* as "statutory construction," though the *Skidmore* Court more aptly described the agency's Interpretive Bulletin as government "policies . . . made in pursuance of official duty, based upon more specialized experience and broader investigations and information," in short, "[g]ood administration of the Act." 323 U.S. 134, 139-40 (1944).

73. See, e.g., Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) [hereinafter Sunstein, *Chevron Step Zero*]; see also Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003) [hereinafter Vermeule, *Mead in the Trenches*]; cf. Pierce, *supra* note 8.

74. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 503 (2005).

75. See *id.* at 529-30 n.67.

76. See generally Pierce, *supra* note 8.

77. See *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534 (2007).

78. See *supra* notes 10-18 and accompanying text.

statutes. When agencies take action such as the rulemaking in *State Farm* or the declaratory ruling in *Brand X*, they do so with a mindset or a purpose that is an essential aspect of the administrative process. As Judge Leventhal wrote, not only is the notion of *tabula rasa* completely inappropriate in administrative rulemaking, “[i]t would be the height of absurdity, even a kind of abuse of administrative process, for an agency to embroil interested parties in a rulemaking proceeding, without some initial concern” that the agency needed to remedy something.<sup>79</sup> The White House may set these strategic objectives<sup>80</sup> or the current Congress may shape them,<sup>81</sup> as illustrated in the underlying facts of *Chevron*, *State Farm*, *Brand X* and other cases. The APA’s requirement in § 553 that an agency must publish the “purpose” of a rule in the Federal Register confirms the forward-looking, purposeful nature of administrative rulemaking.<sup>82</sup> These purposes and agendas shape the kind of meaning that agencies give to statutes when they undertake their carrying-out functions. Agencies are not neutral, court-like organizations that merely have “judgment.”<sup>83</sup> Yet the moniker “statutory construction” brings with it powerful connotations of a disinterested body parsing statutory text in search of a fixed meaning about the intent of a prior, enacting Congress. It is misleading to apply that term to the generic work of public bureaucrats.

In addition to acting purposefully to advance an often political agenda, a core feature of the carrying-out function of public administration is its central reliance on expertise or technical know-how. Expert staff, including scientists, doctors, engineers, social workers, economists, and other technical policy people shape the outputs of administrative actions.

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79. *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1176 (D.C. Cir. 1979) (Leventhal, J., concurring). Those agendas are published periodically in the agency’s Regulatory Agenda, Regulatory Plans and the Unified Agenda.

80. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

81. See generally Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

82. 5 U.S.C. § 553(c) (2000).

83. See Brief for the Federal Petitioners at 40, *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277 & 04-281); Reply Brief for Cable-Industry Petitioners at 27, *Brand X Internet Servs.*, 545 U.S. 967 (2005) (Nos. 04-277 & 04-281). In its brief on the merits in the Supreme Court, the FCC urged the Court not to adopt a rule that would require the agency to opine about the “meaning of a statute” on the demand of a court that found itself grappling with a private cause of action under a regulatory statute that the agency administers. While such a practice might appear to be solicitous of administrative agencies, the FCC understood that it ran afoul of the administrative process. The FCC argued against any doctrine that would require the agency to act “precipitously” or to jump to a “rash” implementation of administrative policy in order to meet the needs of the courts in a private case or controversy. The FCC had declined to submit a view on the statutory issue some years earlier, when the Ninth Circuit was considering the case of the private right of action that became precedent for that circuit in the *Brand X* controversy.

Management and enforcement objectives are also critical. A perspective that conflates the administrative process with statutory construction obscures those factors.

Moreover, the specific procedures that agencies must use to formulate substantive rules are distinctly suited to the goals of public administration and are far different from the judicial process for deciding cases or controversies. The statutory procedures for agencies advance the values of *public administration*. These values include: accountability to the current members of the political branches through direct review by the White House and the Congress; fairness to affected interests through advance notice; broad rights of participation in the rulemaking process; regularity of process and transparency; the use of expertise to run programs; the development of a full administrative record to ensure reasonable decision-making; and enforcement and management norms.<sup>84</sup> Furthermore, in public administration, special interests often have a powerful influence on the content of final rules through submission of comments, meetings with the regulators, membership on Advisory Committees, or even more directly, through negotiation of a consensus rule under the Negotiated Rulemaking Act. The *Chevron* conceit—that administrative output is a process of “statutory construction,” which courts should review as such—ignores the special-interest haggling that influences the content of much administrative action.

The highly dissimilar approaches of agencies and courts in effectuating statutory provisions are readily apparent in the documents that each must prepare to explain its work. By law, the APA requires agencies to publish the “basis” of a final rule,<sup>85</sup> which like the supplemental statement published by the EPA for the bubble rule in *Chevron*, typically includes: a summary of the agency’s policy views; a summary of the technical evidence amassed in the record; the agency’s responses to comments by affected interests; its legal arguments about how its policy carries out specific statutory provisions; the views of related government entities including the states and the White House’s Office of Management and Budget; and management issues, including enforcement concerns. In the proceedings that led to *Brand X*, for example, the FCC described the basis of its declaratory ruling about Internet providers by referencing statutory goals, the Commission’s own policies to minimize regulatory burdens, and its understanding of the current needs of different technologies.<sup>86</sup> These

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84. See, e.g., *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (noting some of those values for informal rulemaking under the APA).

85. 5 U.S.C. § 553(c) (2000).

86. See Brief for the Federal Petitioners, *supra* note 83, at 11. The Commission said its action was “guided by several overarching principles,” including the statutory goal of encouraging “the deployment on a reasonable and timely basis of advanced

grounds for agency implementation are quite different from the rationales found in judicial opinions that give fixed meaning to statutes, which instead use orthodox legal analysis, relying on factors such as the plain meaning of the text, statutory structure, legislative history from the enacting Congress, and perhaps the meaning of other related federal statutes.

An agency's legal authority extends only to carrying out responsibilities consistent, or at least "not inconsistent," with statutory provisions. Fundamentally, an act of public administration must lie within the range of implementation options that are lawful under a particular regulatory statute. But the way in which an agency approaches even the distinctly legal or statutory aspect of much of its work as an institution of public administration is quite different from the way in which a court would work with that same statute to decide a case or controversy. Operating not unlike in-house counsel in other organizations, agency lawyers who are charged with analyzing proposed administrative action for conformity with the agency's legal boundaries, often in the Office of General Counsel, tend to serve the policy people up to and including the Administrator, not the other way around. As employees of the agency, the legal staff operate in a role that is sympathetic to the administrative agenda and responsive to the organizational hierarchy. Government lawyers may well be experts in the sense that they have highly specialized knowledge and institutional memory of the regulatory program, but they are not neutral—at least not neutral in the sense of the structural impartiality of judges. They conduct legal analysis about an agency's range of implementation choices with a pony in the race, even with respect to the distinctly legal inputs of administrative rulemaking, such as the marshalling of statutory text, use of legislative history, and attention to statutory structure.<sup>87</sup> Agency lawyers are advocates for the agency's agenda by design and not by dysfunction.

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telecommunications capability to all Americans" and the Commission's policy goal of minimizing "regulatory uncertainty" and "unnecessary and unduly burdensome regulatory costs" in order to foster "investment and innovation" in broadband services. The Commission also sought to create "a rational framework for the regulation of competing services that are provided via different technologies" and to develop "an analytical approach that is, to the extent possible, consistent across multiple platforms." *Id.* (internal citations omitted).

87. See, e.g., Philip Heymann & Esther Scott, *Taking on Big Tobacco: David Kessler and the Food and Drug Administration*, Case Studies in Public Policy & Management, Case No. 120-96-1349.3, (abridged) (Harvard University, John F. Kennedy School of Government 1997), available at <http://www.ksgcase.harvard.edu/> (explaining how the FDA came to initiate its rulemaking on tobacco); cf. E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 2 (2005) (discussing how *Chevron* may have affected the EPA by lessening the role for lawyers and enhancing the role of policy staff).

For example, consider the work of the General Counsels of the EPA on the issue of the agency's statutory authority to regulate carbon dioxide, a greenhouse gas, under the Clean Air Act. Under President Clinton, two General Counsels of the EPA concluded that the Clean Air Act authorized the agency to regulate greenhouse gas emission standards to address global warming.<sup>88</sup> A short time later, the General Counsel of the EPA under President George W. Bush reached the opposite conclusion.<sup>89</sup> Even though the agency's legal opinion pertained to statutory text and legislative history, the agency's institutional role and agenda influenced the agency's judgment. That quality is fundamental to institutions of public administration, and it should be reflected in legal doctrines about methods of judicial review. Courts and agencies do not give meaning to statutes in fungible ways.

Because agency action is subject to judicial review, agency lawyers often try to anticipate how a court might approach a challenge to the agency's implementation of a statutory term or provision.<sup>90</sup> To do so, aspects of an agency's record may mimic judicial methodology. But this form of reasoning in the shadow of the courts is not indigenous to the administrative process itself, nor is it the core function of administrative agencies. The refrain that agencies are the primary statutory constructors has obscured the reality that agencies carry out statutes with policy agendas, with expertise, with bureaucratic management objectives, with direct input from special interests and under express political direction. Judicial-style legal analysis of the intent of the enacting Congress is not a natural by-product of the administrative process.

## II. THE PERNICIOUS EFFECTS OF THE COURT'S CATEGORY ERROR ABOUT PUBLIC ADMINISTRATION

Through repeated application of the *Chevron* test to the range of mainstream administrative actions over the past couple of decades, the Supreme Court has managed to massage the distinct institutional features and missions of administrative work from a core function of policy implementation into a paradigm of statutory construction. Though often touted as a message to the courts to lighten up on agency policy, *Chevron*'s

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88. See Jennifer S. Lee, *EPA Says It Lacks Power to Regulate Some Gases*, N.Y. TIMES, Aug. 29, 2003, at A17, available at <http://query.nytimes.com/gst/fullpage.html?res=9A02E1DB1F39F93AA1575BC0A9659C8B63>.

89. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1450 (2007) (stating that the agency's current position was "contrary to the opinions of its former general counsels").

90. *Pierce*, *supra* note 8, at 202-03 (observing that agencies will try to predict judicial application of *Chevron* to proposed regulations to minimize the chance of judicial reversal).

two-part test has effected little change in the government's rate of success on judicial review according to most academic studies.<sup>91</sup> It has, however, had other pernicious effects on doctrines of administrative law.

*A. Displacing Statutes as Sources of Administrative Law*

By branding mainstream administrative implementation actions, such as the policy rules or applications in *State Farm*, *Mead*, and *Brand X*, with the misnomer "statutory construction," the Court subtly shifted the locus of the governing law on judicial review from the APA and various enabling statutes to its own judge-made canons. The activity known as "statutory construction"—as opposed to "public administration"—is an activity that traditionally lies within the domain of the courts. Thus the Supreme Court's new conception of standard administrative work enabled the Court to resort to judicial prerogatives when deciding how that judicial-sounding task should be undertaken by government agencies, irrespective of statutes such as the APA and other enabling acts that govern the scope of judicial review and the requirements for administrative procedures.

The Supreme Court self-consciously invoked this rationale in the *Chevron* decision itself. There the Court grounded its judge-made, two-part test for deference to agencies explicitly upon its traditional judicial prerogatives to make the rules about proper ways of construing statutes, writing that the "judiciary is the final authority on issues of statutory construction."<sup>92</sup> This may explain why the *Chevron* Court, like many judicial review cases that followed in its wake, failed even to cite the statutory framework of judicial review in the APA or applicable enabling acts. The Supreme Court reiterated its traditional authority over methods of statutory construction more recently in *Gonzales v. Oregon*, where the majority wrote that *Chevron's* deferential canons of judicial review are incidental to "the courts' role as interpreter of laws."<sup>93</sup> Judge Posner, in

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91. See Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998) (finding a post-*Chevron* affirmance rate of 73% in 1995-96); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1039 (finding an affirmance rate of 70.9% of pre-*Chevron* cases and an affirmance rate of 75.5% post-*Chevron* in 1988); see also Miles & Sunstein, *supra* note 59, at 825-27 (analyzing thousands of *Chevron* cases and concluding that the expectation that *Chevron* would eliminate policy judgments by judges has not been realized). Perhaps, as Kenneth Culp Davis wrote before *Chevron*, judicial verbiage about the standard of review does not really matter; the judges will do what the judges will do. 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 29:13, at 390 (2d ed. 1984).

92. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843 n.9 (1984).

93. 546 U.S. 243, 255 (2006); see also *Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 98 n.8 (1983) ("When an agency's decision is premised on its understanding of a specific congressional intent . . . it engages in the quintessential judicial function of deciding what a statute means."); Fed. Election Comm'n



*Krzalic v. Republic Title Co.*, phrased the point somewhat differently, but to the same effect, when he wrote that *Chevron* “bestowed” upon agencies a “judicial prerogative of statutory construction.”<sup>94</sup>

*Chevron* and its progeny misstate the core function of public administration and misconstrue the legal authority for the administrative implementation of statutory programs. The administrative authority to set a bubble rule, to apply a tariff schedule to the Mead Corporation, and to issue rules about Internet service providers in *Brand X* or passive automobile restraints in *State Farm*, is authority delegated by Congress to agencies as institutions of public administration and it is subject to governing statutes, principally the APA. Mainstream, bread-and-butter administrative action is public implementation of statutory programs. It is neither power delegated to agencies by the courts, nor despite some difficult areas of overlap, is it the same as the courts’ work of statutory construction in the context of a case or controversy.

This category error—the recasting of agency work as derivative of the work of the courts—is the conceptual blunder that launched the judicial “administrative-law improvisation project”<sup>95</sup> on doctrines of judicial review. It started in earnest with the *Chevron* decision and the Court advanced and developed it over successive decades. While the *Chevron* test speaks in terms of deference to legislative intent, the one thing that can be said with certainty is that the Court itself is setting the rules. In this respect, *Chevron* is not counter to *Marbury* but is its analog.

When the Court treats mainstream administrative work as equivalent to statutory construction, it unmoors agencies and the courts not only from the statutes that govern judicial review but also, as we see with *Mead*, from other statutes that mandate specific procedures for validly binding administrative action. Yet the APA specifically directs the courts to enforce those statutory procedural requirements.<sup>96</sup> Because the *Chevron* cases presume that even quintessential administrative implementation is statutory construction, they reason that the judiciary, and not the APA, is the authority that should decide which administrative procedures are

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v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (declaring that “the courts are the final authorities on issues of statutory construction”).

94. 314 F.3d 875, 881 (7th Cir. 2002) (commenting that this “judicial prerogative” enables the court to fashion a requirement that the agency engage in somewhat formal procedures for adopting regulations).

95. Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting). When coining that phrase, Justice Scalia was referring to the majority opinion in *United States v. Mead Corp.*, 533 U.S. 218, (2001), which limits *Chevron*’s binding deference. However, the Court’s improvisation project did not begin with *Mead*; it started with *Chevron*.

96. 5 U.S.C. § 706(2)(D) (2000) (“The reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law.”).

necessary in order to give binding effect to that mainstream agency action of “statutory construction.” Thus, we see the federal courts setting their own requirements for administrative procedures irrespective of the express procedural requirements in the APA and enabling acts. This is truly a disheartening development in administrative law.

The displacement of procedural statutes has initially taken place in opinions in which the Supreme Court majority expresses concern about administrative process values, at least as the Court sees them.<sup>97</sup> In *Mead*, a bare majority held that the agency’s informal letter ruling was not entitled to *Chevron*-style binding deference because it did not emerge from sufficiently rigorous administrative procedures; yet the reasoning of the majority and the protests of the dissent give one pause. The majority opinion framed the question on review as an issue of statutory construction, and once so framed, it followed that the judiciary should determine which agency procedures could bear the weight of binding deference. Given the informal nature of the agency’s procedures in that case, the Court answered: not binding *Chevron* deference but *Skidmore* deference.<sup>98</sup> *Mead* implicitly presumes that since the Custom Service’s action is “statutory construction,” the Court may disregard the APA’s procedural requirements and set its own judge-made standards.

In *Krzalic v. Republic Title Co.*, Judge Posner made the *Mead* assumptions explicit.<sup>99</sup> That case, a private right of action treated by the Seventh Circuit as akin to a case of judicial review, involved an informal policy bulletin issued by the federal Amicus, the Department of Housing and Urban Development (HUD). In deciding not to give the bulletin binding deference under *Chevron*, Judge Posner reasoned, “If an agency is to assume the judicial prerogative of statutory interpretation that *Chevron* bestowed upon it, it must use . . . something more formal, more deliberative, than a simple announcement . . . . A simple announcement is too far removed from the process by which courts interpret statutes to earn deference.”<sup>100</sup> The Seventh Circuit did not rely on the APA, which clearly would not permit such informal guidance to bind private parties. Thus, it is no surprise that two other circuits came to a different conclusion about the

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97. See *Mead*, 533 U.S. at 234-39; see also *Brand X*, 545 U.S. at 1003-05 (Breyer, J., concurring) (discussing *Mead*); *id.* at 1005-20 (Scalia, J., dissenting).

98. See *Mead*, 533 U.S. at 234-39 (rejecting *Chevron* deference and applying *Skidmore*); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore*, however, was not a case of judicial review of agency action.

99. 314 F.3d 875 (7th Cir. 2002).

100. *Id.* at 881 (internal citations omitted).

deference that courts should afford the same informal agency bulletin.<sup>101</sup> No longer is the APA or the organic act authoritative law for determining the legal effect of agency action.

Now the Justices themselves engage in free-wheeling debate about their own rules of proper administrative process for agency action. Justice Scalia would find some agency documents—briefs, position papers, any “agency position” that plainly has the “approval of the agency head”<sup>102</sup>—binding on private parties through the courts as statements of law or statutory construction in a case of judicial review, even though Congress by statute expressly took pains to ensure that agencies may take binding action only when they use specified procedures designed to promote administrative values such as public participation, accountability, and development of a technically rich record. Other Justices disagree, but base their disagreements on their own assessments of process values, not on the express procedural requirements of the APA or enabling acts. Responding to criticism from Justice Scalia in cross talk about *Mead* in *Brand X*, Justice Breyer seemed to concede that on judicial review the judiciary may set the rules about process for so-called statutory construction. In a concurring opinion he wrote, “Thus, while I believe Justice Scalia is right in emphasizing that *Chevron* deference may be appropriate in the absence of formal agency proceedings, *Mead* should not give him cause for concern.”<sup>103</sup> Likewise, in *Christensen v. Harris County*, he opined, “Justice Scalia may well be right that the position of the Department of Labor, set forth in both brief and letter, is an ‘authoritative’ agency view that warrants deference under *Chevron*.”<sup>104</sup> While the Justices may disagree about exactly what level of formality is required in order to give agency action binding effect under *Mead* and *Chevron*, surprisingly little discord exists at the Court over its dismissal of the APA as the source of law for administrative procedures.

Likewise, commentators have uncoupled administrative action from the procedural mandates of the APA, as exemplified by a comment of Professor Cass Sunstein: “Even when an agency’s decision is not preceded

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101. See *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1261 (11th Cir. 2002) (“Because the power to issue interpretations is expressly delegated in [the Act], the [statement of policy] carries the full force of law. As a result we give deference to [it].”); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002) (holding that “deference is due even though HUD’s Policy Statements are not the result of formal rulemaking or adjudication”).

102. *Brand X*, 545 U.S. at 1015 n.10 (Scalia, J., dissenting); see also *Mead*, 533 U.S. at 257 (Scalia, J., dissenting) (“Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.”).

103. *Brand X*, 545 U.S. at 1003-05 (Breyer, J., concurring).

104. 529 U.S. 576, 596 (2000) (Breyer, J., dissenting).

by formal procedures, there is no reason to think that courts are in a better position than agencies to resolve statutory ambiguities.”<sup>105</sup> There may be no reason, unless one considers that Congress legislated something else. The APA details the procedures that public bureaucracies must use if their implementing actions are to determine private rights and responsibilities in a binding way.<sup>106</sup> *Chevron’s* universal conceit that mainstream agency work is statutory construction has transformed an administrative carrying-out project, delegated to agencies by enabling acts and governed by Congress’s specific procedural statutes, into a court-like activity where the judiciary fashions its own version of proper administrative process.

How strange this new procedural landscape could become. When private parties are brought into the regulatory net of an agency, administrative law judges may not treat informal administrative bulletins as binding law because they lack what the APA requires in the way of procedures for that kind of effect. On judicial review, however, the courts well might dub that same material binding on private persons as statements of “statutory meaning.” In addition, consider that the courts might give binding effect to a brief, signed by an Administrator, that has neither gone through notice and comment nor been published in the Federal Register. That would be an extreme detour from the statutory requirements of the APA and its process values for public administration.

The continuing irrelevance of the APA that was triggered by *Mead* and *Chevron’s* own internal logic has become all too evident in recent decisions of the federal courts of appeals. In *Air Brake Systems, Inc. v. Mineta*,<sup>107</sup> the Sixth Circuit faced the question of whether three letters written by the Chief Counsel of the NHTSA, which expressed Counsel’s views that petitioner’s brake system did not conform to safety standards, were reviewable as final agency action. Under settled APA doctrine, the question whether an agency action is final, and therefore reviewable, turns on whether the action has “legal consequences” and determines rights and obligations.<sup>108</sup> In *Air Brake Systems*, the court of appeals answered that question neither by asking whether the APA would allow binding legal consequences to flow from the Counsel’s letters (it would not), nor by asking whether under the organic act the Counsel’s advisory letters could

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105. Sunstein, *Beyond Marbury*, *supra* note 3, at 2603. See generally Vermeule, *Mead in the Trenches*, *supra* note 73; Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

106. Cf. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 882 (7th Cir. 2002) (Easterbrook, J., concurring) (noting that in a private cause of action, the views of an agency may be binding only when the agency exercises its delegated responsibilities as the APA requires. “Otherwise the Administrative Procedure Act . . . would be a dead letter”).

107. 357 F.3d 632 (6th Cir. 2004).

108. *Id.* at 638 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

determine private rights and obligations (they could not), but rather by asking whether the judge-made canons of *Mead*, et al., would afford binding *Chevron* deference to those letters by the Chief Counsel. The court of appeals concluded, through its own assessment, that the letters were too tentative and informal to qualify for *Chevron* deference, but the issue was no longer a matter governed by the APA.<sup>109</sup> Similarly, in *Northwest Ecosystem Alliance v. United States Fish & Wildlife Service*, the Ninth Circuit determined that an agency Policy Statement that did not follow the statutory procedures for informal rulemaking under the APA was nonetheless entitled to have full binding effect.<sup>110</sup> The court explained that the procedures that the agency elected to use were, in the court's judgment, comparable to those required by statute, and using the principles of *Mead*, the court deemed them adequate to support lawfully binding agency action.

This trend is potentially quite pernicious. The Supreme Court's recent approach to administrative procedure, while purportedly rooted in deference to the legislative branch, is nothing of the sort. Its approach is remarkable for its disregard of statutes that were enacted with specific procedural requirements for lawful public administration. Moreover, it is hard to square the Court's recent approach with the central holding of *Vermont Yankee* that the courts may not devise procedures for agencies based on the judiciary's own view of proper administrative process but instead must respect the choices made by Congress.<sup>111</sup> None of this can be reconciled with the APA's specific mandate that a reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law."<sup>112</sup> The Supreme Court's pervasive misconception that administrative action is equivalent to its own project of statutory construction renders the APA increasingly irrelevant as the authoritative source of law on administrative procedures.

Ironically, the holding of the case whose dictum gave birth to *Chevron*'s discussion of agency "gap filling" in statutes, *Morton v. Ruiz*, is now threatened with deep-sixing by its own offspring. If anything, *Morton v. Ruiz* stood for the proposition that unpublished desk drawer material about benefits coverage could not be used to bind Mr. Ruiz, a private person, and that the APA decidedly made it the court's job to force the agency to use the procedures that the statute required: "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative

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109. *Id.* at 642-49 (applying *Mead*).

110. 475 F.3d 1136, 1142 (9th Cir. 2007).

111. See *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 547-49 (1977) (declaring that courts should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

112. 5 U.S.C. § 706(2)(D) (2000).

policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations.”<sup>113</sup> But now under judge-made *Chevron* doctrines, the prospect is very real that “secret” unpublished agency red tape, perhaps when signed by an agency head, is “statutory construction” that the Court may use to bind private persons. Because mainstream agency action is not statutory construction, but rather public administration, the judge-made norms that the Court fashions for administrative processes do not match the values for administrative functions that were settled by Congress in the APA and organic statutes.

*B. Upsetting the Distinct Statutory Roles for Courts and Agencies*

Having taken control from the APA, how has the Court built a new structure of judicial review that is less wise than the old? Measured solely by its overall impact on the success rate of the government, *Chevron* seems to have had little or no effect.<sup>114</sup> Nevertheless, the *Chevron* canons have had corrosive collateral effects that the APA framework largely avoids. The *Chevron* doctrines prompt too much judge-made law about the meaning of regulatory statutes, displacing the administrative function, and they generate too little examination of the reasonableness of public administration.

*1. Chevron Step One: Too Much Judge-Made Law on the Meaning of Regulatory Statutes*

*Chevron*'s framework encourages judge-made ossification of regulatory statutes more than the APA framework that it displaced. Because of their lasting impact through stare decisis,<sup>115</sup> and because they can be broad and abstract, judicial holdings that find fixed meaning in regulatory statutes can deprive agencies of needed flexibility to change course in the future. Judicial precedent about statutory meaning may unwittingly prevent an agency from adjusting its policy to implement the views of an incumbent Administration or from responding usefully to changes in its enforcement needs or other developments on the ground. However, not all judicial ossification is bad. Some types of issues on review do require a clear and fixed judicial declaration of the meaning of statutory provisions, with stare decisis effect, and § 706 of the APA contemplates the use of the judicial

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113. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

114. *See supra* note 91.

115. *See generally* *Neal v. United States*, 516 U.S. 284, 295 (1996) (explaining that stare decisis requires the Court to adhere to precedent, absent any “intervening statutory changes”).

process for those types of questions of law necessarily presented.<sup>116</sup> Nonetheless, a standard of review that encourages ossification of statutes by the courts and that needlessly narrows the range of implementation options for administrative agencies should be avoided.<sup>117</sup>

*Chevron* is known as a doctrine of deference and thus, it is often assumed that the doctrine prevents excessive judicial ossification of regulatory statutes.<sup>118</sup> A closer look at step one of the *Chevron* test belies that understanding. Because the courts treat virtually all quintessential administrative action—including policy implementation and application of law to facts—as “statutory construction,” and because the first step of *Chevron* requires a reviewing court to make a threshold finding on the meaning of the statute using traditional judicial tools,<sup>119</sup> all cases of judicial review under *Chevron* produce a de novo judicial holding about statutory meaning based solely on orthodox judicial methods. That judicial holding may declare that the statutory terms are, legally speaking, ambiguous, or it may declare a precise meaning of the legislative terms as found by the court. Both types of holdings impact the future of regulatory programs by establishing judicial precedent about the meaning of regulatory statutes. The constraint on subsequent administrative policy from judicial ossification occurs when a court concludes that judicial tools of statutory construction reveal precise statutory meaning.

*Chevron* likely has increased that type of output of judge-made law on the precise meaning of statutes. When the government loses under the *Chevron* framework, it tends to lose at step one, on the ground that the court itself, using its traditional tools of statutory construction de novo, has found a precise meaning in the statute.<sup>120</sup> Given the relatively stable rates of government wins and losses before and after *Chevron*, and given the predominance of the arbitrary and capricious method of review in the pre-*Chevron* era, it seems reasonable to conclude that the *Chevron* doctrine produces more, not less, ossification of statutes by courts.

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116. See *infra* Part III.

117. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1419-20 (1992) (discussing hard look review).

118. See, e.g., Sunstein, *Beyond Marbury*, *supra* note 3, at 2588 (arguing that *Chevron* combats ossification in the lower federal courts); cf. Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 318-22 (2004) (arguing that courts and commentators often overstate *Chevron* as a doctrine of deference).

119. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

120. E.g., Magill, *supra* note 8, at 86 (“[O]nce a reviewing court reaches the second step of this framework, the agency interpretation of the statute is usually sustained, often in a perfunctory way.”); see also William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1018-20 (2006) (observing the same pattern in the states).

Application of the APA's standards for judicial review leaves a lighter judicial footprint. Section 706 frames a limited category of so-called questions of law, that is, questions for which a resolution necessarily imposes the kind of ossification that *Chevron* encourages.<sup>121</sup> The text embraces norms of avoidance through its admonition that courts should decide questions of statutory interpretation only "to the extent . . . presented" and when "necessary to decision."<sup>122</sup> This reinforces the phrasing of many enabling acts that an agency's carrying-out function extends to actions "not inconsistent" with law, which allows for a wide array of administrative applications.

The default standard of arbitrary and capricious review, common in the pre-*Chevron* era, leaves a lighter judicial footprint. The setting aside of government action as arbitrary and capricious is a judgment by the court that on a particular record, with a specific rationale offered by the agency, the government has not made a case for its administration of the statutory terms in the particular manner under review. Such a holding often does not prevent an agency from taking the same action again on remand,<sup>123</sup> perhaps with a different rationale about statutory factors, a different factual basis, or more developed policy considerations.<sup>124</sup> In one empirical study of cases in the D.C. Circuit where the court remanded to the agency, including many pre-*Chevron* cases, agencies continued to pursue the challenged regulatory programs roughly 80% of the time. They used a variety of techniques to carry on as before, including supplementing the administrative record, initiating a new and similar rulemaking, or producing a reconsidered statement of basis and purpose.<sup>125</sup> Judicial ossification is not a prominent feature of judicial review under the APA's standard of arbitrariness, yet it is an inevitable ancillary effect of the framing of agency action as statutory construction under *Chevron*.<sup>126</sup>

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121. See 5 U.S.C. § 706 (2000) ("[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.").

122. *Id.*

123. See, e.g., Levin, *Scope-of-Review*, *supra* note 27, at 251 n.7 ("When an action is reversed under § (b)(2) [of the ABA's Restatement] because the agency's rationale is incompatible with a statute, the agency may be able, after further proceedings, to take the same action by reasoning from premises that the statute permits.").

124. See Section of Admin. Law & Regulatory Practice of the Am. Bar Ass'n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 44-45 (2002) [hereinafter *A Blackletter Statement*] (noting that courts "almost always" grant agency requests for remand for further articulation of the rationale).

125. See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 396 (2000) (concluding that in the pre-*Chevron* period identified, the "hard look" arbitrary and capricious standard "generally did not significantly impede agencies in the pursuit of their policy goals").

126. See *Mead Corp. v. United States*, 283 F.3d 1342, 1346-50 (Fed. Cir. 2002). On remand to the Federal Circuit, the court of appeals determined that, as a matter of law,



As regulatory programs have aged, they have become increasingly cluttered with judicial pronouncements about fixed statutory meaning, impeding the ability of agencies to respond flexibly to changed circumstances.<sup>127</sup> The Supreme Court recently addressed this problem in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a particularly troublesome case in the Court's doctrinal developments on judicial review.<sup>128</sup> When reviewing a declaratory ruling of the FCC, the Ninth Circuit Court of Appeals had found itself bound by precedent in the circuit that had arisen some years earlier in a private right of action.<sup>129</sup> In that earlier case, the court of appeals had interpreted and applied the same statutory provision that the later FCC declaratory ruling administered to a different effect. That particular problem of conflicting opinions about statutory provisions can develop in any statutory scheme in which Congress creates both private rights of action and administrative powers of enforcement. This is not a problem that one can lay at the feet of *Chevron*. Mindful of other cases in the lower federal courts in which the troublesome precedent arose from judicial review of agency action and not from a private claim, the *Brand X* majority wrote its opinion expressly to govern both types of precedent.<sup>130</sup>

The Supreme Court held that the Ninth Circuit erred when it found itself bound by the law of the circuit and that the court of appeals should have applied the *Chevron* framework when it reviewed the FCC's ruling.<sup>131</sup> The majority wrote: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."<sup>132</sup> The Court's disruption of settled doctrine on stare decisis is unfortunate. The *Brand X* doctrine may prove to be inadministrable by the lower courts, or it may come to "drain [prior] decisions of all precedential

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ring-fastened day planners are not "diaries, bound" under the Tariff Act's schedule, but are "other" related products not subject to a tariff. *Id.* While some might blame the *Mead* Court's use of *Skidmore* instead of *Chevron* deference for this ossification, the underlying problem is the Court's framing of the issue as a question of law.

127. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1018 (2005) (Scalia, J., dissenting); Brief for the Federal Petitioners, *supra* note 83, at 18-23 (noting confusion with application of stare decisis); see also *Petition for a Writ of Certiorari* at 18-23, *Brand X*, 545 U.S. 967 (No. 04-281).

128. 545 U.S. at 982-83 (2005) (clarifying when a "prior judicial construction . . . trumps an agency construction otherwise entitled to *Chevron* deference").

129. See *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1127-32 (9th Cir. 2003) (struggling to apply precedent from another Ninth Circuit opinion's definition of "information services" to this case), *rev'd*, 545 U.S. 967 (2005); *AT&T Corp. v. Portland*, 216 F.3d 871 (9th Cir. 2000).

130. See *Brand X*, 545 U.S. at 980.

131. *Id.* at 982.

132. *Id.*

value.”<sup>133</sup> In either event, it is a convoluted solution to a problem that is largely of the Court’s own making. A more straightforward approach to the problem of excessive ossification would be to return judicial review standards to the APA, which treats mainstream agency work not as statutory construction but as practical implementation subject to an abuse of discretion standard.

In addition to increasing ossification, *Chevron* undermines the role of agencies as institutions of public administration by greatly expanding the range of issues that the courts assess on review as questions of law rather than matters of public administration. To the extent that regulatory statutes deal in categories and are not self-executing, the statutes have texts that require some form of extension or application by administering or enforcing institutions.<sup>134</sup> Congress gave agencies an executing and administering function through language in enabling acts authorizing them to “carry out” regulatory statutes, subject to review for arbitrariness. Unlike the arbitrary and capricious review of pre-*Chevron* cases such as *State Farm* and *Sierra Club*, however, *Chevron*’s methodology plunges a reviewing court directly into judicial-style interpretive techniques that do not properly respect the different perspectives and missions of agencies when they implement statutory programs. Step one of *Chevron* requires the reviewing court to address whether the enacting Congress “directly spoke[] to the precise question at issue,” an inquiry that the court is to answer using “traditional [i.e., judicial] tools of statutory construction”<sup>135</sup> de novo.

Agencies employ methods of implementing statutory text that are different from the courts’ techniques of interpretation, yet that are legally appropriate for bureaucratic institutions of public administration. Agencies draw upon considerations such as expertise, political input from the current occupants of the political branches, public policy agendas, management and enforcement concerns, and special interest arm-wrestling. Under the APA’s standard of review for arbitrariness, courts examine agency work for its reasonableness as an administrative action, not for its conformity with a baseline set by a court using classic judicial methodology.<sup>136</sup>

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133. *New York v. EPA*, 443 F.3d 880, 886 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

134. 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, 21 (2000) (“[A]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal.”) (quoting THE FEDERALIST NO. 37, at 245 (James Madison) (Isaac Kramnick ed., 1987)).

135. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984).

136. See 5 U.S.C. § 706 (2000).

For example, in *Brand X*, the initial question as framed by the Court under *Chevron* was whether “the ordinary meaning of the word ‘offering’” as well as the “regulatory history of the Communications Act” showed the precise congressional intent.<sup>137</sup> The opinion begins with strictly linguistic and textual methods of interpretation that may be common for judges but less so for bureaucrats, such as resorting to standard dictionary definitions and abstract analogies.<sup>138</sup> Framing the case as a question of statutory construction, the Justices constructed linguistic arguments, such as whether cable companies that sell Internet services are “offering” telecommunications in the same way that car dealerships offer car components, pizza parlors offer pizza with delivery, or pet stores sell puppies with leashes.<sup>139</sup> That framing undermines the purposeful perspective and policy orientation of administrative agencies when they work with statutory text in developing expert policy or applying law to fact. Agencies make connections and think about features in different ways; they work with statutory terms such as “offering,” “source,” and “diaries, bound,” with their own institutional mixture of expertise, policy, politics, and management and enforcement concerns. That policy-driven administrative process, established by statutes, should command respect from the start. The different functions of agencies versus courts and the unique ways in which each institution lawfully works with statutes mean that an agency might take entirely proper action to implement a statute, such as creating a multi-part test or a detailed performance standard, which would be unacceptable action by a court performing the judicial function of statutory construction.

Moreover, the *Chevron* framework forces a disconnect between what agencies actually do by law and how they must justify their actions to a court on review. By treating standard administrative action as statutory construction, *Chevron* requires agencies to justify their administrative actions as a faux judicial process of text parsing, dictionary definitions, and a search for a fixed intent of the enacting Congress using strictly legal methods. Instead, the actual basis for their actions likely flows from a combination of policy and expert considerations, pressures from the current Congress or White House, and bureaucratic management concerns. Not only does the false reality of *Chevron* promote quirky government briefs, but it also undermines the important effect of judicial review in promoting reasoned decision-making by agencies and in disclosing the actual

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137. *Brand X*, 545 U.S. at 989.

138. For analysis of the federal courts’ increasing use of dictionary definitions as a method of interpreting statutes, see Garrett, *supra* note 3, at 58-59.

139. *Brand X*, 545 U.S. at 990-92; *id.* at 1007-11 (Scalia, J., dissenting) (arguing by analogy about the term “offer”).

administrative decision-making processes to affected interests. Those values underlie the doctrine, occasionally invoked in the pre-*Chevron* years, that the courts will not consider post hoc rationalizations of agency action on review.<sup>140</sup> Now that *Chevron* forces agencies to pretend to be in a somewhat different business from the one that statutes construct for them, it hardly seems fair to criticize them, as Justice Scalia did with the FCC in his *Brand X* dissent, for initiating a “new regime of regulation . . . under the guise of statutory construction.”<sup>141</sup> That guise is of the Court’s making.

## 2. *Chevron Step Two: Too Little Judicial Oversight for Administrative Reasonableness*

While *Chevron*’s first step is too rigidly intrusive on the administrative process, its second step is too indulgent. Under *Chevron*’s second step, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>142</sup> That inquiry into the reasonableness of the agency’s “interpretation of the statute” is not an adequate substitute for the arbitrary and capricious review that the APA requires. As a matter of practice, the second step of the *Chevron* test bears little weight in deciding cases. Courts rarely invoke unreasonableness as a ground for setting aside agency action. Professor M. Elizabeth Magill observed a few years ago, “once a reviewing court reaches the second step of this framework, the agency interpretation of the statute is usually sustained, often in a perfunctory way.”<sup>143</sup> Professor Orin Kerr documents a similar result in his empirical study of the federal courts of appeals for a two-year period in the mid-1990s.<sup>144</sup> And in the dozens of cases in which

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140. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (noting that “‘post hoc’ rationalizations . . . have traditionally been found to be an inadequate basis for review . . . . And they clearly do not constitute the whole record compiled by the agency” for purposes of § 706 of the APA) (internal quotations and citations omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (holding in a pre-APA case that since the Commission based its decision on principles of equity, the reviewing court must make its determination on the same grounds); see also *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 653 (1980) (rejecting an agency’s later justification for its decisions because the agency needed to justify its actions based on substantial evidence in the record).

141. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting) (internal quotations omitted).

142. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

143. Magill, *supra* note 8, at 86; see also Andersen, *supra* note 120, at 1020 (observing that once an agency reaches the second step of *Chevron*, the courts usually sustain the agency’s interpretation, “often in a perfunctory way”).

144. See Kerr, *supra* note 91, at 30-31 (providing empirical data confirming that courts often uphold agencies’ views where the rulemaking reaches step two of the *Chevron* test). Based upon empirical data from 1995 and 1996, Kerr concluded that where federal courts of appeals found step two of *Chevron* dispositive, the courts upheld the agencies’ positions 89% of the time. *Id.* at 31; see, e.g., *Barnhart v. Thomas*, 540 U.S. 20, 25-26 (2003) (finding that the statute was unclear at step one of *Chevron*, but then making little effort to

the Supreme Court has used the *Chevron* canons in recent decades, it is hard to find a single case in which the Court deemed the agency action unreasonable at the second step of the test.<sup>145</sup>

Moreover, at the second step, courts often assess the reasonableness of the agency's action as an act of statutory construction, not as an act of public administration. Accordingly, courts often use the same traditional legal tools to review reasonableness—text, statutory structure, and congressional intent—that they use at the first step of the test.<sup>146</sup> *Chevron*'s internal logic, which sees equivalency in the projects of agency and court, drives that repetitive methodology; *Chevron* makes clear that a court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency.”<sup>147</sup>

This under-review of administrative work for its reasonableness as bureaucratic action has unfortunate consequences for the quality of public administration. Bureaucratic action can be hasty, ill-considered, inconsistent, or arbitrary. Congress, through the APA and enabling acts, mandated a form of judicial review that would ensure that agencies act with basic rationality when they undertake their bureaucratic carrying-out function under regulatory or benefits-conferring statutes.<sup>148</sup> The qualities that a court might expect of sound, non-arbitrary administration might include clarity, consistency, fairness, development of a full record, and rational decision-making, but those values are not captured by *Chevron*'s formulation of its step two reasonableness review. The court neglects its

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assess the rationality of the Social Security Administration's five-part sequential process of evaluating whether claimants are entitled to disability benefits).

145. See Magill, *supra* note 8, at 86 (suggesting that *AT&T Corp. v. Iowa Utilities Board* might be one possible exception to the Supreme Court's consistent record of not invalidating agency construction at step two); cf. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 387-92 (1999).

146. See, e.g., *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998) (“In the second step, the court determines whether the regulation harmonizes with the language, origins, and purpose of the statute.”); Magill, *supra* note 8, at 88-89 (identifying those statutory materials as the text of the act, the act's structure, legislative history, and the purpose of the act); *A Blackletter Statement*, *supra* note 124, at 38 (discussing one of the predominant approaches to step two, in which “courts regularly examine the same statutory materials relied on in step one, seeking to determine whether the statute, even if subject to more than one interpretation, can support the particular interpretation adopted by the agency”).

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

148. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-41 (1983); see also *Am. Trucking Ass'ns, Inc. v. United States*, 344 U.S. 298, 314 (1953) (holding that in order for a rule to be declared arbitrary, an agency must have “had no reasonable ground for the exercise of judgment.”); *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) (reiterating that the essential task on judicial review is to guard against “arbitrariness and irrationality in the formulation of rules for general application in the future”).

supervisory role under the APA when it fails to guard against “arbitrariness and irrationality in the formulation of rules for general application in the future.”<sup>149</sup>

There is reason to believe that *Chevron*'s methodology actually has lowered the quality of administrative decision-making on technical and expert matters, since agencies have come to expect less judicial scrutiny on those dimensions in the *Chevron* era. The doctrine relieves the pressure on agencies to develop a full, expert record and to engage in a full-bodied review of technical or expert considerations, as those administrative tasks are no longer of central concern to the courts. One commentator, Osamudia James, persuasively makes this charge—that an agency engaged in policy-making without fully considering the factual implications of its actions—about the Department of Education's rulemaking on review last Term in the *Zuni* case. Both James and M. Elizabeth Magill support a full-bodied arbitrary and capricious review in step two of *Chevron*.<sup>150</sup> In recent years, some lower federal courts seem to stretch the inquiry into the reasonableness of an agency's “construction of a statute” under step two of *Chevron* into something similar to an arbitrary and capricious test.<sup>151</sup> Likewise, last Term the Supreme Court used the arbitrary and capricious test to set aside the agency's decision in *Massachusetts v. EPA*.<sup>152</sup> Though the agency action was a decision not to grant a petition for rulemaking under the Clean Air Act, which is a somewhat atypical administrative action, the Court's opinion illustrates the advantages of using an arbitrary and capricious standard of review to evaluate the technical or expert aspects of an agency's work product. These technical and expert qualities are central to the work of public bureaucracies, yet they are features that are obscured by the false vision of agencies as statutory interpreters. The

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149. *Auto. Parts*, 407 F.2d at 338.

150. See Osamudia R. James, *Breaking Free of Chevron's Constraints: Zuni Public School District et al. v. U.S. Department of Education*, 56 U. KAN. L. REV. (forthcoming Nov. 2007) (discussing the on-going debate over arbitrary and capricious review and recommending that “step-two of [*Chevron*] review should be fortified with the standards of arbitrary and capricious review”); Magill, *supra* note 8, at 93-96 (arguing that step two of *Chevron* should consist of arbitrary and capricious review); see also *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1537-38 (2007).

151. See *A Blackletter Statement*, *supra* note 124, at 38.

Second, in addition to engaging in conventional statutory construction, or in some cases instead of engaging in it, courts at step two of *Chevron* evaluate whether the agency, in reaching its interpretation, reasoned from statutory premises in a well-considered fashion. Courts may look, for example, to whether the interpretation is supported by a reasonable explanation and is logically coherent. In this regard, the step two inquiry tends to merge with review under the arbitrary and capricious standard . . .

*Id.*; see also Magill, *supra* note 8, at 93 (stating that when courts review the reasonableness of an agency's interpretation, their review may be similar to arbitrary and capricious review).

152. 127 S. Ct. 1438, 1463 (2007).

recent subtle doctrinal shifts in the federal courts could begin to realign judicial review methods with the framework of the APA, which more faithfully reflects the core institutional functions of public administration. Complete alignment, however, is elusive so long as the courts continue to see administrative work as statutory construction.<sup>153</sup>

### III. REVIVING THE ACTUAL FUNCTION OF PUBLIC ADMINISTRATION IN STANDARDS OF JUDICIAL REVIEW

#### A. Comparative Institutional Competence and the APA

Instead of presupposing a false equivalency between court and agency, the scheme of § 706 of the APA more wisely disentangles decision-making responsibilities along institutionally appropriate lines. Under the APA, a court should ask: (1) whether the question on review is necessarily a legal question, narrowly defined and properly presented, within the special institutional competence of the court to resolve using a neutral process that involves legal techniques of textual analysis and legislative intent, with lasting effect through the application of *stare decisis*; or (2) is the matter within the domain of public administration, which requires flexibility in application, political responsiveness, public participation, factual development, expertise, and practical considerations of enforcement and management. The bifurcated framework of the APA's provision on scope of review is a more sensible approach to judicial review than the institutional sorting that occurs under *Chevron*, which turns on a court's perception of "gaps" or ambiguities in statutes.<sup>154</sup>

Using the comparative institutional strengths of courts versus agencies as criteria, a consensus might emerge regarding the types of questions that are better suited for resolution by judges in Article III courts than by public administrators. Clearly, the federal courts should decide cases that turn on interpretation of the Constitution, such as fundamental questions about

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153. In recent articles, both Professor Charles Koch and Professor Ronald Krotoszynski, Jr., write thoughtfully about various aspects of the pre-*Chevron* practice under the APA, noting some of its strengths. See Charles H. Koch, *FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981, 983 (2006) (describing hard-look review); Ronald J. Krotoszynski, Jr., "History Belongs to the Winners": *The Bazon-Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1002-04 (2006) (describing the institutionally savvy approach of Judge Leventhal).

154. Justice Breyer wrote some decades ago that allocation of responsibility should be based on "institutional capacities and strengths," which echoes the thinking of Professor Kenneth Culp Davis. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 398 (1986); see also 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:14, at 392 (2d ed. 1984) (writing in favor of scope of review based on "[t]he simple idea of comparative qualifications of judges and of administrators on each issue," as an approach that "would help solve many problems").

separation of powers, government structure, or federalism, and this has been the Court's practice. For example, in *Whitman v. American Trucking Ass'n, Inc.*,<sup>155</sup> and *Commodity Futures Trading Commission v. Schor*,<sup>156</sup> the Supreme Court decided the constitutional questions de novo, although the government's briefs were undoubtedly carefully read and may have been persuasive. The stature of the judiciary as an Article III branch of government, its neutrality and structural independence, the qualifications of the judges, and the nature of the judicial process give the courts a clear comparative advantage over agencies on constitutional issues, including fundamentals about federal and state relations. A consensus about the relative superiority of the independent judiciary over public agencies may also extend to cases of statutory construction that involve the preemptive effect of federal law and norms of federalism. Thus, in two recent cases, the Supreme Court bypassed *Chevron's* methodology when deciding the preemptive effect of federal schemes. During the 2006 Term, in *Watters v. Wachovia Bank*, the Court affirmed the preemptive effect of the federal National Bank Act, yet distanced itself from the agency's views as Amicus and from *Chevron's* methodology.<sup>157</sup> Instead, the Court decided the case in favor of the federal government de novo. In the preceding Term, in *Rapanos v. United States*, the Court did not defer to a rule of the Army Corps of Engineers on the meaning of "navigable waters" under § 404 of the Clean Water Act because of the federalism concerns that infused the question.<sup>158</sup> Core qualities of public bureaucracies—which are mission oriented and politically directed—make agencies less appropriate venues than the courts for solving those types of conflicts between the states and the federal government.

Other types of statutory issues would also benefit from resolution by courts not agencies. These include issues that require a fixed, uniform, and stable resolution of statutory meaning using strictly legal methodology undertaken by structurally neutral and independent judges. For some issues, judicial ossification is in fact desirable and warranted by the nature of the problem. For example, consider questions about an agency's basic jurisdiction. A longstanding tenet of administrative law is the principle that

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155. 531 U.S. 457 (2001).

156. 478 U.S. 833 (1986).

157. 127 S. Ct. 1559, 1572 n.13 (2007). This case was an action brought by a bank's operating subsidiary against state regulators. It was not a case of judicial review of the federal rule; the United States participated as Amicus. Nonetheless, the district court relied upon *Chevron's* two-part test when it deferred to government regulations that ruled that certain state laws were preempted.

158. 126 S. Ct. 2208, 2224 (2006); see also *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (suggesting that federalism issues under the Clean Water Act counsel against deference to the agency's rule about "navigable waters").



an agency's administrative discretion is confined to its statutory jurisdiction, which has outer parameters that courts should enforce. This central tenet is apparent in the APA's command that courts should set aside agency action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."<sup>159</sup> Though sometimes a difficult principle to apply concretely in a given case, the imperative of statutory jurisdiction is a key feature of lawful administrative action; it is noted in older cases, several recent cases,<sup>160</sup> and even in Supreme Court dicta since *Chevron*.<sup>161</sup> These types of restraints on administrative action require resolution by a neutral and independent court using traditional judicial processes to find fixed meaning in statutory text with stare decisis effect.

In addition, certain legal questions, even if not centrally "jurisdictional," should be resolved by the judiciary's institutional processes, with its features of neutrality, stability through stare decisis, and its distinctly legal methodology. Examples might include legal issues such as: whether a federal statute incorporates a federal standard or instead imports state common law; how different sections of a statute relate to each other; how to read one statute in light of another<sup>162</sup> or the contours of private rights of action.<sup>163</sup>

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159. 5 U.S.C. § 706(2)(C) (2000).

160. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

161. For example, *Mead* says that the *Chevron* framework should govern judicial review, assuming that the agency's exercise of authority "does not exceed its jurisdiction." *See United States v. Mead Corp.*, 533 U.S. 218, 227 n.6 (2001) (citing 5 U.S.C. § 706(2)(C) (2000)); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (suggesting that *Chevron* does not apply to an "unusually basic legal question" (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004))). A recent example is *American Bar Ass'n v. FTC*, where the D.C. Circuit struck down an effort by the FTC to regulate lawyers as a profession, finding the action outside the agency's authority to regulate "financial institutions." *See* 430 F.3d 457, 465 (D.C. Cir. 2005).

162. *See, e.g., NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 120-22 (1944) (discussing whether state tort law governs the scope of the term "employee" in federal labor law); *Gen. Dynamics Land Sys.*, 540 U.S. at 600 (holding that an age discrimination statute does not ban discrimination against a younger person); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (construing one antidiscrimination act in light of another, without express reliance on the agency's views); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts.")

163. Congress, by law, seems to have determined that the institutional features of the judiciary are desirable for decision-making about private rights of action. In any event the APA's standard of review section does not per se apply to private rights of action. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."); *cf. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1519 (2007) (finding an action under § 207 of the Federal Communications Act for violations of substantive regulations promulgated by the FCC where § 207's purpose is to allow persons injured by § 201(b) violations to bring federal court damage actions). *But see* Matthew

For those kinds of legal issues—ones that are not practical, iterative, or technical administrative implementation, but are truly questions of law suited for judicial resolution—the Supreme Court might choose to establish norms about how best to consider the views of the government and what weight agency views should have in particular cases. But the Court should set those norms with a clear-eyed view of the actual function of agencies and of how agencies, as subconstitutional bureaucracies of public administration, actually work with statutes. The Court errs when it assumes that an agency’s process of working with statutes is fungible with the judicial process, or that the agenda-planning, political, and iterative approach of government bureaucracies replicates the processes and constitutional legitimacy of Article III courts. Dressing up the basic administrative work of agencies as “statutory construction” gives the agencies an institutional stature that their actual legal structure and modus operandi do not support.

By merging the roles of agency and court into a shared sea of statutory construction, *Chevron* prevents courts from embracing the comparative institutional competence approach that underlies the APA and enabling acts. First, while it is generally accepted that courts should decide issues of constitutional interpretation, the *Chevron* test may actually impede full judicial attention to one central type of constitutional question in administrative law—the non-delegation doctrine. The tension between the search for gaps to support administrative constructions of statutes and the search for gaps to dispute a lawful delegation creates this impediment. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>164</sup> the Supreme Court applied *Chevron* and determined that the agency’s action contravened precise legislative intent.<sup>165</sup> Yet the most authentic ground for the result reached is not that Congress was clear about anything, but that precisely because the statutes were not clear, under non-delegation principles the FDA could not decide on its own to start regulating cigarettes as “drugs” or drug-delivery “devices” under the Food, Drug and Cosmetic Act. The comprehensive regulation of cigarettes seems, at least at first cut, to be the kind of issue that a democratically elected Congress should address and delegate clearly by law—not by vacuum or implication—turning as it does on major public health concerns, national norms about

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C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95 (2005) (arguing for a stronger administrative role over private rights of action).

164. 529 U.S. 120 (2000).

165. *Id.* at 160-61.

personal choice and risky habits, and the public policy contours of an entirely new regulatory program for the significant and distinct tobacco industry.

But under *Chevron*, if the tobacco companies in *Brown & Williamson* had argued that the terms of the Food, Drug and Cosmetic Act were ambiguous or unclear on the precise issue and that constitutional and democratic norms require Congress to make the hard choices about cigarette regulation expressly by law, then the tobacco interests would have come perilously close to an involuntary slide into *Chevron*'s step two by conceding that the statute had a "gap." The result might well have been the mere rubber-stamping of administrative action that is the hallmark of the second part of *Chevron*'s test, and that is driven by the internal logic of the *Chevron* test, which treats the administrative work-product as statutory construction. Thus the industry made strained arguments that the Food, Drug, and Cosmetic Act and snippets of other statutes clearly addressed the precise issue. In embracing that approach, the Court resorted to numerous highly discredited and sloppy techniques of historical storytelling to reach a conclusion, as a matter of judicial statutory construction *de novo*, that Congress was not silent or ambiguous but spoke clearly on the precise issue of tobacco regulation.<sup>166</sup>

Further, *Chevron* prevents courts and agencies from assuming their assigned roles in the overall regulatory enterprise by its sorting of issues based on whether a statutory provision has a "gap" or is "ambiguous." This is a poor proxy for proper institutional sorting based on the comparative institutional strengths and weaknesses of agency and court. Statutes typically use categories that have gaps in the sense that they require application by administering and enforcing institutions,<sup>167</sup> whether court or agency. Lack of specificity is not a meaningful or useful proxy for institutional sorting in standards of review.

Moreover, this form of sorting based on gaps or ambiguities in statutes has the unfortunate effect of encouraging agencies to make strained arguments that their statutes are unclear or incoherent in order to support their administrative actions. Under *Chevron*, agencies have every incentive to argue that their organic statutes are vague or ambiguous, rather than to argue that the statute is clear and that they have taken practical, sometimes variable, and often evolving bureaucratic action to "carry out" the statutory meaning in a reasonable way. This practice distorts and undermines statutes. It is on full display in *New York v. EPA*, a recent D.C. Circuit decision in which the court of appeals chided the EPA for casting about for

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166. *Id.*

167. See Molot, *supra* note 134.

a range of “definitional possibilities” to support the agency’s myriad different claims that various terms in the Clean Air Act, including “physical change” and the word “any,” could have multiple meanings and therefore were ambiguities that supported the agency’s rulemaking under New Source Review in the Clean Air Act.<sup>168</sup> The court of appeals sensibly held the line, rejecting the EPA’s multiple runs at incoherence in the statute.<sup>169</sup> A doctrine of judicial review that encourages the government to use its considerable expertise in the service of finding statutory gaps as a predicate for its programmatic implementation is not a sound regulatory approach.

*Chevron*’s either-or approach sets up a false rivalry between court and agency. It eliminates the healthy opportunity for a distinctly administrative function to work alongside the judicial interpreting role. Under the *Chevron* regime, a court defers to an agency’s action “only if the statute is silent or ambiguous,”<sup>170</sup> or as the D.C. Circuit said in *General Dynamics Land Systems, Inc. v. Cline*, “deference to [an agency’s] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”<sup>171</sup> Despite decades of *Chevron* methodology, it is hard to find any *Chevron* cases in which the courts both used their own tools of judicial construction to find statutory intent and, having found that intent, also validated administrative implementing action on the ground that it was a non-arbitrary carrying-out of that statutory intent by an institution of public administration. Yet that model of institutional arrangements missing under *Chevron* is precisely the model that the APA and regulatory enabling acts envision. The *Hearst* case,<sup>172</sup> which laid the groundwork for § 706 of the APA, assigns different roles to court and agency, two different constituent institutions in the overall regulatory universe. There the Court itself interpreted the statutory term, “employee,” in a new labor law de novo, as a matter of law and with stare decisis effect, to be a term that derives its meaning from federal labor policy and not from state tort laws.<sup>173</sup> Yet the majority opinion preserved a distinct realm for the administrative function of applying that statutory term as construed by the Court to newsboys, and

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168. 443 F.3d 880, 884-87 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2127 (2007).

169. *Id.* at 889-90.

170. *Id.* at 884 (emphasis added).

171. 540 U.S. 581, 600 (2004) (refusing to give the agency’s interpretation deference because “regular interpretive method leaves no serious question, not even about purely textual ambiguity in the ADEA”).

172. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 130-31 (1944) (allocating certain questions requiring expertise to resolution by an agency, as compared to questions of statutory interpretation for a court).

173. *Id.* at 122-24, 129.

later to other types of workers.<sup>174</sup> The implementing function of public administration was subject to review under a standard of reasonableness, which became the arbitrary and capricious test of the APA when Congress passed the APA a few years later. Under the APA, agencies are not surrogates for courts, nor are courts surrogates for agencies.

The practice of carving out an exclusion from *Chevron*'s rules of deference for so called "major questions" could accord with an institutionally savvy approach of reserving questions for the courts that would clearly benefit from judicial as opposed to administrative process for resolution.<sup>175</sup> These exceptions are sometimes referred to as *Chevron* "step zero."<sup>176</sup> But instead of promoting baroque and elaborate exceptions to a doctrine that is centrally flawed on account of its fundamental misconception of administrative work, a better approach would be for the courts to allocate issues for decision-making along the institutional lines specified in the APA. This form of review will not completely avoid complexities in its application, but it is a much surer and wiser approach.

### B. Back to the Future at the Supreme Court

Remarkably, after more than two decades in which the Supreme Court used its *Chevron* methodology relentlessly in nearly all cases of judicial review, last Term Justice Breyer penned three majority opinions that revive the more institutionally savvy approach of the formative days of the APA.<sup>177</sup> Restating the *Chevron* doctrine in crucial respects, Justice Breyer's opinions pull hard for a comparative institutional approach to judicial review of administrative implementation.

In *Zuni Public School District No. 89 v. Department of Education*, the Court held that a federal statutory formula, which sets forth the method that the Department of Education should use to determine whether a state's

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174. *Id.* at 130-31.

175. See Breyer, *supra* note 154, at 370 ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

176. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (specifying that "step zero" provides a choice between *Chevron*, the *Skidmore* framework, and interpreting the issue *de novo*); Sunstein, *Chevron Step Zero*, *supra* note 73, at 191 (defining "step zero" as the preliminary inquiry as to whether *Chevron* applies at all).

177. See *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1537-38 (2007) (analyzing the validity of a regulation interpreting a federal statute containing a method for calculating whether a state's funding manner for public schools renders disbursements equal across the state); *Global Crossing Telecomms., Inc. v. Metrophones Telecomms. Inc.*, 127 S. Ct. 1513, 1516 (2007) (exploring the issue of whether the FCC's application of a statute to a long distance carrier's refusal to compensate payphone operators is reasonable); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007) (finding lawful a Labor Department rule exempting certain companionship workers from requirements of the Fair Labor Standards Act).

public school funding “equalizes” expenditures among districts, permits the Department to disregard certain school districts based on the number of the district’s pupils as well as on the amount of the district’s per pupil expenditures.<sup>178</sup> Two school districts in New Mexico had challenged the agency’s regulations as inconsistent with the federal statute.

The majority opinion begins by surveying the qualities that make the matter on review better suited for resolution by the administrative agency instead of the court, including that the matter on review is “the kind of highly technical, specialized interstitial matter that Congress . . . delegates to specialized agencies to decide.”<sup>179</sup> That echoes Justice Breyer’s comment during oral argument that if ever there was a matter for an agency to decide, this was it.<sup>180</sup> The *Zuni* opinion takes pains to highlight the administrative qualities of the agency’s action, calling it iterative and emphasizing its implementing and operational function in carrying out a statutory program.<sup>181</sup> In his opinion, Justice Breyer avoids framing the issue simply as one of statutory construction. Having sorted the matter into the bin of the public administrator’s implementing function, the opinion assesses the agency’s rule for its basic reasonableness, considering a variety of factors.<sup>182</sup> Finding the rule reasonable, albeit on what one commentator laments was a rather sketchy administrative record,<sup>183</sup> the court determined in a rather perfunctory way that the statute had a *Chevron* textual ambiguity that could shelter the agency’s reasonable rule.<sup>184</sup>

In his concurrence, Justice Kennedy chided the majority for what he called an unfortunate “inversion” of *Chevron*’s logical progression from step one to step two.<sup>185</sup> Justice Kennedy, along with Justice Scalia in dissent, accused the majority opinion of creating an impression that “agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes.”<sup>186</sup> Those observations about Justice’s Breyer’s methodology ring true to a certain extent: Justice Breyer did invert *Chevron*, and he did permit agency policy

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178. See *Zuni*, 127 S. Ct. at 1538.

179. *Id.* at 1536.

180. See Transcript of Oral Argument at 11, *Zuni Pub. Sch. Dist. No. 89*, 127 S. Ct. 1534 (No. 05-1508), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-1508.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1508.pdf).

181. *Zuni*, 127 S. Ct. at 1543 (describing the agency’s action as an implementation that “carries out” the statute).

182. See *id.* at 1543-46.

183. See James, *supra* note 150 (stating that there was little evidence of the expertise of the Department of Education).

184. See *Zuni*, 127 S. Ct. at 1540-41.

185. See *id.* at 1551 (Kennedy, J., concurring) (suggesting that if Justice Breyer’s approach continued, it would appear as if agency policies rather than traditional statutory construction tools were shaping judicial statutory interpretation).

186. *Id.*; see also *id.* at 1552 (Scalia, J., dissenting) (advocating for different techniques of statutory interpretation).

concerns rather than “traditional [i.e., judicial] tools of statutory construction” to have the starring role in his methodology.<sup>187</sup> However, the majority opinion is less an inversion of *Chevron* than it is an avoidance of *Chevron*’s two-step framework. The opinion more closely tracks the standard of arbitrary and capricious review that § 706 of the APA specifies, and it reflects a more realistic understanding of the core function of the administrative agency. As such, the opinion’s methodology resembles methods of review in the early cases of *State Farm*, *Sierra Club* and others of that era, when the courts tended not to frame all actions on judicial review as questions of law or questions of “statutory interpretation.” Rather, those earlier cases preserved a full bodied administrative domain in which agencies could carry out and implement statutes through specific, iterative, bureaucratic action, using administrative expertise and process, as long as the bureaucratic actions were reasonable.<sup>188</sup> In other words, Justice Breyer avoided making a fixed judicial interpretation of the statute as a baseline using only orthodox judicial tools of the sort we have come to expect under *Chevron*.

Thus Justice Scalia’s hearty criticism of the majority in *Zuni*’s dissent is off the mark. The dissent accuses the majority of making *judicial* policy through statutory construction akin to what the Supreme Court did many years earlier in *Church of the Holy Trinity v. United States*,<sup>189</sup> a workhorse for the contested proposition that judges may ignore plain meaning to avoid absurd results. But Justice Scalia’s argument reveals an area of persistent doctrinal confusion ever since the *Chevron* doctrines began treating mainstream public administration as if it were the same as statutory construction by a court in a case or controversy. *Holy Trinity* was not a case of judicial review of administrative action. There was not an administrative implementing function under review, and the Court there was free to determine its own methods of statutory interpretation, as misguided as Justice Scalia may think them now. By contrast, *Zuni* was a case of judicial review of an implementing action taken by an institution of public administration that was charged with “carrying out” a statutory program so long as it did so in a manner “not inconsistent” with its enabling act. Statutory provisions governing the standard of review for that

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187. See *id.* at 1546, 1550; *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

188. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (stating that an agency may change its view on a matter as long as it is not arbitrary and capricious).

189. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 472 (1891) (stating that regardless of how broadly a statute reaches, if an act appears to violate that statute textually, but Congress did not intend to prohibit such an act, courts have an obligation to interpret the law to permit the act pursuant to legislative intent).

bureaucratic act counsel restraint in finding and deciding so-called questions of law and provide that the default standard of review of that implementing function is review for arbitrariness. Justice Breyer's opinion accords with this framework and with the practice of the courts in reviewing mainstream administrative functions in many cases of the pre-*Chevron* era.

A recent, thoughtful piece by Osamudia James criticizes the *Zuni* decision for its failure to probe more deeply into the reasonableness of the agency's rule.<sup>190</sup> She suggests that a more fully developed administrative record and greater attention to the consequences of the agency's rule would have revealed that the agency's rule in fact was unreasonable because of its impact on Native American school children.<sup>191</sup> This type of defect in the administrative process likely stems from overuse of the *Chevron* doctrine itself and not from the majority's improved methodology in *Zuni*, as discussed earlier.<sup>192</sup> *Chevron* discourages the development of full and reasoned administrative records on technical and expert issues, as they are largely irrelevant to a style of judicial review that is framed as review of statutory construction. Moreover, while the Supreme Court should be applauded for nudging the standard of review back toward a comparative institutional approach in *Zuni*, no doubt *Zuni*'s counsel developed and argued the case in anticipation of a typical *Chevron* treatment by the Court.

Underscoring *Zuni*'s break from *Chevron* orthodoxy, Justice Breyer repeats *Zuni*'s atypical methodology in his second majority opinion of the pair of administrative cases announced the same day last Term, *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications Inc.*<sup>193</sup> In that case, the majority upheld a regulation of the FCC that implemented §§ 201(b) and 207 of the Communications Act by allowing payphone operators to sue long-distance carriers for their failure to pay compensation, as an "unreasonable practice."<sup>194</sup> Despite the grumblings from other Justices in *Zuni* about his methodology, Justice Breyer doggedly proceeded in the same fashion in *Global Crossing*. Once again, the majority opinion refused to march down *Chevron*'s two steps. Justice Breyer avoided framing the case simply as one of statutory construction; he frequently called the agency action an "application" or "implementation" of

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190. See James, *supra* note 150 (asserting a failure to comprehend the rule's effect on policy at the public school level).

191. See *id.* (stating that funding cuts disproportionately affect school districts near tribal lands, forcing districts to choose between funding additional academic programs and critically necessary facility improvements).

192. See *supra* Part II.B.2.

193. See *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1521 (2007).

194. See *id.* at 1520.



the statute, which are more realistic descriptors of the administrative function.<sup>195</sup> Once again in *Global Crossing*, the majority reviewed the agency's action under a standard of reasonableness akin to the APA framework that was typical before *Chevron*. In short, the majority found the agency action reasonable, not prohibited by Congress, and thus lawful.<sup>196</sup>

In neither *Zuni* nor *Global Crossing* did Justice Breyer dwell on step one of *Chevron*, which would have required a judicial holding about the precise meaning of a statute or its gaps and ambiguities, using orthodox judicial methodology. Instead, in *Global Crossing*, the majority reformulates the "gap" search of *Chevron* in a way that completely changes its meaning. Rather than asking whether a specific statutory word or phrase (such as "source" or "bound" or "offer" or "drug") is legally ambiguous using traditional tools of statutory construction, Justice Breyer wrote that the question of a "gap" is a more basic inquiry into whether Congress delegated authority to an agency "to apply [the statute] through regulations and orders with the force of law."<sup>197</sup> He transformed the "gap" inquiry into a more basic question of whether an agency has authority to carry out a statutory program. This formulation avoids the problems of undermining the administrative function and of excessive judicial ossification that are generated by *Chevron's* approach.

In his third majority opinion on methods of judicial review last Term, *Long Island Care at Home, Ltd. v. Coke*, Justice Breyer yet again opted for a comparative institutional approach in lieu of *Chevron's* two steps. The Court upheld a regulation of the Department of Labor that extends an exemption for companionship workers under the Fair Labor Standards Act to include services rendered by employees of certain third parties. In a short, unanimous opinion, the Court reasoned that the statutory gap was for the agency to fill because it concerned a topic within the agency's expertise, it was interstitial, and it would benefit from resolution by the administrative process of consultation with affected interests.<sup>198</sup> Having found the matter suited for the administrative domain, the Court then asked whether there was "anything about the regulation that might make it unreasonable or otherwise unlawful."<sup>199</sup> Like both *Zuni* and *Global Crossing*, *Long Island Care at Home* is highly reminiscent of the approach that was taken by the Court in pre-*Chevron* cases during the formative years of the APA.

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195. See *id.* at 1516.

196. *Id.* at 1521-22.

197. *Id.* at 1522.

198. See *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2346-47 (2007).

199. *Id.* at 2346.

Finally, one other decision of the Supreme Court last Term, *Massachusetts v. EPA*,<sup>200</sup> is consistent with the revival of APA standards latent in *Zuni*, *Global Crossing*, and *Long Island Care at Home*. In a majority opinion written by Justice Stevens, who authored the *Chevron* decision in 1984, the Supreme Court used the arbitrary and capricious test of the Clean Air Act to frame review of the EPA's decision not to regulate greenhouse gases, one of the few Supreme Court cases in the *Chevron*-laden decades to resurrect that statutory relic as the standard of review. While the nature of the EPA's action on review in that case was somewhat atypical—a denial of a petition for rulemaking—its use may presage the return of that statutory as the standard for affirmative administrative implementations as well. Decisions to regulate or to refrain from regulating are similar aspects of an administrative function in carrying out a statute.<sup>201</sup> Last Term's administrative law cases may well be the beginning of the end of an era.

#### CONCLUSION

Some twenty years on, *Chevron*'s effect on administrative process is more complicated than the story that is often told about *Chevron*—that it is a doctrine of judicial restraint. Whatever the impact on the rate of agency wins and losses, under *Chevron*'s doctrines, the Court, not Congress, is making the rules. In a little more than two decades, the Supreme Court managed to make large portions of the APA virtually obsolete.

Why did the *Chevron* paradigm—that agency work is statutory construction—come to dominate judicial review? At the time, *Chevron* was not teed up to make new law on the standards of judicial review. And its verbiage on scope of review easily could have fallen into judicial oblivion like so many other quirky formulations over the years. That *Chevron* took hold when its doctrines were less institutionally savvy than the ones they displaced seems counterintuitive. Perhaps the *Chevron* era

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200. 127 S. Ct. 1438, 1463 (2007) (holding that the EPA was arbitrary and capricious in refusing to examine whether greenhouse gases contribute to climate change).

201. As noted above, that standard has been used somewhat more often in recent years in the lower federal courts, albeit frequently in conjunction with step two of the *Chevron* canon. See Murphy et al., *supra* note 8, at 94, 101 (noting efforts of lower federal courts to appraise whether agency engaged in reasoned decision-making); see also Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 184-191 (John F. Duffy & Michael Herz eds., 2005) (describing circumstances under which a court will set aside an agency action). Professor M. Elizabeth Magill recently urged the courts to shift their reasonableness inquiry at step two into an arbitrary and capricious test. See Magill, *supra* note 8, at 93-97 (noting confusion in the lower courts regarding the relationship between step two and the arbitrary and capricious assessment); see also Goldstein v. SEC, 451 F.3d 873, 884 (D.C. Cir. 2006) (finding arbitrary a rule that exempted hedge funds with one hundred or fewer investors from registering under one act, but that required funds with fifteen or more investors to register under another act).

reflects institutional bias or mirroring, as the courts came to view agencies more in the courts' own image. Perhaps *Chevron's* framework gained ground because it coincided with the emergence of a new field in academic writings and law schools: statutory interpretation. Administrative work, tied as it is to statutes, made its way into that pigeonhole, instead of into its own domain of public administration. Fatigue and conflict from the old standards may also share responsibility. Review of an agency's record for rationality as public administration could be dull and taxing for chambers, and it fell afield from what judges, law clerks, and counsel are centrally trained to do.<sup>202</sup> How appealing it must have been when the *Chevron* Court extracted from that messy, bureaucratic, deeply political, highly technical, special interest free-for-all a quality that was more reassuringly familiar to courts and counsel, more manageably narrow, and something that sounded more like the legal process that courts and counsel are trained to manage—"statutory construction." And *Chevron* seemed to answer the call for judicial restraint in setting aside agency actions, a promise that was not in fact realized.

*Chevron's* formulation also fed an impulse of the Justices to advance their own views about the allocation of government power through judicial canons about standards of review, even in the context of statutes such as the APA that should be authoritative. Certainly a disinterested Congress has also played its part in these twenty-some years of judicial improvisation in administrative law. Congress revisits the APA only rarely,<sup>203</sup> and it eschews oversight of the judicial review provisions of the APA or those of specific enabling acts.<sup>204</sup>

Administrative agencies and courts are complex institutions, and if history is a guide, any legal doctrine about the interaction of the two through judicial review will be somewhat taxing and chaotic to implement. But the APA's section on standards of review and parallel provisions in many enabling acts do well to simplify the framework of judicial review in ways that respect the actual institutional strengths of agencies and courts. Recent decisions of the Supreme Court may portend a revival of that more institutionally savvy framework. This is heartening. Fundamentally, the

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202. See, e.g., *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (extending over 130 pages in the Federal Reporter, plus technical appendices).

203. E.g., Negotiated Rulemaking Act, 5 U.S.C. §§ 561-70a (2000) (establishing a structure to execute negotiated rulemaking to improve the informal rulemaking system); Congressional Review Act, 5 U.S.C. §§ 801-08 (2000) (providing for congressional review of agency rulemaking in Chapter 8 of the Administrative Procedure Act).

204. Unfortunately, one of Congress's recent significant actions on administrative process was its de-funding of the Administrative Conference of the United States (ACUS), in 1995. See Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS, Winter 2005, at 3 (describing congressional efforts to revive the ACUS).

APA is a better scheme and, after all, it is the one that Congress enacted into law. Judicial review of agency action can be rescued from its current muddle. Statutes are the way out.

# CHEVRON'S DEMISE: A SURVEY OF CHEVRON FROM INFANCY TO SENESCENCE

LINDA JELLUM\*

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## INTRODUCTION

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>1</sup> the Supreme Court decided what may well become the most cited case in legal history.<sup>2</sup> Interestingly, neither the bench nor the bar considered the case revolutionary at the time.<sup>3</sup> What *Chevron* has become so well known for—the appropriate standard of review that courts apply to agency interpretations of statutes—was not even addressed in the court below.<sup>4</sup> At the time the case was argued before the Supreme Court, the parties and the Court focused attention on the political issue: the “bubble concept.”<sup>5</sup> But while the importance of the political issue has faded, the importance of the procedural issue has gained currency.

In *Chevron*, the Court resolved the question of how much deference courts must give to an agency’s interpretation of a statute.<sup>6</sup> At the time it was decided, many scholars believed that *Chevron* had clearly and simply delineated the appropriate framework for agency deference:<sup>7</sup> first, determine whether Congress had decided the issue, and if not, then defer to any reasonable agency interpretation.<sup>8</sup> But *Chevron* has proved to be less clear, predictable, and simple than originally envisioned. Its guidance is unclear; its application has been, at best, uncertain.

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1. 467 U.S. 837 (1984). According to Professor Thomas Merrill, who reviewed the official U.S. Reports, there are no commas in the petitioner’s name. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 399 n.1 (Peter L. Strauss ed., 2006) [hereinafter *The Story of Chevron*].

2. *Chevron* “has been cited in over 7,000 cases, making it the most frequently cited case in administrative law.” *The Story of Chevron*, *supra* note 1, at 399 & n.2. *Chevron* may well soon surpass *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), as the most cited case overall. *Id.* at 399 n.3.

3. *Id.* at 402 (calling the decision “routine by those who made it”).

4. *Id.* at 413 (“[T]here is nothing in the three petitions [for certiorari or the merits briefs] suggesting that the parties were asking the Court to reconsider basic questions of administrative law.”).

5. *Id.* at 402. For a further discussion of the “bubble concept,” see *infra* note 93.

6. *Chevron* addressed the degree of deference to be given to an agency’s interpretation of a statute made during the rule making process; whether its holding has been extended to other types of agency actions is less clear. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (holding that Custom Service’s informal interpretation of the Tariff Schedule was not entitled to *Chevron* deference); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (holding that the Department of Labor’s interpretation contained in an opinion letter was not entitled to *Chevron* deference).

7. See, e.g., Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 *VAND. L. REV.* 301, 302 (1988) (“The *Chevron* test established a simple approach to a traditionally complicated issue in administrative law.”).

8. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 976 (1992) [hereinafter Merrill, *Judicial Deference*] (stating that “[i]n time, however, lower courts, agencies, and commentators all came to regard the analysis of the deference question set forth in *Chevron* as fundamentally different from that of the previous era”).

*Chevron* has been the focus of tremendous legal scholarship.<sup>9</sup> Indeed, one might wonder if there is anything new to say about *Chevron* given the vast commentary it has generated. Given that this Article concludes that *Chevron*'s importance is fading, one might question whether we need another article on *Chevron*. But because *Chevron* has been a throwaway cite, one probably made by judicial clerks, its use has been particularly rife with inconsistency. This Article seeks to understand this inconsistency by focusing myopically on *Chevron*'s first step and how its reformulation has led to *Chevron*'s demise. At step one, a court must determine "whether Congress has directly spoken to the precise question at issue."<sup>10</sup> But how should a court determine this? Should a court look broadly for congressional intent or more narrowly for textual clarity?

This issue was exactly the one debated by the panel majority and dissenting opinions in the convoluted<sup>11</sup> case of *Mississippi Poultry Ass'n v. Madigan*.<sup>12</sup> In that case, the choice of approach—textualist or intentionalist—proved to be outcome determinative.<sup>13</sup> The majority adopted a textualist approach:<sup>14</sup> an approach "in which the statutory language directs interpretation."<sup>15</sup> Because the majority found the text of the statute to be clear, the agency's inconsistent opinion was irrelevant.

The dissent disagreed both with the majority's textualist approach and with its conclusion.<sup>16</sup> The dissent applied an intentionalist approach:<sup>17</sup> an

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9. See, e.g., David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000) (arguing that some of the common rationales behind *Chevron* were incorrect); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990) (describing *Chevron* as the most important Supreme Court administrative law decision); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (exploring the structural implications of adopting an interpretive model that gives agencies "principal authority for determining the meaning of the statutes" they administer); Pierce, *supra* note 7, at 301-02 (discussing the "*Chevron* two-step" analysis); Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986) (asserting that *Chevron*'s narrowing of judicial review was correct).

10. *Chevron*, 467 U.S. at 842.

11. This case came before a number of courts: first the district court, then the Fifth Circuit panel, which later amended its decision, and finally the court granted en banc review on its own motion.

12. 992 F.2d 1359, 1360-61 (5th Cir. 1993), *aff'd on reh'g*, 31 F.3d 293 (5th Cir. 1994) (en banc).

13. See *infra* Part I.

14. See *Miss. Poultry*, 992 F.2d at 1364 (looking to the text and dictionary definitions to discern meaning).

15. LINDA D. JELLUM & DAVID C. HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 7 (2006).

16. *Miss. Poultry*, 992 F.2d at 1379 (Reavley, J., dissenting) (disagreeing with the majority that the text was clear and turning to the goal of the legislators instead).

17. See *id.* at 1377 (asserting that "[a] rule that precludes courts from considering legislative history and policy when construing statutes amounts to a quasi-evidentiary limitation").

approach “in which legislative intent guides interpretation.”<sup>18</sup> The dissent was critical of the majority’s textualist approach, writing that the textualist approach misconstrues the nature of the inquiry as originally formulated in *Chevron*; “rather than determine what a statute means, [a court] must determine ‘whether Congress has directly spoken to the precise question at issue.’”<sup>19</sup> These are different questions.

*Chevron* itself was relatively clear about which approach to take.<sup>20</sup> Step one was supposed to be a search for the “intentions” of the Legislature; legislative history, purpose, and even social context would all be relevant to this search.<sup>21</sup> But concurrently with the rise of textualism and the fall of intentionalism, a majority of the Supreme Court Justices rejected intentionalism as the appropriate approach for *Chevron*’s first step.<sup>22</sup> Today, many of the Justices routinely equate step one of *Chevron* with a simple search for statutory clarity;<sup>23</sup> the Court proceeds to step two when the text of a statute is ambiguous. In essence, these Justices have interpreted *Chevron* itself in a textual way, by focusing on the words of the case while ignoring the approach that was actually used.

The textualist-intentionalist divide, if you will, exists in all statutory interpretation cases, not just *Chevron* cases. But it has unique application in *Chevron* cases because of the way this divide affects interpretative power. Assume, by way of example, that Congress writes a statute, which the Legislature believes is clear. It is not; ambiguity becomes apparent only when that statute is applied to a particular set of facts. Who resolves this ambiguity: Congress or the Judiciary? In a non-*Chevron* case, the Judiciary must resolve ambiguity for there is no other branch to do so. “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>24</sup> In these traditional statutory interpretation cases, the textualist-intentionalist divide addresses the distribution of power between only the Judiciary and the Legislature.

But if an agency is charged with implementing a statute, a third player has joined the power struggle: the Executive. *Chevron*’s first step is about this power struggle: Which branch should resolve administrative statutory

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18. JELLUM & HRICIK, *supra* note 15, at 7.

19. *Miss. Poultry*, 992 F.2d at 1379 (Reavley, J., dissenting) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

20. See *infra* Part II.

21. See *infra* Part II; Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 353 (1994) [hereinafter Merrill, *Textualism*] (noting that “*Chevron* was decided during the pre-textualist era when legislative history was routinely considered by all Justices”).

22. See, e.g., *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (“[W]hen the statute ‘is silent or ambiguous’ we must defer to a reasonable construction by the agency charged with its implementation.” (quoting *Chevron*, 467 U.S. at 843)); *infra* Part II.

23. See *infra* Part II.

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



ambiguity, the Judiciary or the Executive? Theoretically,<sup>25</sup> the smaller role the Judiciary has at step one, the more interpretative power the Executive will have at step two. Conversely, the greater role the Judiciary has at step one, the less interpretative power the Executive will have at step two. Thus, in *Chevron* cases there is an interpretative power struggle between the Judiciary and the Executive—regardless of whether interpretative power flows to the Judiciary or the Executive—that does not exist in the simple statutory interpretation case.

For now, the Supreme Court has resolved the nature of the inquiry at step one: it is no longer a search for congressional intent; rather, it is simply a search for statutory clarity.<sup>26</sup> Did this change matter? The short answer is “yes.” With the Court’s reformulation of *Chevron* into a simple search for statutory clarity, *Chevron*’s relevance has started to fade, at least at the Supreme Court level.<sup>27</sup> Beginning relatively soon after the textualist

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25. “Theoretically” because without empirical studies, we cannot know which theory cedes more power to the Executive. “Some writers fault the textualist approach for causing Justice Scalia to cede too much authority to federal agencies under *Chevron*.” Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 394 (1996) (presenting various views on Justice Scalia’s adherence to textualism); see William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 872 & n.36 (1993) (calling Justice Scalia a “surface textualist” who accepts the text as the law for the purpose of avoiding judicial responsibility); Bernard Schwartz, “*Shooting the Piano Player*”? *Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 50 (1995); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 n.91 (1989) [hereinafter Sunstein, *Interpreting Statutes*] (suggesting that textualism under *Chevron* would substantially increase the Executive’s power); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597, 1639 (1991) (suggesting that textualism encompasses more than just Justice Scalia’s views); Shane M. Sorenson, Note, *Immigration and Naturalization Service v. Cardoza-Fonseca: Two Steps in the Right Direction*, 3 ADMIN. L.J. 95, 125 (1989) (explaining how Justice Scalia’s interpretation of *Chevron* “suggests that Congress should be presumed to have delegated lawmaking authority to an agency whenever legislators fail to clearly spell out their intentions”); Arthur Stock, Note, *Justice Scalia’s Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 188 (“Justice Scalia recognizes that textualism with statutes reduces the power of individual Members of Congress . . .”); see also Merrill, *Textualism*, *supra* note 21, at 354 (“[T]extualism poses a threat to the future of the deference doctrine.”). Other writers “contend that, because of his adherence to textualism, Justice Scalia too often fails to defer to administrative agencies under the *Chevron* doctrine.” Maggs, *supra*, at 394 (citing Michael Herz, *Textualism and Taboo: Interpretations and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1670 (1991)) (proffering possible explanations for Justice Scalia’s tendency to find statutes clear at step one); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (averring that a hypertextualist method of statutory construction will lead to incoherence in the administrative state); Note, *Lechmere, Inc. v. NLRB: Plain Meaning and the Supreme Administrative Agency*, 4 MD. J. CONTEMP. LEGAL ISSUES 287, 288 (1993) (arguing that the Court occasionally manipulates the *Chevron* doctrine to reverse agency and executive policy that the Court opposes).

26. See *infra* Part III.C.

27. This Article surveys only those cases in the Supreme Court. It is indeed likely that *Chevron* has retained its relevance in the lower courts, especially the D.C. Circuit Court.

reformulation took root, the Court began to limit *Chevron's* application: where *Chevron's* early application knew no bounds, today *Chevron* applies less often and is cited by the Court far less frequently.<sup>28</sup>

The Article evaluates this change. To do so, it proceeds as follows. First, Part I describes the battle regarding *Chevron's* first step using an illustrative case: *Mississippi Poultry*.<sup>29</sup> Next, Part II discusses *Chevron* itself and the Court's original vision of *Chevron*.<sup>30</sup> Although the language Justice Stevens used in *Chevron* was equivocal, his application of that language was anything but. From there, Part III reviews the Supreme Court's development of *Chevron's* first step—from *Chevron's* infancy through senescence.<sup>31</sup> This part reviews a number of cases from each time period, identifies the Court's description of *Chevron's* first step in each case,<sup>32</sup> and then evaluates the Court's application of the first step in each case. Throughout this survey, the Court's reformulation of *Chevron's* first step is detailed: the Court began intentionally, but soon after Justice Scalia's appointment to the bench, the textualist-intentionalist battle began.<sup>33</sup> Ultimately, with a change in the composition of the Court, *Chevron's* first step has become textually based. Finally, this Article concludes by suggesting that *Chevron* is becoming less relevant today for three reasons: first, the case is cited far less frequently by the Court; second, the Court has created a new step in the process, which limits *Chevron's* application; and, third, the Court has limited one of the rationales supporting *Chevron's* holding, namely, implicit delegation.<sup>34</sup> Possibly, the Court's reformulation of *Chevron* has hastened its demise.

#### I. MISSISSIPPI POULTRY: RECASTING THE NATURE OF THE INQUIRY

While it might seem odd to begin an article surveying Supreme Court cases with a Fifth Circuit case, the majority and dissenting opinions in the convoluted case of *Mississippi Poultry Ass'n v. Madigan*<sup>35</sup> nicely illustrate the *Chevron* textualist-intentionalist divide, while also showing the difficulty the lower courts have had and will continue to have with the Court's confusing direction.

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28. See *infra* Part III.E.

29. See *infra* Part I.

30. See *infra* Part II.

31. See *infra* Part III.E.

32. The Justices' descriptions of *Chevron's* first step are far less informative than their actual application of the first step because often a justice does little more than quote *Chevron's* equivocal language. See, e.g., *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (calling *Chevron's* two step test "a formulation now familiar").

33. See *infra* Part III.B.

34. See *infra* Conclusion.

35. 992 F.2d 1359 (5th Cir. 1993), *aff'd on reh'g*, 31 F.3d 293 (5th Cir. 1994) (en banc).

At issue in *Mississippi Poultry* were the 1985 amendments to § 466(d) of the Poultry Products Inspection Act (PPIA).<sup>36</sup> Section 466(d) specifically required that all imported poultry products “shall . . . be subject to *the same* . . . standards applied to products produced in the United States; and . . . [shall be] processed in facilities and under conditions that are *the same as* those under which similar products are processed in the United States.”<sup>37</sup> The Secretary of Agriculture promulgated a regulation interpreting this statute to require that “[t]he foreign inspection system must maintain a program to assure that the requirements referred to in this section [are] *at least equal to* those applicable to the Federal system in the United States, are being met.”<sup>38</sup> The Mississippi Poultry Association, Inc. and the National Broiler Council filed a lawsuit alleging that the agency’s interpretation was arbitrary and capricious.<sup>39</sup> The trial court agreed.<sup>40</sup> Finding clarity in the statutory language, the trial court refused to give the agency interpretation any deference.<sup>41</sup>

The agency appealed, and a three judge panel heard the case.<sup>42</sup> The majority framed the issue as “whether Congress [had] clearly expressed its intent *in the plain language* of the statute.”<sup>43</sup> The majority described *Chevron*’s first step in textualist terms: “[t]he first step in determining the intent of Congress is to examine the language of the statute. For, if the language is unambiguous on its face, . . . judicial inquiry is complete.”<sup>44</sup> Further, the majority said, when the statute is “ambiguous or silent,” a reviewing court should proceed to *Chevron*’s second step.<sup>45</sup> According to the majority, at step one, courts should look at the text only; if the text is ambiguous, then a court should move directly to the agency’s interpretation.

Applying its articulated test, the majority found that the language “the same” was clear and refused to explore other sources of meaning, such as legislative history.<sup>46</sup> The majority reviewed the dictionary<sup>47</sup> and the statute

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36. *Id.* at 1360 n.1 (citing 21 U.S.C. §§ 451-470 (1988)).

37. *Id.* at 1361 n.6 (quoting 21 U.S.C. § 466(d)).

38. 52 Fed. Reg. 15,963 (May 1, 1987) (emphasis added).

39. *Miss. Poultry*, 992 F.2d at 1362.

40. *Id.* (citing *Miss. Poultry Ass’n v. Madigan*, 790 F. Supp. 1283, 1288-89 (S.D. Miss. 1992)).

41. *Id.* at 1362 (citing *Miss. Poultry*, 790 F. Supp. at 1288-89).

42. Later, the court on its own motion ordered a rehearing. *Miss. Poultry Ass’n v. Madigan*, 9 F.3d 1116 (5th Cir. 1993).

43. *Miss. Poultry*, 992 F.2d at 1363 (emphasis added).

44. *Id.* (internal quotations and citations omitted).

45. *Id.*

46. *Id.*

47. To determine whether the language was clear, the majority looked first to a dictionary and concluded that “any fair reading of the dictionary definition of ‘the same’ overwhelmingly demonstrate[d] that ‘the same’ [was] congruent with ‘identical.’” *Id.* at 1364. While the majority acknowledged that secondary dictionary definitions included

as a whole. Because Congress had used both “the same” and “at least equal to” in other parts of the PPIA,<sup>48</sup> the majority reasoned that when Congress wanted to use an equivalency standard, it knew how to do so.<sup>49</sup> Thus, the majority focused its attention almost exclusively on the text and structure of the statute at issue.<sup>50</sup>

In response, the dissent chastised the majority for recasting *Chevron*’s first step as a search for statutory clarity.<sup>51</sup> By transforming the step from a search for intent to a search for textual clarity, the majority ignored the Act’s legislative history and policy implications—factors that the dissent ultimately found dispositive.<sup>52</sup> Believing that the majority misunderstood *Chevron*’s first step, the dissent set out to clarify the two-step framework.

According to the dissent, *Chevron*’s first step required the court to find and effectuate Congress’s choice regarding the language at issue. In other words, the search at step one was not simply for textual clarity, although an analysis of the language of the statute would be part of the search; rather, it was a search for congressional intent.<sup>53</sup> Because text is evidence of intent, the dissent, like the majority, started with the text. In contrast to the majority, however, the dissent found the words “the same” to be ambiguous: “the same” could mean “identical” or “equivalent.”<sup>54</sup> Either meaning was a fair reading of the language.<sup>55</sup>

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synonyms of “equivalent,” such as “closely similar” and “comparable,” the majority reasoned that substituting “at least equal to” for “the same as” made no sense in this case because Congress used “at least equal to” to mean equivalent in other sections of the PPIA. For example, Congress required states and territories to have poultry processes “at least equal to” the federal system. *Id.* at 1364 n.28 (citing 21 U.S.C. § 466(d) (1988)).

48. For example, Congress provided that “the terms ‘pesticide chemical,’ ‘food additive,’ ‘color additive,’ and ‘raw agricultural commodity’ shall have *the same* meaning for purposes of this Act as under [another act].” *Miss. Poultry*, 992 F.2d at 1363 n.26.

49. *Id.* at 1364.

50. Not content to rest on the language of the statute alone, the majority relied on subsequent legislation passed, and turned to language from the Food, Agriculture, Conservation, and Trade Act of 1990 (1990 Farm Bill), a statute enacted after the agency promulgated its regulation. Pub. L. No. 101-624, § 2507, 104 Stat. 4068 (1990). In the Farm Bill, Congress stated that “the regulation . . . with respect to poultry products offered for importation into the United States does not reflect the intention of the Congress; . . .” *Id.* § 2507(b)(1). The Bill then urged the Secretary to amend the regulation to reflect the true legislative intent. *Id.* § 2507(b)(2). The Secretary ignored Congress’ entreaty, however, and allowed the regulation to remain unchanged. *Miss. Poultry*, 992 F.2d at 1362.

51. *Miss. Poultry*, 992 F.2d at 1375 (Reavley, J., dissenting).

52. *See id.* (substantiating why legislative history and policy are dispositive).

53. *See id.* (arguing that “Congress did not choose between identity and equivalence,” so the analysis must go beyond statutory text).

54. *See id.* at 1369-75 (listing various possible definitions to illustrate the ambiguous nature of the statute’s words).

55. *See id.* at 1369 (stating that the “majority must concede that ‘same’ can mean either ‘identical’ or ‘equivalent’”). The majority had found that “equivalent” did not make sense because of the statute’s structure—Congress used “the same” and “equivalent to” in other sections of the statute to mean different things. *See id.* at 1364. The dissent dismissed the majority’s structural argument, in part, by saying “Congress understandably use[d] a common word for several different purposes.” *Id.* at 1372.

Finding the text ambiguous, the dissent turned to the legislative history and policy implications.<sup>56</sup> The legislative history was telling. Prior to 1985, the statute had required that poultry standards in other countries be “substantially equivalent” to the U.S. import standards;<sup>57</sup> by regulation, the agency had interpreted this language to require standards “at least equal to” those in the United States.<sup>58</sup> Hence, foreign countries could export poultry products to the United States so long as that exporting country’s standards were the “substantial equivalent of”<sup>59</sup> federal standards.

In 1985, the Senate Agriculture Committee<sup>60</sup> drafted amending language for the PPIA. The Committee specifically adopted the agency’s “at least equal to” language, approved the bill, and sent it to the Senate for a vote.<sup>61</sup> But during floor debate, Senator Helms, the chair of the Agriculture Committee, offered a “purely technical” amendment substituting the words “the same as” for the words “at least equal to,” in order to “clarif[y] the provision to reflect the original intent of the provision as adopted by committee in markup.”<sup>62</sup> The Senate adopted the new language without debate, discussion, comment, or recorded vote.<sup>63</sup> Later, the Conference Committee adopted the Senate version of the bill—the House bill contained the “at least equal to” language<sup>64</sup>—without any recorded consideration of this rather substantive change.<sup>65</sup>

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The dissent disdainfully rejected the majority’s reliance on *subsequent* legislative history: “I am aware of no case where any court has held that subsequent legislative history is at all relevant to cases like this one, where, rather than determine what a statute means, we must determine ‘whether Congress has directly spoken to the precise question at issue.’” *Id.* at 1379 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Moreover, the dissent argued that Congress could not satisfy *Chevron*’s first step after the statute in question was enacted. In other words, *Chevron* focuses on what Congress meant when it enacted the language in dispute, not what a subsequent Congress may later believe the first Congress meant. *See id.* at 1379 n.18 (finding no case in which a court has “permitted Congress to satisfy *Chevron*’s threshold inquiry after the disputed statute had been enacted”).

56. *See id.* at 1377 (emphasizing that “[l]egislative history and policy together affirmatively establish that Congress has *not* ‘directly spoken to the precise question’”) (internal citations omitted).

57. *See id.* at 1378 (stating that “the Agricultural Committee sent the 1985 Farm Bill to the full Senate with the equivalence standard intact”).

58. *Id.* (citing 9 C.F.R. § 381.196(a)(2)(iv) (1984)).

59. 7 C.F.R. § 81.301(a) (1972).

60. The U.S. Senate Committee on Agriculture, Nutrition, and Forestry.

61. *Miss. Poultry*, 992 F.2d at 1378 (Reavley, J., dissenting) (citing S. REP. NO. 99-145, at 339-40 (1985) and noting that the Committee left the Secretary’s long established equivalence standard intact).

62. *Id.* at 1378 (quoting 131 CONG. REC. 33,358 (Nov. 22, 1985)).

63. *Id.*

64. *Miss. Poultry Ass’n v. Madigan*, 31 F.3d 293, 313 (5th Cir. 1994) (Higginbotham, J., dissenting).

65. *Miss. Poultry*, 992 F.2d at 1378 (Reavley, J., dissenting) (noting that Senator Helms did not mention the trade consequences of the change).

The dissent found the lack of congressional debate regarding Senator Helm's floor amendment compelling.<sup>66</sup> While Senator Helms indicated (perhaps less than truthfully)<sup>67</sup> that the amendment was minor, the amendment actually had major trade implications. If the language "the same as" meant "identical," then the amendment imposed a complete trade barrier; no foreign country's poultry could enter the United States because its inspection system could never be "identical" to the U.S. system.<sup>68</sup> The dissent found it inconceivable that Congress would enact a statute with such major trade implications without talking about "why a barrier was justified, what it was supposed to accomplish, or how its effectiveness would be monitored."<sup>69</sup> Absent evidence that Congress intended "the same" to mean "identical," the dissent concluded that Congress had never "directly spoke[n] to the precise question' of whether [the statute] mandates identicality."<sup>70</sup> Thus, the dissent concluded that the decision of what "the same" meant belonged to the agency. And, under *Chevron's* second step, the dissent found the agency's interpretation reasonable.<sup>71</sup>

While the litigation was pending, Congress again amended the PPIA. As part of the North American Free Trade Agreement Implementation Act (NAFTA), Congress provided that poultry imports from Canada and

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66. *See id.* (describing how Senator Helms offered the amendment, stating that it was of minimal importance, and that it merely accomplished the committee's original intent).

67. As a senator from North Carolina, a large poultry producing state, it is possible that Senator Helms knew exactly what he was doing.

68. *Miss. Poultry*, 922 F.2d at 1378 (Reavley, J., dissenting) (commenting on how "the facts of [the] case provide no basis on which to hold that Congress 'directly spoke[] to the precise question' of whether section 466(d) mandates identicality").

69. *Id.*

70. *See id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)) (stressing the absence of congressional debate over the issue).

71. A few months later, the majority amended its decision, in part, to respond to the dissent's criticism of its approach:

We also reiterate that the instant case does not invite a search for legislative *intent*.

We would be putting the proverbial cart before the horse if we were first to consider legislative intent in testing for ambiguity. For only *after* the language of a statute is found to be ambiguous are we entitled to launch an extra-statutory search for Congressional intent. The threshold inquiry in a *Chevron* analysis is, of course, whether Congress's intent is clear. . . . Here, the plain wording of the PPIA makes the intent of Congress clear as a matter of law. If the language used is clear on its face, "then the first canon is also the last: 'Judicial inquiry is complete.'"

*Miss. Poultry Ass'n v. Madigan*, 9 F.3d 1113, 1115 (5th Cir.) (relying on *Conn. Nat'l Bank v. Germain*, 503 U.S. 249 (1992)), *modifying* 992 F.2d 1359 (5th Cir. 1993). While this quote suggests that the majority recognized the utility of a broader search for congressional meaning, the majority later said within that same opinion that even if it were to find the PPIA ambiguous, the agency's interpretation would still be unacceptable under *Chevron's* second step because the structure of the statute made clear that "the same" meant "identical." *Miss. Poultry*, 9 F.3d at 1114. In other words, the majority continued to cling to its textualist approach despite rhetoric to the contrary.

Mexico “shall comply with [standards that are ‘*the same*’ as those in the United States] or be subject to . . . standards that are *equivalent to* United States standards.”<sup>72</sup> Perhaps because of this schizophrenic legislative enactment, the Fifth Circuit ordered, *on its own motion*, that *Mississippi Poultry* be reheard en banc.<sup>73</sup>

The outcome did not change after rehearing before the full bench; the court was tightly divided: eight to affirm, seven to reverse. The majority remained true to its textualist approach,<sup>74</sup> while the dissent accused the majority of “exacting literalism” and of issuing “a flood of legalisms” to avoid the “textual command.”<sup>75</sup> According to the dissent, “[t]his case [was] simple.”<sup>76</sup> The statute was ambiguous, and the legislative history and policy implications showed that Congress did not choose between “identity” and “equivalency;” therefore, the choice belonged to the agency.<sup>77</sup> The dissent accepted as reasonable the agency’s interpretation of

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72. North America Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 361(e), 107 Stat. 2123-24 (1993) (emphasis added) (codified at 21 U.S.C. § 466(d) (1988)).

73. *See Miss. Poultry*, 9 F.3d at 1116 (ordering a rehearing en banc on its own motion); Supplemental Brief of Appellants on Reh’g en Banc at 10, *Miss. Poultry Ass’n Inc. v. Madigan*, No. 92-7420 (5th Cir. Dec. 16, 1993) (recounting the procedural history of the case). Defendants-Appellants’ request for rehearing was then denied as moot. *Miss. Poultry Ass’n v. Madigan*, No. 92-7420, 1993 U.S. App. LEXIS 33337 (Dec. 16, 1993).

74. The en banc majority retained the panel majority’s interpretative focus—a court defers to an agency’s interpretation only when the language of the statute is ambiguous or silent:

[I]f Congress has clearly expressed its intent *in the plain language* of the statute, “that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” If, but only if, *the language of the statute* is determined to be either ambiguous or silent on the particular issue is the reviewing court to proceed to the second *Chevron* inquiry: “whether the agency’s answer is based on a permissible construction of the statute.”

*Miss. Poultry Ass’n v. Madigan*, 31 F.3d 293, 299 (5th Cir. 1994) (emphasis added) (quoting *Chevron*, 467 U.S. at 842-43 & n.9). In general, the en banc opinion tracked much of the reasoning of the panel decision. *See Miss. Poultry*, 31 F.3d at 300. But unlike the panel majority, the en banc majority acknowledged that the agency offered an alternative dictionary definition that, at least arguably, “ma[d]e some sense under the statute at issue.” *Id.* Acknowledging that the agency proposed the better standard, the majority nonetheless rejected it. *Id.* at 310 (“[I]t simply is not the role of the court to decide which of the two other branches has proposed the preferable rule . . . . It is Congress that has the right to make this choice, even if it may ultimately prove to be ill-advised.”).

75. *Id.* at 310 (Higginbotham, J., dissenting).

76. *Id.* The dissent pointed out that “[t]he question . . . is not . . . whether we would select the definition of ‘same’ that the Secretary did. Rather our directive is to determine whether Congress chose among the above definitions.” *Id.* at 312. Because the Senate had offered no debate, discussion, or even a comment to Senator Helm’s floor amendment and because the conference committee similarly failed to explain why it chose “the same” from the Senate bill, rather than “at least equal to” from the House version, the dissent reasoned that Congress never intended to “embed a protectionist measure in [the] bill. . . .” *Id.* at 313-14.

77. *Id.* at 315.

“the same” to mean “equivalent.”<sup>78</sup> Rather than imposing a trade barrier, the statute merely set a floor for foreign poultry importation: imported poultry had to be at least as safe and wholesome as American poultry.<sup>79</sup>

Ultimately, which holding was right, the majority’s or dissent’s, is unimportant to the point of this article.<sup>80</sup> But while the correctness of the holding is unimportant, whether the dissent or the majority’s reasoning was correct is central. The depth of the inquiry at *Chevron*’s first step is not merely of academic interest. The answer directly affects the power distribution between the legislative, executive, and judicial branches of government. If a court turns to sources of meaning other than the agency’s interpretation whenever the statute’s text is ambiguous, theoretically,<sup>81</sup> the Judiciary will retain greater interpretative power and the Legislature will retain greater lawmaking control. The Executive would have correspondingly less power. If Congress fails to draft a perfectly clear statute, a court will have many sources for discerning exactly what Congress intended to accomplish, including the purpose of the statute, legislative history, and social or legal context. Only when all sources fail to resolve the ambiguity will the Judiciary be bound by the Executive’s

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78. *Id.* at 311-15.

79. *See id.* at 310 (noting that the majority’s interpretation would prohibit virtually all poultry importation).

80. I find the question interesting and disagree with them both. I disagree with the majority that the language “the same” is so clear that Congress could not have intended “equivalent.” But contrary to the dissent’s argument, I find the legislative history to be relatively clear that the Legislature did speak to the precise issue in question and choose “the same” over “at least equal to.” The legislative history shows that the Senate amended this language during floor debate with Senator Helm’s offer of a “purely technical” amendment, with no discussion of change whatsoever, including the political ramifications the new language would have. Did Congress mean to enact a trade barrier? No. The dissent was likely correct that Congress would not have erected a trade barrier without discussion. But if true, why then did Congress choose language that could be interpreted to effect a trade barrier? Simply put, Congress screwed up. What the absence of any debate, comment, vote, or discussion showed was that Congress, as a whole, failed to understand that its statute could be interpreted to enact a virtual ban on imported poultry. Thus, rather than show that Congress did not decide which standard it wanted—Congress specifically did choose—the legislative history shows instead that Congress failed to consider the implications of its choice.

After *Mississippi Poultry* was decided, Congress immediately invalidated the majority’s decision by amending the PPIA to replace “the same” with “equivalent to.” Pub. L. 103-465, § 431(k)(1), 108 Stat. 4969-70 (1994) (codified at 21 U.S.C. § 466(d)(1) (1994)). Does Congress’s action mean that the dissent was correct in reasoning that Congress never intended to enact a trade barrier and, thus, never intended “the same” to mean “identical”? Yes and no. The amendment does show that Congress likely never intended to enact a trade barrier, but it does not prove that Congress meant “the same” to mean “at least equal to.” Rather, it shows that Congress simply did not consider that the change in language would have such a profound impact on trade; Congress failed to do its job well.

81. As some have posited, the Justices do not always do what theory suggests they should. *See generally* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) (finding a strong relationship between a justice’s political views and his or her *Chevron* rulings).



reasonable interpretation. Thus, under this formulation of *Chevron*, the power to make laws remains with the Legislature, while the power to say what those laws mean remains with the Judiciary.

But if *Chevron*'s first step is a search for textual clarity, power should shift to the Executive because it will be difficult for Congress to draft unambiguous statutes. If a court turns to the agency's interpretation whenever the statute's text is ambiguous, the Executive gains both lawmaking and interpretative power. Note that Congress can retain control only by drafting flawlessly—an impossible task as public choice theory has shown.<sup>82</sup> Language is inherently ambiguous. It is difficult for Congress to draft well, let alone perfectly. When Congress fails to draft a perfectly clear statute, a court will have one source for resolving this ambiguity—the agency's interpretation. Only if that interpretation is unreasonable can the Judiciary ignore the agency's interpretation. Under a textualist formulation of *Chevron*, the power to say what laws mean should belong to the Executive. But as some posit, even if textualists fail in practice to defer to the Executive, interpretative power is still affected, albeit differently. Rather than defer to the Executive when Congress intended, textualists may well refuse to defer at all. Either way, there is an interpretative power struggle between the Judiciary and the Executive.

So, which was right, the dissenting or the majority approach? To answer this question, we must look not only at *Chevron* itself, but at Supreme Court cases immediately following *Chevron*. How was *Chevron* originally fashioned, and how is *Chevron* ultimately understood and applied today?

## II. *CHEVRON*: THE BIRTH OF THE TWO-STEP FRAMEWORK

More than 200 years ago, the Supreme Court first resolved the issue of which branch—the Judiciary or the Legislature—had the power to interpret the law in *Marbury v. Madison*.<sup>83</sup> “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>84</sup> The Legislature enacts laws while the Judiciary interprets them. Then, along came agencies, and their interpretative role was unclear.

Before 1984, the Supreme Court had not clearly delineated the appropriate level of deference that a court should give an agency when the agency interpreted a statute by regulation.<sup>85</sup> Courts would give deference

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82. See Sunstein, *Interpreting Statutes*, *supra* note 25, at 446-50 (discussing public choice theory in which statutes “reflect unprincipled ‘deals’ and not intelligible collective ‘purposes’”).

83. 5 U.S. (1 Cranch) 137 (1803).

84. *Id.* at 177.

85. Shortly before *Chevron* was decided, the Court heard *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29 (1983). In that case, the Reagan Administration, which had swept into office with a promise to deregulate, argued

to agency interpretations depending upon “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>86</sup> This level of deference is known as *Skidmore* deference. Additionally, courts looked to see if the agency opinion had “‘warrant in the record’ and a reasonable basis in law.”<sup>87</sup> Thus, while some deference was accorded, the amount of deference varied depending on the circumstances surrounding the interpretation.<sup>88</sup> In effect, agencies faced a balancing test: the more consistent, thorough, and considered they were, the more likely the court would defer to their interpretation.<sup>89</sup> Under *Skidmore v. Swift & Co.* and *National Labor Relations Board v. Hearst Publications, Inc.*, agencies were little more than expert witnesses; when agency interpretations were persuasive, the court generally deferred to them.<sup>90</sup> When the interpretations did not have that power, the court was more free to ignore them. Deference was based on pragmatism.

*Chevron* changed the basis for deference. In *Chevron*, the Supreme Court created the two-step framework for determining when deference should be given to an agency’s interpretation of a statute. In creating this framework, the Court shifted the basis for deference from pragmatism to implied congressional delegation and democratic theory.<sup>91</sup> Deference,

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that agency decisions to do so should be given greater deference than agency decisions to regulate; this argument was soundly rejected. See *The Story of Chevron*, *supra* note 1, at 412-13 (averring that the Court’s decision created a “significant setback to the Administration’s deregulation campaign”).

86. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

87. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 131 (1944) (citing to *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146 (1939)). *Skidmore* applied to agency opinions that were less formally adopted, such as opinion letters, while *Hearst* applied to formal adjudication. The question of how much deference to give interpretations arrived at after notice-and-comment rulemaking had not yet been resolved.

88. See generally Merrill, *Judicial Deference*, *supra* note 8, at 972-75; Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985) (“The decision whether to grant deference depends on various attributes of the agency’s legal authority and functions and of the administrative interpretation at issue.”).

89. See Merrill, *Judicial Deference*, *supra* note 8, at 972-75 (categorizing pre-*Chevron* deference factors into three groups: factors addressing “Congress[s] interpretive intent,” factors addressing the “attributes of the particular agency decision at issue,” and “factors thought to demonstrate congruence between the outcome reached by the agency and congressional intent regarding that specific issue”).

90. See *Skidmore*, 323 U.S. at 140 (describing agency administrators’ ruling, interpretations, and opinions as constituting a body of experience and informed judgment to which courts and litigants may properly resort for guidance); *Hearst*, 322 U.S. at 131-32 (accepting the Board’s decision as long as it has “warrant in the record and a reasonable basis in law”) (internal citations omitted).

91. See *The Story of Chevron*, *supra* note 1, at 401. Consider, however, that the basis for deference—a judicial presumption of implied Congressional delegation—is troubling. If the delegation is considered final, precluding the court from any interpretative review, it likely violates § 706 of the Administrative Procedure Act, the Constitution, and *Marbury v. Madison*’s edict that “final interpretive authority rests with the courts.” Hasen, *supra* note 9,

which agencies had earned through their own actions, became an all-or-nothing grant of power from Congress.<sup>92</sup> Either Congress was clear and the Judiciary did not defer at all to the agency, or Congress was unclear and the Judiciary deferred completely to the agency. Agencies were no longer expert advisors to the Judiciary; rather, they became competitors for interpretative power. Thus, *Chevron* altered judicial deference to agency interpretations to an all-or-nothing choice: either the court adopted or rejected the agency's reasonable interpretation in full.

Interestingly, when it was decided, no one thought *Chevron* was about deference. Instead, everyone believed that *Chevron* was about the "bubble concept": specifically, "whether [the] EPA[] [could] allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble.'"<sup>93</sup> As for the deference issue, the parties did not argue the issue;<sup>94</sup> the lower court did not address the issue;<sup>95</sup> and Justice Stevens, who authored *Chevron*, later claimed that the case was merely a "restatement of existing law, nothing more or less."<sup>96</sup> He cited *Hearst* for support of the two-step process.<sup>97</sup> The *Hearst* court

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at 339-40. Hasen persuasively argues that *Chevron* can better be understood as a prudential "Doctrine of Independent Judicial Deference to Agencies." *Id.* at 357. Under this theory, courts would defer to agencies because of their expertise in the area. *Id.* at 357-62 ("[A] court's deference is purely substantive and has nothing to do with a judgment about who has the authority to decide.").

92. See *The Story of Chevron*, *supra* note 1, at 401 (explaining that if a court decided the issue at step one, the agency would get no deference, but if the court decided the issue at step two, the agency would get maximum deference).

93. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984). The agency's "bubble concept" had been challenged twice in the D.C. Circuit Court already. In one case, the "bubble concept" was allowed—*ASARCO Inc. v. EPA*; in the other, it was not—*Alabama Power v. Costle*. See *Ala. Power Co. v. Costle*, 636 F.2d 323, 410-11 (1979) (concluding that the EPA's treatment of utility boilers was not an abuse of discretion); *ASARCO Inc. v. EPA*, 578 F.2d 319, 325 (1978) (accepting the definition of "source" as an individual facility, as distinguished from a combination of facilities). The D.C. Circuit in both cases focused on the purpose of the act at issue; because the two different acts being challenged had different purposes, one to maintain current air quality and the other to enhance it, the court reached different results. See *ASARCO*, 578 F.2d at 329 n.40; *Ala. Power Co.*, 636 F.2d at 411. See generally *The Story of Chevron*, *supra* note 1, at 408 (explaining that policy, rather than text, was the focus).

94. See *The Story of Chevron*, *supra* note 1, at 413 (noting that there is nothing in the three petitions suggesting that the parties asked the Court to address this issue).

95. See *Natural Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 725-28 (D.C. Cir. 1982). Then-Judge Ginsburg did not mention deference nor identify any standard of review. One wonders whether *Chevron*'s two-step framework would exist had Ginsburg applied *Skidmore* deference or, for that matter, any deference.

96. *The Story of Chevron*, *supra* note 1, at 420.

97. *Chevron*, 467 U.S. at 844 n.14.

similarly had looked first to whether Congress had intended the language at issue to have a particular meaning, and then deferred to the agency's reasonable choice when congressional intent was absent.<sup>98</sup>

The facts of *Chevron* are straightforward; *Chevron* involved a challenge to the Clean Air Act, which Congress amended in 1977.<sup>99</sup> The amendments expressly required states that had not met national air quality standards to establish a permit program regulating new or modified "stationary sources" of air pollution.<sup>100</sup> The statute did not specifically define "stationary sources;"<sup>101</sup> so, the Environmental Protection Agency (EPA) filled the gap.<sup>102</sup> By promulgating a regulation through notice-and-comment rulemaking, the EPA defined "stationary sources" to include all pollution-emitting devices within an entire plant: the "bubble concept."<sup>103</sup> A plant could increase emissions on one device so long as it commensurately decreased emissions on another so that plant emissions remained constant.<sup>104</sup>

The regulation was challenged as being an unreasonable "construction of the statutory term 'stationary source.'"<sup>105</sup> The D.C. Circuit agreed.<sup>106</sup> The

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98. *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 130 (1944) ("It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act.")

99. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified at 42 U.S.C. §§ 7501-7508 (2000)).

100. 42 U.S.C. § 7502(c)(5) (2000).

101. *Natural Res. Def. Council, Inc., v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd sub nom. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

102. By this time, *ASARCO* and *Alabama Power* had been decided. *See The Story of Chevron*, *supra* note 1, at 409 ("Final rules were not issued until August 1980, after the D.C. Circuit's full opinion in *Alabama Power* had issued.")

103. *See* 45 Fed. Reg. 52,676, 52,697 (Aug. 7, 1980). The EPA defined "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." *Id.* at 52,731. Originally, the EPA dually defined "installation" as "an identifiable piece of process equipment." *Id.* at 52,742. Then, pursuant to the EPA's initial regulation, "stationary source" included both entire plants and single devices. *Id.* at 52,696-97.

In 1981, President Reagan came into office on a platform of deregulation. *See Chevron*, 467 U.S. at 857-58. In October, the EPA repealed the dual definition and instead adopted a plant-wide definition; using one definition consistently throughout the various programs would reduce regulatory complexity and provide greater flexibility to the states in designing nonattainment programs. *See Gorsuch*, 685 F.2d at 724 (citing 46 Fed. Reg. 50,766 (Oct. 14, 1981)) (discussing the concerns the EPA asserted in connection with this definition).

104. *See Gorsuch*, 685 F.2d at 724 n.26 (noting that this ability under the regulation to offset emissions allows operators to avoid the permitting process).

105. *Chevron*, 467 U.S. at 840.

106. *See Gorsuch*, 685 F.2d at 720 (stating that the EPA's use of the "bubble concept" to reduce the size of mandatory new source review in nonattainment areas was improper). Justice Ginsberg wrote the appellate court opinion prior to being appointed to the Supreme Court by President Clinton. In coming to that conclusion, the court reviewed the statutory language and legislative history and found both inconclusive. *See id.* at 723 (calling the statute dense and stating that the question was not explicitly answered by the statute or squarely addressed in the legislative history). Stating that it did "not write on a clean slate,"

Supreme Court reversed,<sup>107</sup> explaining that the lower court had applied the wrong standard,<sup>108</sup> and held that the agency's interpretation was "permissible."<sup>109</sup> In so holding, the Court developed the now boiler-plate, two-step framework used to evaluate agency interpretations.<sup>110</sup> According to the *Chevron* Court, the first question a court must resolve when confronted with an agency's interpretation of a statute was "whether Congress ha[d] directly spoken to the precise question at issue."<sup>111</sup> If Congress had spoken to the issue, a court need only determine whether the agency's interpretation was consistent.<sup>112</sup> Only when the court determined that Congress did not decide the issue should a court move to the second step—determining whether the agency interpretation was permissible or reasonable.<sup>113</sup>

In developing its two-step framework, the Court articulated three reasons to justify its decision to defer to the agency: implicit delegation,<sup>114</sup> agency expertise,<sup>115</sup> and political accountability.<sup>116</sup> Two of these, implicit delegation and political accountability, departed somewhat from prior law and have had a tremendous impact on administrative law in their own right.<sup>117</sup> To support its holding, the Court started with the implicit delegation rationale and reasoned that with the power to administer a congressionally-created program comes the power to formulate policy and

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the court then reviewed its earlier opinions, *ASARCO* and *Alabama Power*. *Id.* at 720. Reconciling these two somewhat inconsistent opinions, the court concluded that the "bubble concept" was permissible when Congress intended to *preserve* existing air quality but impermissible when Congress intended to *improve* air quality. *See id.* (noting that Congress intended the new source review requirements not only to maintain air quality but to promote cleanup of nonattainment areas). Because the purpose of the program at issue in *Chevron* was to reduce emissions, an interpretation that allowed emissions to remain constant would be inconsistent. *Id.*

107. *Chevron*, 467 U.S. at 842.

108. *Id.* at 845

Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one.

*Id.*

109. *Id.* at 866.

110. *See id.* at 842-43.

111. *Id.* at 842.

112. *See id.* at 842-43 (noting that "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

113. *Id.* at 843. The Court used both the term "permissible" and the term "reasonable." Since *Chevron* was decided, the word "reasonable" has become the more common articulation of the standard. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

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

115. *Id.* at 865.

116. *Id.*

117. *See The Story of Chevron, supra* note 1, at 401.

make “rules to fill any gap left, whether implicitly or explicitly, by Congress.”<sup>118</sup> When Congress explicitly leaves a gap for an agency to fill, the agency’s interpretation controls, so long as it is not arbitrary, capricious, or manifestly contrary to the statute.<sup>119</sup> And when delegation is implicit, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>120</sup> The implicit delegation rationale expanded “the sphere” of legitimate agency lawmaking.<sup>121</sup> Before *Chevron*, agencies could legitimately make “law” only when Congress explicitly delegated.<sup>122</sup> After *Chevron*, agencies could legitimately make “law” regardless of whether Congress explicitly delegated. Thus, *Chevron* effectively expanded the arena of legitimate agency lawmaking.

The implicit delegation rationale had another effect; it diminished the judicial interpretative role. Prior to *Chevron*, courts looked to agency opinions as merely one source for determining meaning: the better reasoned the agency’s interpretation, the more likely the court would defer to it. But the court, not the agency, interpreted the statute. *Chevron* changed that balance and weakened the Judiciary’s role. The case required courts to defer first to Congress, then to agency interpretations, regardless of how well reasoned the interpretations were. Thus, before *Chevron*, the Judiciary determined what a statute meant with an agency’s expert guidance. After *Chevron*, that balance shifted.

The second reason the Court provided for justifying its decision to defer to the agency’s interpretation was not new.<sup>123</sup> The Court in *Chevron* reasoned that “[j]udges are not experts,” at least not in these technical areas.<sup>124</sup> In contrast, agency personnel are highly qualified to make technical determinations and are charged with making these determinations.<sup>125</sup> Regardless of whether Congress actually intended to delegate to the agency, it simply makes sense to defer to such expertise.<sup>126</sup>

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118. *Chevron*, 467 U.S. at 843.

119. *Id.* at 843-44.

120. *Id.* at 844.

121. *The Story of Chevron*, *supra* note 1, at 401.

122. *Id.*

123. Both *Skidmore* and *Hearst* discussed this rationale. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-38 (1944) (opining that the agency administrator had “accumulated a considerable experience in the problems” that the agency faced); *NLRB v. Hearst Publ’ns., Inc.*, 322 U.S. 111, 130-31 (1944) (commenting that administrators had the benefit of “[e]veryday experience in the administration of the statute” which “gives it familiarity with the circumstances and backgrounds of employment relationships”).

124. *Chevron*, 467 U.S. at 865.

125. *Id.*

126. *Id.*

The third reason the Court provided was political accountability: the Executive, unlike the Judicial branch, is accountable to the public.<sup>127</sup> Thus, it is more appropriate for this political branch of the government to resolve conflicting policies “in light of everyday realities.”<sup>128</sup> “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>129</sup> This rationale was important for a number of reasons. Prior to *Chevron*, not every agency opinion was entitled to deference.<sup>130</sup> But *Chevron* established an all-or-nothing default rule:<sup>131</sup> either Congress had decided the issue or left it to the agency. In doing so, *Chevron* flipped the pre-existing default rule: prior to *Chevron*, deference to the agency’s interpretation required a good reason, while post-*Chevron*, deference to the agency’s interpretation required one reason: lack of clarity.<sup>132</sup> The Court reasoned that agency interpretation was preferable to judicial interpretation because agencies were politically accountable; the Judiciary was not.<sup>133</sup>

Thus, contrary to Justice Stevens’ belief that *Chevron* merely confirmed existing law, *Chevron* vastly expanded the scope of agency lawmaking and interpretive power. In doing so, *Chevron* changed the political landscape by redistributing interpretative power from the Judiciary to the Executive.

### III. CHEVRON AS APPLIED BY THE SUPREME COURT

#### A. Chevron’s Infancy: Intentionalism Reigns

While *Chevron* was a unanimous opinion,<sup>134</sup> its guidance has proven less than perfectly clear. Debate soon arose regarding the nature of the inquiry at the first step. Should the search be broad and include legislative history and other sources of statutory meaning? Or should the search be narrow and encompass the text only? The *Chevron* Court’s description of the first step in the framework was somewhat equivocal: on the one hand, the Court asked “whether Congress ha[d] *directly spoken* to the precise question at

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127. *Id.*

128. *Id.* at 865-66.

129. *Id.* at 866.

130. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833-34 (2001) (stating that prior to *Chevron*, courts only had to defer when Congress had expressly delegated authority to an agency).

131. *The Story of Chevron*, *supra* note 1, at 401.

132. Merrill, *Judicial Deference*, *supra* note 8, at 978 (describing the Court’s shift in emphasis).

133. *Id.* at 978-79; *see also The Story of Chevron*, *supra* note 1, at 401-02.

134. *Chevron*, 467 U.S. at 866 (noting that Justices Marshall, Rehnquist, and O’Connor took no part in the decision).

issue,”<sup>135</sup> on the other, it asked whether “the *intent* of Congress [was] clear.”<sup>136</sup> These questions appear to conflict: did the Court intend step one to be a search for Congressional intent or merely a search for textual clarity? What should a court do with this equivocal direction: turn to an agency’s opinion whenever a statute’s text was ambiguous or turn to the agency’s opinion only when the text was ambiguous and other sources of meaning, such as legislative history and social context, failed to resolve the ambiguity?

While its language may have been equivocal, the Court’s application of its test was anything but. Perhaps because the Court approached non-regulatory statutory interpretation questions broadly at that time,<sup>137</sup> the Court applied *Chevron*’s two-step framework broadly. The Court analyzed the enactment history,<sup>138</sup> the legislative history,<sup>139</sup> and the statutory text<sup>140</sup>—none of which it found conclusive.<sup>141</sup> Indeed, the Court did not

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135. *Id.* at 842 (emphasis added). Additionally, the Court said that only “if the statute [was] silent or ambiguous,” should a court turn to the agency’s construction. *Id.* at 843 & n.9.

136. *Id.* at 842 (emphasis added). In a footnote, the Court said, “The judiciary . . . must reject administrative constructions which are contrary to clear congressional *intent*. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an *intention* on the precise question at issue, that *intention* is the law and must be given effect.” *Id.* at 843 n.9 (internal citations omitted) (emphasis added). The Court’s reference to “traditional tools of statutory construction” further supports that the search was to be broad, rather than limited to a search of the language of the statute. The full quote is as follows:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.* at 842-43 (internal footnotes omitted).

137. See Merrill, *Textualism*, *supra* note 21, at 353 (noting that *Chevron* was decided during the pre-textualism era); *The Story of Chevron*, *supra* note 1, at 417-18 (stating that *Chevron* was decided at a time when Justices considered legislative history). At that time, textualism had yet to emerge in the Court as the preferred interpretative approach. *Chevron* was decided in 1984. Justice Scalia, who is often credited with new textualism’s emergence, did not ascend to the bench until 1986. Before *Chevron* was decided, the Supreme Court routinely looked to legislative history and other sources to resolve statutory meaning. See Merrill, *Textualism*, *supra* note 21, at 353.

138. *Chevron*, 467 U.S. at 845-48 (examining statutes passed in the 1950s and 1960s to diminish pollution).

139. *Id.* at 851-53, 862-64 (examining the history of the 1977 Amendments).

140. *Id.* at 849-51, 859-62 (examining the language and requirements of the statute).

141. *Id.* at 861 (“We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.”); *id.* at 862 (“Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating . . . [and] silent on the precise issue before us.”).



immediately turn to the text at all, but rather reviewed the legislative history before turning to the text.<sup>142</sup> Only after perusing all sources did the Court finally determine that Congress had no specific intent on the bubble-concept issue.<sup>143</sup> At that point, the Court turned to the agency's interpretation and found it to be a "permissible construction of the statute."<sup>144</sup> The Court's application of its framework was unequivocal: the Court searched broadly for legislative intent rather than narrowly for textual clarity.<sup>145</sup> Thus, *Chevron* directed courts to apply an intentionalist approach to matters of regulatory interpretation. Did the Supreme Court follow its own directive?

In the early years following *Chevron*, the Court remained relatively true to the intentionalist directive it had issued. *Chevron* was cited by the Supreme Court only once in the term following its debut, although arguably it applied more often.<sup>146</sup> In this lone instance, it was cited by the dissent, not the majority. Writing for the majority in *Securities Industry Ass'n v. Board of Governors of Federal Reserve System*, Justice Blackmun held that because commercial paper fell within the plain language and purpose of the Glass-Steagall Act, it was a "security" under the Act.<sup>147</sup> In describing the level of deference due to the Board's interpretation of the statute, Justice Blackmun failed to cite *Chevron* at all:

The Board is the agency responsible for federal regulation of the national banking system, and its interpretation of a federal banking statute is entitled to substantial deference. . . . whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent. We also have made clear, however, that deference is not to be a device that emasculates the significance of judicial review. Judicial deference to an agency's interpretation of a statute only sets the framework for judicial analysis; it does not displace it. A reviewing court must reject administrative constructions of [a] statute, whether

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142. *Id.* at 845-59.

143. *Id.* at 861.

144. *Id.* at 866.

145. See Merrill, *Judicial Deference*, *supra* note 8, at 976 (maintaining that "[i]f the court concluded that Congress had a 'specific intention' with respect to the issue at hand, it would adopt and enforce that answer" (internal footnote omitted)).

146. See *The Story of Chevron*, *supra* note 1, at 421 (noting that "nineteen argued cases in the next Term . . . presented some kind of question about whether the Court should defer to an agency interpretation").

147. 468 U.S. 137, 139-40 (1984) (construing Banking (Glass-Steagall) Act of 1933, ch. 89, 48 Stat. 162).

reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.<sup>148</sup>

Because the Board had changed its position during the litigation, the majority refused to defer to the interpretation at all.<sup>149</sup>

Justice O'Connor, writing for Justices Brennan and Stevens, dissented and reminded the majority of its recent landmark opinion: "Because of the Board's expertise and experience in this complicated area of law, and because of its extensive responsibility for administering the federal banking laws, the Board's interpretation of the Glass-Steagall Act must be sustained unless it is unreasonable."<sup>150</sup> Reviewing the language of the Act and its legislative history, Justice O'Connor concluded that the Board's interpretation was "certainly 'a reasonable construction of the statutory language and [was] consistent with legislative intent.'"<sup>151</sup>

The following year, Justice White, writing for Justices Burger, Brennan, Powell, and Rehnquist in *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*<sup>152</sup> applied *Chevron* to uphold the EPA's decision that it could issue variances under the Clean Water Act. Under § 307(a) of the Act,<sup>153</sup> the EPA was required to publish a list of toxic pollutants and set effluent limitations for direct and indirect dischargers.<sup>154</sup> To comply, the EPA created categories of sources and set uniform discharge limitations for those categories.<sup>155</sup> In addition, the EPA developed variances from the categories to ensure "that its necessarily rough-hewn categories [did] not unfairly burden atypical plants."<sup>156</sup> An interested party could request a "variance to make effluent limitations either more or less stringent."<sup>157</sup> In 1977, Congress amended the statute to prohibit the secretary from "modify[ing] any requirement of [the Act] as it applies to any specific pollutant which is on the toxic pollutant list."<sup>158</sup> The EPA continued to allow the variances and even expanded the program.<sup>159</sup>

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148. *Id.* at 142-43 (internal citations and quotations omitted).

149. *Id.* at 143-44 (determining that "less weight" was due to the Board because it changed its position).

150. *Id.* at 161 (O'Connor, J., dissenting).

151. *Id.* at 173 (quoting *Secs. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 207, 217 (1984)).

152. 470 U.S. 116 (1985). Interestingly, Justice Alito, as assistant to the Solicitor General, argued this case for the EPA. Brief for the United States Environmental Protection Agency at 1, *Chem. Mfrs. Ass'n*, 470 U.S. 116 (1985) (Nos. 83-1013, 83-1373).

153. 33 U.S.C. § 1317(a)(1)-(2) (2000).

154. *Chem. Mfrs. Ass'n*, 470 U.S. at 119.

155. *Id.* at 119-20.

156. *Id.* at 120.

157. *Id.* at 120-21.

158. *Id.* at 123 (emphasis added).

159. *Id.* at 124 (stating that the EPA promulgated regulations explicitly allowing variances, but that variances were infrequently granted).

When challenged, the EPA argued that the amendment prohibited only those modifications expressly permitted by other provisions of the Act, not the variances.<sup>160</sup>

In applying *Chevron*, Justice White defined the first step in an intentionalist way: “[I]f Congress has clearly expressed *an intent* contrary to that of the Agency, our duty is to enforce the will of Congress.”<sup>161</sup> Justice White also applied the test in an intentional way; he began with the text and acknowledged that the plain language of the statute seemed to undermine the agency’s interpretation:

[Plaintiff] insists that the language of § 301(l) is itself enough to require affirmance of the Court of Appeals, since on its face it forbids any modifications of the effluent limitations that EPA must promulgate for toxic pollutants. If the word “modify” in §301(l) is read in its broadest sense, that is, to encompass any change or alteration in the standards, [Plaintiff] is correct.<sup>162</sup>

Nonetheless, the majority reasoned that this interpretation of the word “modify” made no sense when the statute was viewed in its entirety; thus, the EPA’s interpretation of the statute was not foreclosed.<sup>163</sup> Articulating an intentionalist view of *Chevron*, the majority said, “We should defer to [the agency’s] view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress.”<sup>164</sup> True to its word, the majority examined the language, the legislative history, and the purpose of the statute<sup>165</sup> to conclude that none of these sources were determinative of Congress’s intent on this issue.<sup>166</sup> Finding no evidence of Congress’s intent, the majority deferred to the agency’s interpretation.

Viewed in its entirety, neither the language nor the legislative history of the Act demonstrates a clear congressional intent to forbid EPA’s sensible variance mechanism for tailoring the categories it promulgates.

In the absence of a congressional directive to the contrary, we accept EPA’s conclusion that § 301(l) does not prohibit FDF variances.<sup>167</sup>

Thus, the majority upheld the EPA’s interpretation after applying *Chevron* in an intentionalist way.

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160. *Id.* at 125 (detailing the EPA’s argument that the variances were a distinct issue).

161. *Id.* (emphasis added).

162. *Id.*

163. *Id.* at 125-26 (finding that “modify” had “no plain meaning”).

164. *Id.* at 126.

165. *Id.* at 129 (stating that “the legislative history itself does not evince an unambiguous congressional intention to forbid all FDF waivers with respect to toxic materials” and that “[n]either are we convinced that FDF variances threaten to frustrate the goals and operation of the statutory scheme”).

166. *Id.* at 134.

167. *Id.*

Justice Marshall, joined in dissent by Justices Stevens and Blackmun, agreed with the majority's intentionalist approach but disagreed with the conclusions the majority reached.<sup>168</sup> Like the majority, Justice Marshall looked for "the clear intent of Congress"<sup>169</sup> to resolve the dispute. But unlike the majority, he rejected the agency's interpretation because it was "inconsistent with the clear intent of Congress, as evidenced by the statutory language, history, structure, and purpose."<sup>170</sup>

Thus, in *Chevron's* infancy, all of the Justices described and applied *Chevron* in an intentionalist way. While they did disagree on the outcome of a case, they did not fight about the appropriate approach to *Chevron*. But this harmony soon dissolved.

### B. *Chevron's Terrible Twos: Scalia Enlists*

In 1986, Justice Antonin Scalia was appointed to the bench.<sup>171</sup> Many have discussed Justice Scalia's resurrection of textualism, advanced initially from his position on the D.C. Circuit Court.<sup>172</sup> It was not long before textualism's influence began to affect the rest of the Court and its *Chevron* analysis. "Committed textualists" would feel compelled to "reformulate the two-step inquiry to purge it of these intentionalist elements."<sup>173</sup>

The Court's change in analysis can first be seen in *Young v. Community Nutrition Institute*, where Justice O'Connor, writing for Justices Burger, Brennan, White, Marshall, Blackmun, Powell, and Rehnquist, held that the Food and Drug Administration's (FDA) interpretation of the Food, Drug, and Cosmetic Act was reasonable.<sup>174</sup> The Act provided that whenever a toxin could not be eliminated altogether, "the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health."<sup>175</sup> Such limits were known as "tolerance levels." The FDA had refused to promulgate

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168. *Id.* at 135 (Marshall, J., dissenting).

169. *Id.*

170. *Id.* Justice O'Connor agreed but wrote separately because she believed that the language of the statute and its legislative history precluded the EPA's interpretation. She found it unnecessary to also look at the purpose of the statute. *Id.* at 165 (O'Connor, J., dissenting).

171. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> [hereinafter Supreme Court Biographies].

172. See, e.g., Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206 (describing the rise of "institutional legislative history" after Scalia's new textualism gained influence).

173. Merrill, *Textualism*, *supra* note 21, at 353.

174. 476 U.S. 974, 975-76 (1986).

175. *Id.* at 984 (Stevens, J., dissenting) (quoting 21 U.S.C. § 346 (2000)).

tolerance levels for Aflatoxin.<sup>176</sup> The simple issue was whether the word “shall” modified “promulgate” or “to such extent as he finds necessary for the protection of public health.”<sup>177</sup>

In analyzing the case, Justice O'Connor was not clear in describing her *Chevron* approach; she simply quoted *Chevron's* equivocal direction.<sup>178</sup> But in applying the two-step process, she was very clear; she used a textualist approach, reviewing the text of the statute only.<sup>179</sup> Finding it ambiguous, she turned—without first discussing the appropriateness of reviewing legislative history or other sources of meaning in light of this ambiguity—to the reasonableness of the agency's opinion. Reviewing the legislative history and potential for absurdity,<sup>180</sup> she ultimately deferred to the agency.<sup>181</sup>

Justice Stevens dissented and criticized the majority opinion as lacking “judgment and . . . judging.”<sup>182</sup> Justice Stevens did not find the language ambiguous; nor did he find the interpretation to be supported by the legislative history.<sup>183</sup> Rather, he chastised the majority's approach as simplistic and formulaic:

The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference. A statute is not “unclear unless we think there are decent arguments for each of two competing interpretations of it.” Thus, to say that the statute is susceptible of two meanings, as does the Court, is not to say that either is acceptable . . . . As Justice Frankfurter reminds us, “[t]he purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone” . . . . The Court, correctly self-conscious of the limits of the judicial role, employs a reasoning so formulaic that it trivializes the art of judging.<sup>184</sup>

The battle over the appropriate approach had begun.

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176. Whether this type of agency action is entitled to *Chevron* deference would likely be debated today. See *infra* Conclusion.

177. *Young*, 476 U.S. at 979-80.

178. *Id.* at 980.

179. *Id.* at 980-81.

180. *Id.* at 981-83 (suggesting that the Court's interpretation would not “render that provision superfluous”).

181. *Id.* at 981 (finding “the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA”).

182. *Id.* at 985 (Stevens, J., dissenting).

183. *Id.*

184. *Id.* at 988 (quoting RONALD DWORKIN, *LAW'S EMPIRE* 352 (Harvard Univ. Press 1986) and Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947)).

Justice Scalia began his own assault in 1987, when the Court decided *INS v. Cardoza-Fonseca*.<sup>185</sup> In that case, a foreign citizen requested asylum under the Refugee Act of 1980, which authorized the Attorney General to grant asylum to refugees who had “a well-founded fear of persecution.”<sup>186</sup> Adopting the Board of Immigration Appeals (BIA) interpretation, the immigration judge had held that the “well-founded fear of persecution” language required the refugee to show that there was “a clear probability of persecution” if she returned home.<sup>187</sup>

Justice Stevens, writing for the majority,<sup>188</sup> rejected the BIA’s interpretation.<sup>189</sup> He described *Chevron*,<sup>190</sup> then analyzed the text, structure, and legislative history of the Refugee Act to conclude that all three precluded the agency’s interpretation.<sup>191</sup>

Justice Scalia concurred in the judgment. But he wrote separately to promote his textualist agenda by criticizing the majority’s approach to *Chevron*:

I am . . . troubled, however, by the Court’s discussion of . . . deference. Since the Court quite rightly concludes that the [agency’s] interpretation is clearly inconsistent with the plain meaning . . . and the structure of the Act, . . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference. Even more unjustifiable, however, is the Court’s use of this superfluous discussion as the occasion to express controversial, and I believe erroneous, views on the meaning of this Court’s decision in *Chevron*. *Chevron* stated that where there is no “unambiguously expressed intent of Congress, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” This Court has consistently interpreted *Chevron* . . . as holding that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent. The Court’s discussion is flatly inconsistent with this well-established interpretation. The Court first implies that courts may substitute their interpretation of a statute for

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185. 480 U.S. 421 (1987).

186. *Id.* at 423 (quoting 8 U.S.C. § 1101(a)(42) (2000)).

187. *Id.* at 425 (citation omitted) (internal quotation marks omitted).

188. Justices Brennan, Marshall, Blackmun, and O’Connor joined Justice Stevens’ majority opinion. *Id.* at 422.

189. *Id.* at 423.

190. *Id.* at 446-48 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

191. *Id.* at 431-44. Concurring, Blackmun agreed that the agency’s “interpretation of the statutory term [was] so strikingly contrary to plain language and legislative history.” *Id.* at 450 (Blackmun, J., concurring).

that of an agency whenever, “[e]mploying traditional tools of statutory construction,” they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.<sup>192</sup>

Justice Scalia was particularly troubled by the majority’s use of legislative history.<sup>193</sup> According to Justice Scalia, when a statute has a plain meaning, courts must accept that meaning and not search for “unenacted legislative intent.”<sup>194</sup> Thus, while Justice Scalia agreed with the majority’s conclusion, he disagreed with the majority’s intentionalist approach to *Chevron*, and used his concurrence to attack that approach.

But no one joined his attack. Justices Powell, Rehnquist, and White dissented, not because they disagreed with the *approach* the majority used, but rather because they found the language of the act and the legislative history ambiguous.<sup>195</sup> Because traditional tools of construction did not resolve the ambiguity, the dissent moved to the second step of *Chevron* and would have affirmed the agency’s interpretation as a reasonable construction of ambiguous legislation.<sup>196</sup> Thus, Justice Powell, like the majority, remained firmly in the intentionalist camp. Justice Scalia was alone in his textual tirade; but he would not remain so for long.

In 1988, Justice Powell left the Court and was replaced by Justice Anthony Kennedy.<sup>197</sup> Justice Kennedy soon parroted Justice Scalia’s textualist approach. For example, in *K Mart Corp. v. Cartier, Inc.*,<sup>198</sup> the issue before the Court was whether the Secretary of the Treasury’s regulations, which permitted the importation of certain foreign-manufactured goods under two exceptions, were reasonable agency interpretations of the Tariff Act.<sup>199</sup> Because two separate exceptions were analyzed, the decision included a number of concurring and dissenting opinions. Justice Kennedy delivered the opinion of the Court. In doing so, he described *Chevron*’s first step in textualist terms:

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192. *Id.* at 453-54 (Scalia, J., concurring) (internal citations and quotations omitted).

193. *Id.* at 452-53 (agreeing that the standards were not the same, but suggesting that the language was clear).

194. *Id.* at 453.

195. *Id.* at 461 (Powell, J., dissenting) (stating that a “well-founded fear” suggested “some objective basis without specifying a particular evidentiary threshold”).

196. *Id.* at 455.

197. See Supreme Court Biographies, *supra* note 171 (detailing the biographical information of the current Justices).

198. 486 U.S. 281 (1988).

199. *Id.* at 285 (citations omitted).

In determining whether a challenged regulation is valid, a reviewing court must first determine if the regulation is consistent with the language of the statute. . . . If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency regulation is a permissible construction of the statute. If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.<sup>200</sup>

After describing *Chevron* in this way, Justice Kennedy applied the two-step test consistently by reviewing only the statute.<sup>201</sup> Finding the statute ambiguous as to one of the issues only, Justice Kennedy deferred to the agency's interpretation on this issue. But because he viewed the other interpretation to be inconsistent with the plain text of the statute, he found the agency's interpretation to be unreasonable on this second issue.<sup>202</sup> Justice White agreed.<sup>203</sup>

In contrast, Justice Brennan, who was joined by Justices Marshall and Stevens, described *Chevron* in an intentionalist way: "An assessment of the reasonableness of the [Agency's] interpretation . . . begins, as always, with an assessment of 'the particular statutory language at issue, as well as the language and design of the statute as a whole.'"<sup>204</sup> Justice Brennan made clear that the analysis was not complete after a simple textual review, however:

Even if the language of [the Act] clearly covered [the issue], "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" It is therefore appropriate to turn to our other "traditional tools of statutory construction" for clues of congressional intent.<sup>205</sup>

After finding the text ambiguous,<sup>206</sup> Justice Brennan reviewed the legislative history and purpose of the Act to conclude that the agency's interpretation was consistent with Congress's intent.<sup>207</sup>

Justice Scalia dissented, in part, from Justice Kennedy's opinion. While Justice Scalia agreed with Justice Kennedy's "analytic approach,"<sup>208</sup> he disagreed with Justice Kennedy's application of that test to one of the

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200. *Id.* at 291-92 (internal citations omitted).

201. *K Mart Corp.*, 486 U.S. at 292-94.

202. *Id.* at 294.

203. *Id.* at 284.

204. *Id.* at 297 (Brennan, J., concurring and dissenting in part) (emphasis added).

205. *Id.* at 300 (internal footnote omitted) (citing *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987)).

206. *Id.* at 299 (finding the phrase "foreign manufacturer" to mean either a foreigner or a foreign country).

207. *Id.* at 309.

208. *Id.* at 318 (Scalia, J., concurring and dissenting in part).



agency's regulations, which he concluded conflicted with the plain text.<sup>209</sup> In response to Justice Brennan's intentionalist approach, Justice Scalia was scathing: "Justice Brennan's approach . . . requires judges to rewrite the United States Code to accord with the unenacted purposes of Congresses long since called home."<sup>210</sup> Justices Rehnquist, O'Connor, and Blackmun signed onto Justice Scalia's dissent.<sup>211</sup>

At this point, the Court was split into three imperfect camps: those few who remained relatively faithful to *Chevron's* intentionalist underpinnings—Brennan, Stevens, Blackmun, and Marshall, those who appeared to reject that approach in favor of a more text-based approach—Scalia, Kennedy, O'Connor, and Rehnquist, and White, who waffled between the two.<sup>212</sup> Justice Scalia's textualist first step made strong headway in the few short years he had been on the bench.

### C. *Chevron's 'Tween Years: New Recruits Muddy the Battlefield*

For the Court, the late 1980s and early 1990s were a time of debate and confusion about *Chevron*. During this time, the composition of the Court changed dramatically. Justice Kennedy replaced Justice Powell in 1988. In the next six years, four new Justices joined the bench as four others died or retired. In 1990, Justice Clarence Thomas replaced Justice Marshall; in 1993, Justice Ruth Ginsberg replaced Justice White; and in 1994, Justice Stephen Breyer replaced Justice Blackmun.<sup>213</sup> The new faces brought two immediate changes.

First, during this time, the Court was very inconsistent in its approach to *Chevron*, even getting it backwards in one case. At times, this new Court spoke and acted textually,<sup>214</sup> at other times, it spoke and acted intentionally.<sup>215</sup> And, at least once, the Court applied *Chevron's* second step first.<sup>216</sup> It seems that the Justices were learning to work with *Chevron* during this period.

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209. *Id.*

210. *Id.* at 325.

211. *Id.* at 318.

212. This second group likely signed onto opinions because of the conclusions that were reached, not because of the approach to *Chevron* that was used. See generally Merrill, *Textualism*, *supra* note 21, at 365 (opining that each Justice had an incentive for abandoning legislative history analysis if he or she wanted Thomas's or Scalia's vote).

213. See Supreme Court Biographies, *supra* note 171 (detailing the biographical information of the current Justices).

214. See, e.g., *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (stating that "[i]f the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency").

215. See, e.g., *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 32 (1990) (focusing on Congressional intent in enacting the Paperwork Reduction Act).

216. See, e.g., *Pub. Employees Ret. Sys. of Oh. v. Betts*, 492 U.S. 158 (1989) (looking at the reasonableness of the agency's interpretation before looking at the clarity of the language).

Second, with the exception of Justice Stevens, the original author of *Chevron*, the intentionalist Justices (Powell, Brennan, Marshall, and Blackmun) were gone, replaced for the most part with more pragmatic and less dogmatic Justices. Over time, these new judges would leave their imprint on the Court's *Chevron* doctrine; but first, they had to understand *Chevron*. Thus, the cases from this time frame illustrate the Justices' uncertainty.

Sometimes, the Justices just got *Chevron* wrong. For example, in *Public Employees Retirement System v. Betts*,<sup>217</sup> Justice Kennedy—writing for Chief Justice Rehnquist, and Justices White, Blackmun, Stevens, O'Connor, and Scalia<sup>218</sup>—applied *Chevron*'s two-step test backwards. In *Betts*, the Court evaluated the Equal Employment Opportunity Commission's (EEOC) interpretation of the term "subterfuge" in the Age Discrimination in Employment Act.<sup>219</sup> The Act forbade public and private employers from discriminating against employees on account of age. Under an exception,<sup>220</sup> however, age-based employment decisions taken pursuant to "any bona fide employee benefit plan . . . which [was] not a subterfuge to evade the purposes of [the Act]," were exempt.<sup>221</sup> The EEOC interpreted "subterfuge" to exclude plans that prescribed lower benefits for older employees provided that the employer justified the program with a plausible business purpose.<sup>222</sup> Finding the agency interpretation to be at odds with the plain language of the statute, the majority refused to defer. Justice Kennedy's description of *Chevron* was text-based: "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."<sup>223</sup>

In so considering, the majority misapplied *Chevron*. Rather than follow *Chevron*'s two-step framework—look to see if Congress spoke to the precise issue first, then review the agency's decision for reasonableness—the majority first examined the reasonableness of the agency's interpretation. The majority found that the agency's interpretation contradicted the clear statutory language and was inconsistent with the legislative history.<sup>224</sup> After rejecting the agency's interpretation as invalid,

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217. 492 U.S. 158 (1989).

218. *Id.* at 160.

219. *Id.* at 171 (discussing the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621-634 (2000)).

220. 29 U.S.C. § 623(f)(2) (2000).

221. *Betts*, 492 U.S. at 164 (quoting 29 U.S.C. § 623(f)(2)).

222. *Id.* at 170.

223. *Id.* at 171.

224. *Id.* at 175.

the majority then attempted to discern the “precise meaning of the term.”<sup>225</sup> In doing so, the majority used an intentionalist approach to this pure question of statutory interpretation. The majority reviewed the text and found it ambiguous.<sup>226</sup> The majority then turned to the legislative history and a related statute—Title VII.<sup>227</sup> Thus, in this case, the majority described *Chevron*'s first step in a textualist way, but applied the two-step test backwards.

Not surprisingly, Justice Marshall, in dissent, cried foul:

Ordinarily, we ascertain the meaning of a statutory provision by looking to its text, and, if the statutory language is unclear, to its legislative history. Where these barometers offer ambiguous guidance as to Congress' intent, we defer to the interpretations of the provision articulated by the agenc[y] . . . . Eschewing this approach, the majority begins its analysis not by seeking to glean meaning from the statute, but by launching a no-holds-barred attack on the [agency's interpretation] . . . . Only after burial, and almost by afterthought, does the majority attempt to come up with its own interpretation of the [language] . . . .<sup>228</sup>

Because the dissent found the text and structure of the act ambiguous,<sup>229</sup> the dissent reviewed the legislative history and found it to be quite clear.<sup>230</sup> Coincidentally, the agency interpretation was consistent with congressional intent in this instance: the statute meant exactly what the agency said it meant.<sup>231</sup> Thus, the dissent would have stopped at *Chevron*'s first step because Congress had spoken on this precise issue. The dissent remained true to *Chevron*'s intentionalist directive and accused the majority of manipulating the outcome for a desired result.<sup>232</sup>

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225. *Id.*

226. *Id.* at 177. The Court found that the term “subterfuge” had multiple possible meanings. *Id.* at 170-71.

227. *See id.* at 175-82 (drawing parallels of congressional meaning between the statutes).

228. *Id.* at 185-86 (Marshall, J., dissenting) (internal citations omitted).

229. *See id.* at 188-89 (explaining that the majority's approach is “puzzling in light of [the majority's] concession that its construction of the words of the statute is not the only plausible one”) (internal quotations and citation omitted).

230. *See id.* at 189.

231. *Id.* at 192 (arguing the agency's interpretation was “mandated” by Congress). Had the language and history been ambiguous, the dissent would have deferred to the agency under *Chevron*. *Id.*

232. *Betts* is fascinating in that the majority opinion illustrates the Supreme Court's reluctance to relinquish interpretative control. By reversing the two-step process, the majority essentially eliminated the agency from the interpretative process and returned to a *Skidmore*-based approach. The agency's opinion had no power to persuade; thus, to the majority, it was irrelevant.

Despite this early confusion, the Justices returned to intentionalism in *Dole v. United Steelworkers of America*.<sup>233</sup> Justice Brennan—writing for Justices Marshall, Blackmun, Stevens, O'Connor, Kennedy, and (very surprisingly) Scalia<sup>234</sup>—rejected the agency's interpretation. The Court held that the Paperwork Reduction Act of 1980<sup>235</sup> did not authorize the Office of Management and Budget (OMB) to review and countermand agency regulations that mandated disclosure by regulated entities to third parties.<sup>236</sup> The statute applied whenever “obtaining or soliciting facts by an agency through . . . reporting or recordkeeping requirements” took place.<sup>237</sup> OMB had interpreted the language “obtaining or soliciting facts by an agency” to apply whenever any agency required a regulated entity to disclose information to third parties, not just when an agency required the regulated entity to disclose to the government.<sup>238</sup> The majority disagreed.

To reach its conclusion, the majority applied an intentionalist approach to the issue, and determined that the language, structure, and purpose of the Act proved that OMB's position was untenable because Congress intended the Act to encompass agency disclosure rules only, not third party disclosure rules.<sup>239</sup> Justice Brennan described *Chevron's* first step as follows:

“[O]ur first job is to try to determine congressional intent, using traditional tools of statutory construction.” Our “starting point is the language of the statute,” but “in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”<sup>240</sup>

Although the majority stated that the starting point in a *Chevron* inquiry is always the statutory language, it made clear that the search should not stop there.<sup>241</sup> Applying an intentionalist approach, the majority first rejected OMB's plain meaning argument, finding “the provision detailing Congress's purposes in enacting the statute” particularly useful.<sup>242</sup> Additionally, the Court reviewed the legislative history and found that

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233. 494 U.S. 26 (1990). The issue before the Court was whether the Office of Management and Budget correctly determined that it had the authority under the Paperwork Reduction Act to review agency disclosure regulations requiring regulated entities to disclose information to third parties. *Id.* at 32.

234. *Id.* at 27-28.

235. 44 U.S.C. §§ 3501-3520 (2000).

236. *See Dole*, 494 U.S. at 32 (affirming the decision of the Third Circuit).

237. *Id.* at 35 (alteration in original).

238. *Id.*

239. *Id.*

240. *Id.* (quoting *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987), and *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 5 (1985), and *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)).

241. *See Dole*, 494 U.S. at 36 (suggesting that it is also important to consider the entire act, as well as its objects and policy).

242. *Id.*

OMB's interpretation was "contrary to clear legislative history."<sup>243</sup> "Because we find that the statute, as a whole, clearly expresses Congress's intention, we decline to defer to OMB's interpretation."<sup>244</sup> Thus, the majority reviewed the language, structure, legislative history, and purpose of the Act to determine Congress's intent in the statute before it and reject OMB's interpretation.<sup>245</sup> Given his general textualist approach, it is indeed odd that Justice Scalia signed onto this opinion, which represented everything about statutory interpretation with which he disagreed.

The dissent, written by Justice White and joined by Chief Justice Rehnquist, disagreed not with the majority's intentionalist approach, but with the conclusion that flowed from that approach. In the dissent's opinion, the Act was ambiguous, the purpose was broader than described by the majority, and the legislative history was unconvincing;<sup>246</sup> therefore, deference to the agency was due under *Chevron*.<sup>247</sup> But, while both opinions looked broadly for congressional intent, the dissent, like Justice Scalia in *INS v. Cardoza-Fonseca*, chided the majority for turning *Chevron* into a doctrine of desperation:

The Court concedes that the Act does not expressly address "whether Congress intended the Paperwork Reduction Act to apply to disclosure rules as well as information-gathering rules." Curiously, the Court then almost immediately asserts that interpreting the Act to provide coverage for disclosure requests is untenable. The plain language of the Act, however, suggests the contrary. Indeed, the Court appears to acknowledge that petitioners' interpretation of the Act, although not the one the Court prefers, is nonetheless reasonable: "Petitioners' interpretation . . . is not the most natural reading of this language." The Court goes on to arrive at what it believes is the most reasonable of plausible interpretations; it cannot rationally conclude that its interpretation is the only one that Congress could possibly have intended . . . . As I see it, by independently construing the statute rather than asking if the agency's interpretation is a permissible one and deferring to it if that is the case, the Court's approach is clearly contrary to *Chevron*.<sup>248</sup>

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243. *Id.* at 40.

244. *Id.* at 42.

245. *Id.* The dissent disagreed with the conclusion, not the approach: "Since the statute itself is not clear and unambiguous, the legislative history is muddy at best, and [the Agency] has given the statute what I believe is a permissible construction, I cannot agree . . ." *Id.* at 53 (White, J., dissenting).

246. *See id.* at 43, 51-52 (White, J., dissenting) (finding the majority's conclusions "curious").

247. *Id.* at 43-44.

248. *Id.* at 44-46 (internal citations and emphasis omitted).

Interestingly, this was not the first time that a disagreeing Justice charged colleagues with eviscerating *Chevron* by rejecting the agency's interpretation and deciding for themselves what the statute meant.<sup>249</sup> And it would not be the last.

In 1992, the Court moved further toward textualism in *National Railroad Passenger Corp. v. Boston & Maine Corp.*<sup>250</sup> The Court reviewed the Interstate Commerce Commission's interpretation of the Rail Passenger Service Act,<sup>251</sup> which was made during an informal adjudication.<sup>252</sup> Whether *Chevron* appropriately applies to agency interpretations made during informal adjudication remains unclear today.<sup>253</sup> But, at the time this case was decided, the majority relied on *Chevron* as if there were no doubt.<sup>254</sup> Justice Kennedy, writing for Justices Rehnquist, Stevens, O'Connor, Scalia, and Souter, described *Chevron* as follows:

[W]hen a court is reviewing an agency decision based on a statutory interpretation, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." . . . If the text is ambiguous and so open to interpretation in some respects, a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable.<sup>255</sup>

Applying *Chevron*, the majority looked only to dictionary definitions of the word at issue: "required." Finding the language ambiguous, the Court immediately deferred to the agency's interpretation.<sup>256</sup> In doing so, the majority never looked beyond the text for resolution of the ambiguity. Somewhat surprisingly, Justice Stevens signed onto this opinion, which took an approach at odds with his intentionalist view.

In its opinion, the majority laid the ground work for a simple, but ultimately unworkable test: the "alternative dictionary definition" test. Under this test, "[t]he existence of alternative dictionary definitions of the word [at issue], each making some sense under the statute, itself indicates that the statute is open to interpretation."<sup>257</sup> In essence, Justice Kennedy

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249. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring).

250. 503 U.S. 407 (1992).

251. 45 U.S.C. § 562(d) (1988) (repealed 1994).

252. *Boston & Me. Corp.*, 503 U.S. at 409-10.

253. See, e.g., *Gonzales v. Reno*, 215 F.3d 1243, 1245-46 (11th Cir. 2000) (analyzing whether *Chevron* applies to an informal adjudication); see also discussion *infra* Part III.E.

254. *Boston & Me. Corp.*, 503 U.S. at 417 (calling *Chevron* deference a "well-settled principle of federal law").

255. *Id.* at 417-18 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

256. *Id.* at 419 (looking at an amendment enacted during the pendency of the appeal).

257. *Id.* at 418.

implied that courts should defer to an agency's interpretation when the language at issue has more than one dictionary definition. Under this formulation, agency deference would have increased significantly as it is rare for language to have only one definition.<sup>258</sup> In any event, the Court soon backed away from this overly simplified articulation of *Chevron's* first step.<sup>259</sup>

The dissent, written by Justice White and joined by Justices Blackmun and Thomas, was critical not of the majority's articulation or application of *Chevron's* two-step test, but rather of the majority's willingness to defer to an interpretation made for the first time in the government's brief on appeal before the Court.<sup>260</sup> The dissent believed that because the agency never actually interpreted anything prior to the litigation, there was no interpretation to which the Court could or should defer.<sup>261</sup>

In contrast, in *MCI Telecommunications Corp. v. AT&T Co.*,<sup>262</sup> the Justices disagreed on the proper approach for applying *Chevron*. The majority used a textualist approach, while the dissent returned to *Chevron's* intentionalist underpinnings. Although neither the majority nor dissent described *Chevron*, their approach to *Chevron* is readily apparent from the text of their opinions.

In *MCI Telecommunications Corp.*, Justice Scalia, writing for Chief Justice Rehnquist and Justices Kennedy, Thomas, and Ginsburg,<sup>263</sup> applied *Chevron* in a textualist manner. The statute at issue provided that the

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258. Indeed, in *Mississippi Poultry*, the en banc majority rejected the agency's argument that when language has more than one definition in the dictionary, the language is inherently ambiguous and subject to agency interpretation. *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 307 (5th Cir. 1994). The majority correctly noted that such an approach would radically shift the balance of power from Congress to the agencies because language is inherently indeterminate. There will always be multiple dictionary definitions. *Id.*

259. See *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227 (1994) (noting that in some cases, one dictionary definition can contradict other definitions that are recognized and widely accepted).

260. *Boston & Me. Corp.*, 503 U.S. at 424-25 (White, J., dissenting):

The majority opinion proceeds from the well-established principle that courts should defer to permissible agency interpretations of ambiguous legislation. I have no quarrel with that general proposition. I do, however, object to its invocation to justify the majority's deference, not to an agency interpretation of a statute, but to the *post hoc* rationalization of Government lawyers attempting to explain a gap in the reasoning and factfinding of the Interstate Commerce Commission.

*Id.* (internal citations omitted). But see Merrill, *Judicial Deference*, *supra* note 8, at 987 (arguing that if *Chevron* rests on implied delegation of authority, it should not matter when or how the agency first articulates its decision.).

261. *Boston & Me. Corp.*, 503 U.S. at 428 (White, J., dissenting) (arguing to remand the case so that the agency could "do its job properly").

262. 512 U.S. 218 (1994).

263. *Id.* at 219.

Federal Communications Commission (FCC) “may, in its discretion and for good cause shown, *modify* any requirement” of the statute.<sup>264</sup> The FCC interpreted the word “modify” to allow it to make a tariff filing requirement optional.<sup>265</sup> The issue for the Court was whether the FCC’s decision to make the filing optional for all nondominant long distance carriers was a valid exercise of its authority. The FCC argued that its interpretation of the word “modify” was entitled to deference under *Chevron*’s second step.<sup>266</sup> The majority disagreed. Reviewing dictionary definitions and other sections of the Communications Act of 1934, Justice Scalia concluded that the power to “modify” a requirement did not include the power to eliminate it altogether.<sup>267</sup> Although Justice Scalia was sympathetic to the FCC’s argument that its interpretation better furthered the purpose of the statute, “the Commission’s estimations[] of desirable policy cannot alter the meaning of the federal Communications Act of 1934.”<sup>268</sup>

Justice Stevens, writing for himself and Justices Blackmun and Souter, disagreed.<sup>269</sup> Arguing that the majority rejected an agency’s interpretation “in favor of a rigid literalism that deprive[d] the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions,”<sup>270</sup> Justice Stevens focused on the purpose of the statute and found that the FCC’s interpretation was a permissible construction of the statute.<sup>271</sup> Indeed, he chided the majority’s over-reliance on the dictionary for determining the meaning of the statute under the first step of *Chevron*: “Dictionaries can be useful aids in statutory interpretation, but they are no substitute for close analysis of what words mean as used in a particular statutory context.”<sup>272</sup>

Thus, the opinions of the late 1980s and 1990s show a court divided and confused by *Chevron*. At times the Justices describe and apply *Chevron* textually, at other times, intentionally. There is no consistency, just a muddy battlefield.

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264. *Id.* at 224 (emphasis added).

265. *Id.* at 223.

266. *Id.* at 225-26 (contending that the Court should give deference to the agency’s choice among dictionary definitions, as it did in *Boston & Me. Corp.*).

267. *Id.* at 227-28 (arguing that the word “modify” cannot mean both small changes and fundamental changes, and announcing that the “modify” means “moderate change”).

268. *Id.* at 234.

269. *Id.* at 235 (Stevens, J., dissenting).

270. *Id.*

271. *Id.* at 245 (finding that the FCC considered competing interests and policies consistently with the goals set forth by Congress in the Communications Act).

272. *Id.* at 240.



*D. Chevron's Senescence: Textualism Reigns*

While Justice Stevens clung tenaciously to *Chevron's* intentionalist heritage, few of the other Justices clung with him, and those who did left the Court. In just ten short years, the war ended. Today, *Chevron's* first step is routinely described and applied as a search for mere textual clarity.<sup>273</sup> The battle appears to be over, at least until the composition of the Court changes again.

The cases during the late 1990s and into the early 2000s show Justices who are almost impatient with *Chevron's* first step as they play lip service to it, and then examine more fully whether the agency's interpretation was reasonable under the second step.<sup>274</sup> Essentially, the Court conflates the two steps: ambiguity is implied while reasonableness is examined more closely and thoroughly. Indeed, the Court appears to have moved its more searching inquiry from step one to step two. In other words, the Justices will review the purpose of the statute, the enactment history, and the legislative history in determining whether an agency's interpretation of a statute is reasonable. For example, in 1995, Justice Ginsburg delivered the opinion for a unanimous Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*<sup>275</sup> The issue before the Court was whether the Comptroller of Currency's determination that national banks could serve as agents in the sale of annuities was a reasonable construction of the National Bank Act.<sup>276</sup> The Comptroller had determined that such sales were "incidental" to "the business of banking."<sup>277</sup> In reviewing the Comptroller's determination under *Chevron's* first step, Justice Ginsburg simply repeated *Chevron's* equivocal direction.<sup>278</sup> Implying, but never saying directly, that the text was ambiguous, she moved directly to step two, reviewed the text of the statute and the enactment history, and

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273. See, e.g., *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002) ("Accordingly, the question before us is whether the text of the statute resolves the issue, or, if not, whether the [agency's] interpretation is permissible in light of the deference to be accorded the agency under the statutory scheme.").

274. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (stating simply that "Congress has not 'directly spoken to the precise question at issue,'" before moving to step two (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))).

275. 513 U.S. 251, 253 (1995).

276. *Id.* at 254.

277. *Id.*

278. *Id.* at 257 (stating that when faced with an administrator's statutory exposition, the inquiry should begin with whether Congress's intent is clear regarding "the precise question at issue" (quoting *Chevron*, 467 U.S. at 842)).

concluded that the agency's interpretation was reasonable and "in accord with the legislature's intent."<sup>279</sup> Justice Ginsberg spoke of looking for intent, but she looked at step two, rather than step one.

Similarly, in 1997, Justice Scalia delivered the opinion for a unanimous Court in *Auer v. Robbins*.<sup>280</sup> One of the issues<sup>281</sup> in that case was whether the Secretary of Labor's "salary-basis" test, which was used to determine an employee's exempt status, was a permissible reading of the Fair Labor Standards Act.<sup>282</sup> Quoting *Chevron*, Justice Scalia wrote that "[b]ecause Congress ha[d] not 'directly spoken to the precise question at issue,' [the Court] must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'"<sup>283</sup> Like Justice Ginsburg in *NationsBank*, Justice Scalia never analyzed whether the Congress had directly spoken to the precise question, but rather moved almost immediately to the second step of *Chevron* to find that the agency's interpretation was reasonable.<sup>284</sup> Unlike Justice Ginsburg, Justice Scalia looked only at the text of the statute in his analysis at the second step.

Again in 1999, Justice Kennedy delivered the opinion for a unanimous Court in *INS v. Aguirre-Aguirre*.<sup>285</sup> The issue was whether the BIA's interpretation of the Immigration and Nationality Act was reasonable. The Act gave the Attorney General the discretion to withhold an alien's deportation when the Attorney General determined that the alien's life or freedom would be threatened "on account of . . . political opinion."<sup>286</sup> Under the statute, the Attorney General must withhold deportation if an alien establishes that he is likely to be subject to persecution for political reasons, but the Attorney General cannot withhold deportation if the alien committed a "serious nonpolitical crime" before arriving in the United States.<sup>287</sup> Relying on its prior precedent, the BIA interpreted "serious nonpolitical crime" to include crimes in which the "political aspect of the offense outweigh[ed] its common-law character."<sup>288</sup> The Ninth Circuit reversed without applying *Chevron*.

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279. *Id.* at 259.

280. 519 U.S. 452 (1997).

281. This case is perhaps better known for a second issue: the proper level of deference an agency receives for an interpretation of its own regulation. *Id.* at 461.

282. *Id.* at 454.

283. *Id.* at 457 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

284. Compare *id.* at 458, with *NationsBank*, 513 U.S. at 259.

285. 526 U.S. 415 (1999).

286. *Id.* at 419 (quoting 8 U.S.C. § 1253(h)(1) (2000)).

287. *Id.* (quoting 8 U.S.C. § 1253(h)(2)(C)).

288. *Id.* at 422 (quoting *Matter of McMullen*, 19 I. & N. Dec., 90, 97-98 (B.I.A. 1984)).

In reversing the Ninth Circuit, Justice Kennedy chastised it for not appropriately applying *Chevron*, arguing “that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’”<sup>289</sup> After implying that the statute was ambiguous but never actually completing the analysis, Justice Kennedy immediately moved to review the reasonableness of the agency’s decision under *Chevron*’s second step and then deferred to the agency.<sup>290</sup> In reviewing the reasonableness of the BIA’s interpretation under step two, Justice Kennedy did look beyond the text to the purpose of the Act.<sup>291</sup>

Three years later in *Yellow Transportation, Inc. v. Michigan*,<sup>292</sup> Justice O’Connor—writing for Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, Souter, Ginsburg and Breyer<sup>293</sup>—described *Chevron*’s first step as “whether the *text* of the statute resolves the issue . . . . If the statute speaks clearly ‘to the precise question at issue,’ we ‘must give effect to the unambiguously *expressed* intent of Congress.’”<sup>294</sup> The issue in *Yellow Transportation* was whether a state that waived a registration fee actually “collected or charged” the fee that it waived.<sup>295</sup> Through its regulations, the agency interpreted the statute to require that the fee actually be collected, not waived.<sup>296</sup> While Justice O’Connor did articulate a two-step process, she similarly conflated these two steps. She quoted *Chevron*, implied ambiguity, and reviewed only the text of the Act to find the agency’s interpretation reasonable.<sup>297</sup> Justice Stevens wrote separately to concur because he believed that the statute gave the ICC the authority to regulate as it did.<sup>298</sup> Because the delegation was explicit, he did not view the interpretation as one requiring *Chevron* deference.<sup>299</sup>

Similarly, in *Barnhart v. Thomas*,<sup>300</sup> the Court moved quickly to the second step. There, the Court was asked to decide whether the Social Security Administration’s interpretation of Title VII was entitled to deference. The agency, by regulation, had determined that the clause

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289. *Id.* at 425 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987)).

290. *Id.*

291. *Id.* at 427 (explaining that, pursuant to *INS v. Cardoza-Fonseca*, one of the primary purposes of the Act “was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees”).

292. 537 U.S. 36 (2002).

293. *Id.* at 38.

294. *Id.* at 45 (emphasis added) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

295. *Id.* at 46.

296. *Id.*

297. *Id.*

298. *Id.* at 50 (Stevens, J., concurring) (explaining that because it was a “permissible exercise of the board authority vested in the ICC to ‘establish a fee system,’” he concurred with the judgment (internal quotation and citations omitted)).

299. *See id.* at 50.

300. 540 U.S. 20 (2003).

“which exists in the national economy” in the statute did not apply to “previous work.”<sup>301</sup> Justice Scalia, delivering the opinion for a unanimous Court,<sup>302</sup> described *Chevron* as follows: “[W]hen a statute speaks clearly to the issue at hand we ‘must give effect to the unambiguously expressed intent of Congress,’ but when the statute ‘is silent or ambiguous’ we must defer to a reasonable construction by the agency charged with its implementation.”<sup>303</sup> Referring to the rule of last antecedent, in which a limiting clause refers only to the noun directly preceding it, Justice Scalia concluded that the agency’s interpretation was consistent with the plain language of the statute and, thus, was reasonable under step two.<sup>304</sup> No justice disagreed or dissented.

And again in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,<sup>305</sup> the majority conflated the two steps. Justice Thomas, speaking for Chief Justice Rehnquist and Justices Stevens, O’Connor, Kennedy, and Breyer,<sup>306</sup> wrote:

At the first step, we ask whether the statute’s plain terms “directly address[s] the precise question at issue.” If the statute is ambiguous on the point, we defer at step two to the agency’s interpretation so long as the construction is “a reasonable policy choice for the agency to make.”<sup>307</sup>

True to his directive, Justice Thomas did not review sources beyond the text.<sup>308</sup> Justice Scalia dissented, not because he disagreed with Justice Thomas’s *Chevron* approach, but because he found the statute clear and contrary to the agency’s interpretation.<sup>309</sup>

Despite the dominance of the textualist approach at step one, some of the Justices have added an intentionalist element to step two. For example, in *General Dynamics Land Systems, Inc. v. Cline*,<sup>310</sup> workers whose benefits were cut brought a reverse age discrimination claim under the Age Discrimination in Employment Act.<sup>311</sup> While Justice Souter—writing for the majority of Chief Justice Rehnquist and Justices O’Connor, Stevens, Breyer, and Ginsberg—was uncertain whether *Skidmore* or *Chevron* should apply, he concluded that which test applied did not matter.<sup>312</sup> Rather, even

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301. *Id.* at 25.

302. *Id.* at 21.

303. *Id.* at 26 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

304. *Id.* at 29-30.

305. 545 U.S. 967 (2005).

306. *Id.* at 972.

307. *Id.* at 986 (alteration in original) (quoting *Chevron*, 467 U.S. at 843, 845).

308. *Id.* at 987-89.

309. *Id.* at 1013-14 (Scalia, J., dissenting).

310. 540 U.S. 581 (2004).

311. 29 U.S.C. §§ 621-634 (2000).

312. *Cline*, 540 U.S. at 600.

if *Chevron* applied, “deference to [an agency’s] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of *congressional intent*.”<sup>313</sup> Then Justice Souter reviewed “the text, structure, purpose, and [legislative and social] history of the [Act], along with its relationship to other federal statutes”<sup>314</sup> to find that the statute did not mean what the agency said it meant.<sup>315</sup> In other words, the agency’s interpretation was unreasonable under step two because it conflicted with the purpose and history of the Act.

Justice Scalia dissented. He chided Justice Souter’s approach, calling it “anything but ‘regular.’”<sup>316</sup> In an extremely short dissent, Justice Scalia merely said, “Because [the Act] ‘does not unambiguously require a different interpretation, and . . . the [agency’s] regulation is an entirely reasonable interpretation of the text,’ I would defer to the agency’s authoritative conclusion.”<sup>317</sup>

Justice Thomas also dissented. He agreed that the plain language of the statute mandated the agency’s interpretation.<sup>318</sup> Criticizing the majority’s opinion, Justice Thomas focused on the majority’s reliance on the social history that led to the Act’s passage: “[T]he Court, of necessity, creates a new tool of statutory interpretation, and then proceeds to give this newly created ‘social history’ analysis dispositive weight.”<sup>319</sup> But unlike Justice Scalia, Justice Thomas appeared willing to consider legislative history in some *Chevron* analyses: “the statute is clear, and hence there is no need to delve into the legislative history . . . .”<sup>320</sup>

In 2005, two more Justices left the Court—Justices Rehnquist and O’Connor—to be replaced with Chief Justice Roberts and Justice Samuel Alito. While it is too early to determine what effect these changes will have on the Court’s *Chevron* analysis, Justices Roberts and Alito seem to have accepted Justice Scalia’s approach as seen recently in *Rapanos v. United States*.<sup>321</sup> Justice Scalia, writing for the plurality—Chief Justice Roberts, and Justices Thomas and Alito<sup>322</sup>—rejected the Army Corps of

313. *Id.* (emphasis added).

314. *Id.*

315. *Id.*

316. *Id.* at 601 (Scalia, J., dissenting).

317. *Id.* at 602 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 29-30 (2003) and *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001)).

318. *Cline*, 540 U.S. at 602 (Thomas, J., dissenting) (arguing that the younger workers should be able to sue for discrimination).

319. *Id.*

320. *Id.* at 606.

321. 126 S. Ct. 2208 (2006).

322. *Id.* at 2214. Justice Kennedy concurred, arguing that an earlier opinion of the Court had added the “significant nexus” requirement. *Id.* at 2236 (Kennedy, J., concurring). Because that requirement was not addressed in this case, Justice Kennedy would have remanded. *Id.* at 2252.

Engineers's interpretation of "the waters of the United States" in the Clean Water Act.<sup>323</sup> The Corps had interpreted "waters" to include "virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only 'the presence of litter and debris.'"<sup>324</sup> Citing *Chevron*, Justice Scalia analyzed the text of the statute and held that the agency's "expansive interpretation . . . [was not] 'based on a permissible construction of the statute.'"<sup>325</sup> The term "waters" contemplates "relatively permanent, standing or flowing bodies of water,"<sup>326</sup> not tributaries where "water occasionally or intermittently flows."<sup>327</sup> "The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."<sup>328</sup> Moreover, Justice Scalia continued, even if the language were ambiguous, the EPA's interpretation would be unreasonable.<sup>329</sup>

Justice Stevens, in dissent—joined by Justices Souter, Ginsberg, and Breyer<sup>330</sup>—disagreed with the plurality's textual focus. To Justice Stevens, "the proper analysis [was] straightforward . . . . The Corps' . . . decision to treat these wetlands as encompassed within the term 'waters of the United States' [was] a quintessential example of the Executive's reasonable interpretation of a statutory provision."<sup>331</sup> The language of the statute was at least ambiguous, and the agency's interpretation reasonable. In applying *Chevron*, Justice Stevens did not limit himself to an analysis of the text,<sup>332</sup> but looked also at the purpose of the statute.<sup>333</sup> In response to Justice Stevens's argument that the agency's interpretation would better further the purposes of the Act, Justice Scalia wrote that "no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations."<sup>334</sup>

Chief Justice Roberts's concurrence scolded the agency for failing to limit its boundless interpretation despite the Court's earlier rejection of a similar interpretation.<sup>335</sup> The Chief Justice noted that the agency had

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323. *Id.* at 2225 (majority opinion) (rejecting the Corps' argument that the "waters of the United States" includes "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall").

324. *Id.* at 2217 (citing 33 C.F.R. § 328.3(e) (2006)).

325. *Id.* at 2225 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

326. *Id.* at 2221.

327. *Id.*

328. *Id.* at 2222.

329. *Id.* at 2224.

330. *Id.* at 2252 (Stevens, J., dissenting).

331. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

332. *Id.* at 2262-63 (disagreeing that the word "waters" required continually flowing water).

333. *Id.* at 2265 (discussing the law's purpose to prevent the pollution from spreading).

334. *Id.* at 2232 (majority opinion).

335. *Id.* at 2235 (Roberts, C.J., concurring) (citing *Solid Waste Agency of N. Cook Co. v. Army Corps of Engineers*, 531 U.S. 159 (2001)).

unsuccessfully tried to amend its interpretation using notice-and-comment rulemaking.<sup>336</sup> Had the agency been successful, the Chief Justice suggested he may have been more willing to join the dissent's opinion:

Agencies delegated rulemaking authority . . . are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.<sup>337</sup>

Chief Justice Roberts thus implied that if the EPA had issued the interpretation via a new informal rulemaking, then deference would be due. Unfortunately, Chief Justice Roberts' rationale makes little sense. The plurality opinion, which he joined, found the language of the statute to be unambiguous.<sup>338</sup> Because the language was unambiguous, Congress's words controlled; no deference to the agency's regulation was due at all. But Justice Roberts's opinion suggested that if the EPA had simply issued a new regulation saying essentially the same thing, the new regulation would be entitled to deference. Why? Is a statute unambiguous when the agency's interpretation is too broad, but ambiguous when the agency's opinion is a little more reasonable? Or—and more likely—did the Chief Justice simply skip straight to *Chevron's* second step to find that the agency's first interpretation was unreasonable, while another interpretation might not be? Whichever is accurate, the opinion offers little insight into his position in the textualist-intentionalist debate.

Most recently, the Court decided *Zuni Public School District No. 89 v. Department of Education*.<sup>339</sup> The issue in *Zuni* was whether the Department of Education's interpretation of the Federal Impact Aid Program was reasonable. That statute identified the method the Department was to use to determine "whether a State's public school funding program 'equalize[d] expenditures' throughout the State."<sup>340</sup> In doing so, the statute required the Department "to 'disregard' school districts 'with *per-pupil expenditures . . . above the 95th percentile or below the 5th percentile of such expenditures . . . in the State.*'"<sup>341</sup> The Department interpreted the emphasized language as allowing it to consider

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336. *Id.* at 2236 ("The proposed rulemaking went nowhere.").

337. *Id.* at 2235-36 (internal citation omitted).

338. *See id.* at 2220-24 (majority opinion).

339. 127 S. Ct. 1534 (2007).

340. *Id.* at 1538.

341. *Id.* (alteration in original) (quoting 20 U.S.C. § 7709(b)(2)(B)(i) (2000)).

the size of the district's expenditures per pupil, as well as the population of a school district.<sup>342</sup> It was the latter consideration that was not readily apparent from the statute's text.

Justice Breyer, writing for the majority, upheld the agency's interpretation of this clause.<sup>343</sup> In so doing, Justice Breyer first identified *Chevron's* first step as textualist: "if the language of the statute is open or ambiguous—that is, if Congress left a 'gap' for the agency to fill—then we must uphold the Secretary's interpretation as long as it is reasonable."<sup>344</sup> But, rather than determine whether the language was open or ambiguous, Justice Breyer instead turned to the second step of *Chevron's* test: whether the interpretation was reasonable.<sup>345</sup> In determining the reasonableness of the agency's interpretation, he reviewed the statute's history and purpose to conclude that the Department's interpretation was reasonable despite the language of the statute's text.<sup>346</sup>

In the opinion, Justice Breyer admitted that under *Chevron* today, text is controlling:

[N]ormally neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation . . . . Under this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis.<sup>347</sup>

Despite the clarity of the text in *Zuni*, Justice Breyer reasoned that because the language was technical, it was capable of multiple meanings.<sup>348</sup> Exactly how he reached this conclusion is not easy to understand. In any event, Justice Breyer, in backwards fashion, analyzed the Department's interpretation using a textualist approach, found the statute to be ambiguous, and concluded that the Department's interpretation was reasonable because it furthered the statute's purpose.

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342. *Id.* at 1538 (setting out the procedure to be followed by the Secretary of Education).

343. *Id.* at 1538-39.

344. *Id.* at 1540 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

345. *Id.* at 1541 (examining legislative history and stating that "[f]or purposes of exposition, we depart from a normal order of discussion, namely an order that first considers *Zuni's* statutory language argument").

346. *Id.* at 1543 ("Thus, the history and purpose of the disregard instruction indicate that the Secretary's calculation formula is a reasonable method that carries out Congress'[s] likely intent in enacting the statutory provision before us.>").

347. *Id.* (internal citations omitted).

348. *Id.* at 1546.



Justice Breyer's analysis is convoluted and difficult to follow. First, he applies *Chevron* backwards. Second, he does not clearly explain why the text is ambiguous simply because it is technical.<sup>349</sup> Had Justice Breyer not adopted the textualist view of *Chevron*, his opinion would have been easier to write, to understand, and to accept. Instead, in straining to reject clear text and reach a result he believed matched Congress's intent, Justice Breyer confuses the reader. What Justice Breyer should have said is that this case represented one instance in which evidence other than the text showed either: (1) that the language was ambiguous and the agency's interpretation was reasonable (Justice Kennedy's point in his concurrence), or (2) that Congress intended the Department to interpret the statute exactly as the Department did (Justice Stevens's point in his concurrence). Instead, Justice Breyer wrote an opinion that adopts a textualist approach to *Chevron*, but then immediately misapplies that approach.

Rejecting Justice Breyer's textualist approach, Justice Stevens concurred but pointed out that "'in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.'"<sup>350</sup> In contrast, Justice Kennedy's concurrence, which Justice Alito joined, agreed that *Chevron*'s first step is textualist,<sup>351</sup> but disagreed with Justice Breyer's decision to reverse *Chevron*'s two-step test:

The opinion of the Court, however, inverts *Chevron*'s logical progression. Were the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes. It is our obligation to set a good example; and so, in my view, it would have been preferable, and more faithful to *Chevron*, to arrange the opinion differently.<sup>352</sup>

Perhaps at this point, no one will be surprised to learn that Justice Scalia, joined by Justice Thomas and Chief Justice Roberts, dissented. Taking aim at Justice's Breyer's "cart-before-the-horse approach,"<sup>353</sup> Justice Scalia returned to "Statutory Interpretation 101"<sup>354</sup> by focusing first on the text.

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349. *Id.* at 1543-46 (discussing, but failing to explain, that the ambiguity of technical language is context-dependent).

350. *Id.* at 1549 (Stevens, J., concurring) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

351. *Id.* at 1550 (Kennedy, J., concurring) ("When considering an administrative agency's interpretation of a statute, a court first determines 'whether Congress has directly spoken to the precise question at issue.'" (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984))).

352. *Id.* at 1551.

353. *Id.* at 1552 (Scalia, J., dissenting) (referring to Justice Breyer's analysis of *Chevron*'s second step first).

354. *Id.*

Finding the text unambiguous, Justice Scalia's job was finished and the Department's interpretation, which was at odds with the clear language, was also finished.<sup>355</sup>

Today, after more than twenty years and a change in the composition of the Court, *Chevron's* first step has narrowed from a search for legislative intent to a search for statutory clarity. While none of the Justices, including Justice Scalia, consistently use one approach and only one approach, they certainly have strong preferences. For Justices Scalia, Thomas, Kennedy, and most recently and perhaps most surprisingly, Breyer,<sup>356</sup> the debate appears to be over. *Chevron's* first step has been transformed into a simple search for textual clarity. Justice Kennedy may moderate as he replaces Justice O'Connor as the swing vote, but based on the opinions that he authored to date, he is a first step *Chevron* textualist.<sup>357</sup>

It is still too early to tell which approach Chief Justice Roberts and Justice Alito will take. As of the drafting of this article, both Justices had signed on to a limited number of cases in which *Chevron* applied.<sup>358</sup> Only recently did Justice Alito author a *Chevron* opinion: *National Ass'n of Home Builders v. Defenders of Wildlife*.<sup>359</sup> In that opinion, Justice Alito said, "[D]eference is appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text."<sup>360</sup> While it is too early to know for sure which approach they will consistently adopt, both seem headed towards textualism.

For Justice Stevens, the approach remains intentionalist. For the remaining Justices—Souter and Ginsburg—*Chevron* remains more complex: sometimes they sign onto a textualist opinion, sometimes an intentionalist one. For these Justices, perhaps pragmatism outweighs dogmatism.<sup>361</sup>

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355. *Id.* at 1555.

356. Because Justice Breyer is a staunch supporter of purposivism, it is surprising to find him adopting the textualist version of *Chevron*. Indeed, until recently, I would have linked Justices Breyer and Stevens together as united against Justice Scalia's textualist *Chevron* approach. But Justice Breyer's most recent opinion, *Zuni Public School District No. 89 v. Department of Education*, 127 S. Ct. 1534 (2007), leaves little doubt that he has accepted this formulation.

357. *See infra* Part III.E.

358. I could find no D.C. District Court of Appeals cases citing *Chevron* that the Chief Justice authored.

359. 127 S. Ct. 2518 (2007).

360. *Id.* at 2534 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy joined his opinion. Justices Stevens, Souter, Breyer, and Ginsburg dissented.

361. Interestingly, Justice Breyer touts a broader approach to statutory interpretation more generally. *See generally* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) (advocating an approach that considers a law's purpose and consequences and does not simply rely on a rigid theory of judicial interpretation).

In part, the Justices' warring approaches to *Chevron's* first step likely reflect their individual assessment of the relevance of legislative history more generally, not just within *Chevron's* first step.<sup>362</sup> Justice Scalia, for example, refuses to use legislative history in virtually all statutory interpretation cases,<sup>363</sup> not just *Chevron* cases. Other Justices, such as Stevens and Breyer, disagree with him and view legislative history as relevant to meaning.<sup>364</sup> Additionally, the Justices' preferred approach may reflect their view of *Chevron*; those Justices who believe the Court should be deferring to the agency more often might prefer textualism,<sup>365</sup> while those who believe the Court should be "faithful agents"<sup>366</sup> to the Legislature might prefer intentionalism. In any event, the intentionalists seem to have lost the battle, at least for now.

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362. See WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE, PROBLEMS AND CASES* 150 (3d ed. 2006) (describing how Justices Scalia and Thomas, in particular, generally disapprove of the use of legislative history).

363. *But see* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 442 n.4 (1990) (quoting *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 174-75 (R. Katzmann ed. 1988)) (quoting Justice Scalia's comments during a panel discussion: "I play the game like everybody else . . . I'm in a system which has accepted rules and legislative history is used . . . You read my opinions, I sin with the rest of them").

364. See JELLUM & HRICK, *supra* note 15, at 191 (citing *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991)). See generally Michael Sherman, *The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer*, 16 ADMIN. L. NEWS 1, 13 (Summer 1991).

365. Justice Scalia would disagree with this statement:

In my experience, there is a fairly close correlation between the degree to which a person is . . . a "strict constructionist" . . . and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).

366. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5, 15-22 (2001) (arguing that the textualist approach provides the best means of implementing the faithful agent model).

E. *Chevron's Demise: Textualism Wins the Battle but Loses the War*

As *Chevron* turns twenty-something, its relevance is waning. Indeed, today, "*Chevron* is often ignored by the Supreme Court."<sup>367</sup> Although some argue that *Chevron's* imprint is widening,<sup>368</sup> it is actually narrowing. The Supreme Court has narrowed *Chevron* in two ways: (1) it cites the case less frequently than in the past, and (2) it has limited *Chevron's* application by creating another step and by limiting one of *Chevron's* rationales: implicit delegation.

First, the Court cites *Chevron* far less frequently today than in years past. In 1992, Professor Thomas Merrill examined the opinions of the Supreme Court and found that on average per year "[t]he Supreme Court decide[d] somewhere between ten and twenty cases in which it confront[ed] an issue about whether to defer to an administrative interpretation of a statute."<sup>369</sup> Professor Merrill reviewed all the cases in which at least one Justice cited *Chevron*.<sup>370</sup> But my own more recent search was significantly less fruitful; the Court cites *Chevron* much less frequently than it used to. For example, during the 2005-2006 Term, the majority referred to *Chevron* only three times: *Rapanos v. United States*,<sup>371</sup> *S.D. Warren Co. v. Maine Board of Environmental Protection*,<sup>372</sup> and *Gonzales v. Oregon*.<sup>373</sup> Additionally, the dissent mentioned *Chevron* in another case solely to support the notion that an agency could issue a regulation if it chose.<sup>374</sup> In the 2004-2005 Term, the majority cited *Chevron* only once, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>375</sup> while dissenting and concurring Justices cited *Chevron* two more times.<sup>376</sup>

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367. Merrill, *Judicial Deference*, *supra* note 8, at 982; *see, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (Scalia, J., concurring) (failing to mention *Chevron* in the majority opinion despite Justice Scalia's comment: "This is an absolutely classic case for deference to agency interpretation").

368. *See The Story of Chevron*, *supra* note 1, at 399 & n.2. According to Professor Merrill, *Chevron* "has been cited in over 7,000 cases, making it the most frequently cited case in administrative law." Further, Professor Merrill thinks that *Chevron* may well soon surpass *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), as the most cited case overall. *Id.*

369. Merrill, *Judicial Deference*, *supra* note 8, at 980-81 (reviewing the Supreme Court decisions from the 1984 through 1990 Terms).

370. *Id.* at 980-81 & n.51.

371. 126 S. Ct. 2208 (2006).

372. 126 S. Ct. 1843, 1848 (2006) (discussing whether to defer to agency interpretation of the term "discharge").

373. 546 U.S. 243 (2006).

374. *Schaffer v. Weast*, 546 U.S. 49, 70 (2005) (Breyer, J., dissenting) (supposing the promulgation of a hypothetical uniform federal procedural standard if the need arose).

375. 545 U.S. 967, 974 (2005) (deferring to the Federal Communication Commission's interpretation of the term "telecommunications service" in the Communications Act).

376. *Smith v. City of Jackson*, 544 U.S. 228, 243 (2005) (citing *Chevron* in the concurrence and dissent); *Clark v. Martinez*, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) (citing *Chevron* only in the dissenting opinion).

Similarly, *Chevron* was cited a mere five times in the 2003-2004 Term. A majority of the Court cited *Chevron* four times: *Household Credit Services, Inc. v. Pfennig*,<sup>377</sup> *General Dynamics Land Systems, Inc. v. Cline*,<sup>378</sup> *Alaska Department of Environmental Conservation v. EPA*,<sup>379</sup> and *Barnhart v. Thomas*.<sup>380</sup> In one additional case, Justice Scalia cited *Chevron* in his concurrence.<sup>381</sup> And, in one case, the dissent cited *Chevron*, but the case did not involve an agency deference question.<sup>382</sup> Thus, the Court has reduced its citations from ten to twenty per year to approximately three to five.<sup>383</sup>

To be fair, the Court generally appears to be hearing fewer cases.<sup>384</sup> Moreover, citation numbers do not explain whether this difference reflects: (1) a decline in cases involving review of agency interpretations of statutes more generally, (2) a decline in the number of appeals sought by agencies, or (3) a decline in the Court's use of *Chevron* in such cases.<sup>385</sup> But because the Court controls its own docket,<sup>386</sup> the distinction between these

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377. 541 U.S. 232 (2004).

378. 540 U.S. 581, 600 (2004) (refusing to determine whether *Chevron* or *Skidmore* deference applied when the agency was so clearly wrong).

379. 540 U.S. 461 (2004).

380. 540 U.S. 20 (2003).

381. *Yates v. Hendon*, 541 U.S. 1, 24 (2004) (Scalia, J., concurring) (arguing that *Chevron* and not *Skidmore* deference applied to an agency interpretation made in the agency's brief).

382. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 269 (2004) (Breyer, J., dissenting) (citing *Chevron* only for the proposition that "paying special attention to administrative views is well established in American law").

383. After I wrote this draft, however, the Supreme Court decided three important *Chevron* cases: *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Ed.*, 127 S. Ct. 1354 (2007) (applying a textualist-based *Chevron* step one); *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007) (applying *Chevron* deference to an informal agency regulation, even though the agency had identified the regulations as only interpretative); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007) (applying a textualist-based *Chevron* step one). Perhaps I chose my title too hastily.

384. Apparently, Supreme Court cases are down overall. "After decades of decline in its caseload, the court [sic] is once again on track to take its fewest number of cases in modern history . . . . In William H. Rehnquist's first term as chief justice in 1986, the court [sic] disposed of 175 cases. That had dwindled to 82 cases last year after Chief Justice John G. Roberts Jr. took over." Robert Barnes, *Justices Continue Trend of Hearing Fewer Cases*, WASH. POST, Jan. 7, 2007, at A4.

385. While the sample size is small, I did review the cases from the 2005-2006 term. I found that the Court had applied *Chevron* in the few cases in which it was applicable, suggesting that the decline is less about the Court applying *Chevron* less often and more about the Court taking fewer *Chevron*-related cases. Additionally, the decrease could represent agencies' decisions not to seek the review from what they view as a less deferential court. Data on file with the author.

386. "There is one reason for the decline from the heavy workloads of the 1980s that everyone agrees on: A 1988 congressional decision made at the court's [sic] behest eliminated a number of mandatory appeals, leaving the [J]ustices to pretty much set their own agenda." Barnes, *supra* note 384.

differences may be academic; whether the Court chooses to hear fewer agency interpretation cases or simply fails to use *Chevron* when it does, *Chevron* is still less important today than it was fifteen years ago.

In addition to citing *Chevron* less often, the Court has curtailed *Chevron* in another way: by limiting the types of agency interpretations entitled to *Chevron* deference—what Professor Cass Sunstein calls *Chevron* “step-zero.”<sup>387</sup> When the Court decided *Chevron*, it said nothing about the types of agency interpretations entitled to deference. Prior to *Chevron*, the formality of the agency’s interpretation process was simply a factor in the Court’s analysis. Interpretations made through a more deliberative process, such as notice-and-comment rulemaking, were more persuasive than those interpretations made through a less deliberative process, such as policy and interpretative statements.<sup>388</sup> But *Chevron* itself did not distinguish between deliberative agency decisionmaking and non-deliberative agency decisionmaking. In fact, immediately after *Chevron* was decided, the Court applied it to all types of agency interpretations.<sup>389</sup> However, general applicability is no longer the rule.

In 2000 and 2001, the Court decided two cases, *Christensen v. Harris County*<sup>390</sup> and *United States v. Mead Corp.*,<sup>391</sup> in which the Court substantially limited *Chevron*’s applicability. In *Christensen*, the Court examined the level of deference to be accorded interpretative letters from the Department of Labor construing the Fair Labor Standards Act.<sup>392</sup> That Act required employers, including states, to pay their employees who work more than forty hours per week overtime pay or compensation time. Consequently, “Harris County became concerned that it lacked the resources to pay monetary compensation to employees who worked

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387. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207-11 (2006) [hereinafter Sunstein, *Step Zero*] (discussing the disagreements between Justices Scalia and Breyer on questions involving *Chevron* step one). Interestingly, it might be more appropriate to call this analysis *Chevron* step one and one-half because courts should only need to reach the issue before proceeding to *Chevron*’s second step. In other words, if the statute is clear, there is no need to consider whether a court should defer under *Chevron* or *Skidmore*. Accord Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1908 (2006) (suggesting that the question of the type of deference should not be placed before *Chevron*’s first step).

388. See Sunstein, *Step Zero*, *supra* note 387, at 211 (explaining the difference between the *Chevron* and *Skidmore* doctrines).

389. See, e.g., *Reno v. Koray*, 515 U.S. 50, 61 (1995) (suggesting that *Chevron* should apply to an agency’s internal guideline); *Nat’l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (applying *Chevron* to an agency’s interpretation made informally); *Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 439 (1986) (suggesting that *Chevron* should apply to an agency’s longstanding “practice and belief”); *cf.* *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 483 (1998) (applying *Chevron* to an agency’s approval of a credit union’s charter).

390. 529 U.S. 576 (2000).

391. 533 U.S. 218 (2001).

392. *Christensen*, 529 U.S. at 586-87.

overtime after reaching the statutory cap on compensatory time accrual and to employees who left their jobs with sizable reserves of accrued time.”<sup>393</sup> Concerned, the county wrote the Department of Labor, the agency that administers the Act, and asked whether the county could require employees to use compensation time.<sup>394</sup> The agency said “no.” Harris County did it anyway, and the employees sued, asserting that the required use of compensation time violated the Act.<sup>395</sup>

Justice Thomas delivered the opinion for the majority. Reviewing the statute, he concluded that it said “nothing about restricting an employer’s efforts to require employees to use compensatory time.”<sup>396</sup> He then addressed the level of deference to be afforded to the agency’s opinion letter. Refusing to apply *Chevron*, he wrote, “[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore*, but only to the extent that those interpretations have the ‘power to persuade.’”<sup>397</sup> Applying *Skidmore* deference, Justice Thomas refused to defer to this interpretation at all, finding it completely “backwards.”<sup>398</sup>

Justice Scalia concurred, but wrote separately to criticize the majority’s return to *Skidmore*.<sup>399</sup> In Justice Scalia’s view, regardless of the way the agency arrived at its interpretation, *Chevron* applied. Applying *Chevron* to the agency’s opinion letter, Justice Scalia concluded that the agency’s interpretation was unreasonable.<sup>400</sup>

Shortly after the Court decided *Christensen*, it affirmed its divergent approach to agency interpretations lacking the “force of law”<sup>401</sup> in *United States v. Mead Corp.*<sup>402</sup> At issue in that case was the degree of deference owed to a ruling letter from the United States Customs Service, which interpreted the Harmonized Tariff Schedule.<sup>403</sup> The Mead Corporation imported day planners, which the Customs Service had treated for several years as exempt from tariff.<sup>404</sup> But in 1993, the Customs Service abruptly changed course and identified the day planners as “diaries” subject to a

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393. *Id.* at 580.

394. *Id.*

395. *Id.* at 581.

396. *Id.* at 585 (emphasis omitted).

397. *Id.* at 587 (citation omitted).

398. *Id.* at 588.

399. *Id.* at 589-90 (Scalia, J., concurring) (“I do not comprehend Justice Breyer’s contention that *Skidmore* deference . . . is not an anachronism.”).

400. *Id.* at 591.

401. *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001).

402. *Id.* at 237-38.

403. *Id.* at 221 (questioning whether a tariff classification ruling deserved any deference).

404. *Id.* at 225 (exempting day planners from 1989 to 1993).

four percent tariff.<sup>405</sup> When Mead protested, the agency sent a “carefully reasoned but never published”<sup>406</sup> ruling letter to explain its change of course. Mead sued.

Justice Souter wrote the majority opinion.<sup>407</sup> The deference issue was central to the Court’s opinion. In part, the majority reasoned that the formality of the decisionmaking process determined whether *Chevron* or *Skidmore* deference applied.<sup>408</sup> According to Justice Souter, *Chevron* deference is appropriate when an agency is required to engage in, and undertakes, notice-and-comment rulemaking or formal adjudication.<sup>409</sup> But Justice Souter muddied the waters of *Chevron* applicability when he wrote, “[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”<sup>410</sup> He suggested that precedential value and binding character, while important, also do “not add up to *Chevron* entitlement.”<sup>411</sup>

Not surprisingly, Justice Scalia dissented in a lengthy opinion.<sup>412</sup> He was critical of the majority’s confusing direction for *Chevron*’s application,<sup>413</sup> and he disapproved of the majority’s resurrection of *Skidmore*’s “totality of the circumstances” test.<sup>414</sup> “We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come.”<sup>415</sup> According to Justice Scalia, deference to agency opinions is all or nothing: either *Chevron* deference or no deference.<sup>416</sup> And *Chevron* applies when the agency interpretation is “authoritative,” meaning that it represents the agency’s final opinion on the issue.<sup>417</sup> The majority was skeptical of Justice Scalia’s approach, countering that “Justice Scalia’s first priority over the years has been to limit and simplify [the *Chevron* doctrine]. The Court’s choice has been to tailor deference to variety.”<sup>418</sup>

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405. *Id.*

406. *Id.*

407. *Id.* at 220.

408. *Id.* at 229 (suggesting that formality would be a “good indicator of delegation”).

409. *Id.* at 230 (assuming that under those circumstances, Congress anticipated administrative action).

410. *Id.* at 230-31 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 263 (1995)).

411. *Id.* at 232.

412. *Id.* at 239-61 (Scalia, J., dissenting).

413. *Id.* at 241 (chiding that “[t]he Court’s new doctrine is neither sound in principle nor sustainable in practice”).

414. *Id.* at 250 (arguing that *Skidmore* creates excess litigation).

415. *Id.* at 239 (internal quotations omitted).

416. *Id.* at 237 (majority opinion) (characterizing Justice Scalia’s dissent).

417. *Id.*

418. *Id.* at 236.



The next term, in *Barnhart v. Walton*,<sup>419</sup> the Court again addressed the level of deference to be afforded an agency regulation. Rather than resolve the confusion, however, the Court added a new level of complexity to *Chevron*'s step zero. In *Barnhart*, the Court was faced with how much deference to give a Social Security Administration's regulation, interpreting the Social Security Act.<sup>420</sup> Because the regulation was the product of notice-and-comment rulemaking, Justice Breyer, writing for the majority, applied *Chevron* deference. So far, no surprises. But Justice Breyer did not stop there. Before issuing the regulation, the agency had originally articulated the same interpretation in less formal ways, including by letter, by manual, and by adjudication. Justice Breyer observed that the agency's interpretation was "longstanding" and that the Court normally "accord[s] particular deference to an agency interpretation of 'longstanding' duration."<sup>421</sup> Justice Breyer, in dicta, was quick to point out that even though the original interpretation was arrived at by less formal procedures, such informality "does not automatically deprive that interpretation of the judicial deference otherwise its due."<sup>422</sup> Rather, a number of factors help determine whether *Chevron* analysis is appropriate: "[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time . . . ."<sup>423</sup>

The factors that Justice Breyer suggested are appropriate to determine whether Congress intended courts to defer are eerily reminiscent of pre-*Chevron* days: the more reasoned and considered the agency opinion, the more deference due.<sup>424</sup> *Chevron* step zero would have been much easier had the Court simply applied *Chevron* when the agency used more formal procedures and *Skidmore* when the agency used less formal procedures. But the majority was unwilling to conclude that such a simplistic approach was warranted given the variety of procedural choices available to agencies.<sup>425</sup>

Once again, Justice Scalia concurred separately. For him, the issue of whether *Chevron* applied was simple: the agency decision was reached as a result of notice-and-comment rulemaking.<sup>426</sup> End of debate.

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419. 535 U.S. 212 (2002).

420. *Id.* at 214-15.

421. *Id.* at 219-20.

422. *Id.* at 221.

423. *Id.* at 222.

424. *See supra* Part II.

425. Sunstein, *Step Zero*, *supra* note 387, at 216.

426. *Barnhart*, 535 U.S. at 226-27 (Scalia, J., concurring).

While *Mead* and *Christensen* had seemed to suggest that when Congress directs an agency to use more formal procedures and the agency does so, *Chevron* applies, *Barnhart* suggested that even when the agency uses less formal procedures, *Chevron* may apply.<sup>427</sup> If the dicta in *Barnhart* holds, then *Chevron* deference applies both when Congress delegates relatively formal procedures and the agency uses them, and when Congress provides other evidence that it intended courts to defer to the agency interpretation. But just when *Chevron* applies remains unclear. *Barnhart* has not aided certainty in the lower courts<sup>428</sup> or in the classroom. According to Cass Sunstein:

[U]nder *Christensen*, *Mead*, and *Barnhart*, the real question is Congress's (implied) instructions *in the particular statutory scheme*. The grant of authority to act with the force of law is a sufficient but not necessary condition for a court to find that Congress has granted an agency the power to interpret ambiguous statutory terms.<sup>429</sup>

In some ways, *Christensen*, *Mead*, and *Barnhart* thus show the majority beginning to reject Scalia's simplistic reformulation of *Chevron* to return the case to its intentionalist underpinnings. With step zero, the Justices returned the Court's focus to congressional intent, but the locus of the inquiry changed. Whereas the Court's focus in *Chevron* had been on Congress's intent regarding the meaning of the specific statutory language at issue, *Mead* changed the focus to Congressional intent regarding delegation to the agency: when Congress intends courts to defer, courts should defer.

Despite Justice Scalia's heartfelt adherence to a world without *Skidmore*, he has lost this battle. Today, the first step in *Chevron* analysis is whether *Chevron* applies at all. While at this point the cases fail to offer a simple test to the lower courts on this issue, we do know that *Chevron* applies only to some agency interpretations. All other interpretations receive *Skidmore* deference. With fewer agency interpretations entitled to deference, *Chevron* applies less often today than it might have. Indeed, the argument over *Chevron* is now more likely to be whether to apply it at all, rather than how to apply it. When courts apply *Skidmore* rather than *Chevron*, judicial

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427. But see the Court's most recent decision in this area: *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (2007), in which the Court applied *Chevron* deference to informal agency regulations (which went through notice and comment procedures), even though the agency identified the regulations as interpretative.

428. Sunstein, *Step Zero*, *supra* note 387, at 219-21.

429. *Id.* at 218.

deference to agencies decreases.<sup>430</sup> “While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference means just the opposite.”<sup>431</sup>

In addition to creating step zero, the Court has limited *Chevron*'s application in another way: it has limited *Chevron*'s implicit delegation rationale. In *Chevron*, one of the Court's rationales for deferring to the agency's interpretation was that by enacting gaps and creating ambiguities, Congress intended to delegate implicitly to the agency.<sup>432</sup> But in a series of cases, starting with *FDA v. Brown & Williamson Tobacco Corp.*,<sup>433</sup> the Court rejected, or at least limited, this rationale.

Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation . . . . This is hardly an ordinary case.<sup>434</sup>

In *Brown & Williamson*, Justice O'Connor—writing for Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas—rejected the Food and Drug Administration's (FDA) attempt to regulate tobacco. The FDA was authorized to regulate “drugs,” “devices,” and “combination products.”<sup>435</sup> The statute defined these terms as “articles . . . intended to affect the structure or any function of the body.”<sup>436</sup> The FDA interpreted this language as allowing it to regulate tobacco and cigarettes.<sup>437</sup> Despite the fact that the language of the statute alone was broad enough to support the agency's interpretation, Justice O'Connor concluded “that Congress ha[d] directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products.”<sup>438</sup> Justice O'Connor supported her holding by noting that Congress had: (1) created a distinct regulatory scheme for tobacco products, (2) squarely rejected proposals to give the FDA jurisdiction over tobacco, and (3) acted repeatedly to preclude other agencies from exercising authority in this area.<sup>439</sup> In this case then, the majority held that while Congress may not have spoken on the precise

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430. Wildermuth, *supra* note 387, at 1898-99 (citing Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 327-28 (2002)).

431. Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Actions*, 58 VAND. L. REV. 1443, 1446 (2005).

432. *See supra* Part II.

433. 529 U.S. 120 (2000).

434. *Id.* at 159 (internal citations omitted).

435. *Id.* at 126 (citing 21 U.S.C. § 321(g)-(h) (1994 & Supp. III 1997)).

436. *Id.*

437. *Id.* at 125 (explaining that the FDA considered nicotine to be a “drug”).

438. *Id.* at 133.

439. *Id.* at 154-56.

issue, it had spoken broadly enough on related questions to prevent the agency from acting at all. Disagreeing, Justice Breyer—writing on behalf of Justices Stevens, Souter, and Ginsberg—dissented on the ground that the statute’s language and general purpose both supported the FDA’s finding that cigarettes were within its statutory authority.<sup>440</sup>

Six years later, in another highly political case, *Gonzales v. Oregon*,<sup>441</sup> the Court again refused to defer under *Chevron*. There, the issue before the Court was “whether the Controlled Substances Act allow[ed] the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure.”<sup>442</sup> The Justices disagreed over whether the Attorney General’s interpretive rule was entitled to *Chevron* deference. Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer joined.<sup>443</sup> Justice Kennedy reasoned that because Congress had not intended the Attorney General to have such broad interpretative power, Congress had not delegated interpretative power to the agency: “The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA’s registration provision is not sustainable.”<sup>444</sup> Accordingly, because implicit delegation was unsustainable, the interpretation was entitled to *Skidmore* deference.<sup>445</sup> And, given the importance of the issue to the nation, the majority was particularly skeptical of the Attorney General’s attempt to backdoor its overly broad interpretation.<sup>446</sup>

A particularly scathing Justice Scalia dissented, joined by Chief Justice Roberts and Justice Thomas. Justice Scalia argued that the interpretation was entitled to *Chevron* deference and that even if the interpretation was not entitled to deference, “the most reasonable interpretation of the Regulation and of the statute would produce the same result.”<sup>447</sup> Thus, the Court limited one of *Chevron*’s rationales: that when Congress leaves a gap or writes ambiguously, Congress intended, albeit implicitly, to delegate the power to interpret the statute to the agency. Now, at least when the issue is of critical importance, such gaps and ambiguities mean no such thing.

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440. *Id.* at 161-62 (Breyer, J., dissenting).

441. 546 U.S. 243 (2006).

442. *Id.* at 248-49.

443. *Id.* at 247.

444. *Id.* at 267.

445. *Id.* at 268.

446. *See id.* at 272 (expressing a skeptical view of the Attorney General’s position given the CSA’s “silence on the practice of medicine generally and its recognition of state regulation of the medical profession”).

447. *Id.* at 285 (Scalia, J., dissenting).

Today, *Chevron*'s stronghold appears to be weakening. As the Court embraced a textualist *Chevron*, it simultaneously adopted a more intentional pre-step (step zero) and limited *Chevron*'s application. Thus, the Court cites *Chevron* far less often today than in the past; it applies *Chevron* less frequently due to step zero, which limits the doctrine's applicability; and the Court has limited *Chevron*'s implicit delegation rationale.

#### CONCLUSION

*Chevron* delineated a two-step framework for determining whether an agency's interpretation of a statute should receive judicial deference. But the opinion has proved to be less accurate, predictable, and simple than originally envisioned as is readily apparent from this paper's analysis. Moreover, the Court's guidance about how to apply *Chevron* was, at best, equivocal—hence, the illustrative debate by the majority and minority in *Mississippi Poultry*.<sup>448</sup> And with the addition of step zero, the Court created even less certainty for the lower courts. Far from the simple, two-step test many originally envisioned, *Chevron* has been transformed into a three-step test that no one, not even the Justices of the Supreme Court, completely understands.

*Chevron*'s legacy is unclear. Those judges and scholars who viewed *Chevron* as an agency-friendly decision have been proved wrong: "Interestingly, because of the strictures of its first step, *Chevron* is not quite the 'agency deference' case that it [was] commonly thought to be by many of its supporters (and detractors)."<sup>449</sup> Those judges and scholars who viewed it as the ultimate structure for determining the appropriate level of deference to be awarded to agency interpretations have also been proved wrong; the exceptions have begun to swallow the rule. *Chevron* is making a hasty retreat.<sup>450</sup>

If *Chevron*'s demise is imminent, then perhaps it is irrelevant whether *Chevron*'s first step is a search for Congressional intent or textual clarity. But, perhaps, the Court's retreat from *Chevron* would have been less hasty had the Court remained truer to its original directive. By changing the nature of the inquiry from "what did Congress intend" to "are the words clear," the Court affected the power distribution among the various branches. With an intentionalist approach, law making power would

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448. See *supra* Part I.

449. *Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 299 n.34 (5th Cir. 1994) (citing Merrill, *Judicial Deference*, *supra* note 8, at 980-85, to emphasize that *Chevron*, as applied by the Supreme Court, has led to less deference to agency interpretations).

450. See Merrill, *Textualism*, *supra* note 21, at 361-62 (asserting that the Court has substantially reduced its use of *Chevron*).

theoretically remain with the Legislature while interpretative power would vest in the Executive. This power distribution is consistent with *Chevron*'s implicit delegation doctrine: if Congress was silent or unclear, it implicitly delegated its law making authority to the agency.<sup>451</sup>

By turning *Chevron*'s first step textualist and limiting its application, the Court appears to have reclaimed the interpretative power it ceded when *Chevron* was decided. Under a textualist approach, what Congress intended is no longer relevant unless Congress clearly expresses that intention in the text itself: Congress's law making power is curtailed. Intuitively, under this approach, agency interpretative power should increase. Language is inherently ambiguous. It is impossible for Congress to draft perfectly. If the Justices dogmatically defer to the agency whenever a statute is ambiguous, agency deference should be the rule rather than the exception. Sure enough, "the Court's transition from intentionalism to textualism initially increased *Chevron* deference. However, as that transition has moved into subsequent phases, it is now having the opposite effect."<sup>452</sup> As *Chevron*'s first step has become more text based, the Court has begun to limit *Chevron*'s application. Today, *Chevron* applies in fewer cases than in the past because the Court cites it less frequently, because the Court created step zero, and because the Court rejected, in some cases, the implicit delegation doctrine. In the end, the Court's reformulation of *Chevron*'s first step has likely hastened *Chevron*'s demise.

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451. See *supra* Part II.

452. Pierce, *supra* note 25, at 751.

# THE EMERGING OUTLINES OF A REVISED *CHEVRON* DOCTRINE: CONGRESSIONAL INTENT, JUDICIAL JUDGMENT, AND ADMINISTRATIVE AUTONOMY

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#### INTRODUCTION

The Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> was widely seen as a major alteration in the relations between courts and administrative agencies. *Chevron* dealt with one of the issues that courts have found most perplexing in this relationship: the extent to which courts should defer to agency interpretations of statutory terms and the extent to which courts should construe those terms independently.<sup>2</sup> On the one hand, the courts are obligated under the Constitution and the Administrative Procedure Act to construe the law and, on the other hand, the courts are obliged by that same Constitution to refrain from interfering with the tasks of administration.<sup>3</sup>

Prior to 1984, the governing precedent dealing with this issue was *Skidmore v. Swift & Co.*<sup>4</sup> Under *Skidmore*, a court inquired into the persuasiveness of the agency interpretation. *Skidmore*, and the cases that followed it, identified a number of factors that helped in the assessment of the persuasiveness of the agency interpretation. If, and only if, the court found the agency interpretation persuasive, it deferred.<sup>5</sup> *Chevron*, however, changed all of that. *Chevron* established its now famous two-step format. Under step one, the court determines whether the congressional intent is clear. If it is, the court follows that intent.<sup>6</sup> If the congressional intent is unclear, however, and the statutory term thus remains ambiguous, then the court, in step two, defers to the reasonable interpretation of the agency.<sup>7</sup>

Within the last several years, the Court began rewriting the so-called *Chevron* doctrine in ways that are not yet fully understood, but whose broad outlines are becoming increasingly clear. *Chevron* is being rewritten because in its original or "strong" form, it was unstable. Initially, the Court largely ignored this instability, but ultimately needed to address it. This instability is related to the problematic nature of step one, the presumption of congressional delegation of interpretive authority to the administering agency, the relation between *Chevron* and *Skidmore*—including the scope

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

2. *Id.* at 842-43.

3. 5 U.S.C. §§ 551-559, 701-706 (2000).

4. 323 U.S. 134 (1944).

5. *See id.* at 140 (weighing the thoroughness of evidence, validity of reasoning and consistency with earlier and later rulings, along with other factors to determine the persuasive power of an agency interpretation).

6. *Chevron*, 467 U.S. at 842-43.

7. *Id.* at 843.



or “domain” of the *Chevron* doctrine<sup>8</sup>—and the interplay of the *Chevron* doctrine with stare decisis. These and other aspects of this instability are addressed in Part III below.

Occasionally during the first decade and a half of the *Chevron* doctrine, some of these matters influenced the decisions of the Court. In the last five years, however, the Court has begun to confront the problems inherent in the *Chevron* doctrine head on. The resulting series of decisions are reshaping that doctrine in ways that trouble some who have embraced the original version. They trouble others who would revise the *Chevron* doctrine in directions different from that in which the Court appears to be headed. Yet the new revision of the *Chevron* doctrine may lend the doctrine both strength and stability.

This Article examines the way that the Supreme Court is currently rewriting the *Chevron* doctrine. The Court appears to be heading generally in a direction long favored by Justice Breyer, although the emerging case law is adding layers of richness to the *Chevron* doctrine beyond those earlier contemplated by any of the Justices. In one dimension, the new direction appears generally to require mandatory deference in the more routine or interstitial interpretations, but not necessarily in matters at the core of the statutory design. In another dimension, it also appears to allow the courts greater freedom to decide when deference would be inappropriate. But the Court is also incorporating into its new design additional elements that enrich it in ways that none of the prior commentators have publicly discussed.

Because the deference issue is part of the overall set of relationships between courts and agencies, this Article begins with a brief review, in Part II, of the models that have governed the relationships between courts and agencies during the nineteenth and twentieth centuries. In Part III, the Article examines the contemporary model governing those relationships, exploring the new contours of that model now being developed under the recent glosses that the Court has been imposing on the *Chevron* doctrine. With the Supreme Court’s decisions in *Alaska Department of Environmental Conservation v. EPA*<sup>9</sup> in January of 2004 and *National Cable & Telecommunications Ass’n v. Brand X Internet Services*<sup>10</sup> in June of 2005, the new model may be approaching its completion. *Brand X* can be understood not only as ensuring that agencies possess continuing

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8. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 837 (2001) (discussing the scope of the *Chevron* doctrine).

9. 540 U.S. 461 (2004).

10. 545 U.S. 967 (2005).

flexibility in addressing policy issues over time, but also as reinforcing a newly-recognized judicial role that courts play in the application of *Chevron* as articulated in *Barnhart v. Walton*.<sup>11</sup>

## I. REGULATORY DECISION-MAKING AND JUDICIAL REVIEW

The story of how the seemingly ever-expanding regulatory activities of the government have been accommodated within a framework of judicial review is a complex one. It is a story in which the courts have sought to uphold the rule of law and yet respect the constitutional autonomy of the Executive. This task was relatively easy during the early years of the Republic when administration was relatively simple and direct government action affected few individuals. It became more complex as government regulation expanded. Over the course of American history, several identifiable models of the court/administrator relationship have emerged, each reflecting an adjustment in the relations between these institutions that seems to have worked in a particular time period. The principal factors that have determined the workability of a given adjustment are the scale and intrusiveness of government regulation and the political landscape.

### A. *The Nineteenth Century Model*

From its earliest years, the U.S. government administered tasks such as the collection of customs duties, the operation of the post office, the payment of pensions, and other core governmental tasks. The officials administering the underlying statutes necessarily interpreted them while performing their duties. Early in the nineteenth century when government tasks were simple and peripheral to the lives of most citizens, courts accorded a broad autonomy to the executive branch, normally avoiding direct review of its operations.<sup>12</sup> Courts recognized that officials would have to construe the statutes that they were administering, and they allowed them to do so. Justice Marshall, in *Marbury v. Madison*, referred to a broad range of activity that the courts would consider “political” and thus beyond their competence to review.<sup>13</sup> In Marshall’s view it was only when official actions created rights in private property that the courts could become involved.<sup>14</sup> Marshall’s broad distinction between private rights and the administrative action of government came to be embodied in an early nineteenth century working model of the relationship between the courts and government administration.

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11. 535 U.S. 212 (2002).

12. 5 U.S. (1 Cranch) 137, 164-66 (1803).

13. *Id.*

14. *Id.* at 155, 165.

Marshall's choice of language merits our attention. In addition to championing judicial power and successfully asserting the Court's power to review legislation for constitutionality in *Marbury*, Marshall laid the groundwork for further judicial constraints upon the exercise of executive power when he seized upon the "property rights" language to describe the interest *Marbury* asserted.<sup>15</sup> The language of property would have resonated in post-colonial America. Indeed, the new Constitution had accorded special protection to "property" at least twice.<sup>16</sup> Marshall's choice of words seems keyed towards engendering broad support for his assertion of judicial power vis-à-vis the executive. Just as he asserted the power of the courts against the Congress (in declaring the obligation of the courts to review legislation for constitutionality), he also asserted the power of the courts against the Executive (in asserting judicial power to protect property rights even against the government).

A few decades after *Marbury*, the relationships between the courts and the administration evolved to what might be called the nineteenth-century model. This model is illustrated by the 1840 case of *Decatur v. Paulding*.<sup>17</sup> That case involved a situation in which Congress, on the same day, enacted general pension legislation and also passed a resolution providing for a particular pension to the widow of Stephen Decatur, a naval officer and war hero. When Mrs. Decatur claimed benefits under both the statute and the resolution, the Secretary of the Navy was required to determine whether she was entitled to benefits under both.<sup>18</sup> When Mrs. Decatur challenged the Secretary's negative determination in court, the Supreme Court ruled that in administering the pension laws, the Secretary of the Navy was required to exercise "his judgment upon the construction of the law and the resolution" and refused to interfere with his determination.<sup>19</sup>

*Gaines v. Thompson*<sup>20</sup> provides another example. In that case, the Supreme Court refused to interfere with a decision of the Commissioner of the Land Office to cancel the issuance of a land patent. Although the action taken by the Commissioner depended upon on his interpretation of the statute, the Court took the view that interpretation was an essential part of his task with which the courts would not interfere.<sup>21</sup> Subsequently, after

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15. See *id.* at 165 ("Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

16. U.S. CONST. amend. V.

17. 39 U.S. (14 Pet.) 497 (1840).

18. *Id.* at 517.

19. *Id.* at 515.

20. 74 U.S. (7 Wall.) 347 (1868).

21. *Id.* at 352.

the Land Office had done its work and conveyed title to a private party, the courts could review the Land Office's statutory interpretation in a legal action between rival claimants to the land.<sup>22</sup>

In these early cases, the Court appears to have operated on a relatively simple separation-of-powers model. The work of administration is part of the task of the Executive branch in which the courts would not interfere. Construing and interpreting statutes is an essential part of administration. Although the courts would not interfere with interpretations made by officials in the course of their work, the courts would not be bound by those interpretations. When disputes came before the courts, the courts would make their own interpretations of the matters in question. Generally, these disputes would arise in litigation between private parties, because, as in the question of land title, the law provided "rights" in the land enforceable against others, but rarely recognized enforceable rights against the government. Indeed, a private right was created only at the moment that the government's administrative activity ceased, as illustrated in the land patent cases cited above.<sup>23</sup> This, of course, was the exact approach employed by Justice Marshall in *Marbury v. Madison*: had the Court possessed original jurisdiction, mandamus would have been the proper remedy because the process of appointing Marbury to the office of Justice of the Peace was completed when President Adams signed his commission. With the completion of that process, a property right had arisen in *Marbury*.<sup>24</sup>

This relegation of the judicial concern to the protection of property would, in time, be recast into the law of standing. Traditionally, no one possessed standing to complain of government action unless that action impaired a person's property rights. Occasionally, however, that stringent requirement was met as shown by the cases cited below. The courts also managed to allow suits for refunds of customs duties through the fiction that the collectors were individually liable for improperly collected amounts. Thus invoking common-law remedies like assumpsit as vehicles for suit without formally impinging on an otherwise general government immunity from suit.<sup>25</sup> And the Supreme Court used a property-rights rationale as a basis for upholding injunctions against the federal

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22. See generally *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72 (1871). For a discussion of this point, see Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 411 (1958).

23. See *supra* notes 17 and 20 and accompanying text.

24. 5 U.S. (1 Cranch) 137, 157-58, 162 (1803).

25. *Elliott v. Swartwout*, 35 U.S. (10 Pet.) 137 (1836). This procedure was subsequently established by statute. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (1845). See *Developments in the Law: Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 839 (1957).

government in *United States v. Lee*.<sup>26</sup> The Court's ruling in *Ex parte Young*,<sup>27</sup> upholding an injunctive action against a state government, was also based upon a property-rights rationale. Although the latter case was based upon the Due Process Clause of the Fourteenth Amendment, its applicability to the federal government through the Due Process Clause of the Fifth Amendment was apparent.

*B. The Mid-Twentieth Century Model:  
Its Emergence and Characteristics*

*1. Modern Regulation and the Incorporation of Progressive Ideology*

The emergence of pervasive regulation over various sectors of the economy revealed the inadequacies of the simple constitutional model described above for a complex modern economy. That model was not necessarily inaccurate in its basic outline, but required elaboration. A critical step in the emerging breakdown of the original paradigm took place when Congress established the Interstate Commerce Commission (ICC) to oversee the regulation of railroad rates.<sup>28</sup> The ICC—widely perceived as a tribunal that would resolve railroad-rate issues—provided the basic blueprint for the regulatory institutions that would later be known as “independent agencies.” Of key significance for later developments, ICC decisions would form a body of precedents that were in fact rules governing railroad operations. Later, the ICC would be given power to approve or disapprove rates prospectively, further consolidating its position as an overall regulator.<sup>29</sup> Conceptually, the practicing bar and the courts came to understand the ICC's power to set rates for the future as “legislative” acts. That these “legislative” acts would be performed, for the most part through trial-like procedures appropriate to its structure as a tribunal, contributed to an evolving complexity in the legal vocabulary of regulation.

In 1914, when Congress wanted to extend regulation over business behavior generally, it created the Federal Trade Commission (FTC) and modeled its structure upon the ICC.<sup>30</sup> Like the ICC, the FTC took the form of a multi-member body charged with administering a statutory prohibition

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26. 106 U.S. 196, 210-23 (1882), *superseded by statute*, Quiet Title Act of 1972, Pub. L. No. 92-562, 86 Stat. 1176, 1176-77 (codified as amended at 28 U.S.C. § 2409a), *as recognized in* Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983).

27. 209 U.S. 123, 167-68 (1908).

28. An Act to Regulate Commerce, ch. 104, §§ 11-12, 24 Stat. 379, 383 (1887).

29. Act to Amend an Act Entitled “An Act to Regulate Commerce,” ch. 3591, § 4, 34 Stat. 584, 589 (1906).

30. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914).

on “unfair methods of competition.”<sup>31</sup> Congress intentionally legislated in broad terms so that the FTC, through the process of adjudicating individual cases, might build up a body of precedents that would provide detailed content to that prohibition.<sup>32</sup> In employing the structure of the ICC to design the FTC, Congress was attempting to make the latter as nonpartisan as possible. Indeed, the structure of both the ICC and the FTC reflected the ideology of the progressive movement—in ascendancy during the late nineteenth and early twentieth centuries. In the progressive view, because much regulation was technical, its administration could be taken out of the political arena and be entrusted to nonpartisan experts in the relevant field.

Under the progressive approach, regulatory agencies were designed to weigh technical expertise over politics by insulating the agency from direct presidential control and ensuring that they were headed by persons representing both political parties. Both the ICC and the FTC were insulated from presidential control by according their members tenure in office for fixed statutory terms.<sup>33</sup> No more than a bare majority of members could be from the same political party, thus ensuring minority-party membership on the respective commissions. In addition, independence and nonpartisanship were furthered by staggering the terms of the members, so that membership changes would come gradually.<sup>34</sup>

The ICC/FTC model was followed in 1927 when Congress enacted the Federal Radio Act.<sup>35</sup> That Act—the predecessor of the Communications Act of 1934—created the Federal Radio Commission, a regulatory agency charged with governing the uses of the radio spectrum. There were five members appointed by the President with Senate confirmation, staggered terms, and no more than three Commissioners could be from the same political party.<sup>36</sup> The Federal Water Power Act of 1920 was originally administered by a Federal Power Commission composed of the Secretaries of War, Interior, and Agriculture.<sup>37</sup> In 1930, however, Congress restructured the Federal Power Commission on the ICC/FTC model, with five commissioners, staggered terms, and a maximum of three commissioners from any one political party.<sup>38</sup> In the New Deal era when regulation proliferated, its administration was repeatedly entrusted to

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31. *Id.* § 6(b) (codified as amended at 15 U.S.C. § 45(b) (2000)).

32. S. REP. NO. 597, at 10 (1914).

33. *See* Act to Amend an Act Entitled “An Act to Regulate Commerce,” ch. 3591, § 8, 34 Stat. 584, 595 (1906); Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 717-18 (1914).

34. *See supra* note 33.

35. Radio Act of 1927, ch. 169, § 3, 44 Stat. 1162, 1162-63 (1927).

36. *Id.*

37. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920).

38. Act to Reorganize the Federal Power Commission, ch. 572, 46 Stat. 797 (1930).

independent agencies. Motor carrier regulation was entrusted to the ICC.<sup>39</sup> Regulation of labor relations was entrusted to a National Labor Relations Board (NLRB).<sup>40</sup> Securities regulation was initially entrusted to the FTC, but subsequently reassigned to the newly created Securities and Exchange Commission, an agency modeled on the FTC.<sup>41</sup> Newly established airline regulation was assigned to a Civil Aeronautics Board whose structure also conformed to the ICC/FTC model.<sup>42</sup>

## 2. *The Elements of the Mid-Twentieth Century Model*

During the New Deal period, Congress subjected large segments of business behavior to regulation supervised by regulatory agencies or officials. Former Harvard Law School dean and Roosevelt advisor, James Landis, probably best articulated the prevailing ethos of that period as one that saw extensive government intervention in the economy as necessary both for the welfare of society as a whole and for the welfare of business itself.<sup>43</sup> Indeed, Landis and other New Deal thinkers believed that government planning was necessary to supplement market incentives, because the market did not take adequate account of the future nor of needed structural changes.<sup>44</sup>

Regulation during the New Deal period made extensive use of the independent regulatory agency mechanism that developed during the preceding half century. Where the progressives believed that this model could incorporate nonpartisan technical expertise, the Roosevelt Administration saw its potential for policy implementation. The NLRB was one of the most active New Deal agencies implementing policy. But, in the context of the major efforts of the administration and Congress to reshape the American economy, that agency demonstrated the flaws inherent in the progressive vision. Politics and political ideology cannot be separated from administration like the progressives wanted to believe. Indeed, a conscious and visible incorporation of politics into administration may have been a healthy adaptation of the constitutional scheme at this

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39. Motor Carrier Act, 1935, ch. 498, 49 Stat. 543 (1935).

40. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

41. Securities Exchange Act of 1934, ch. 404, § 210, 48 Stat. 881, 908-09 (1934).

42. Civil Aeronautics Act of 1938, ch. 601, § 201, 52 Stat. 973, 980-81 (1938).

43. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 15-16 (1938) (“The creation of [administrative] power is . . . the response made . . . to the demand that government assume responsibility not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state.”).

44. See *id.* at 23-24 (explaining that the administrative process ensures that business is regulated by experts in particular industries able “to shift requirements as the condition of the industry may dictate, . . . [pursue] . . . energetic measures upon the appearance of an emergency, and . . . realize conclusions as to policy” through enforcement).

period of time, helping to bring into widespread focus the challenge posed by modern regulation for the simple constitutional scheme envisioned by the Framers.

The elements of the mid-twentieth century model were worked out during a period spanning the late 1930s through the early 1950s. Except for judicial review specifically provided under a regulatory statute,<sup>45</sup> the government was largely immune from suit. Standing doctrine continued to present a major barrier to people challenging government actions in court. To bring such an action, a plaintiff had to be prepared to prove that the action impaired or threatened one or more of his legal rights. Since most government action did not affect anyone's property or legal rights (however much it adversely affected them in fact), agency administration was largely immune from judicial challenge.<sup>46</sup> When agency rules were applied in a way that might affect how a person used her property, they were subject to minimum rationality review under the arbitrary and capricious standard.<sup>47</sup> Pre-enforcement review was rare, because controversies with an agency were not considered ripe until the agency commenced an enforcement proceeding. During this period, agencies employed adjudication as the principal enforcement tool and as the primary means for developing policy. Agency adjudications were generally subject to judicial review under the substantial-evidence standard pursuant to the agency's enabling act.

Agencies' aggressive use of the adjudicatory process in the late 1930s combined with unclear procedural rules ultimately persuaded President Roosevelt to appoint the Attorney General's Committee to Study Administrative Procedure whose Final Report (Report) was issued in 1941.<sup>48</sup> In 1946, Congress enacted the Administrative Procedure Act (APA)<sup>49</sup> based upon a synthesis of that Report's majority and minority

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45. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (construing the provision now found in 47 U.S.C. § 402(b)(6) (2000)). Another exception is contractual claims where the government consented to be subject to suit before the court of claims.

46. See, e.g., *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137-39, 141, 143-44 (1939) (denying public utility companies standing to challenge the damaging competition posed to their enterprises by a government program for generating, distributing, and selling electric power harnessed from the Tennessee River Valley, holding that the program neither invaded the utility companies' property interest in their franchises nor violated the companies' constitutional rights).

47. See *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 181-82 (1935) (upholding a state regulation over strawberry and raspberry containers against constitutional challenge on the ground that it was not arbitrary or capricious because the prescription of the form and dimensions of horticultural containers bore a reasonable relation to the protection of buyers and to the preservation and shipment of the fruit).

48. COMM. ON ADMIN. PROCEDURE, ADMININSTRATIVE PROCEDURE IN GOVERNMENT. AGENCIES, S. DOC. NO. 77-8, at 109 (1st Sess. 1941).

49. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2000)).



positions. In the early 1950s, the Supreme Court and a prestigious panel of the Second Circuit elaborated upon the meaning of the widely-used substantial evidence standard as applied to judicial review of regulatory agency decisions.<sup>50</sup>

The Report, the APA, and court decisions identified public concern over the fairness of administrative adjudications but provided reassurance that adjudications would indeed be fair to the parties, while carefully preserving administrative control over policy. Overzealous enforcement, especially in NLRB adjudications, may sometimes have resulted in the skewing of evidentiary-fact determinations to achieve policy objectives. In order to halt such abuses, the new administrative model—carefully outlined in the Report, the APA, and later judicial decisions—provided for impartial determinations of evidentiary facts by newly independent hearing officers, while preserving the power of the regulatory agency to develop and implement policy free from judicial interference. In regulation through adjudication—which was the norm during this period—agency policy was largely developed and applied in the process of converting evidentiary facts into ultimate ones.<sup>51</sup>

In the mid-twentieth century model, judicial review of agency adjudications left broad authority for regulatory agencies to develop policy in the course of adjudications. Congress seems to have had this model of judicial review in mind when it enacted the Federal Trade Commission Act in 1914. Congress expected that the FTC would gradually develop a body of administrative precedents defining the “unfair methods of competition” that the Act prohibited.<sup>52</sup> Yet for a time, the Supreme Court exhibited hostility to this kind of judicial review. In its 1920 *FTC v. Gratz* decision,<sup>53</sup> for example, the Court declared that interpreting the meaning of that phrase was ultimately the responsibility of the courts, rather than the FTC.

Two decades later, however, the authority of administrative agencies to resolve ambiguities in statutory terms had become a feature of the mid-twentieth-century model. Several Supreme Court decisions illustrated this

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50. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951) (explaining that the “substantial evidence” standard incorporated in the Administrative Procedure Act requires appellate courts to consider the entire record behind an agency’s decision, including evidence opposed to the agency’s view, and to overturn an agency’s decision if it “cannot conscientiously find that the evidence supporting [the agency’s] decision is substantial” in light of the entire evidentiary record), *rev’g* 179 F.2d 749 (2d Cir. 1950); see also *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951) (discussing the roles of agencies and reviewing courts).

51. See *infra* text accompanying notes 52-61.

52. See *supra* text accompanying note 32.

53. 253 U.S. 421, 427-28 (1920) (“The words ‘unfair method of competition’ are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include.”).

model: *NLRB v. Hearst Publications, Inc.*,<sup>54</sup> *Unemployment Compensation Commission of Alaska v. Aragon*,<sup>55</sup> and *Gray v. Powell*<sup>56</sup> on one hand, and *Packard Motor Car Co. v. NLRB*<sup>57</sup> on the other. In the *Hearst*, *Aragon*, and *Gray* opinions, the Court insisted upon judicial deference to agency determinations of ultimate fact. As the Court articulated in *Hearst*, the courts must accept an agency's determination about how to apply an ambiguous statutory term "if it has 'warrant in the record' and a reasonable basis in law."<sup>58</sup> Conversely, as the Court emphasized in *Packard*, the courts themselves retained exclusive control over questions of law, which in this context meant the limits of agency authority. Indeed, in *Gray*, the Court elaborated upon this model, pointing out that the ambiguity in the statutory term at issue would permit a wide range of applications.<sup>59</sup> The Court's role was to identify the limits of the ambiguity and, therefore, the limits of the agency's decisional authority. Where the ambiguity ended, so did the agency's authority. In each of the above cases, the Court exercised its role of deciding the relevant question of law, such as whether the statutory term at issue was ambiguous and the extent and limits of its ambiguity, determinations that set the scope for agency exercises of their authority in applying the term.<sup>60</sup>

During this period, courts and agencies allocated authority through the language of "law" and "fact." Courts decided questions of law while agencies decided questions of fact. Of course, many agency decisions, such as the NLRB's determination in *Hearst* of whether the statutory term "employee" extended to street newspaper vendors, whose complex relationships with their supplier partially resembled common-law master-

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54. 322 U.S. 111 (1944).

55. 329 U.S. 143 (1946).

56. 314 U.S. 402 (1941).

57. 330 U.S. 485 (1947).

58. *Hearst*, 322 U.S. at 131.

59. In *Gray*, a railroad had sought to escape regulation under the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72, by claiming an exemption that provided for "coal consumed by the producer." 314 U.S. at 405 n.1. The Director of the Interior Department's Bituminous Coal Division had ruled against the railroad. The Court ruled that coal purchased on the open market clearly fell outside of the exemption, but that coal extracted by the user from its own land with its own employees was clearly within the exemption. Within these limits, however, the Director had authority to determine the applicability of the exemption to the factually complex cases like the one in issue, where the railroad leased a coal mine and hired an independent contractor to extract the coal. 314 U.S. at 403, 414-17.

60. In *Hearst*, the Court determined that the master/servant rule that governed employment relationships in other contexts was not incorporated into the National Labor Relations Act's definition of "employee." 322 U.S. at 124-25. In *Packard*, the Court decided that the term "employee" was broad enough to include foremen. 330 U.S. at 491-94. In *Aragon*, the Court decided that the agency had no authority to determine that a labor dispute was in active progress for purposes of the Alaska unemployment compensation statute when that company would have been closed for independent reasons. 329 U.S. at 152-53.

servant relationships and partially resembled an independent contractor relationship, were not decisions on simple evidentiary-fact questions. Instead, there was a policy component to the NLRB's decision in *Hearst*, as the Court recognized in describing the NLRB's task as determining "[w]here all the conditions of the relation [between the workers and the company] require protection."<sup>61</sup> However, in the law/fact language then employed, this determination was still considered one of ultimate fact.

In short, the substantial-evidence review standard recognized a broad scope for agency policy development and implementation. In so doing, it continued a long judicial tradition of respecting administrative autonomy over setting policy. Courts recognized this administrative autonomy in a host of other administrative law doctrines, such as exhaustion, ripeness, and standing. The exhaustion doctrine kept the courts from interfering with agency processes for policy development; the ripeness doctrine insulated agency policies from challenge until they were applied; and the standing doctrine of the period barred challenges to agency policies unless and until those policies impaired a legal right of the challenger.

## II. THE CURRENT MODEL: REGULATION BY RULE AND THE *CHEVRON* COMPONENT

### *A. The Shift to Rulemaking and the Emergence of the Chevron Doctrine*

By the late twentieth century, the mid-century model of court-agency relations had evolved into a new paradigm. Standing to challenge government action had been extended to persons who were injured in fact by government action; impairment of a legal right was no longer required.<sup>62</sup> Even so, the challenger would only be able to test the lawfulness of the government action; underlying administrative policy choices remained immune.

The more important shifts in the model, however, were related to the growing tendency of agencies to regulate by rule. Congress increasingly conferred substantive rulemaking power on regulatory agencies and courts construed earlier enacted statutes as conferring that authority.<sup>63</sup> In line with

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61. *Hearst*, 322 U.S. at 129.

62. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-54 (1970) (distinguishing the question of whether a complainant has a legal interest that merits protection from the "case or controversy" analysis of whether a complainant has standing to sue); *Barlow v. Collins*, 397 U.S. 159, 164-65 (1970) (upholding the standing of tenant farmers to challenge agency action under the Food and Agriculture Act under the new approach).

63. *See, e.g., Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973) (holding that the Federal Trade Commission Act conferred upon the FTC broad powers to make substantive rules and regulations to carry out the purposes of the Act).

the new importance of rulemaking, courts reinterpreted the ripeness doctrine to permit broad pre-enforcement review.<sup>64</sup> The Court essentially redefined arbitrary and capricious review to mandate review of an actual or constructed record that included the information that the agency had when it acted,<sup>65</sup> an interpretation that carried immense consequences for rulemaking. This approach was incorporated in the newer regulatory statutes which explicitly authorized judicial review of agency rulemaking decisions, some of which defined the record on which that review would take place. Consistent with this new approach, these statutes required rulemaking proceedings to be reviewed within a set period—often ninety days—from the conclusion of the rulemaking proceedings.<sup>66</sup> The model embodied a major shift from the earlier model in its approach to the judicial review of rules and rulemaking. Whereas rules could be reviewed under the earlier model only when they were applied, the late twentieth century/early twenty-first century model subjected rules to almost immediate review as a matter of course.

The Court's decision in *Chevron*<sup>67</sup> was a part of this adaptation of the older model of a regulatory system that emphasized regulation by rule. The *Chevron* decision involved agency rulemaking in a regulatory context in which administrative powers were shared between federal and state environmental agencies. The Clean Air Act required those states that were not yet in compliance with Environmental Protection Agency (EPA)-set national air quality standards to establish a regulatory program under which permits would be required for all new or modified "stationary sources."<sup>68</sup> In that case, the Reagan-Administration EPA had issued a regulation that

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64. *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (holding that a challenge to regulations having an immediate and significant impact on an industry that presented only a legal issue was ripe for judicial review); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (same); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) (holding pre-enforcement challenge to regulation not ripe where the legal issue was unsuited to pre-enforcement challenge and where the immediate impact of the regulation on petitioners was not severe).

65. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (holding that reviewing courts must consider whether agency action was "based on a consideration of relevant factors and whether there has been a clear error of judgment").

66. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1)-(2) (2000) (providing for a 120 day period for review); Clean Air Act, 42 U.S.C. § 7607(b)(1)-(2) (2000) (allowing review of actions taken pursuant to the Act only within 60 days of promulgation or 60 days after grounds for review arise); Noise Control Act, 42 U.S.C. § 4915(a) (2000) (stipulating a 90 day review period); Occupational Safety and Health Act, 29 U.S.C. § 655(f) (2000) (providing for a 60 day review period); *see also* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 734-35 (1983) (explaining that "prototype statutes contain an explicit preenforcement review 'statute of limitations' that restricts appeals . . . to sixty or ninety days after promulgation . . . [whereas a] larger group of statutes provides for time limited preenforcement review, but does not forbid review at the enforcement stage").

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

68. *See* 42 U.S.C. § 7502(c)(5) (2000).

permitted states to employ a plant-wide definition of the statutory term “stationary source.” The definition excluded plant modifications that did not increase the plant’s total amount of emissions. The issue before the Court was whether the agency’s new definition of the statutory term was valid.

In its decision, the Court first observed that the term “stationary source” was ambiguous. It then ruled that Congress confers interpretive authority on a regulatory agency when it employs imprecise or ambiguous terms in legislation whose administration is entrusted to that agency. Accordingly, the Court required courts to defer to an agency construction of such a term so long as the agency’s construction was reasonable. The judicial duty to defer to an agency’s construction of an ambiguous statute mandated in *Chevron* is similar to the judicial duty to defer to an agency’s application of an ambiguous statutory term required by *Hearst*, *Aragon*, and *Gray*. Consistency seemed to require the extension of the judicial deference to agency interpretations contained in adjudications to judicial deference to agency interpretations in rulemaking (and perhaps other) contexts, now that rulemaking had become the regulatory tool of choice. Yet, however consistent it was with *Hearst*, *Aragon*, and *Gray*, the *Chevron* decision carried consequences that earlier decisions did not. Earlier decisions required courts to defer to agency applications of regulatory statutes to particular cases. The narrowness of those decisions was reflected in the judicial practice of referring to them as ones of (ultimate) fact. No individual agency decision of that kind was likely to have major consequences. *Chevron*, however, required deference to agency interpretations that—like the one in *Chevron* itself—were widely applicable. The old fact/law language was no longer useful in allocating functions between courts and agencies. Now both courts and agencies were deciding issues of law.<sup>69</sup>

Scholarly literature widely discussed *Chevron*. Some commentators thought that the Court had improperly conferred on agencies the judicial function of deciding questions of law. If it had, then that would appear to be in conflict with the APA as well as the traditional (and constitutional) role of courts.<sup>70</sup> Some commentators argued that the courts were

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69. Early in the *Chevron* period, however, Justice Stevens (author of the *Chevron* opinion) exhibited uncertainty over the scope of the new deference doctrine. In his opinion for the Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), Stevens used language implying that courts owe more deference to an agency’s interpretation in cases where the agency is applying the statute in question to a particular set of facts.

70. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 Nw. U. L. REV. 1239 (2002); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 24 (1996); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 142-43 (1990);

inconsistent in their application of *Chevron*: sometimes courts deferred when they should not have; at other times courts refused to defer when they should have.<sup>71</sup> Some commentators contended that *Chevron* was a device by which a conservative Supreme Court sought to compel liberal lower court judges to defer to the conservative policies of a Republican administration.<sup>72</sup>

### B. *The Instability of the Original Chevron Doctrine*

*Chevron* purported to provide an easily administrable technique for courts to deal with deference issues. Under its mandate, courts would engage in a two-step analysis. In step one, a court would determine whether congressional intent was “clear.” If that intent was unclear, then under step two, the court would defer to the agency’s interpretation so long as that interpretation was reasonable. Yet while the *Chevron* formula is easily stated, it was inherently unstable in its original form because it did not address many critical issues.

First, in *Chevron* step one, the court determines whether the congressional intent is “clear.” But merely asking the question in this way obscures the fact that ambiguity is a matter of degree, that there is sometimes a subjective element to ambiguity, and that interpretive judgments are often probabilistic. In perhaps most of the cases in which *Chevron* has been employed, the statutory term has been ambiguous to some degree. Even in cases that proceeded no further than *Chevron* step one, there was enough of an issue about the meaning of the statutory term that the parties chose litigation. In cases where a court has been able to conclude that the term is unambiguous, it may have been resolving a facial ambiguity by using an array of interpretive tools. The canons of construction are widely used to resolve facial ambiguities. Sometimes courts make reference to legislative history. Justice Scalia—the leading proponent of a broad reading of *Chevron*—has argued that whether a particular judge is likely to find a challenged term ambiguous or not may depend upon that judge’s interpretive approach: the judge who takes a

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Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074 (1990) [hereinafter Sunstein, *Law and Administration*] (“The *Chevron* principle . . . is quite jarring to those who recall the suggestion, found in *Marbury v. Madison* and repeated time and again in American public law, that it is for judges, and no one else, to ‘say what the law is.’”); Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 367-68 (1987) (Cass R. Sunstein, speaking).

71. Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-85 (1992).

72. Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996).

textualist approach is more apt to find the meaning of a statutory term clear while one who resorts to legislative history may be more apt to find the term ambiguous.<sup>73</sup> A judge who employs a purposive approach may discover ambiguities that would be unseen using a plain meaning approach, or, conversely, the judge may find textual uncertainties resolved by resort to purpose. Ambiguity is certainly a matter of degree. When more than one interpretation is possible, how certain must a judge be when discarding competing interpretations in favor of one believed to “clearly” reflect congressional intent? Is the judge 80% certain? Could the judge’s certainty be analogized to the array of standards governing certainty over issues of fact (such as preponderance, clear and convincing, a definite and firm conviction)? Ambiguity thus runs in a range and it can become greater or less as the tools of interpretation vary. It is also subjective in that it reflects the interpreter’s approach, tools of construction, sensitivity, and perceived need to reach a determination. The literature complaining that courts are inconsistent in their application of *Chevron* reflect these facts. Because ambiguity is a matter of degree and tends to vary with the interpretive approach employed, there will always be inconsistencies in the way courts handle *Chevron* step one.

Second, *Chevron* sets forth a rule for deferring, despite the fact that deference issues arise in widely varying circumstances. Sometimes interpretive issues will be entwined with administration; sometimes they will not. Often the agency has given considerable thought and attention to its interpretation; in other cases it has not. Sometimes representatives of those affected may have provided their input to the agency; sometimes they may not have done so.

Third, *Chevron* provides an unsatisfactory rationale for deference. Its rationale is an implied delegation. By using an ambiguous term in the statute, Congress—according to the *Chevron* opinion—implicitly delegates authority to interpret that term to the administering agency. When Congress uses an ambiguous term, it surely has abdicated the power to construe that term itself. But the power to construe the meaning of the ambiguous term may have lodged in the courts. How do we know whether the courts or the administering agency should have the last word in construing the ambiguous term? Restated in terms of delegation, how do we know when Congress intends to delegate that interpretive authority to the agency and when it does not? Justice Scalia, perhaps the strongest defender of *Chevron*, suggests that we should accept a presumption that Congress always delegates interpretive authority to the agency

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73. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520-21; see also Sunstein, *Law and Administration*, *supra* note 70, at 2094.

administering the statute in question.<sup>74</sup> He states quite frankly that this presumption is not likely to accord with the facts, but that it provides a practical tool for dealing with a recurrent issue. By contrast, Justice Breyer has long maintained that while the *Chevron* doctrine is useful, it should not be employed in a way that prevents us from trying to ascertain whether it is likely that Congress would have approved of delegating final interpretive authority to agencies.<sup>75</sup>

Fourth, although the *Chevron* decision commanded deference to the interpretation of the administering agency, it surely did not mean that courts should defer to all interpretations that emanated from the agency, regardless of the internal consideration that was given to the interpretation, the rank of the agency officials issuing the interpretation, and the formality of the interpretation. If some interpretations deserve mandatory deference and others do not, how should courts distinguish them? These issues were inherent in the *Chevron* doctrine from the beginning. From the early years of the doctrine, Justice Scalia would have courts defer to the “authoritative” interpretations of the relevant agency. Yet by at least 1991, the Court’s decision in *EEOC v. Arabian American Oil Co.*<sup>76</sup> had made clear that not all agency interpretations deserved mandatory deference. In that case, the Court had ruled that the Equal Employment Opportunity Commission’s (EEOC) guidelines were not entitled to *Chevron* deference because Congress had not conferred rulemaking power upon that agency.

Fifth, immediately after the *Chevron* decision, it was unclear whether the Court’s earlier decision in *Skidmore* retained any vitality. In *Skidmore* the plaintiffs brought suit under the Fair Labor Standards Act, claiming pay for three or four nights a week in which they had agreed to stay within hailing distance of a fire station.<sup>77</sup> During this period, they were expected to answer fire alarms, but otherwise were free to do anything they wished, so long as they remained in the area.<sup>78</sup> The statute required payment for “working time” but that phrase was undefined.<sup>79</sup> The Act was enforced both by private actions and suits brought by the Act’s Administrator seeking injunctions against violations.<sup>80</sup> The Court referenced the Administrator’s experience and indicated that his interpretations were

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74. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 198-205 (2006) [hereinafter Sunstein, *Chevron Step Zero*] (distinguishing Justice Scalia’s simplistic view of *Chevron* with Justice Breyer’s case-by-case analysis).

75. *Id.*

76. 499 U.S. 244, 257 (1991). In so ruling, the Court relied upon *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976), a pre-*Chevron* precedent.

77. *Skidmore v. Swift & Co.*, 323 U.S. 134, 135-36 (1944).

78. *Id.*

79. *Id.*

80. *Id.* at 135-38.



entitled to respect.<sup>81</sup> Although the lower court was not bound by the Administrator's interpretations, the Court said that the weight that should be given to his interpretations in any particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."<sup>82</sup> If *Chevron* applied to any "authoritative" agency interpretation as Justice Scalia contended, then *Skidmore* had little continuing relevance. But if *Chevron*'s application was narrower—as *Arabian American Oil Co.* indicated in 1991—then *Skidmore* had a wider scope.

Finally, how would the deference mandated by *Chevron* play out against the rule of stare decisis and judicial interpretation? If a court interprets a statute first, would an agency be bound by the court's interpretation? Until recently, answers to these questions were unclear. Several Supreme Court decisions indicated that the latter question should be answered affirmatively. But if agencies are so bound, what becomes of the agency flexibility that was a hallmark of the *Chevron* decision?

All of the questions set forth above were implicit in *Chevron* from the beginning. They carried the potential of destabilizing the so-called *Chevron* doctrine. Yet the Court did not begin to address these questions in earnest until the new millennium. In a series of decisions, the Court has moved haltingly and somewhat inconsistently. Nonetheless, this body of decisions may be outlining a new and more stable *Chevron* doctrine. In the next section, we examine these recent cases.

### III. MOVING TOWARDS A REVISED *CHEVRON* DOCTRINE

#### A. Christensen and Mead: *The Force of Law Standard*

In the early 2000s, the Court engaged in a series of decisions that would revise our understanding of *Chevron*. The first such decision was *Christensen v. Harris County*.<sup>83</sup> The Court ruled in *Christensen* that an agency opinion letter was not entitled to mandatory deference.<sup>84</sup> Speaking for the Court, Justice Thomas indicated that the lack of rulemaking or formal adjudicatory procedures made *Chevron* deference unwarranted.<sup>85</sup>

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81. *Id.* at 140.

82. *Id.* at 140.

83. 529 U.S. 576 (2000).

84. *Id.* at 587-88.

85. *Id.*

He followed up by observing that opinion letters and other interpretations made outside of these procedures did not carry the force of law.<sup>86</sup> Justice Thomas noted that:

Here . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.<sup>87</sup>

In 2001, the Court decided *United States v. Mead Corp.*<sup>88</sup> The Court again determined that an agency—this time the Customs Bureau—was not exercising congressionally-delegated power to resolve statutory ambiguity.<sup>89</sup> The interpretation at issue concerned a statutory tariff classification that was issued in a ruling letter.<sup>90</sup> The Court observed that forty-six Customs offices issue 10,000 to 15,000 classification rulings annually.<sup>91</sup> In language that made *Chevron* deference dependent upon whether the agency interpretation carried the “force of law”—a phrase used by Justice Thomas in *Christensen*—Justice Souter’s majority opinion ruled that classification rulings did not carry the force of law and hence did not merit *Chevron* deference.<sup>92</sup> The sheer volume of classification rulings indicated to the Court that they could not carry the force of law.<sup>93</sup> The Court suggested that delegation by Congress to an agency to make rules carrying the force of law could be inferred when the agency was construing a statute in the course of an adjudication or a rulemaking proceeding.<sup>94</sup> It left open the possibility that an agency might be exercising such delegated power in other contexts as well, but it provided little help on how to identify these other situations.

The Court in *Mead* observed that just because the mandatory deference required by *Chevron* was not applicable, a court might still defer to an agency interpretation because it found the interpretation persuasive, referring to the Court’s 1944 decision in *Skidmore*.<sup>95</sup> The issue in *Skidmore* involved an interpretation of the Fair Labor Standards Act, an

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86. *Id.*

87. *Id.* at 587.

88. 533 U.S. 218 (2001).

89. *Id.* at 231-32.

90. *Id.* at 225-27.

91. *Id.* at 233.

92. *Id.* at 226-27.

93. *Id.* at 233 (“Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”).

94. *Id.* at 227.

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

Act that was enforceable in the courts.<sup>96</sup> The workers themselves or the government could bring these actions (through the Administrator of the Fair Labor Standards Act). In *Skidmore*, the Court pointed out that the Administrator had accumulated extensive experience in the administration of the Act through his issuance of rulings, interpretations, and opinions. Accordingly, the Court ordered lower courts to consider those agency interpretations for their persuasive effect.

In his *Mead* dissent, Justice Scalia pointed out that the majority ruling appeared to undermine agency flexibility over policy, a flexibility that the Court had recognized in *Chevron*. *Chevron* had allowed the Reagan-Administration EPA to construe the term “stationary source” in the Clean Air Act on a plant-wide basis.<sup>97</sup> Yet the EPA had construed that term differently during the prior Carter Administration, rejecting such a plant-wide construction. Nonetheless, the Court had both required courts to defer to the agency’s interpretation and allowed the agency to revise its interpretation (within the bounds of reasonableness) as the agency saw fit. Now that all agency interpretations were not governed by *Chevron*, Scalia saw a greater risk that courts would interpret statutory terms before the agency was called upon to construe them in adjudications or rulemaking proceedings. If a court construed the term first, then under the prevailing view<sup>98</sup> the court interpretation would be a precedent, binding on the agency under the doctrine of stare decisis.<sup>99</sup> Stare decisis would impede the courts

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96. *Id.* at 135-36.

97. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 862-63 (1984).

98. For the then-prevailing view that agencies would be bound by a court’s prior construction of the statutory term at issue, Justice Scalia cited three cases: *Neal v. United States*, 516 U.S. 284, 295 (1996); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992); and *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990). These decisions were explained in *Brand X* as *Chevron* step one decisions—a prior (or later) judicial interpretation binds an agency when the court determines that the congressional intent is clear. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

99. Justice Scalia’s concern about the stare decisis effect of a prior judicial interpretation of an ambiguous statutory term was not reflected in at least some of the lower court decisions that gave *Chevron* deference to agency interpretations that conflicted with prior judicial interpretations. See, e.g., *Satellite Broad. & Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) (“Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as ‘the agency’s answer is based on a permissible construction of the statute.’” (quoting *Chevron*, 467 U.S. at 844)); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld unless ‘they exceeded the Secretary’s authority [or] are arbitrary and capricious.’”) (alteration in original) (internal citation omitted). Prior to the Court’s decision in *Brand X* but after its decision in *Edelman*, Richard Murphy had proposed the use of the arbitrary and capricious review standard as a vehicle for preserving agency flexibility over policy. Under Murphy’s proposal, a subsequent agency interpretation would constitute a new “relevant factor” for purposes of judicial review, thus freeing the court from the stare decisis constraint exerted by its own earlier decision. See Richard W. Murphy, *A “New” Counter-Marbury: Reconciling Skidmore Deference and*

from correcting their own interpretive mistakes. Agency control over policy, exercised through the interpretation of imprecise statutory terms, would be subject to the hazard that the interpretive issue might reach a court before an agency had a chance to deal with it. The agency flexibility recognized in *Chevron* would be impaired.

*Mead* engendered a widespread discussion in the academic literature about when *Chevron* would require unconditional deference to agency interpretations and when, on the contrary, judicial deference to agency interpretations would have to be earned by their persuasive power under *Skidmore*.<sup>100</sup> *Mead* indicated that courts should defer to agency interpretations that were issued after notice-and-comment rulemaking proceedings and to those that were embodied in adjudications. *Mead* also indicated that *Chevron* deference might be required in other situations, without providing guidance for identifying them. *Mead* provided a helpful framework necessary for determining when *Chevron* would and would not apply, but it left open a number of pressing issues. In addition to the uncertainty over the circumstances in which *Chevron* would apply in the absence of rulemaking or adjudicatory proceedings, Justice Scalia's argument that *Mead* facilitated judicial intrusion into agency policy development needed a response. Finally, Justice Breyer hinted in *Barnhart v. Walton*<sup>101</sup> that the line separating *Chevron* mandatory deference and *Skidmore* persuasive deference might not be a sharp one.<sup>102</sup>

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*Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 48-49 (2004). Shortly after the Court's decision in *Mead*, Kenneth Bamberger proposed a theory of provisional precedent based upon a federalism model: just as the decisions of a federal court construing state law is a precedent until a state court decides to the contrary, so a federal court interpretation of a statutory term would act as a precedent until the relevant agency adopted a different interpretation. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1306-15 (2002).

100. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1547-48 (2006); Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699 (2002); Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002) [hereinafter Merrill, *The Mead Doctrine*]; Murphy, *supra* note 99; Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877 (2006).

101. 535 U.S. 212 (2002).

102. *Id.* at 219-22 (using *Skidmore* factors to support the application of *Chevron*); *Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106-07 (1st Cir. 1984) (analogizing the choice between *Chevron* and *Skidmore* as governing precedents to the choice between *Hearst* and *Packard* as governing precedents).

### B. Ways of Understanding Mead

Although *Mead* purported to delineate the boundaries of *Chevron*'s application, it spoke in unclear language and, as a result, has generated its own uncertainty. It has also generated a wave of law review articles that attempt to resolve that uncertainty. Indeed, because *Mead* has set the parameters in which the application of *Chevron* deference is debated, the language in which those parameters were cast is critical to an understanding of that current debate. First, Justice Souter said: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."<sup>103</sup>

In his next sentence, the Justice wrote: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."<sup>104</sup> A few pages further in the opinion, Justice Souter stated: "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."<sup>105</sup> In setting the bounds of the judicial obligation to defer to agency statutory interpretations, *Mead* thus invoked the criterion that the agency be entrusted with the power to issue rules carrying the force of law and went on to say that delegation of that power can be inferred from an agency's power to engage in notice-and-comment rulemaking, adjudication, or other formal procedure that fosters fairness and deliberation.<sup>106</sup>

Thomas Merrill has been one of the most prolific writers on the issue of how we should understand the limitations on *Chevron* mandated by *Christensen* and *Mead*. He and Kristin Hickman wrote a highly-regarded article after the Court's decision in *Christensen*, but before its decision in *Mead*, arguing that *Chevron* deference should be limited to cases in which agency rules carried the "force of law."<sup>107</sup> Justice Souter cited the article with approval in his majority opinion in *Mead*.<sup>108</sup> Although that opinion adopted "force of law" as indicative of *Chevron* deference, it did not cite

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103. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

104. *Id.* at 227.

105. *Id.* at 230 & n.11 (citing Merrill & Hickman, *supra* note 8, at 872).

106. *Id.* at 230.

107. Merrill & Hickman, *supra* note 8, at 837, 877-82.

108. *Mead*, 533 U.S. at 230 n.11.

the Merrill and Hickman article for that proposition. Rather, Justice Souter cited the article as supporting his statement (quoted above) that Congress contemplates deference with the effect of law when it provides for a formal procedure tending to foster fairness and deliberation.<sup>109</sup> Subsequently, Merrill, taking a formalist approach towards *Mead*'s "force of law" criterion, has argued in a number of law review articles that, during the early part of the twentieth century, Congress followed a convention under which rules were understood to carry the force of law only when Congress attached a penalty for their violation.<sup>110</sup> Based upon this convention, Merrill has suggested the adoption of a meta-rule for determining the obligation of courts to apply *Chevron* deference: only agencies whose rulemaking authority meets the standard of that convention would merit *Chevron* deference.<sup>111</sup> Otherwise, deference would be governed by *Skidmore* and would have to be earned by its persuasive power.

Merrill's approach carries the attraction of simplicity and ease of application. He emphasizes this simplicity by referring to the initial determination—whether a *Chevron* analysis is applicable at all as "step zero."<sup>112</sup> Several factors appear to undercut his position: First, it is not clear that Merrill is attributing the same meaning to the phrase "force of law" as the Court. As Einer Elhauge observes, that phrase is "hardly self-defining."<sup>113</sup> Merrill's understanding of a rule carrying the force of law is keyed to the existence of a penalty for violation. Indeed, Merrill describes his understanding as Austinian, referring to the nineteenth-century legal philosopher who saw punishment as an essential component of law.<sup>114</sup> This understanding appears to be different from Justice Souter's understanding of a rule carrying the force of law. Justice Souter explicitly stated that an agency's authority to issue rules carrying the force of law can be shown, among other things, by an agency's power to engage not only in rulemaking, but in adjudication as well.<sup>115</sup> Under Merrill's Austinian

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109. *Id.* (citing Merrill & Hickman, *supra* note 8, at 872).

110. Merrill, *The Mead Doctrine*, *supra* note 100, at 807; Merrill & Hickman, *supra* note 8, at 837, 877-82; Thomas W. Merrill & Katherine Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); see also Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2111-14, 2171-75 (2004).

111. Merrill, *The Mead Doctrine*, *supra* note 100, at 819-26.

112. Merrill & Hickman, *supra* note 8, at 876-78.

113. Einer Elhauge, *Preference Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139 (2002); see also Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1013 (2005) (complaining that in *Mead*, "the Court's discussion and application of this concept ['force of law'] were incoherent"); Sunstein, *Chevron Step Zero*, *supra* note 74, at 222 (identifying two possible meanings of the phrase).

114. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE, Lectures 11-12 (Robert Campbell ed., 1875) (asserting the laws are commands, disobedience of which results in punishment).

115. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

understanding, the decisions of the NLRB do not carry the force of law, because they require the assistance of a court in enforcing them.<sup>116</sup> Souter, however, said nothing about whether the adjudication to which deference was owed did or did not require judicial assistance in its enforcement.<sup>117</sup> Indeed, he cited with apparent approval a case involving an NLRB adjudication as one in which the Court had previously applied *Chevron* deference.<sup>118</sup> Souter thus appears to understand a “rule” to include a generalizable pronouncement encompassed in an adjudicative decision without regard to the process by which that decision is enforced. As referenced below, Robert Anthony argued more than a decade ago that *Chevron* deference was co-extensive with agency interpretations having the force of law, but Anthony’s interpretation of the force-of-law phrase appears to be closer to that of Justice Souter.<sup>119</sup>

Second, as Merrill himself admits, the enabling statutes of most agencies contain a general grant of rulemaking authority, and there is a host of judicial precedent to the effect that power to issue rules with the force of law is presumed from such general grants.<sup>120</sup> Thus, almost all agencies have power to issue rules with the force of law. Several Supreme Court decisions, moreover, either hold or assume that general grants of rulemaking authority confer the power to issue rules carrying the force of law. So again, most agencies possess that power.

Third, Merrill is not entirely clear on his understanding of the “force of law” phrase. At one point he says that NLRB rules would carry “legislative effect” because “they announced how the NLRB would exercise its enforcement authority in the future.”<sup>121</sup> But Merrill also repeatedly says that neither the NLRB’s rules nor its adjudications carry the force of law, the former because Congress provided no penalty for their

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116. Merrill, *The Mead Doctrine*, *supra* note 100, at 832. Merrill recognizes that Souter’s understanding of the phrase “force of law” is different from his own Austinian understanding. *See id.* at 813 (“[T]he Souter opinion implicitly treats ‘force of law’ as an undefined standard that invites consideration of a number of variables of indefinite weight.”); Merrill & Hickman, *supra* note 8, at 892.

117. *See Mead*, 533 U.S. at 227. These passages are quoted above in text at notes 104 & 105. Elhauge also reads Justice Souter’s language as suggesting that an agency interpretation acquires the force of law when it has been issued in a rulemaking or adjudicative proceeding or otherwise in a way that provides for significant comment opportunities. *See Elhauge*, *supra* note 113, at 2139-40.

118. *See Mead*, 533 U.S. at 230 n.12 (citing *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996)).

119. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 38 (1990). Anthony argued, for example, that NLRB interpretations bound the courts because indicators such as “the large numbers of these cases, the relative level of detail involved, the potential waste of requiring reinterpretation by the courts, and the lodgement of direct review in the courts of appeals” pointed in that direction. *Id.* Thus, they carried the force of law. *Id.*

120. Merrill & Hickman, *supra* note 8, at 890.

121. Merrill & Watts, *supra* note 110, at 568.

violation and the latter because its adjudicative orders require judicial assistance for enforcement.<sup>122</sup> Nor is it clear why a rule that is enforced in an adjudication, rather than in a court proceeding, is not a rule carrying the force of law.<sup>123</sup>

Fourth, there is a danger of using the convention in a misleading way. If the convention is used to mean that the only rules that carry the force of law are those to which Congress has attached a penalty, then it would be simpler to omit reference to the convention and merely say that only rules with a statutory penalty carry the force of law. Merrill's discussion of the convention also fails to adequately address the differences between rules enforced in the courts and rules enforced in agency adjudications.

Cass Sunstein agrees with Merrill that *Chevron* deference should be determined by an easily applicable rule.<sup>124</sup> In contrast with Merrill, however, Sunstein would not engage in a "step zero" inquiry into whether the agency has been authorized to issue rules with the force of law. Rather, Sunstein would have the courts defer to agency interpretations under the *Chevron* rubric whenever they carry the force of law—understood in the Austinian sense—or are the result of notice-and-comment or trial-type procedures.<sup>125</sup> Sunstein's preference for a straightforward rule governing the application of *Chevron* aligns him, to a large extent, with Justice Scalia as well. The primary difference between Sunstein and Scalia is that Sunstein would limit *Chevron*'s application to situations where the agency employed participatory procedures, whereas Justice Scalia would apply *Chevron* to any "authoritative" agency interpretation, regardless of the underlying procedures.<sup>126</sup>

These approaches towards integrating *Mead* into the newly dynamic *Chevron* doctrine are further discussed after we consider Justice Breyer's opinion for the Court in *Barnhart v. Walton*.<sup>127</sup> In that case, Justice Breyer offered a somewhat more complex and nuanced understanding of *Mead* and *Chevron* than any of the approaches discussed above. His *Barnhart* opinion eschews a rule-based approach to the application of *Chevron*. The

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122. Merrill, *The Mead Doctrine*, *supra* note 100, at 832; Merrill & Hickman, *supra* note 8, at 892.

123. Merrill cites *Pacific Gas & Electric Co. v. FPC* as stating the legal effects test which he equates with "force of law." 506 F.2d 33, 38 (D.C. Cir. 1974). But the court's definition appears to embrace a rule that is enforced in an adjudication. See Merrill, *The Mead Doctrine*, *supra* note 100, at 827. This approach appears to recognize "force of law" in rules of the NLRB, contrary to Merrill's position elsewhere. See discussion *supra* notes 114 & 120 and accompanying text.

124. Sunstein, *Chevron Step Zero*, *supra* note 74.

125. *Id.* at 228.

126. Compare Sunstein, *Chevron Step Zero*, *supra* note 74, with Scalia, *supra* note 73.

127. 535 U.S. 212 (2002).



*Barnhart* approach, accordingly, differs from the rule-based approaches endorsed by Justice Scalia and Professors Merrill and Sunstein. We now turn to *Barnhart*.

### C. *Barnhart's Gloss on Chevron*

*Barnhart v. Walton* was, among other things, an attempt by the Court to address the issues left unanswered in *Mead*.<sup>128</sup> In that case, Walton sought disability benefits for an impairment that prevented his gainful employment for a period of less than one year.<sup>129</sup> The statute defined a compensable disability as an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than twelve months.”<sup>130</sup> The Social Security Administration construed the statute to require the inability to engage in gainful activity for twelve months, rejecting Walton’s interpretation that the twelve months referred only to the underlying impairment, and not to the inability. The agency also rejected Walton’s interpretation that an inability to engage in gainful activity that was initially expected to last for twelve months qualified under the definition, even though the inability in fact lasted for a lesser period.<sup>131</sup> Following notice-and-comment procedure, the agency construed the statute as providing that no disability exists if the claimant is doing “substantial gainful activity.”<sup>132</sup> The agency had construed that regulation as denying the presence of disability if within twelve months of the onset of the impairment, the impairment no longer prevented the claimant from engaging in substantial gainful activity.<sup>133</sup>

Walton challenged the agency determination in court. He lost before the district court but prevailed in the Fourth Circuit. That Circuit ruled that under the clear language of the statute, the twelve-month duration requirement applied to the impairment, and not to the inability to engage in gainful employment.<sup>134</sup> The Supreme Court granted certiorari and reversed. Justice Breyer, writing for the majority, ruled that the statute was ambiguous and that the agency’s interpretation was a plausible one which required deference under *Chevron*.<sup>135</sup>

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128. *See id.*

129. *Id.* at 215.

130. *Id.* at 214 (emphasis omitted) (quoting 42 U.S.C. § 423(d)(1)(A) (1994)).

131. *Id.* at 218-20.

132. *Id.* at 214.

133. *Id.* at 223.

134. *Walton v. Apfel*, 235 F.3d 184, 190 (4th Cir. 2000), *rev'd sub nom. Barnhart v. Walton*, 535 U.S. 212 (2002).

135. *Barnhart*, 535 U.S. at 222.

Walton urged the Court to disregard the agency's interpretation of its regulations on the ground that the regulations were only recently enacted. Justice Breyer's opinion, after summarily rejecting that contention, went on to bolster its ruling to defer by observing that the agency had long interpreted the statute in this way.<sup>136</sup> The long standing history of the agency interpretation was a reason for according it *Chevron* deference, even if the agency had not initially issued it through notice-and-comment proceedings. Referring to *Christensen*, Justice Breyer said that any language in that case indicating that notice-and-comment proceedings were essential to *Chevron* deference had been effectively overturned in *Mead*.<sup>137</sup> Finally, Justice Breyer gave the following explanation of why *Chevron* should apply:

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute . . . and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.<sup>138</sup>

Some of this language is unremarkable. Cases applying *Chevron* deference have often referred to the technical and complex nature of the issue before them,<sup>139</sup> as well as agency expertise.<sup>140</sup> This language is somewhat different because it references the "interstitial" nature of the legal question as a criterion for applying *Chevron* deference. The Court had previously employed that phrase in a *Chevron* context only once.<sup>141</sup>

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136. *Id.* at 221.

137. *Id.* at 222.

138. *Id.*

139. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (noting that the complexity of such administrative matters is a reason for judicial deference to agencies and administrators); see also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (stating that the court must give deference to agency interpretation of the agency's own regulation).

140. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) ("This practical agency expertise is one of the principal justifications behind *Chevron* deference."). Of course, an agency's practical expertise often supports the persuasive force of an agency interpretation under the *Skidmore* framework.

141. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), the Court (through Justice O'Connor) quoted Justice Breyer's law review article in support of its decision denying deference to a Food & Drug Administration interpretation, a decision in which Justice Breyer dissented. See discussion of *Brown & Williamson*, *infra* notes 164-67 and accompanying text. Justice Breyer has recently employed that term in two opinions that mandate *Chevron* deference. See *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2346 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1541 (2007).

Yet insofar as that phrase connotes a legal question involved in the administration of a regulatory scheme, it seems an appropriate one to which courts should render *Chevron*-like deference.

Yet Breyer may be suggesting more than the particular appropriateness of mandatory deference in this case. He may also be suggesting that the more a legal issue departs from routine administration, the less likely Congress would want the administering agency's interpretation to govern. Indeed, Breyer may be incorporating into the *Chevron* framework an indicator long employed by courts reviewing agency adjudications: to determine whether an issue should be treated as one of ultimate fact, and therefore within the province of the agency under *Hearst*, or as one of "law," and therefore within the responsibility of the reviewing court to decide independently under *Packard* in the pre-*Chevron* world.<sup>142</sup>

Breyer used similar language in referring to *Chevron* in the past. He did so in determining whether *Chevron* or *Skidmore* would govern the obligation of a court to defer to an agency determination. In *Mayburg v. Secretary of Health & Human Services*,<sup>143</sup> then First Circuit Judge Breyer employed that language to distinguish *Chevron* a few months after it had been decided. In that case, Breyer wrote:

The less important the question of law . . . the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views . . . . Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.<sup>144</sup>

Breyer followed his opinion in *Mayburg* with a law review article elaborating that approach.<sup>145</sup> In his law review article, Justice Breyer wrote:

A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.<sup>146</sup>

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142. Compare *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944), with *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

143. 740 F.2d 100 (1st Cir. 1984).

144. *Id.* at 106; see also *Constance v. Sec'y of Health & Human Servs.*, 672 F.2d 990, 995-96 (1st Cir. 1982) (Breyer, J.) (employing similar language to justify persuasive deference under *Skidmore*).

145. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

146. *Id.* at 370. Justice Breyer distinguishes major issues from more routine ones, which he refers to as interstitial issues. This usage has the potential for confusion, since a number of cases describe agency authority to make rules as involving interstitial matters and

Thus Justice Breyer, in *Barnhart*, may be providing a response to the question left open in *Mead*. His understanding of *Chevron*'s applicability is the one that he propounded in *Mayberg* immediately in the wake of the *Chevron* decision, and later in the *Administrative Law Review*. That understanding is apparent in his dissenting opinion in *Christensen* where he articulated his understanding of the close relationship between *Skidmore* and *Chevron*.<sup>147</sup> Breyer has repeatedly contended that deference should be accorded to agency interpretations in situations where Congress intends to accord such deference.<sup>148</sup> This is the ostensible rationale of *Chevron*, but *Chevron* and the later cases applying the *Chevron* precedent generally presume a congressional intent to delegate rather than inquire into what Congress would likely want on the particular interpretive issues before it.<sup>149</sup> Breyer believes that Congress would prefer increasing deference to agency interpretations as the interpretive issue becomes closely connected with everyday administration.<sup>150</sup> Factors such as the technical nature of the issue and its complexity reinforce the need to defer. *Chevron* deference is therefore analogous to the deference traditionally accorded to routine agency applications of statutory terms in agency adjudications. Deference in those situations is given because Congress wants the courts to accord administering agencies the scope to carry out the statutory program. Deference, however, ceases to be mandatory when issues attain levels of importance that affect the basic design of the regulatory scheme. These "boundary" issues differ from so-called "jurisdictional" issues,<sup>151</sup> which

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warning courts against usurping this interstitial authority. *See, e.g.*, *Household Credit Servs., Inc. v. Pfenning*, 541 U.S. 232, 244 (2004); *Babbitt v. Sweet Home Chapter of Cmty.*, 515 U.S. 687, 733 (1995) (Scalia, J., dissenting); *Ford Motor Co. v. Milhollin*, 444 U.S. 555, 568 (1980); *see also* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947)). But interstitial actually means "between the gaps" and therefore agency "interstitial" authority to make rules means making rules to fill gaps in statutory meaning. References in the cases describing agency authority as interstitial accurately describe the underlying understanding of *Chevron*. Justice Breyer's assertion that agency authority to interpret extends to interstitial matters is, literally, a truism.

147. *See* *Christensen v. Harris County*, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting).

148. Stephen Breyer, Lecture, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002); *see* Breyer, *supra* note 145, at 370, 372, 382 (contending that deference varies with the context as Congress would intend).

149. *See, e.g.*, *Christensen*, 529 U.S. at 578; *United States v. Mead Corp.*, 533 U.S. 218 (2001).

150. Breyer, *supra* note 145, at 369-72.

151. The question of whether *Chevron* deference applies to the resolution of "jurisdictional" issues has proved troublesome to courts. *Compare* *Lyon County Landfill v. EPA*, 406 F.3d 981, 983-84 (8th Cir. 2005) (*Chevron* deference), *and* *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1279 (D.C. Cir. 2007) (*Chevron* deference), *with* *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002) (*de novo* review). *See also* *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-81 (1988) (Scalia, J. concurring); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 54 (1990) (White, J., dissenting). Professor Sunstein had argued (consistent with the argument here) that deference should not "be accorded to the agency when the

can vary widely in their regulatory significance. Justice Scalia was right when he said (concurring in *Mississippi Power & Light Co. v. Mississippi*) that “there is no discernable line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority.”<sup>152</sup> But clearly there are issues that do press the boundaries of statutory design and thus are for judicial resolution, as Justice Scalia himself conceded when he argued that Congress would expect an administering agency to be responsible for resolving ambiguities “within broad limits,”<sup>153</sup> thus precisely acknowledging these limitations on the *Chevron* presumption. As the issues become less routine and rise in importance, it becomes less clear whether Congress would want the courts to defer to the agency interpretation. Sometimes an interpretive issue rises to a level that Judge Breyer had called “central to the statutory scheme” in *Mayburg*.<sup>154</sup> In his *Brand X* concurrence, Justice Breyer referred to such an interpretive issue as raising “an unusually basic legal question.”<sup>155</sup> Issues of this magnitude, he asserts, are for the courts because Congress expects the courts, rather than agencies, to oversee the broad outlines of its statutes. In rendering its own interpretation, the court may be interested in the agency’s views, but whether or not the court accepts them depends upon the persuasiveness of the agency’s rationale.

As referenced below, this approach is neither radical nor new. It can be restated in terms of the responsibility of courts to ensure that agencies operate within the boundaries established in their enabling statutes.<sup>156</sup> Issues entwined with routine administration are generally for agencies. But the courts are obliged to determine the boundaries within which the agencies operate. Breyer’s citations in *Mayburg* to the old *Hearst* and *Packard* cases reference that distinction. The former symbolizes the wide latitude of agencies to control their approaches to administration within the boundaries of their delegated authority, while the latter symbolizes the

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issue is whether the agency’s authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determinations of fact and policy.” Sunstein, *Law and Administration After Chevron*, *supra* note 70, at 2100. He appears, however, no longer to hold that view. See Sunstein, *Chevron Step Zero*, *supra* note 74, at 247 (“There is no sufficient reason for a ‘major question’ exception to *Chevron*.”).

152. 487 U.S. at 381 (Scalia, J., concurring).

153. *Id.* at 382.

154. See *Mayburg v. Sec’y of Health & Human Servs.*, 740 F.2d 100, 107 (1st Cir. 1984) (explaining that the “spell of illness” provision was “central to the statutory scheme”).

155. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring).

156. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983) (“[T]he judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.”); see also Doug Geysler, *Courts Still “Say What the Law is”*: *Explaining the Functions of the Judiciary and Agencies After Brand X*, 106 COLUM. L. REV. 2129, 2154-55 (2006).

responsibility of the courts to determine those boundaries. The more an issue rises in importance, the more likely it is that the courts may discover a judicially-ascertainable intent, and thus resolve the interpretive issue at *Chevron's* step one. Congress typically focuses on a statute's main outlines and purposes and gives less attention to its details. There is more likely to be an ascertainable "intent" as the relative importance of the issues increase, because the legislative struggles over these issues will be reflected in definitions, the interrelations of provisions, and/or the structure as a whole. Struggles over the major issues are also likely to be reflected in the legislative history.

Breyer, however, is saying something more than that congressional intent is likely to be more easily ascertainable as an issue rises in importance. He is saying that because the judicial obligation to defer depends upon congressional intent, the courts should do their best to ascertain that intent. Since that intent may not be expressed, the courts should employ a number of factors that indicate whether Congress would want to pass final interpretive authority to the agency, or leave it with the court. Among the factors are the importance of the issue and its centrality to the statutory scheme. As the interpretive issue becomes more important and more central, it becomes increasingly likely that the interpretation raises major boundary issues. When it does, those major issues are for judicial determination. The critical notion is that such major boundary issues can be for judicial interpretation, even when the court cannot say with one hundred percent certitude that its conclusion is the only plausible one. This is the crux of Justice Scalia's question, "How clear is clear?" Clarity can exhibit degrees and extend over a range. The result may be clear to the court, but, perhaps only clear at an 80% confidence level. In any event, when the significance of the issue becomes sufficiently great, the interpretive responsibility becomes the court's.

Breyer's approach to *Chevron* deference takes the "force of law" criterion set forth in *Mead* as a touchstone of when mandatory deference is required. However, Breyer provides the "force of law" criterion with a meaning pregnant with the possibility of reconnecting the *Chevron* doctrine to its roots in the mid-century deference cases. Agency interpretations have the "force of law" when they bind the courts. Cass Sunstein suggests that such a definition is circular.<sup>157</sup> It is circular if a rule's having the "force of law" means that the rule binds the courts and the courts are bound when the rule carries the "force of law." Yet Breyer's approach is not circular at all. It is closely related to the traditional understanding that agencies are better equipped to deal with those interpretive issues that are

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157. Sunstein, *Chevron Step Zero*, *supra* note 74, at 222.

closely connected with the more routine tasks of regulation than are courts. Concomitantly, courts are better at ferreting out statutory meaning when the issues are larger and more important, and therefore when it is more likely that Congress has addressed them in some way or at least would want interpretive differences to be resolved by the courts. Even though the statutory meaning remains ambiguous, the courts are institutionally better equipped to decide major issues than are more narrowly-focused regulatory agencies. Related to that understanding about judicial abilities is another traditional understanding: courts bear the primary responsibility for deciphering the basic outlines of the legislative design. As the interpretive issues appear to be more intertwined with legislative deals, Breyer indicates that the judges should be more free to resolve those issues on their own. The courts can read the statute objectively because they remain free from prior involvement in the legislative process. Conversely, courts are less capable of resolving statutory meaning as the issues become more entwined with the tasks of administration, tasks with which courts are generally novices. Breyer thus appears to be using the “force of law” phrase to refer to the contexts in which agency decisions have traditionally bound the courts. The ramifications of Breyer’s approach are further developed below.

Not all commentators appreciate Justice Breyer’s approach. Robert Anthony has described the quoted language from *Barnhart* as “little short of astounding.”<sup>158</sup> Cass Sunstein believes that Breyer’s approach is too uncertain. Thomas Merrill—like Sunstein and Scalia—wants to simplify *Chevron*’s application by resort to an easily-applicable rule. Kristin Hickman believes that Breyer’s approach can be discounted because most other Justices do not share his views.<sup>159</sup> Yet these critics may overemphasize the difficulties in Breyer’s approach or underestimate the impact that *Barnhart* may exert on the developing case law. Sunstein, for example, correctly observes that in many cases, there may be no apparent difference between applying *Chevron* and *Skidmore*.<sup>160</sup> As pointed out below, Justice Ginsburg’s majority opinion in *Alaska Department of Environmental Conservation* blurs distinctions between *Chevron* and *Skidmore* along lines that are easily reconcilable with Justice Breyer’s

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158. Robert A. Anthony, *Keeping Chevron Pure*, 5 GREEN BAG 2D 371, 373 (2002) (reading the *Barnhart* opinion as endorsing “a loosely-cabined juggle of multiple and indeterminate factors for determining in each case whether *Chevron* governs”).

159. See Hickman, *supra* note 100, at 1587-88 (asserting that a majority of the Justices do not share Justice Breyer’s views on *Chevron*).

160. See Sunstein, *Chevron Step Zero*, *supra* note 74, at 229-30 (describing examples of cases where there was no need to choose between *Skidmore* and *Chevron*).

approach in *Barnhart*.<sup>161</sup> The relationship between *Chevron* and *Skidmore* is developing. As a result, the courts often may not need to engage in an extended analysis of which line of deference to follow.

Before assessing the merits of Breyer's language in *Barnhart*, it must be read in its overall context. *Barnhart* is one of a series of cases over the last several years in which the Court has been recasting the *Chevron* doctrine. *Mead* held that judicial deference would be indicated when an agency interpreted a statutory term in a rulemaking proceeding, in an adjudication, or in some undefined third way.<sup>162</sup> In *Barnhart*, Breyer addressed, in part, the application of *Chevron* in this uncharted third area. Rather than criticize Breyer for suggesting the use of imprecise criteria for identifying when *Chevron* deference would be applicable, as Robert Anthony does,<sup>163</sup> Breyer's proposed analytical factors might better be welcomed as an attempt to throw light upon an area that *Mead* left completely indeterminate. Breyer's approach also ties in traditional court/agency relations to *Mead*'s understanding of *Chevron*'s applicability.

Breyer's *Barnhart* language, however, may have wider ramifications than merely offering a route through *Mead*'s unexplored third category. Because Breyer has always seen *Chevron* deference as blurring into *Skidmore* deference, one must assess both: (1) how the language that Justice Breyer employed in *Barnhart* might determine *Chevron*'s applicability in *Mead*'s third category; and (2) how that language might recast the entire *Chevron* doctrine, modifying the judicial obligation to defer in cases involving matters of major policy, even when the agency has employed rulemaking or adjudicatory procedures. Breyer's critics appear to be most concerned with the latter issue. Accordingly, an examination of the wider ramifications of that language is warranted. (Most of the discussion below can also be applied to the narrower issue as well.)

Justice Breyer's broad approach towards the applicability of *Chevron* does not furnish a mechanical rule, but it supplies a workable guideline. Courts have been using the *Hearst/Packard* distinction for many years to determine whether or not deference is required in an analogous circumstance. The criticisms directed against Justice Breyer's approach could, also, be directed against the distinction between mandatory deference in *Hearst*-type situations and non-mandatory deference in *Packard*-type situations. Yet courts have lived with that distinction for well over half a century.

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161. See discussion *infra* notes 180-92.

162. *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) (“[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”).

163. See Anthony, *supra* note 158, at 373-74.



Justice O'Connor's majority opinion in *Brown & Williamson Tobacco Corp.*<sup>164</sup> of 2000 and to a lesser extent in *MCI Telecommunications Corp. v. AT&T Corp.* of 1994 provides some support for Justice Breyer's approach to distinguishing between major and minor issues in applying *Chevron*.<sup>165</sup> Justice O'Connor's opinion in *Brown & Williamson*, rejecting the Food and Drug Commission's (FDA) interpretation of the term "drug" in the Food, Drug, and Cosmetic Act, stated that *Chevron's* assumption of an implicit delegation by the Congress to regulatory agencies to resolve the ambiguity of statutory terms may not extend to "extraordinary cases" involving major questions.<sup>166</sup> Since the FDA's interpretation would give it authority to regulate tobacco, this was "hardly an ordinary case" in Justice O'Connor's words.<sup>167</sup> In support of her position that the *Chevron* assumption of implicit delegation does not extend to major issues, Justice O'Connor cited Breyer's law review article on this subject (with an accompanying quotation). She also cited and quoted from *MCI*.

*MCI* involved the FCC's interpretation of the Communications Act. The Act obligated all long-distance telephone carriers (under § 203(a))<sup>168</sup> to file their tariffs with the Commission. Section 203(b)(2), however, gave the Commission authority to "modify" any requirement of § 203. Employing that authority, the Commission abolished the filing requirement for all carriers except AT&T, then the "dominant" long-distance carrier. Relying on an array of dictionary definitions of the term "modify," Justice Scalia's majority opinion ruled that the FCC's power to "modify" carriers' filing obligations did not extend to "fundamental changes." But in so ruling, Justice Scalia buttressed his opinion with the following language: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."<sup>169</sup> After quoting this language in her *Brown & Williamson* opinion, Justice O'Connor continued: "As in *MCI*, we are confident that Congress could not

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164. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."). *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), is a mirror image of *Brown & Williamson* on the substantive issue of regulatory authority. In *Massachusetts v. EPA*, however, the majority was able to determine that the EPA possessed authority to regulate carbon dioxide from the "unambiguous" statutory text.

165. See 512 U.S. 218, 231 (1994) (noting that it would be "highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion").

166. *Brown & Williamson*, 529 U.S. at 159.

167. *Id.*

168. See 47 U.S.C. § 203(a)-(b) (2000) (requiring that telecommunications companies file certain charge schedules).

169. *MCI*, 512 U.S. at 231.

have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>170</sup> The Justice concluded “based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”<sup>171</sup> Justice O’Connor decided the case under *Chevron*’s step one. Thus in both *Brown & Williamson* and *MCI*, the Court took the extensive regulatory change that would have resulted from the agency’s interpretation of a succinct statutory term as effectively raising a presumption against that interpretation.

The Court has not adopted a clear-statement canon for interpreting boundary terms, but it is moving in that direction. When an agency adopts an interpretation of a statutory term that would substantially expand that agency’s authority, then the agency bears the burden of persuading the court that its interpretation is the correct one. Justice Kennedy’s majority opinion in *Gonzales v. Oregon*<sup>172</sup> shows a concern with the extensive scope of the power asserted by the Attorney General in a regulation construing the Controlled Substances Act.<sup>173</sup> While the broad power asserted surely influenced the decision, that decision was supported by a traditional analysis relying upon statutory design.

*Babbitt v. Sweet Home Chapter of Communities*<sup>174</sup> can also be read as providing support for Breyer’s position. Justice Souter’s extensive discussion of the statutory term “harm” in that case involved a judicial interpretation of a limiting statutory term, but one that concluded that the agency had not crossed the limits of its authority. As with *Brown & Williamson* and *MCI*, *Sweet Home* also illustrates an exercise of judicial responsibility over statutory limits. *Sweet Home* contained an extensive judicial investigation into the meaning of the term “harm,” concluding that the agency’s assertion of its authority fell within the authority delegated to it. Under the *Chevron* rubric, courts inquiring into the extent of agency authority must equate that authority with statutory ambiguity. That was exactly what the Court did in *Sweet Home*. Because the Court both took responsibility for interpreting the limits of the authority-conferring term (in the sense of determining that those limits had not been crossed) and upheld the agency’s interpretation, *Sweet Home* was an analogue to the *Packard*

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170. *Brown & Williamson*, 529 U.S. at 160.

171. *Id.* at 160-61.

172. 546 U.S. 243 (2006).

173. *Id.* at 257.

174. 515 U.S. 687 (1995).

case in which the Court ruled that the term “employee” was broad enough to permit the NLRB to extend the protections of the National Labor Relations Act to foremen.<sup>175</sup>

Breyer’s critics have not adequately pointed out the correspondences between the *Chevron* steps one-and-two analyses and the determinations made in the *Hearst/Packard* line of cases about the scope of agency authority. In *Chevron* step one, the court determines whether the statutory term is ambiguous. In the *Hearst/Packard* line of cases, the court determines the boundaries within which the statutory term confines agency authority. Those boundaries are limited by the extent to which the statutory term is ambiguous. The same is true in the *Chevron* line of cases, as the discussion of the *Sweet Home* case shows. Moreover, the critics, and even the cases themselves, tend to focus their discussion of the *Chevron* doctrine on the presence or absence of a statutory ambiguity, rather than the equally important question of the extent of an identified ambiguity. However, the whole rationale of *Chevron* requires that the agency interpretation fall within the scope of the ambiguity, for it is the ambiguity that (in the *Chevron* rubric) constitutes the delegation of interpretive authority to the agency. Moreover, *Chevron* requires in step two that the agency interpretation be a reasonable one. In context, this means that the agency’s interpretation be one that the statute allows: that is, the agency interpretation must be consistent with what the court can unambiguously determine about the statute’s meaning and (for the reasons stated above) is confined to the resolution of the ambiguity in question.

Once we acknowledge in both the *Hearst/Packard* line of cases and the *Chevron* line of cases that judges confront ambiguities that may well exist in a range, we are likely to be more sensitive to the fact that the boundaries of these ambiguities may themselves be imprecise. Accordingly, at the margins, judges—who decide that congressional intent is “clear”—are sometimes making judgments that are less certain than they are matters of probability. Indeed, their very words often reveal that their judgments are matters of probability. Consider, for example, Justice Scalia’s passage in

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175. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947). *Packard* is often cited for the proposition that the courts will independently resolve issues of law. True enough, but the issue in *Packard* was not whether the statutory term “employee” embraced foremen, but rather, whether its action fell within the scope of that ambiguity when the agency extended that term’s application to foremen. In *Sweet Home*, as in *Packard*, the Court assessed the statutory boundaries and determined that the agency had not exceeded them. In both lines of cases, there is a step one: the court must determine whether the statutory term is, or is not, ambiguous. And in both lines of cases, when the court determines that the term is ambiguous, the court must determine whether the agency’s interpretation falls within the scope of that ambiguity. See, e.g., *Gonzales*, 546 U.S. at 284 (Scalia, J., dissenting) (referring to the invalidity of agency interpretations when “beyond the scope of ambiguity in the statute”).

*MCI*, quoted above, in which he says that it “is highly unlikely” that Congress meant to confer power upon the FCC to abolish rate-filing. In emphasizing the assistance that the major or routine character of the interpretive issue can provide the courts, Breyer seems to be suggesting that these factors can weigh the probabilities with which judges make these *Chevron* step one determinations.

Finally, the critics overemphasize the difficulties in separating out the larger or “major” issues from the routine or interstitial ones. At the margins, the distinction is, of course, imprecise. However, many distinctions that are imprecise at the margins are workable ones. Some cases will fall fairly clearly into the category of the routine or interstitial while other cases will fall fairly clearly into the category of major issues. The middle area—where it is not clear whether the issue is a major or minor one—may be precisely where judicial judgment is needed. *Chevron* itself involved an issue that was an important one and certainly not routine. Whether the EPA interpretation was authorized by the statute depended upon how the statute’s twin goals of cleaner air and economic growth were reconciled. The Court deferred to the EPA because it determined that the statute was ambiguous. Under Breyer’s approach, the decision to defer to the agency might have been justified on the ground that allowance or disallowance of the bubble concept was more tied to issues of administration than to the overall statutory design. Yet the issue is a close one and could easily have been determined the other way. Perhaps this merely says that when competing decisional factors are in balance, a decision either way is an acceptable one.

One merit of Breyer’s approach is that—unlike past approaches to *Chevron*—it is consistent with the recognition of degrees of clarity and ambiguity. A second merit of Breyer’s approach is that it allows room for courts to exercise judgment. A third merit of his approach is that it is consistent with judicial economy: courts can continue to defer to agencies in routine cases.

Clarity and ambiguity can be matters of degree and an assessment that statutory terms are “clear” may involve probabilistic judgments.<sup>176</sup> As a result, *Chevron* step one is prone to inconsistent treatment. Justice Breyer’s approach is one that recognizes that clarity and ambiguity are matters of degree. In looking to the importance of the issue and its centrality to the statutory scheme or conversely to its ties to routine administration, Breyer is employing factors that point in a given direction. These factors combine with others, such as the length of time that the agency has adhered to its interpretation, the consideration it has given to

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176. See *supra* note 73 and accompanying text.

the issue, and the agency's expertise, as pointers. Most of the time these factors will reinforce the indications of the major/minor issue dichotomy, but not always. Breyer's process is one of weighing and judging: exactly the kind of process needed in an environment of multiple indicators. When the term at issue affects our basic understanding of the statute, we may prefer a judicial resolution, even as we admit that the term is not without ambiguity. Taking this approach might even foster more consistency among the courts, because judges would no longer be obliged to pretend that ambiguity did not come in shades. They could forthrightly explain how they assessed the factors indicative of an ambiguity and why they chose to resolve the ambiguity themselves or to refer it to the agency for resolution. The list of factors that Breyer has identified would probably be helpful to them, channeling their analysis along the lines of other judges confronting similar problems. *Barnhart* opens the way for judges to be honest in dealing with statutory ambiguities.

Second, Breyer's approach would allow courts openly to exercise judgment. Of course, courts always exercise judgment, but past approaches to *Chevron* tended to deny this obvious truth. Judges were supposed to determine whether congressional intent was "clear." If the intent was ambiguous, then the judges were required to refer the interpretive issue to the agency. Breyer's approach would allow courts to make judgments about the propriety of referring such an issue to an agency, considering the centrality of that issue to the statute, its importance, its relation to the issues of administration, the need for expertise, and like factors.

Third, Breyer's approach exploits the respective institutional competences of courts and agencies. His approach is keyed to according deference in the routine and less important issues that are the substance of agency workload and where the agency is likely to identify the relevant factors through its experience in administering its statutory program. By contrast, Breyer would find less of an obligation to defer where the issues are larger, less technical, and less routine. Optimal resolution of the latter kind of interpretive issue may require the broad perspectives of the judiciary. In the absence of direct evidence of congressional intent, allocating the interpretive task to the institution best equipped to handle it appears superior to a practice of allocating that task invariably to the administering agency.<sup>177</sup>

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177. Both the traditional approach to *Chevron* and Breyer's revisionist approach are broadly consistent with minimizing the impact of interest groups upon the law and its administration. Interest groups exert their maximum force in two circumstances: (1) when they are able to influence a sufficient number of legislators to block proposed legislation; and (2) when they are able to secure modifications of legislation by trading their support for the desired modifications. The setting for these circumstances is in the legislative process. Under the original version of the *Chevron* doctrine, courts would enforce the legislative

Finally, as observed above, the *Barnhart* opinion cannot be evaluated in isolation. We have already noted how it can be understood in relation to *Mead*. Now it remains to be seen how Justice Breyer's *Barnhart* opinion relates to other recent decisions of the Court. We continue with an examination of *Alaska Department of Environmental Conservation and Brand X*.

*D. Understanding Chevron, Mead, and Barnhart  
in their Historical Contexts*

*1. The Role of Elastic (or Ambiguous) Statutory Terms*

When the Court recognized an extensive scope for an agency's interpretive authority coincident with open-textured or elastic statutory terms in its *Chevron* decision, it did so at a time when rulemaking had become the primary mode of regulation. This was not surprising, since Congress has employed open-textured and elastic statutory terms as a means for conferring broad authority on regulatory agencies commensurate with the scope of the tasks assigned to them throughout the history of modern regulation. The Court did so during the middle years of the last century when adjudication was the primary means to carry out regulation, and it continued to do so when rulemaking became the primary means to carry out regulation.

*2. The Contribution of Mead to a Proper Understanding of Chevron*

Under the mid-century deference cases, courts were required to defer to agency determinations about how to apply ambiguous or elastic statutory terms in adjudications. That deference was concomitant with the agency's delegated responsibility to administer. Thus, deference was coincident with the agency's exercise of its administrative role.

The *Chevron* formulation of judicial deference initially was phrased in terms of the presence or absence of textual ambiguity. In *Chevron* itself, such a textual approach was adequate to uphold the EPA's interpretation because the relevant statutory term was ambiguous, and the EPA's interpretation emerged in its attempt to foster the installation of plants and

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deals that result from interest-group bargaining only to the extent that they are unambiguous, leaving all ambiguities to be resolved by the Executive Branch (broadly defined to include the independent agencies). The Executive appears to be somewhat less vulnerable to interest-group influences than members of Congress. Nonetheless, agencies, and especially independent agencies, may be vulnerable to interest-group influence exercised through members of Congress on oversight and appropriations committees. By contrast, the Breyer revision allows courts a greater role in resolving ambiguities in the original deal. Since courts can examine statutes objectively, their interpretations will not be skewed by interest group concerns.

equipment incorporating cleaner technologies, an attempt that lay close to the center of its regulatory responsibilities. *Mead*, however, was an important step on the path towards the articulation of the proper sphere for mandatory judicial deference. Indeed, if, as suggested above, the *Chevron* doctrine is a modern analogue to the *Hearst/Packard* doctrine, requiring courts to defer to agency interpretations exercising authority that Congress has conferred upon them, then *Mead*'s analytical steps follow. First is the question of whether Congress has conferred interpretive power on the agency. We can answer this in the affirmative when we find that Congress has conferred adjudicative or rulemaking power on the agency. (Observe that this issue was always implicit in the *Hearst/Packard* cases: Congress had necessarily conferred adjudicatory power on the agencies whose adjudicatory decisions were under review.) The second question is whether the agency exercised that power in issuing the interpretation under review. Again, an affirmative answer follows when the agency has issued its interpretation in an adjudication or in a rulemaking proceeding. Those are the most formal ways available to an agency to exercise its delegated interpretive power. They bring the full decision-making competence of the agency to bear on the interpretive issue. In addition, they incorporate critical input from outside the agency. In Justice Souter's phrase, these procedures tend "to foster the fairness and deliberation" on which agencies' exercise of their interpretive authority should be based.

### 3. *Step Zero and the Viewpoints of the Justices*

Justice Scalia's view that judicial deference should be accorded to all "authoritative" interpretations of an agency is not so far from a position that would require mandatory deference to agency interpretations that were part of decision-making by the highest echelons of the agency in the process of administering the regulatory scheme committed to its charge. As we know, Scalia would extend the obligation to defer to agency interpretations emanating from agency actions that are less structured than adjudication or notice-and-comment rulemaking. But even Scalia would require involvement by the agency head before he would be willing to view an interpretation as authoritative. We have observed above that Justice Souter's emphasis on rulemaking and adjudication as bases for agency interpretations meriting mandatory deference echoes the approaches employed in the mid-century deference cases. In both lines, deference is accorded to agency interpretations that issue from highly-structured agency procedures forming the core of its administrative tasks. Breyer takes a somewhat more flexible position, viewing adjudication and rulemaking as important indicators of mandatory deference, although he—like Justice Souter—seems willing to find deference required in other circumstances as

well when it appears that the agency is employing the interpretive power Congress conferred upon it. In summary, Souter and Breyer share with Scalia an understanding that “authoritative” interpretations merit judicial deference; they differ over the circumstances in which they are willing to find an authoritative interpretation. Justice Souter’s reference to adjudication and rulemaking as indicators of mandatory deference resonates with the message of the mid-century deference cases that courts should defer when a regulatory agency is engaged in the core act of regulating.

#### 4. *The Force of Law Criterion*

In the discussion above, it was said that agencies engaged in rulemaking or adjudication are engaged in core acts of regulating. It was also said that modern agencies engaged in rulemaking are acting analogously to the way traditional regulation was effectuated through adjudicating. This is the “force of law” criterion as the Court has employed it. Force of law is not an Austinian concept, as Thomas Merrill believes. Rather, as applied to agency interpretations, it is equatable with those interpretations that the agency makes in the process of performing its core regulatory tasks. Understood in this way, agency interpretations that merit mandatory deference under *Chevron* are analogous to the agency interpretations that traditionally merit judicial deference under the mid-century deference cases, such as *Hearst* and *Gray*.

#### 5. *Barnhart*

The passage in *Barnhart* in which Justice Breyer suggested that the interstitial nature of the legal question, the agency’s expertise, the importance of the question to administration, and the long consideration the agency has given to the issue were factors indicating that judicial deference under *Chevron* was appropriate and can be understood as suggesting that the scope of *Chevron* and that of *Skidmore* overlap to some extent. Most administrative law scholars recognize that the indicators of *Chevron* deference often point in the same direction as do the indicators of *Skidmore* deference.

Again, Justice Breyer’s language in *Barnhart*—especially his reference to the “interstitial nature” of the legal question—can also be understood as suggesting that the factors that he mentioned are relevant in analogizing the respective interpretive roles of courts and agencies in modern contexts to their roles as elaborated in the mid-century deference cases. When these factors are indicative of an agency grappling with an interpretive issue lying at the core of its regulatory task, final interpretive authority lies in the agency. This is what the mid-century deference cases were about. Yet



those mid-century deference cases also firmly confirmed the responsibility of the courts to enforce the ultimate boundaries of agency authority and thus, to construe the statutory terms that marked the outer limits of that authority. The focus, as observed in the discussion above,<sup>178</sup> is not on “jurisdiction,” at least in the ordinary sense of the term, because jurisdictional issues can vary widely in their importance and in the degree to which they are bound up or entwined with everyday administration. Breyer is suggesting (in the passage under discussion) not only that *Chevron* deference is analogous to the judicial deference demanded by *Hearst*, *Gray*, and similar cases, but also that courts are the ultimate interpreters of the boundaries of agency authority. Cass Sunstein has called this passage in *Barnhart* an “extraordinary triumph” for Justice Breyer,<sup>179</sup> but this reading of the events misses the analogies between *Chevron* and the earlier deference cases. Once those analogies are understood, then both *Barnhart* and *Mead* are seen to reflect deference standards that have always been latent in the cases.

E. Alaska Department of Environmental Conservation  
and Brand X as the Completion of the  
Late Twentieth/Early Twenty-First Century Model

In its 2004 decision in *Alaska Department of Environmental Conservation v. EPA*,<sup>180</sup> the Court provided another critical component for its new deference model. In that case, a zinc mining company was seeking necessary regulatory approval for increased electric generation in conjunction with the expansion of its mine.<sup>181</sup> The mine was located in an area designated as “unclassifiable” for purposes of the Clean Air Act’s “prevention of significant deterioration” program.<sup>182</sup> Because the generators were expected to emit significant amounts of nitrogen oxides, the mining company was required to seek a permit from the Alaska department of Environmental Conservation.<sup>183</sup> For pollutant-emitting facilities constructed in unclassifiable areas, the Act imposes a requirement that the company install “best available control technology” (BACT) on those facilities as a precondition for a permit. The Alaska department issued the desired permit but authorized the company to proceed with control technology that reduced emissions by 30% instead of alternative technology that would reduce those emissions by 90%.<sup>184</sup> The EPA then

178. See *supra* notes 151-55 and accompanying text.

179. Sunstein, *Chevron Step Zero*, *supra* note 74, at 217.

180. 540 U.S. 461 (2004).

181. *Id.* at 474-75.

182. *Id.* at 471, 474-75.

183. *Id.* at 472.

184. *Id.* at 475.

determined that the Alaska department's decision was "both arbitrary and erroneous" and issued a series of orders that barred construction of the facility unless the Alaska department made a satisfactory case that it had correctly determined the BACT requirements.<sup>185</sup>

In the litigation that followed, both the mining company and the Alaska department contended that the EPA lacked authority under the Clean Air Act to review the reasonableness of the state agency's determination of BACT compliance under the Act. The EPA construed the Act's provisions as requiring that the state agency make its BACT determinations in a manner "faithful to the statute's definition" (and thus, in effect, to require use of the more effective technology) and that the Act's oversight provisions conferred on it the authority to "ensure that a State's BACT determination is reasonably moored to the Act's provisions."<sup>186</sup> The EPA prevailed on these points in both the Ninth Circuit and in the Supreme Court.

Justice Ginsburg's majority opinion held that because the EPA's interpretation was contained in internal guidance memoranda, it was not entitled to *Chevron* deference. Nonetheless, her opinion upheld the EPA's position, and much (but not necessarily all) of her language suggested that the court was allowing the EPA interpretation to prevail without incorporating the EPA interpretation into a judicial construction of the statute, as would have been expected under the traditional *Skidmore* format. The EPA interpretation was "permissible" without necessarily being a required interpretation. Thus, she wrote: "We hold . . . that the Agency has rationally construed the Act's text and that EPA's construction warrants our respect and approbation."<sup>187</sup> In rejecting the Alaska department's contention that the Act failed to confer reviewing authority on the EPA, Justice Ginsburg stated that: "[The Alaska Department of Environmental Conservation's] arguments do not persuade us to reject as impermissible EPA's longstanding, consistently maintained interpretation."<sup>188</sup> Later, Justice Ginsburg made this point again. Referring to the EPA's interpretation, she wrote: "That rational interpretation, we agree, is surely permissible."<sup>189</sup>

Thus, Justice Ginsburg's majority opinion treats the agency interpretation as not qualified for *Chevron* deference, but nonetheless accepts it. Although she is apparently accepting the agency interpretation under *Skidmore*, Justice Ginsburg is not following the *Skidmore* rubric as

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185. *Id.* at 480.

186. *Id.* at 485.

187. *Id.*

188. *Id.* at 488.

189. *Id.* at 493.

commonly understood. Under *Skidmore*, the court accepts the agency interpretation if it finds it persuasive. If the court finds the opinion persuasive and follows it, then the interpretation is the court's and not the agency's. Here, however, the Court repeatedly refers to the agency's interpretation as permissible and/or rational. As Justice Kennedy points out in dissent, although the majority opinion rules that *Chevron* is inapplicable, it nonetheless employs "*Chevron's* vocabulary." Kennedy then complains that: "In applying *Chevron de facto* under these circumstances . . . the majority undermines the well-established distinction our precedents draw between *Chevron* and less deferential forms of judicial review."<sup>190</sup>

Justice Ginsburg's majority opinion, however, may have been doing something slightly different from what Justice Kennedy was claiming. By explicitly disavowing *Chevron's* application, she had placed the deference issue within the scope of *Skidmore*. However, by accepting an agency interpretation that she considered to be "permissible" rather than correct, she was suggesting the possibility of adding an element of flexibility to *Skidmore*. In so doing, she was coming close to meeting Justice Scalia's concern, expressed in his *Mead* dissent, that a judicial interpretation of a term before the agency has interpreted it in a manner entitled to *Chevron* deference would bar that agency from ever reaching its own inconsistent interpretation. Were she to have upheld the EPA's interpretation simply as permissible, Justice Ginsburg would have avoided a definitive interpretation of the provisions of the Clean Air Act at issue, thereby leaving the EPA free to formulate its own interpretation at a subsequent time in rulemaking proceedings that would qualify for *Chevron* deference.

Although Justice Ginsburg's opinion contains all of the above elements, it is more complex. Her opinion also employed language indicating that the Court itself was construing the relevant provisions of the Clear Air Act: "We credit EPA's longstanding construction of the Act and confirm EPA's authority . . . to rule on the reasonableness of BACT decisions by state permitting authorities."<sup>191</sup> Continuing, "we conclude that EPA has supervisory authority over the reasonableness of state permitting authorities' BACT determinations . . ."<sup>192</sup> Thus Justice Ginsburg uses *Chevron*-like language referring to the agency's interpretation as permissible, while also employing the very different language of independent judicial interpretation. Why was she combining language from these apparently alternative approaches? Perhaps she is signaling that independent judicial interpretation blends into *Skidmore* deference and the latter into *Chevron* deference. Justice Breyer's opinion in *Barnhart*

190. *Id.* at 517-18 (Kennedy, J., dissenting).

191. *Id.* at 495 (majority opinion).

192. *Id.* at 502.

suggests a significant overlap between and among completely independent judicial interpretation, *Skidmore* deference, and *Chevron* deference. Justice Ginsburg may have intended to lend additional support to that position.

Two years before the decision in *Alaska Department*, the Court decided *Edelman v. Lynchburg College*,<sup>193</sup> a case involving an interpretation of the EEOC embodied in a regulation. As in *Alaska Department*, the Court ruled that the agency's interpretation was both reasonable and one that the Court "would adopt even if there were no formal rule and we were interpreting the statute from scratch."<sup>194</sup> Thus, according to the Court, "there is no occasion to defer and no point in asking what kind of deference, or how much."<sup>195</sup>

Perhaps *Alaska Department* falls into the decisional framework of *Edelman*. In both cases, the agency interpretation was "reasonable" or "permissible." In both cases, the Court interpreted the disputed statutory provisions, arriving at an interpretation that was the same as the agency's. The Court told us that *Chevron* deference was not involved in the *Alaska Department* case, although it used *Chevron*-like language. In *Edelman*, although the Court arrived at the same interpretation as the agency, it also denied that it was ruling that the agency's interpretation was the only one permissible. *Edelman* thus implies that the agency might well change its interpretation, even though the Court had already adopted its own interpretation, and that *stare decisis* might not bar a later inconsistent agency interpretation. Justice Ginsburg's opinion in *Alaska Department* suggests a similar result: the agency interpretation is permissible, the Court is adopting the same interpretation, but the Court's reference to the "permissibility" of the agency interpretation could be taken as implying that the agency may well be within its rights to change that interpretation in the future.

These two cases presage the developments in *Brand X* in 2005.<sup>196</sup> A narrow reading of *Edelman* merely suggests that because the Court arrived at the same interpretation as the agency, there was no need to resolve deference issues. A broader reading of *Edelman* suggests that a later agency interpretation can undo a judicial interpretation of a statutory term.

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193. 535 U.S. 106 (2002).

194. *Id.* at 114. *But see* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (deciding there was no need to consider issues of deference because the agency interpretation was clearly wrong). *General Dynamics*, however, differs from *Edelman* because when a court adopts an interpretation identical to the agency's, it need not decide whether the agency possesses final interpretive authority on that issue, whereas when a court rejects an agency's interpretation, the court is ruling that the agency lacked power to adopt such an interpretation.

195. *Edelman*, 535 U.S. at 114. The Court also stated that "We, of course, do not mean to say that the EEOC's position is the 'only one permissible.'" 535 U.S. at 114 n.8.

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

A broad reading of *Alaska Department* applies the latter model to the *Skidmore* context: judicial and agency interpretations can coincide, but a subsequent agency interpretation can supersede the current one. In that event, the court may well enforce a permissible agency interpretation that differs from the court's own.

Justice Ginsburg, however, appears to have been doing something more than merely preserving the agency's ability to invoke the *Chevron* doctrine in support of subsequent rulemaking. She was crafting a model in which judicial deference to an agency interpretation would not deprive the agency of the flexibility to reexamine its position, regardless of whether the deference occurred in a *Skidmore* or a *Chevron* context. Indeed, from this perspective, *Alaska Department* can be considered a precursor of—and a conceptual companion to—*Brand X*, since the concerns that appear to have underlain Justice Ginsburg's *Alaska Department* opinion were then addressed directly in Justice Thomas' *Brand X* opinion the following year, but in a *Chevron* (not *Skidmore*) context.

In *Brand X*,<sup>197</sup> the Court was confronted with a situation in which the Federal Communications Commission (FCC) had construed the term "telecommunications service" in the Telecommunications Act of 1996 as not including the provision of broadband internet service by cable companies. This interpretation freed the cable companies from the mandatory common-carrier regulation that the Act imposes upon all providers of telecommunications service. The FCC adopted its interpretation in a Declaratory Ruling, issued in March 2002, after notice-and-comment proceedings. The Ninth Circuit, however, vacated the Declaratory Ruling on the ground that the FCC's interpretation was inconsistent with that court's own earlier construction of "telecommunications service" in *AT&T Corp. v. Portland*,<sup>198</sup> a case in which the FCC was not a party.

In the majority opinion, written by Justice Thomas, the Court ruled that Congress entrusted the FCC with the administration of the legislation and that the statutory term in issue was ambiguous. *Chevron* therefore required the courts to accept the FCC's interpretation, so long as it lay within the bounds of reasonableness. On the critical issue involving the appellate court's own prior interpretation of the same term, the Court ruled that the FCC's interpretation prevailed, even if it was issued after the court had issued its own inconsistent prior interpretation.

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197. *Id.*

198. 216 F.3d 871 (9th Cir. 2000).

As Justice Thomas wrote, the Ninth Circuit's prior interpretation resolved a statutory ambiguity to the best of that court's ability. It may have been the "best" interpretation of the term, but it was not the only reasonable interpretation. So long as alternative interpretations were possible, the choice of how to interpret the statutory term would lie with the FCC. The court's interpretation was not "wrong." Rather, the agency—as the authoritative interpreter—was free to adopt a different interpretation.<sup>199</sup>

*Brand X* thus explicitly eliminates the hazard that troubled Justice Scalia in his *Mead* dissent. The fortuities of when an interpretive issue reaches a court will have no effect on the extent to which an agency is free to formulate its own interpretation. It recognizes the historic role that administering agencies have played in the development of policy. *Chevron* recognized that role, requiring courts to defer to agency interpretations, including those that were widely applicable, just as *Gray*, *Hearst*, and *Aragon* required courts to defer to agency applications of statutory terms to particularized sets of facts at mid-century. The agency's role as the authoritative interpreter—both before and after interpretive issues come before a court—thus brings the current paradigm of agency/court interaction closer to completion.

Justice Thomas explained away the cases that troubled Justice Scalia in his *Mead* dissent—*Neal*, *Maslin Industries*, and *Lechmere*—in terms of *Chevron* step one.<sup>200</sup> A court's determination of whether the statutory term is ambiguous always prevails. If the court determines that the statute is unambiguous, then there is no room for a different agency interpretation. But if a court determines that the statute is ambiguous, then—within the limits of the ambiguity—the agency is the authoritative interpreter. *Neal*, *Maslin Industries*, and *Lechmere* required that the agency abide by the court's prior interpretation, because in those cases the court had determined that the statute was unambiguous. They disposed of the interpretive issue in step one. By contrast, the judicial interpretation involved in the *Brand X* case was taken as not having decided that only one interpretation was reasonable. There was, accordingly, room for an agency determination within the bounds of reasonableness provided by the statute.

The technique adopted by the Court in *Brand X* could appropriately be described as an endorsement of a theory of provisional precedent, as applied to judicial interpretations of terms contained in an agency's organic

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199. *Brand X*, 545 U.S. at 979-80.

200. *See id.* at 984; *see also supra* note 98.

statute. Justice Scalia condemned that theory in his *Mead* dissent.<sup>201</sup> Professor Bamberger proposed such an approach in 2002, the year after the *Mead* decision, drawing an analogy to the provisional nature of federal court precedents construing state law.<sup>202</sup> Relying upon the analytical framework underlying the arbitrary and capricious review standard, Professor Richard Murphy made a slightly different proposal designed to allow reviewing courts to uphold agency interpretations at variance with judicial precedent.<sup>203</sup> These proposals reflected a widespread concern over the troublesome relation between *Chevron*'s call for agency flexibility and the doctrine of stare decisis, a relation that—as Justice Scalia pointed out—*Mead* appeared to worsen. In the end, however, the Court effectively adopted Bamberger's proposal, albeit without referring to him.

*Brand X* casts light not only on the agency flexibility issue highlighted by Justice Scalia's dissent in *Mead*, but also on the approach that Justice Breyer explicated in his *Barnhart* opinion. When Breyer brought the mid-century deference cases into the *Chevron* framework, he was not only offering a new framework for assessing the extent of the judicial obligation to defer, but also addressing Scalia's concern about preserving agency flexibility. When the Court insisted in its mid-century deference cases (*Hearst*, *Gray*, *Aragon*) that deference was due to the administering agency's applications of broad statutory terms, it was also implicitly recognizing agency flexibility. In those earlier deference cases, the judicial obligation to defer was cast in the language of "fact": courts were to defer to agency determinations of (ultimate) fact. Moreover, because facts varied with each case, the scope provided for agency flexibility over how to apply the statute was wide indeed. Nothing in these cases barred an agency from revising or modifying its interpretation, either from case to case, or from year to year.

The agency flexibility that Justice Thomas' *Brand X* opinion provides under *Chevron* confirms and reinforces the agency flexibility that *Alaska Department* had brought into the *Skidmore* context. Each of these decisions seems to recognize an area in which agency interpretations play important roles. *Brand X* concedes to agencies' scope revision of their interpretations within the area allocated to them under *Chevron*. *Alaska Department* anticipated *Brand X*'s route to preserving agency flexibility, when Justice Ginsburg employed the agency interpretation in her decision without incorporating it into a judicial precedent. Perhaps more important,

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201. *United States v. Mead Corp.*, 533 U.S. 218, 247-50 (2001) (Scalia, J., dissenting) (arguing that such an approach would "be a landmark abdication of judicial power" and "worlds apart from *Chevron*").

202. Bamberger, *supra* note 99.

203. Murphy, *supra* note 99.

*Alaska Department* provides a new format for courts to follow in applying *Skidmore*: courts need not adopt an agency interpretation to apply it. By finding the agency interpretation worthy of “respect,” they can employ that interpretation without necessarily embracing it themselves. *Brand X* adds the gloss that even if the court explicitly adopts the agency interpretation, that judicial decision will not bind the agency thereafter unless the court decides that its interpretation is the only possible one.

Let’s now review how the several recent *Chevron* cases relate to each other and to the *Chevron* doctrine as a whole. *Mead* tells us that there are indeed limits to the judicial obligation to defer. In *Mead*, the Court ruled that the thousands of customs classifications rulings did not command mandatory deference. This result seems fore-ordained. Because of their volume, no customs classification ruling can be assumed to embody the considered policy of the Bureau of Customs. There are too many rulings to involve the Commissioner or his close assistants in each ruling. And the speed with which the rulings are issued appears inconsistent with high-level consideration of their content. Accordingly, the Court appears to have taken the right approach when it denied mandatory deference, but suggested that it would be appropriate for a court to follow a ruling if it found its rationale persuasive. When *Mead* indicated that the mandatory deference of *Chevron* would apply to agency interpretations announced in adjudications or rulemaking proceedings, it may be suggesting that interpretations arising in those contexts would receive substantial consideration. Indeed, in both contexts, the interpretive issue would be addressed by interested parties outside the agency, who would then press the agency to consider the ramifications of its decision.

*Barnhart* added the gloss to *Mead* that interpretive issues entwined with administration were prima facie more entitled to deference than issues involving the principal parameters of the statute. For reasons already discussed, this gloss helps to complete *Mead*’s directions in cases involving agency interpretations issued outside the context of rulemaking or adjudication. *Barnhart*’s gloss can also be extended beyond this narrow application, as a further limitation on *Chevron*’s mandatory deference. Understood in this latter way, major issues of statutory interpretation would remain a judicial responsibility, even if the agency had formulated its own interpretation in rulemaking or in an adjudication. This broad application of *Barnhart* seems consistent with an allocation of decision-making based upon institutional competence as well as upon what most members of Congress would likely intend, were the issue called to their attention.

Under the approach just described, the persuasive deference of *Skidmore* and the mandatory deference of *Chevron* blur together. The rulings of *Mead* did not warrant mandatory deference because it was not clear that



they embodied careful consideration at the highest agency levels. Each ruling, however, would be a candidate for persuasive deference, based upon its own intrinsic merits. Adjudication and rulemaking raise presumptions of careful consideration at the highest agency levels. On interpretations affecting the major contours of a regulatory program, the courts, whose broad perspectives provide them with superior institutional competence, should bear the ultimate interpretational responsibility. In performing this task, however, they should assess agency interpretations for their persuasiveness.

The blurring of *Skidmore* and *Chevron* would have generated serious administrative problems during the era when agency interpretations could be revised under *Chevron*, but could be frozen when a court, deferring under *Skidmore*, adopted the agency interpretation as its own. *Alaska Department of Environmental Conservation*, however, has shown that a court can defer under *Skidmore* without adopting the agency's interpretation as its own. Moreover, *Brand X* has shown that even when a court does interpret a statute, it need not foreclose the agency from subsequently adopting a different one. These two cases have removed the primary obstacle to a blurring of *Skidmore* and *Chevron* into a larger deference format, in which each of these decisions, rather than competing for application, now reinforce one another.

#### CONCLUSION

A new model for judicial review of agency interpretations seems to be emerging. That model is one in which the mandatory obligation to defer, set forth in *Chevron*, is limited. Analogous to the cases that have required judicial deference to agency applications of broad statutory terms, the deference obligation is most clear when the agency interpretation is entwined with routine matters of administration. The obligation becomes less mandatory as the interpretation at issue plays a critical role in determining the outlines of the statutory scheme. The new model eschews bright line boundaries for the application of mandatory deference. Rather, the new model provides workable criteria for assessing the obligation to defer. The obligation (or lack of it) is clear enough at the ends of that spectrum, while in its middle ranges, contextual judgment is required to assess the presence of an obligation to defer.

The new model retains and extends the agency flexibility over policy that had been a hallmark of the *Chevron* doctrine. Although this new model restricts the scope of *Chevron*'s application, it allows greater freedom to agencies to formulate their own statutory interpretations and to revise them than did the earlier law. Even in the heyday of *Chevron*, it had been thought that a prior judicial interpretation foreclosed a later

inconsistent agency interpretation. Moreover, *Skidmore* had seemed to imply that when a court deferred to an agency interpretation that it found persuasive, that interpretation was no longer subject to agency revision. Now, agencies need not fear a loss of flexibility when a court is persuaded by the agency's interpretation. Indeed, *Alaska Department* suggests that a proper judicial stance in a *Skidmore* situation is not to adopt a persuasive agency interpretation but merely to accord it respect. Step one from *Chevron* appears to have been extended to *Skidmore* review. And issues of timing no longer pose a threat to agency flexibility. That a court formulates its own interpretation of a statutory term (that is ambiguous in the *Chevron* step one sense) does not detract from the agency's ability later to issue its own interpretation.

The complaint, voiced by some, that Justice Breyer is blending *Skidmore* and *Chevron*, is losing its force. Indeed, Justice Kennedy made a similar complaint about Justice Ginsburg. It would have been important to maintain the boundaries between *Skidmore* and *Chevron* when *Chevron* deference was mandatory; *Skidmore* deference depended on the persuasiveness of the agency's reasoning, and *Chevron* was the primary source for agency flexibility to revise its interpretation. *Alaska Department of Environmental Conservation* and *Brand X* have recast the law governing agencies' abilities to revise their interpretations. As a result, *Skidmore* and *Chevron* are emerging as component parts in a larger deference framework, one in which the respective roles of these precedents overlap, in which both *Skidmore* and *Chevron* partially reinforce each other, and in which ultimate interpretive authority is based upon institutional competence.

# THE THIRD ANNUAL DISTINGUISHED LECTURE ON ADMINISTRATIVE LAW AND REGULATORY PRACTICE

## THE NEED FOR OVERSIGHT OF AGENCY POLICIES FOR SETTLING ENFORCEMENT ACTIONS

RICHARD M. COOPER\*

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### INTRODUCTION

The vast majority of enforcement actions by federal agencies against public companies and other major institutions in our society end in settlements, not in contested proceedings. Enforcement officials develop policies of general applicability and standard forms of agreement for shaping such settlements. Although there is some tailoring of agreements

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to the facts and circumstances of individual cases, enforcement officials generally demand—and obtain—settlement agreements that contain certain types of provisions dictated in advance by their enforcement policies and forms of agreement.

Such provisions can be quite onerous; for example, they can require payment of hundreds of millions of dollars and significant changes in organizational operations. Yet, enforcement officials adopt their settlement policies and forms of agreement without notice-and-comment rulemaking, or any other opportunity for public participation in their formulation. The officials implement these policies in case-by-case agreements without judicial review. Some kind of effective and independent review is needed. That review should be provided by administrative oversight, and, better yet, by congressional oversight.

Enforcement policies are exempt from the Administrative Procedure Act's requirement of notice and comment.<sup>1</sup> In my experience, it is not the general practice of agencies voluntarily to subject their enforcement policies or forms of agreement for settling enforcement actions to any formal (or even informal) public process for scrutiny and comment. Except in rare circumstances, such as the outpouring of opposition to the demands by the Department of Justice (DOJ) for waivers of the corporate attorney-client privilege as part of settlements of criminal investigations, private parties not actually involved in an investigation or other enforcement proceeding generally do not comment on such policies and forms of agreements.

Although under presidential executive orders, some administrative review of major actions by executive branch agencies occurs, as far as I am aware, such review has not extended to general enforcement policies or the terms of settlement agreements. Generally, within regulatory agencies, senior enforcement officials and lawyers, not the most senior officials with agency-wide responsibilities beyond enforcement, perform the internal review of enforcement matters—including review of general policies and forms of agreement and settlement terms in individual cases.

This paper will focus on three types of agreements that federal agencies use to settle potential enforcement actions against public companies and other types of institutions. The first consists of non-prosecution and deferred-prosecution agreements entered into by the U.S. Attorneys' Offices, the Criminal Division in the DOJ, and occasionally other Divisions in the DOJ. The second includes agreements for consent decrees entered into by the Food and Drug Administration (FDA). The third includes

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1. 5 U.S.C. § 553(b)(A) (2000).

corporate integrity and institutional compliance agreements entered into by the Office of Inspector General in the Department of Health and Human Services (OIG).

Many other federal agencies with enforcement authority close investigations with settlement agreements. The issues raised by the examples discussed here may be similar to those raised by the settlement policies of other agencies as well.

#### I. DOJ NON-PROSECUTION AND DEFERRED PROSECUTION AGREEMENTS

The DOJ's Principles of Federal Prosecution provide that a non-prosecution agreement is essentially a grant to a party of immunity from prosecution in return for the party's cooperation in furthering the prosecution of some other party or parties.<sup>2</sup> The cooperation an organization can provide may include, in addition to production of documents, information learned in an internal investigation protected by the organization's attorney-client privilege, and information about possible crimes unknown to the government, and by placing pressure on the organization's employees to cooperate with prosecutors. Receiving the results of such internal investigations is particularly valuable to prosecutors because it effectively expands their investigative resources.

One example of a non-prosecution agreement with a business organization is a settlement in June 2006 that resolved an investigation by the Office of the U.S. Attorney for the Southern District of New York of an Austrian bank known as "BAWAG P.S.K."<sup>3</sup> The bank agreed to forfeit to the United States \$337.5 million to be used to compensate claimants in the Refco matter.<sup>4</sup> The DOJ press release stated that BAWAG and its parent company would pay "at least \$675 million in connection with the non-prosecution agreement and to settle . . . [certain] claims against them."<sup>5</sup>

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2. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.600 (2007), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.600](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.600).

3. See Press Release, Office of the U.S. Attorney for the Southern District of New York, Austrian Bank "BAWAG" To Pay \$337.5 Million For Restitution to Victims of Refco Fraud (June 5, 2006), available at <http://www.usdoj.gov/usao/nys/pressreleases/June06/bagwagnon-prosecutionagreementpr.pdf> [hereinafter BAWAG Press Release] (noting the government's use of a non-prosecution agreement in settling the case).

4. For a summary of the Refco matter, see Emily Thornton, *Commentary: Refco: The Reckoning*, BUS. WK, Nov. 7, 2005, available at [http://www.businessweek.com/magazine/content/05\\_45/b3958095.htm](http://www.businessweek.com/magazine/content/05_45/b3958095.htm). See also *Ex-Owner at Refco Charged in Fraud Case*, N.Y. TIMES, Jan. 17, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0DE2D61030F934A25752C0A9619C8B63>.

5. BAWAG Press Release, *supra* note 3, at 1.

The bank and its parent had provided “full cooperation with [the government’s] investigation” and they agreed “to continue that cooperation in the future.”<sup>6</sup>

A deferred prosecution is one in which, pursuant to a written agreement, the government files criminal charges but, with the approval of the court, agrees to defer proceedings on the charges for a specified period (commonly twelve, eighteen, twenty-four, or thirty-six months). During the deferral period, a defendant is to fulfill certain commitments stated in the agreement. If, at the end of the deferral period, the defendant has fulfilled all of those commitments, the charges are dismissed.

Deferred prosecution agreements began as a means of avoiding prosecution of individuals by deferring the filing or processing of criminal charges so as to give the individuals an opportunity to show that they had reformed. Such arrangements commonly included social services to promote reform and sometimes included restitution by the defendant to victims. In the mid-1990s, and much more frequently during the last several years, the DOJ has extended the technique, with modifications, to public companies and other institutions.

A deferred prosecution agreement commonly includes provisions in which an organization:

- accepts and acknowledges its responsibility for the conduct described in an appended statement of facts, which the organization agrees not to contradict in any public statement (the statement of facts amounts to an admission of all the elements of the crimes alleged in the complaint or information [filed in court with the deferred prosecution agreement]);
- agrees to cooperate fully in the ongoing investigation(s) relating to its conduct, including waiver of the organization’s attorney-client privilege and work product protection;<sup>7</sup>
- agrees not to commit further violations during the deferral period;
- agrees to provide specified compensation to victims and/or to pay to the government a specified amount as a penalty;

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6. *Id.* at 3.

7. It remains to be seen whether, and to what extent, the DOJ policy of obtaining waivers of the organizational attorney-client privilege in deferred prosecution agreements will change as a result of the Memorandum issued by Deputy Attorney General Paul J. McNulty on December 12, 2006, to replace the Thompson Memorandum. See Memorandum from Paul J. McNulty, Deputy Attorney General, Dep’t of Justice, to Heads of Department Components and U.S. Attorneys (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speeches/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf) [hereinafter McNulty Memorandum]; Memorandum from Larry D. Thompson, Deputy Attorney General, Dep’t of Justice, to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf) [hereinafter Thompson Memorandum].

- agrees to implement specified remedial actions (in addition to those already implemented) to prevent future violations, including measures affecting organizational governance and compliance with applicable laws, and engagement of an independent examiner or monitor with wide-ranging authority to assess compliance with the agreement and applicable laws and to issue reports thereon to enforcement agencies; and
- agrees that, if the government initially determines that the organization has committed a willful material breach of the agreement, the government will notify the organization in writing of that determination, the organization will have two weeks to show that no such breach occurred, and the government's final determination as to breach shall not be reviewable by any court.<sup>8</sup>

An example of a deferred prosecution agreement is one in 2005 that resolved a criminal investigation of Bristol-Myers Squibb Company (BMS) by the Office of the U.S. Attorney for the District of New Jersey.<sup>9</sup> BMS agreed to be charged with securities fraud and to pay \$300 million to compensate shareholders (beyond the \$539 million it had already paid or committed to pay shareholders).<sup>10</sup> In a settlement with the Securities Exchange Commission (SEC), BMS had also previously agreed to pay a civil penalty of \$100 million and \$50 million to a shareholder fund.<sup>11</sup>

Under the BMS agreement, prosecution was deferred for twenty-four months.<sup>12</sup> The agreement described extensive remedial actions the company had already taken.<sup>13</sup> BMS further agreed, among other things, "to continue to cooperate fully" with the U.S. Attorney's Office and other governmental agencies conducting investigations, and to waive its attorney-client privilege and work-product protection as to requests by governmental investigators for information.<sup>14</sup> The company also agreed to significant organizational changes, including creating a non-executive chairman of its board of directors, adding a new independent director,

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8. The foregoing list is excerpted from Richard M. Cooper, *Deferred Prosecution: An Added Technique for Resolving Federal Criminal Investigations of Organizations*, BRIEFLY . . . PERSPECTIVES ON LEGISLATION, REGULATION, AND LITIGATION, Aug. 2006, at 11-12, which includes general discussions of non-prosecution and deferred prosecution agreements.

9. See Press Release, Office of the U.S. Attorney for the District of New Jersey, Bristol-Myers Squibb Charged with Conspiring to Commit Securities Fraud; Prosecution Deferred for Two Years (June 15, 2005), available at [http://www.usdoj.gov/usao/nj/press/files/bms0615\\_r.htm](http://www.usdoj.gov/usao/nj/press/files/bms0615_r.htm) [hereinafter Bristol-Myers Press Release]. For a copy of the Deferred Prosecution Agreement, see Deferred Prosecution Agreement between Christopher J. Christie, U.S. Attorney for the District of New Jersey, and Bristol-Myers Squibb Company (June 15, 2005), available at <http://www.usdoj.gov/usao/nj/press/files/pdf/files/deferredpros.pdf> [hereinafter BMS Agreement].

10. Bristol-Myers Press Release, *supra* note 9.

11. BMS Agreement, *supra* note 9, at 1-2, ¶ 5(b).

12. *Id.* at 1, ¶ 4.

13. *Id.* at 1-3, ¶ 5.

14. *Id.* at 8-9, ¶¶ 31, 32.

adding mandatory training programs for employees to foster compliance, and hiring an independent monitor to report to the government on its compliance with the agreement.<sup>15</sup> The agreement also included provisions as to internal meetings and reports involving the non-executive chairman of the board and provisions as to financial disclosures.<sup>16</sup>

As part of the price for avoiding prosecution, the company also agreed to endow a chair at Seton Hall University Law School, which happened to be the alma mater of the U.S. Attorney.<sup>17</sup> BMS further agreed that “the determination whether BMS has breached this [a]greement rests solely in the discretion of the [U.S. Attorney’s] Office, and the exercise of discretion by the Office under this paragraph is not subject to review in any court or tribunal outside the Department of Justice.”<sup>18</sup>

## II. FDA CONSENT DECREES

The Federal Food, Drug, and Cosmetic Act (FDCA) provides for a range of enforcement actions, including an injunction in federal district court.<sup>19</sup> A consent decree is an injunction to which the defendant consents. The FDA has no written statement of general policy for its consent decrees. Typically, it seeks an injunction or consent decree when multiple inspections of a manufacturing facility or other interactions between the agency and a regulated company show, in the agency’s view, continuing or seriously inadequate compliance with regulatory requirements. Common provisions of an FDA consent decree include:

- cessation of some or all shipments from the facility until an independent outside expert certifies, and an FDA inspection confirms, that the facility has achieved compliance with regulatory requirements;
- permission for the company to continue to ship “medically necessary” products, subject to payments to the government of amounts of money intended to deprive the company of any profit from the sale of such products until compliance is achieved;
- periodic reports by the outside expert to the company and to FDA on progress at the facility toward achievement of compliance;

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15. *Id.* at 1-2 ¶ 5(a), (d), (f), 3-4, ¶¶ 8-13, 5-6, ¶¶ 18-19.

16. *Id.* at 4, ¶ 13, 7, ¶ 25.

17. *Id.* at 6, ¶ 20; see *Big Pharma Gets Its Hooks Into Seton Hall Law School*, 21 CORP. CRIME RPTER. 19 (May 7, 2007), available at <http://www.corporatecrimereporter.com/setonhall050107.htm>.

18. BMS Agreement, *supra* note 9, at 10, ¶ 37.

19. The provision for injunctions is 21 U.S.C. § 332 (2000). See also *id.* § 333 (penalties), § 334 (seizure), § 335a (debarment, temporary denial of approval, and suspension), § 335b (civil penalties), and § 335c (withdrawal of approval of abbreviated drug applications).



- payment to the government of a specified amount of money per day as “liquidated damages” if specified milestones for corrective actions are not achieved or other violations of the decree, the FDCA, or regulations under the FDCA occur during the life of the decree;
- a grant to FDA of authority, not otherwise provided by the FDCA, to order the company to take certain types of action if FDA determines that the company has not complied with the decree; and
- limitations on the record the company may present to the court for review of actions by FDA under the decree, and specification of a lenient standard of review (the “arbitrary and capricious” standard of 5 U.S.C. § 706(2)(A)).

A representative example of an FDA consent decree is one entered against Schering-Plough Corporation (Schering) in 2002.<sup>20</sup> Among numerous other provisions, that decree bars Schering from shipping human and veterinary drugs from each of four facilities until certain requirements are met; the requirements differ among the facilities.<sup>21</sup> The decree identifies certain products as medically necessary and permits their continued shipment.<sup>22</sup> It provides for Schering to pay the United States \$500 million in equitable disgorgement.<sup>23</sup> The decree further provides that, if FDA determines that Schering has failed to comply with certain provisions of the decree and is still distributing drugs from the affected facilities, FDA has “the sole and unreviewable discretion” to order Schering to pay, from the proceeds of the sales of such products, \$15,000 per day for each business day of continuing noncompliance with any of multiple obligations, up to a maximum of \$175 million.<sup>24</sup> In certain circumstances, the payments of \$15,000 per day stop, and FDA can order Schering to pay the United States a percentage of the net sales of certain drugs.<sup>25</sup>

A more recent FDA consent decree involving GlaxoSmithKline, Inc. (through its U.S. subsidiaries) utilizes similar non-compliance penalties. In addition, it provides for payments of \$10,000 per day for each day of noncompliance, up to a maximum of \$10 million, as “liquidated damages.”<sup>26</sup>

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20. Consent Decree of Permanent Injunction, *United States v. Schering-Plough Corp.*, No. C-02-2397 (JAP) (D.N.J. May 20, 2002).

21. *Id.* at 2-6, ¶ 4.

22. *Id.* at 15-17, ¶ 7.

23. *Id.* at 23, ¶ 15.

24. *Id.* at 24-25, ¶ 16.

25. *Id.* at 26-28, ¶ 17.

26. Consent Decree of Condemnation and Permanent Injunction at 17, ¶ 32, *United States v. Undetermined quantities . . . PAXIL CR™ PAROXÉTINE HCl CONTROLLED-RELEASE TABLETS*, No. 5:05-CV-141-FL(1) (E.D.N.C. May 5, 2005).

### III. HHS OIG INSTITUTIONAL COMPLIANCE AND CORPORATE INTEGRITY AGREEMENTS

The Office of Inspector General (OIG) in the Department of Health and Human Services (HHS) has authority to seek permissive exclusion of health care providers from Medicare, Medicaid, and other federally funded healthcare programs. The principal basis for such exclusion is a determination by HHS that, in connection with a federal healthcare program, a provider has culpably submitted a false claim or has otherwise committed fraud, and thereby has violated the anti-kickback law,<sup>27</sup> or has committed some other prohibited act.<sup>28</sup> It is not necessary for a court to make an original determination. As an alternative to exclusion, the OIG may agree with a provider to enter into a Corporate Integrity Agreement (CIA) or an Institutional Compliance Agreement (ICA).

OIG summarizes the common provisions of its comprehensive CIAs as including requirements that the provider:

- Hire a compliance officer or appoint a compliance committee;
- Develop written standards and policies [to prevent further violations];
- Implement a comprehensive employee training program;
- Review claims submitted to federal health care programs;
- Establish a confidential disclosure program;
- Restrict employment of ineligible persons; and
- Submit a variety of reports to the OIG.<sup>29</sup>

Provisions for monetary penalties—payments of specified amounts of money per day for violations—are also common in CIAs. For certain types of “material breach,” exclusion from federal healthcare programs is a possible remedy. Thus, even if the daily penalties do not accumulate to a large amount, exclusion could be a very drastic sanction. Under another common provision, OIG decisions under the agreement, including decisions on penalties and on exclusion from federal healthcare programs due to a violation of the CIA, are reviewable within HHS, but not by the courts.

An example of a CIA is one entered into in 2003 with GlaxoSmithKline.<sup>30</sup> Among other things, the agreement provides for monetary penalties ranging from \$1,000 to \$2,500 per day for different

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27. See 42 U.S.C. § 1320a-7b(b) (2000).

28. See *id.* § 1320a-7b.

29. HHS Office of Inspector General, Fraud Prevention & Detection, Corporate Integrity Agreements, <http://www.oig.hhs.gov/fraud/cias.html> (last visited Aug. 7, 2007).

30. See Corporate Integrity Agreement Between the Office of Inspector General of the Dep’t of Health and Human Services and SmithKline Beecham Corporation d/b/a GlaxoSmithKline (Apr. 15, 2003), available at [http://www.oig.hhs.gov/fraud/cia/agreements/SmithKline\\_Beecham\\_Corp\\_db\\_a\\_GlaxoSmithKline041503.PDF](http://www.oig.hhs.gov/fraud/cia/agreements/SmithKline_Beecham_Corp_db_a_GlaxoSmithKline041503.PDF).

kinds of violations.<sup>31</sup> It also precludes judicial review of decisions by OIG or HHS under the agreement.<sup>32</sup>

#### IV. THE PROBLEM

Public companies and other organizations enter into these types of settlement agreements to avoid the prospect of going to court or suffering an administrative sanction, such as exclusion from Medicaid, Medicare, and other federal healthcare programs. Organizations commonly view the prospect of civil litigation against the government and administrative sanctions as far worse than settling on the government's terms. Settling is attractive when the likelihood of prevailing in a contested proceeding does not justify the risks and costs of the proceeding or when even a certainty or near-certainty of prevailing would involve unacceptable costs and/or collateral risks.

The settlements described above impose on the organizations the certainty or possibility of very large costs, significant contractual obligations, and significant curtailment of procedural rights. Because organizations almost always accept such settlements rather than litigate, it is reasonable to infer that they have little bargaining power. Their bargaining power may be weak because the enforcement officials develop strong cases; because the organizations are highly averse to the risks of governmental enforcement litigation; or because the mere pendency, process, and uncertainty of such litigation impose unacceptable costs, regardless of the ultimate outcome.

Settlements of many similar cases may stifle development of the law.<sup>33</sup> Even when enforcement officials may very well be exceeding their statutory authority or invading constitutionally protected rights (e.g., commercial free speech), organizations almost always prefer to settle. In doing so, they give up an opportunity to obtain a judicial ruling on the agency's enforcement theories. In addition, if and when a case is later litigated, the prior settlements may be cited as precedents.<sup>34</sup>

It is unclear whether the common settlement provisions described above are statutorily authorized or good public policy. For example, although the courts have held that the FDCA authorizes courts to award disgorgement of profits and restitution,<sup>35</sup> there has been no judicial decision either way as to

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31. *Id.* at 23-25, ¶ X. A.

32. *Id.* at 27-29, ¶ X. E.

33. I thank Dan Troy for suggesting this point.

34. See *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 234 (3d Cir. 2005) (discussing prior consent decrees between pharmaceutical companies and FDA).

35. See *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058 (10th Cir. 2006) (disgorgement), *cert. denied*, 127 S. Ct. 80 (2006); *Lane Labs-USA, Inc.*, 427 F.3d at 220 (restitution).

whether the FDCA authorizes daily penalties masquerading as “liquidated damages.” More generally, did Congress intend FDA injunctions to become money-making machines for the Treasury Department, with no statutorily prescribed method for determining appropriate amounts? Did it intend the HHS OIG to impose daily penalties on providers? Did Congress intend that settlement agreements provide for unreviewable agency decision-making? Did it intend that allegations of violations of consented-to court injunctions and other settlement documents filed in court be adjudicated not by the judiciary but by federal agencies, with no judicial review or only limited review? Did it intend enforcement officials to dictate how corporations and other institutions would organize themselves for compliance, and what the elements of compliance programs would be?

In *Federalist No. 48*, James Madison wrote: “It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.”<sup>36</sup> The insight is ancient: in *The Furies* by Aeschylus, Athena says to citizens of Athens: “Here awe and fear must press on the heart, for untouched by fear no man is just.”<sup>37</sup> Where are the effectual restraints on the power of federal enforcement officials to dictate settlements? Where are the awe and fear that press upon their hearts to make them just?

For lawyers, the obvious leading candidate is judicial review. A court asked to “so order” a proposed consent decree under a statute certainly may review the decree to determine whether it furthers the objectives of the statute.<sup>38</sup> As a practical matter, however, judicial review is unavailable. Some settlement agreements, such as non-prosecution agreements and CIAs, do not involve any judicial proceeding, and are not filed in any court. Even where settlement agreements are filed in court, as are deferred prosecution agreements and consent decrees, judicial review does not occur because neither party to such an agreement seeks it and because it is not evident that any third party could obtain review. Case-by-case review would deprive a settling defendant of a settlement it wants, even if the government is overreaching.

A company facing an FDA demand for an injunction could admit liability and litigate only the terms, or only a few of the terms, of the injunction. Companies do not do that, however, presumably for several reasons. Admission of violations could collaterally estop a company in

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36. THE FEDERALIST NO. 48, at 256 (James Madison) (George Carey & James McClellan eds., 2001).

37. AESCHYLUS, *The Furies*, in THE ORESTEIA OF AESCHYLUS 93, 119 (Robert Lowell trans., Farrar, Straus & Giroux 1978). For an alternate translation, see AESCHYLUS, *The Eumenides*, in 1 THE COMPLETE GREEK TRAGEDIES 1, 178 (Richmond Lattimore trans., David Grene & Richard Lattimore eds., 1942).

38. Sys. Fed’n No. 91, Ry. Employe[e]s’ Dep’t v. Wright, 364 U.S. 642, 651 (1961).

other litigation; by contrast, resolution by consent decree typically involves no admissions and no judicial findings of fact. In addition, if no agreement on the outcome exists when the government files its complaint, the complaint is likely to contain more graphic detail than it would if it were part of an agreed disposition of the case. During the litigation of the remedy, even though the defendant has admitted the prior violations, the government presumably would introduce evidence of the violations to support arguments for strong relief. The filing of the complaint and the presentation of such evidence are likely to generate publicity adverse to the defendant; such publicity would aid its competitors and possibly other litigants against the defendant. As to the final outcome, the defendant would also face prolonged uncertainty, which could depress its business prospects and its stock price.

Third parties are unlikely to be able to intervene because they would lack standing. There is no analogue here to the Tunney Act, which provides for a public proceeding to determine whether a settlement under the antitrust laws is in the public interest.<sup>39</sup> These are not class actions, where hearings on proposed settlements occur for the protection of the class.<sup>40</sup> Moreover, in all or most cases, both the enforcement office and the company that have entered into a settlement agreement would strongly resist any effort by a third party to inquire into and possibly overturn their settlement. The enforcement office wants no inquiry into its authority to extract concessions from settling defendants, and presumably a settling defendant would rather make all the concessions it has made than see its settlement overturned and have to litigate against the enforcement office. Moreover, even if a settling defendant might benefit from a settlement on less onerous terms, a public proceeding to obtain such terms would impose on it some of the most significant costs it presumably sought to avoid by settling: potentially prolonged uncertainty until the completion of the proceeding (including any appeals) and potentially a stream of adverse publicity (in contrast to stories in one news cycle resulting from press releases announcing the initial settlement).

In some circumstances where the government obtains in a settlement with one defendant a concession that it later uses to disadvantage a second defendant in a separate proceeding, the second defendant may be able to obtain judicial review of the lawfulness of the concession. Such a strategy has succeeded thus far in *United States v. Stein*, where the District Court for the Southern District of New York held that the provision in a deferred prosecution agreement that barred an organization from advancing

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39. See 15 U.S.C. § 16(f) (2000).

40. See FED. R. CIV. P. 23(e).

attorneys' fees to its former employees under investigation violated the former employees' rights under the Sixth Amendment and the Due Process Clause of the Fifth Amendment.<sup>41</sup>

Nevertheless, not all questionable provisions in settlement agreements disadvantage third parties; and not all disadvantaged third parties become involved in a separate proceeding in which they can seek relief from their disadvantage. Moreover, the kind of collateral attack that has succeeded thus far in *Stein* is a limited, delayed, burdensome, and roundabout way to challenge settlement policies of general applicability.

Judicial review, therefore, appears not to be an effectual restraint on the power of enforcement officials to extract concessions in settlements. Moreover, what is needed much more than case-by-case post hoc review of individual settlements is advance review of the policies and forms of agreement that shape an enforcement agency's settlements generally.

Next, one might turn to the Executive Branch to police itself; however, such self-policing simply has not happened. Agency heads generally avoid imposing any constraint on enforcement tactics, so as not to be distracted from the substantive programs that are their main concern, and so as not to incur criticism for weakening enforcement. Also, why should they risk having to spend political capital for the benefit of organizations that have gotten—or may in the future get—into trouble due to noncompliance?

Furthermore, review under Executive Orders has never reached policies for settlement of enforcement actions. Such policies slip through the cracks in the Executive Orders' definitions. For example, as amended by later amendments, including by President Bush's Executive Order 13,422 of January 18, 2007, Executive Order 12,866 defines the key terms "regulation," "regulatory action" and "guidance document" in ways that would not, without considerable stretch and strain, reach the unwritten but real policies that shape settlements of enforcement actions.<sup>42</sup> The Executive Order's definition of the term "significant regulatory action" includes one that "is likely to result in a regulation that may . . . [h]ave an annual effect on the economy of \$100 million or more."<sup>43</sup> Several FDA consent decrees and DOJ deferred prosecution agreements have involved

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41. See *United States v. Stein*, 435 F. Supp. 2d 330, 364-66 (S.D.N.Y. 2006). The court later dismissed the indictment against thirteen of the sixteen defendants, and the government has appealed. *United States v. Stein*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *appeal docketed*, No. 1137 (2d Cir. July 16, 2007).

42. See Exec. Order No. 12,866, § 3(d), (e), & (g), 58 Fed. Reg. 51,735 (Sept. 30, 1993) (as amended by Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 26, 2002) and Exec. Order No. 13,422, 72 Fed. Reg. 2,703 (Jan. 18, 2007)), available at [http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866\\_amended\\_01-2007.pdf](http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866_amended_01-2007.pdf).

43. *Id.* § 3(f)(1).

payments of more than \$100 million,<sup>44</sup> and the policies that lead to such settlements result in payments averaging more than \$100 million annually; however, the policies are not “regulations,” and they and the settlements do not “result in a regulation.”

Could the Executive Branch police itself in this area? Yes, of course. To do so, it would have to be willing to risk criticism from groups that see it as part of their mission to make enforcement as tough as possible. To be willing to incur that political risk, agencies or the Executive Office of the President would have to be persuaded that the current lack of effectual restraint on settlements of enforcement proceedings is a serious problem worthy of attention. Somebody, or better, somebodies would have to take up that task of persuasion.

Our last resort for effectual restraint is Congress. The committees that have legislative jurisdiction over agencies have legislative jurisdiction over their enforcement policies and practices. So, too, does the House Committee on Oversight and Government Reform.<sup>45</sup> Thus, there is no question of congressional authority to review such policies and practices.<sup>46</sup>

Oversight and the threat of remedial legislation can also be effectual. The uproar over the Thompson Memorandum and DOJ’s routine demands for waiver of the corporate attorney-client privilege as part of the price for settlement of a criminal investigation of a corporation led to an oversight hearing on September 12, 2006.<sup>47</sup> On December 8, 2006, Senator Arlen Specter, who had been Chairman of the Senate Judiciary Committee and, after the 2006 elections, was about to become the ranking minority member, introduced his proposed Attorney-Client Privilege Protection Act.<sup>48</sup> On December 12, 2006, DOJ issued the McNulty Memorandum to modify its policy on demands for waivers.<sup>49</sup> Awe and fear at work? Maybe.<sup>50</sup>

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44. See, e.g., BAWAG Press Release, *supra* note 3; BMS Agreement, *supra* note 9, at 1-2, ¶ 5(b).

45. See About the Committee on Oversight and Government Reform, <http://oversight.house.gov/about.asp> (last visited Sept. 27, 2007) (“The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. It has jurisdiction to investigate any federal program and any matter with federal policy implications.”).

46. For a general introduction to the law of congressional oversight, see Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry*, CRS Report for Congress No. 95-464 (Apr. 7, 1995), available at <http://www.ncseonline.org/nle/crsreports/government/gov-3.cfm>.

47. *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:34117.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:34117.pdf).

48. S. 30, 109th Cong. (2006).

49. See McNulty Memorandum, *supra* note 7.

50. On August 1, 2007, the House Judiciary Committee reported H.R. 3013, the proposed Attorney-Client Privilege Protection Act, out of committee. A companion bill is

Samuel Johnson said: “Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”<sup>51</sup> The ritual hangings we call congressional oversight hearings concentrate the minds of heads of federal agencies. The prospect of a congressional hearing on an agency’s settlements of enforcement actions might, for the first time, acquaint the agency’s head with what the agency’s enforcement officials have been doing. The experience could well prove salutary.

Bringing about focused congressional committee oversight, however, requires the same kind of political mobilization as is needed to stimulate Executive Branch review. Individual organizations will not want their own interactions with enforcement officials to be highlighted in news accounts. Consequently, trade associations, lawyers’ associations, and other groups should take the lead in seeking oversight of settlement policies, particularly those that arguably have extended their demands beyond appropriate limits. Although congressional oversight may not be included in some law school courses on administrative law, officials at federal agencies know that it can be a very potent influence on administrative proceedings. Sometimes, it can provide a speedier and more effective remedy than judicial review could provide.

Not all oversight will produce action as promptly as did the oversight of the Thompson Memorandum. If, however, the concern regarding governmental overreaching in settlement agreements continues, such oversight will be a good place to begin. Generally, administrative lawyers should consider administrative and congressional oversight (as well as the press) among the potentially available sources of remedies for inappropriate policies or actions of federal agencies.

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pending in the Senate. DOJ argues that the bill improperly interferes with its prosecutorial decision-making. See *DOJ Attorney Objects to House Bill as Interfering with Prosecutorial Discretion*, 5 CORP. ACCOUNTABILITY REP. (BNA) 860 (Aug. 24, 2007).

51. James Boswell, *The Life of Samuel Johnson LL.D.*, in 44 GREAT BOOKS OF THE WESTERN WORLD 351 (Robert Maynard Hutchins ed., 1952) (1791).



# NOTES AND COMMENTS

## ONE HUNDRED YEARS OF THE DOCTRINE OF PRIMARY JURISDICTION: BUT WHAT STANDARD OF REVIEW IS APPROPRIATE FOR IT?

NICHOLAS A. LUCCHETTI\*

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## INTRODUCTION

The federal courts of appeals are currently split on which standard of review to give a district court's determination of whether an issue before it falls within an administrative agency's primary jurisdiction.<sup>1</sup> The Second,<sup>2</sup> Eighth,<sup>3</sup> and Ninth Circuits<sup>4</sup> currently use a de novo standard.<sup>5</sup> The Third,<sup>6</sup>

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1. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (identifying the split among the circuit courts and adhering to the abuse of discretion standard of review); *Current Circuit Splits*, 2 SETON HALL CIR. REV. 509, 521 (2006) (summarizing the explanation of the split described in *S. Utah Wilderness Alliance*, 425 F.3d at 750); Fred Huntsman, Comment, *Who Makes the Call? The Primary Jurisdiction Doctrine in Texas After Cash America International, Inc. v. Bennett, Subaru of America, Inc. v. David McDavid Nissan, Inc., and Butnaru v. Ford Motor Co.*, 54 BAYLOR L. REV. 897, 910 (2002) (reporting that the circuits are split and concluding that the majority of courts use a de novo standard of review).

2. See *Ellis v. Tribune Television Co.*, 443 F.3d 71, 83 n.14 (2d Cir. 2006) ("We review de novo the district court's decision not to apply the primary jurisdiction doctrine." (citing *Nat'l Commc'ns Ass'n v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995))); *Nat'l Commc'ns Ass'n*, 46 F.3d at 222 (clarifying that "[a]lthough sometimes framed in terms of whether the district court abused its discretion," the circuit actually reviewed issues of primary jurisdiction de novo (citing *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 854 (2d Cir. 1988))). But see *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 72 (2d Cir. 2002) ("We emphasize that primary jurisdiction is a discretionary doctrine . . ."); *Goya Foods*, 846 F.2d at 854 (holding that the district court "applied an incorrect legal standard and thereby exceeded [its] discretion").

3. See *United States v. Henderson*, 416 F.3d 686, 691 (8th Cir. 2005) ("This court appears to review primary jurisdiction de novo."); *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (accepting the parties' invitation to review the issue of primary jurisdiction de novo).

4. See *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1155 (9th Cir. 2000) (holding that the Ninth Circuit reviews challenges "invoking the primary jurisdiction doctrine de novo"); *Int'l Bhd. of Teamsters v. Am. Delivery Serv. Co.*, 50 F.3d 770, 773 (9th Cir. 1995) (stating the standard of review in the Ninth Circuit is de novo (citing *Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1406 (9th Cir. 1991))); *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (asserting in a footnote that prior Ninth Circuit precedent unequivocally states that the "application of the primary jurisdiction doctrine is a question of law, reviewed de novo" (citing *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985))). The only case in which the Ninth Circuit gives insight into its rationale is *Gen. Dynamics Corp., supra*, which expressly argued against an abuse of discretion standard and for de novo review; however, the Ninth Circuit has obfuscated what standard of review is appropriate in several cases that cannot be reconciled with de novo review. See *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (citing *Gen. Dynamics Corp.*, 307 F.3d at 1362, but stating that "the doctrine of primary jurisdiction is committed to the sound discretion of the court"). Most confusingly, the Ninth Circuit even came to the conclusion, after the cases mentioned above, that it has never discussed the standard of review for primary jurisdiction. See *United States v. Culliton*, 328 F.3d 1074, 1081 (9th Cir. 2003) ("This circuit has not yet discussed the standard of review for the application of the primary jurisdiction doctrine.").

5. The Texas Supreme Court also recently discussed the appropriate standard of review for the primary jurisdiction doctrine and held that Texas courts review the doctrine de novo. See *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (deciding whether an agency has primary jurisdiction requires statutory interpretation, which supports the idea that the doctrine of primary jurisdiction, is a question of law).

Fourth,<sup>7</sup> Fifth,<sup>8</sup> Tenth,<sup>9</sup> and D.C. Circuits<sup>10</sup> use an abuse of discretion standard. It is currently unclear what standard of review the First,<sup>11</sup> Sixth,<sup>12</sup> and Eleventh<sup>13</sup> Circuits use. Therefore, defendants who appeal whether an agency should have first decided an issue in a case might face substantially different burdens in persuading the appellate court, depending on in which jurisdiction the plaintiff brought the action.

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6. See *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993) (“A district court’s decision not to submit an issue for initial determination by the agency will be reversed only for an abuse of discretion.”); *P.R. Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 549 (3d Cir. 1988) (“[A] district court’s decision not to submit an issue for initial determination by an agency is reversible only if it constituted an abuse of discretion.”).

7. See *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 & n.24 (4th Cir. 1996) (holding that the standard of review for primary jurisdiction is abuse of discretion and rejecting a party’s contention that it should be de novo).

8. See *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988) (“[Primary jurisdiction] is a flexible doctrine to be applied at the discretion of the district court.” (citing *El Paso Natural Gas Co. v. Sun Oil Co.*, 708 F.2d 1011, 1020 (5th Cir. 1983))); *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) (“[Primary jurisdiction] is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process.”).

9. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (identifying the split, listing the circuits on each side, and stating that the Tenth Circuit reviews application of primary jurisdiction for abuse of discretion); *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1377 (10th Cir. 1989) (stating that the Tenth Circuit reviews a district court’s application of primary jurisdiction under the abuse of discretion standard).

10. See *Nat’l Tel. Coop. Ass’n v. Exxon Mobil Corp.*, 244 F.3d 153, 156 (D.C. Cir. 2001) (“We review the district court’s decision [of whether to apply primary jurisdiction] to the contrary only for abuse of discretion.” (citing *Env’tl. Tech. Council*, 98 F.3d at 789; *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 947-48 (10th Cir. 1995))).

11. Compare *U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) (“[T]he primary jurisdiction doctrine permits and occasionally requires a court to stay its hand while allowing an agency to address issues within its ken.” (citing *Ass’n of Int’l Auto. Mfrs. v. Comm’r, Mass. Dep’t of Env’tl. Prot.*, 196 F.3d 302, 304 (1st Cir. 1999))), with *Newspaper Guild of Salem v. Ottaway Newspapers, Inc.*, 79 F.3d 1273, 1283 (1st Cir. 1996) (“We review de novo the district court’s implicit jurisdictional finding that the Guild’s claims fall within the primary jurisdiction of the NLRB.” (citing *Int’l Bhd. of Teamsters v. Am. Delivery Serv., Co.*, 50 F.3d 770, 773 (9th Cir. 1995))).

12. Compare *United States v. Haun*, 124 F.3d 745, 749-50 (6th Cir. 1997) (reversing the district court’s referral to an agency under de novo review without stating the standard of review for primary jurisdiction and noting that the court should not have applied primary jurisdiction as the reason for the reversal), with *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216, 235 n.30 (6th Cir. 1980) (“The primary jurisdiction doctrine is a rule of judicial construction which permits a court, in exercise of its sound discretion, to defer to an administrative agency for the initial resolution of certain disputes.”).

13. See *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265-66 (11th Cir. 2000) (describing primary jurisdiction and the *Burford* abstention as the same and going on to review the *Burford* abstention under an abuse of discretion standard of review (citing *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943))).

The discord among the circuits stems from the various courts' interpretation of the nature of the doctrine of primary jurisdiction.<sup>14</sup> Those jurisdictions that use a de novo standard treat the application of the doctrine of primary jurisdiction as a matter of law, requiring a district court to either delay proceedings or dismiss the case and refer the issue to an agency if the doctrine is applicable.<sup>15</sup> Alternatively, jurisdictions that use an abuse of discretion standard treat the doctrine as "a matter of judicial self-restraint,"<sup>16</sup> and therefore, a discretionary doctrine.<sup>17</sup>

This Comment examines the circuit split over whether to use a de novo or an abuse of discretion standard of review upon an appeal from a district court's decision of whether an issue is within an agency's primary jurisdiction. Part I explains the doctrine of primary jurisdiction. Part II examines the circuit split and the different jurisdictions' reasoning behind their particular choice of the standard of review. Part III concludes that federal courts of appeals should adopt a de novo standard of review when determining whether a district court should have applied the doctrine.

### I. THE DOCTRINE OF PRIMARY JURISDICTION

The doctrine of primary jurisdiction is a New York egg cream.<sup>18</sup> As an egg cream is neither an egg nor cream, primary jurisdiction is neither primary nor essentially jurisdictional.<sup>19</sup> The doctrine of primary

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14. See Huntsman, *supra* note 1, at 910 (suggesting that the standard of review for the doctrine of primary jurisdiction hinges on its classification as either a prudential or jurisdictional doctrine).

15. See, e.g., *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (reasoning that the Supreme Court often uses mandatory language when discussing the doctrine of primary jurisdiction).

16. See *Ashland Oil & Ref. Co. v. Fed. Power Comm'n*, 421 F.2d 17, 20 (6th Cir. 1970) (explaining that courts, not administrative agencies, make the determination whether the doctrine applies); 73 C.J.S. *Public Administrative Law and Procedure* § 73 (2007) (distinguishing the doctrine from questions of subject matter jurisdiction).

17. See *Env'tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 n.24 (4th Cir. 1996) (rejecting a party's contention that the court should review the matter de novo because primary jurisdiction is a discretionary matter); *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983) (holding that the court could not "second guess whether the trial judge used his discretion wisely").

18. This analogy is based on Contract Law Professor Nancy Abramowitz's metaphor that parol evidence is an egg cream.

19. See *MFS Sec. Corp. v. N.Y. Stock Exch., Inc.*, 277 F.3d 613, 622 (2d Cir. 2002) (relying on *Ricci v. Chi. Mercantile Exch.*, 447 F.2d 713, 720 (7th Cir. 1971) to demonstrate that "primary jurisdiction is neither jurisdictional nor primary" and analogizing to Voltaire's statement that the Holy Roman Empire was "neither holy, nor Roman, nor an empire" (quoting FRANÇOIS MARIE AROUET DE VOLTAIRE, *ESSAI SUR LES MOEURS ET L'ESPRIT DES NATIONS* 70 (1769))); see also *Env'tl. Tech. Council*, 98 F.3d at 789 n.24 (clarifying that "despite what the term [primary jurisdiction] may imply, [it] does not speak to the jurisdictional power of the federal courts" (quoting *Bessemer & Lake Erie R.R. Co.*, 717 F.2d at 599)); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002) (distinguishing primary jurisdiction and exclusive jurisdiction by explaining that "primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional");

jurisdiction stands for the idea that courts should allow agencies to decide issues that are either within the agencies' specialized sphere of knowledge<sup>20</sup> or when there is a need for a uniform answer from a single agency rather than a multitude of answers from various courts.<sup>21</sup> The doctrine of primary jurisdiction is a misnomer, however, in that the court must first have jurisdiction to invoke the doctrine.<sup>22</sup> It is not that the agency has jurisdiction before the court does, but rather, the agency and the court share jurisdiction, and where the court applies the doctrine, it delays the case pending a decision by the agency or dismisses and refers the case to the agency.<sup>23</sup>

The doctrine of primary jurisdiction is a judge-made rule that allocates power between courts and agencies.<sup>24</sup> This is necessary because when the Legislative Branch creates a new agency with powers to adjudicate, courts do not lose any of their own power,<sup>25</sup> which in effect means that two bodies

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Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH. ADMIN. L.J. 288, 331 (2006) ("Primary jurisdiction is not really jurisdictional at all—it is prudential."). *But see* Louis L. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964) (describing primary jurisdiction as "*pro tanto* exclusive jurisdiction; insofar as the agency has jurisdiction it excludes the courts").

20. *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) (explaining that, originally, uniformity of answers was the important factor, but currently there is importance attached to the specialized knowledge of the relevant agency (citing Far E. Conference v. United States, 342 U.S. 570, 574 (1952))); 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 13.23[1] (2d ed. 1997) (discussing the origins of the primary jurisdiction doctrine).

21. *See* W. Pac. R.R. Co., 352 U.S. at 64 (explaining that the Court had earlier emphasized that primary jurisdiction promotes uniformity through courts deferring certain questions to the relevant agency); Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907) (creating the doctrine of primary jurisdiction to promote uniformity).

22. *See* W. Pac. R.R. Co., 352 U.S. at 63-64 (distinguishing exhaustion of remedies and primary jurisdiction by stating that primary jurisdiction is applicable "where a claim is originally cognizable in the courts").

23. *See id.* at 64 (explaining that where primary jurisdiction is applicable, courts must suspend the judicial process and refer the issue to the agency).

24. *See id.* at 63 (addressing the nature of primary jurisdiction in that it "is concerned with promoting proper relationships between the courts and administrative agencies"); United States v. Radio Corp. of Am., 358 U.S. 334, 346 n.14 (1959) (explaining that the doctrine of primary jurisdiction promotes proper relationships between the courts and agencies charged with regulatory duties (citing W. Pac. R.R. Co., 352 U.S. at 63-64)); Gerald E. Berendt & Walter J. Kendall III, *Administrative Law: Judicial Review—Reflections on the Proper Relationship Between Courts and Agencies*, 58 CHI.-KENT L. REV. 215, 238 (1982) ("When faced with the issue of primary jurisdiction, a court is essentially concerned with the proper allocation of power between the court and the agency."); Greg Goelzhauser, Comment, *Price Squeeze in a Deregulated Electric Power Industry*, 32 FLA. ST. U. L. REV. 225, 249 (2004) (explaining the doctrine of primary jurisdiction). *But see* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 199 n.29 (1978) (quoting 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01, at 3 (1958)) ("The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue.").

25. *See* United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1365 (9th Cir. 1987) ("Typically, the creation of a new agency means the addition to the legal system of a new

share jurisdiction over certain areas of law. Therefore, primary jurisdiction is applicable when a court and an agency have concurrent jurisdiction over a case or over a particular issue within a case.<sup>26</sup> The court must then decide either to hear the case or to dismiss or delay it and send the issue to the agency for a determination. One commentator explained that primary jurisdiction concerns “when” a court will decide an issue, rather than “whether it may” do so.<sup>27</sup>

#### A. Objectives of the Doctrine of Primary Jurisdiction

There are two objectives of primary jurisdiction: uniformity and expertise.<sup>28</sup> The Supreme Court first invoked the doctrine where there was a need for uniform answers to an issue involving the legality of a tariff.<sup>29</sup> One hundred years ago, in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*,<sup>30</sup> a case involving whether a rate tariff was legal, the Court held that the district court *must* allow the Interstate Commerce Commission to make an initial determination of whether a rate schedule was legal.<sup>31</sup> The Court was concerned that if both the Commission and the courts had the power to rule on the schedules, their determinations might not be uniform.<sup>32</sup>

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lawmaking and law applying authority, with no explicit subtraction from the previously-existing power of the courts.” (quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 22:1, at 81 (2d ed. 1983))).

26. See *W. Pac. R.R. Co.*, 352 U.S. at 63-64 (clarifying that primary jurisdiction is applicable “where a claim is originally cognizable in the courts”); *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (explaining that primary jurisdiction requires a court “to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling,” but noting that the referral does not prevent the court from retaining jurisdiction).

27. 4 DAVIS, *supra* note 25, § 22.1, at 82.

28. See *W. Pac. R.R. Co.*, 352 U.S. at 64 (explaining the two reasons for primary jurisdiction are uniformity among courts and agencies, and the expertise of the agency); *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 751 (10th Cir. 2005) (“These two concerns—regulatory uniformity and agency expertise—drive the primary jurisdiction analysis.”).

29. See generally *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (holding that the shipper could not continue an action for unreasonable shipping rates, which were set according to the Interstate Commerce Act, unless the Interstate Commerce Commission determined that the rates were unreasonable).

30. *Id.*

31. *Id.* at 448 (determining that it did not need to decide whether the lower court would have had jurisdiction because a congressional act required the Interstate Commerce Commission to first entertain such disputes).

32. See *id.* at 440-41 (arguing that if the agency did not have the power to set rates, they would vary depending on different judicial decisions preventing equality in the market).

To promote this uniformity, the Court ruled that the agency should first reach a decision on the issue to avoid various courts creating a multitude of answers to a specific question.<sup>33</sup>

More recently, the Court has based the doctrine of primary jurisdiction on the reasoning that where an agency may better resolve a complex issue through its experience in a certain area, courts should allow the agency to make an initial determination.<sup>34</sup> Courts base this reasoning on the fact that they tend to be generalist in nature and do not have the specific expertise of an agency.<sup>35</sup> One exception to this rule is that there is no need for the court to defer to the agency where the court has traditionally had competence in the particular area.<sup>36</sup>

The nature of primary jurisdiction might be under controversy in part because there is no fixed rule for where to apply the doctrine.<sup>37</sup> Some circuits have provided factors to determine whether the courts in the circuit should apply the doctrine,<sup>38</sup> and others have held that a part of the determination is that the court must also balance the benefits of the agency's decision with the costs of delaying the proceedings.<sup>39</sup> However,

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33. *Id.* at 440-41, 448 (noting that if the rates were determined by courts, the protections that the statute was intended to create would be nullified).

34. *See* *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64-65 (1956) (explaining that it makes sense to allow agencies to make preliminary determinations because of their "specialization," "insight gained through experience," and "more flexible procedure" (quoting *Far E. Conference v. United States*, 342 U.S. 570, 574-75 (1952))).

35. *See* 4 DAVIS, *supra* note 25, § 22:1, at 82 ("[T]he most common reason for a court to hold that the agency has primary jurisdiction is that the judges, who usually deem themselves to be relatively the generalists, should not act on a question until the administrators, who may be relatively the specialists, have acted on it.").

36. *See Far E. Conference*, 342 U.S. at 574 (recognizing that the Court has applied primary jurisdiction "in cases raising issues of fact not within the conventional experience of judges"); *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 686 (1965) (holding that primary jurisdiction was not applicable in part because the courts had experience in the particular issue at bar).

37. *See W. Pac. R.R. Co.*, 352 U.S. at 64 (holding that there is no fixed rule for applying the doctrine of primary jurisdiction).

38. *See United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987) (listing four factors that are present where the doctrine is invoked: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration"); *Nat'l Commc'ns Ass'n v. AT&T*, 46 F.3d 220, 222-23 (2d Cir. 1995) (agreeing with a lower court that four factors have "generally been the focus of the analysis"). The Second Circuit's factors were:

(1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made.

*Nat'l Commc'ns Ass'n*, 46 F.3d at 222-23.

39. *See Nat'l Commc'ns Ass'n*, 46 F.3d at 223, 225 (holding that the delay in deferring to the agency outweighed its advantages (citing *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 321 (1973))); *Ricci*, 409 U.S. at 321 (Marshall, J., dissenting) ("Wise use of the

“[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.”<sup>40</sup> In all cases, the court needs to look to the relevant agency-enabling legislation to ascertain whether the agency has concurrent jurisdiction with the reviewing court.<sup>41</sup> The analysis of whether primary jurisdiction applies thus contains an element of statutory interpretation.

### B. *Application of the Doctrine of Primary Jurisdiction*

The most frequent context where primary jurisdiction arises is with regard to regulated industries.<sup>42</sup> In particular, courts have applied primary jurisdiction to issues involving questions of fact and issues involving administrative discretion and referred the issues to, among other agencies, the Interstate Commerce Commission, the Commodity Exchange Commission, and the National Labor Relations Board.<sup>43</sup> One early example where the Court found the doctrine applicable is *Texas & Pacific Railway Co. v. American Tie & Timber Co.*,<sup>44</sup> which is the first case where the Court applied primary jurisdiction to a question of interpretation of a tariff.<sup>45</sup> In this case, a shipper wanted to ship wooden railroad ties as

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doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay.”); *see also* Section of Admin. Law & Regulatory Practice of the Am. Bar Ass’n, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 49 (2002) (stating one of the considerations to which courts look when deciding to invoke primary jurisdiction is “whether the referral to the administrative agency will impose undue delays or costs on the litigants”); Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 362-63 (1996) (“[T]he courts have remained sensitive to the effect of agency delay upon private litigants—specifically, the fear that the agency may not act quickly . . .”).

40. *W. Pac. R.R. Co.*, 352 U.S. at 64.

41. *See* *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (determining that the legislative history of the relevant act did not give the agency the power to decide antitrust issues); *Gen. Dynamics Corp.*, 828 F.2d at 1363 n.13 (“[A] court must not employ the doctrine [of primary jurisdiction] unless the particular division of power was intended by Congress.”); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (“[W]hether an agency has primary jurisdiction requires statutory construction.”).

42. *See* Jaffe, *supra* note 19, at 1050 (discussing the application of primary jurisdiction outside traditionally regulated industries).

43. *See* E.H. Schopler, Annotation, *The Doctrine of Primary Administrative Jurisdiction as Defined and Applied by the Supreme Court*, 38 L. Ed. 2d 796, 804-14 (1974) (providing summaries of cases where courts have referred issues to particular agencies under the primary jurisdiction doctrine).

44. 234 U.S. 138 (1914).

45. *See* Louis L. Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws.*, 102 U. PA. L. REV. 577, 584 (1954) [hereinafter *Primary Jurisdiction Reconsidered*] (discussing the problem the Court has had applying the primary jurisdiction doctrine to questions of interpretation).



“lumber,” but the carrier rejected them under that category and argued the ties required a new rate.<sup>46</sup> The Court found that only the Interstate Commerce Committee could settle the issue.<sup>47</sup>

In contradistinction to the application of primary jurisdiction in *American Tie & Timber Co.*, the Court in *Great Northern Railway Co. v. Merchants Elevator Co.* refused to apply the doctrine, explaining that the issue before them was to interpret the meaning of words “in their ordinary sense.”<sup>48</sup> The dispute in *Great Northern Railway* involved whether a charge for reconsignment of a shipment of corn should have been excluded under a rule that the fee was not applicable to grain held for inspection.<sup>49</sup> The Court differentiated *American Tie & Timber Co.* by explaining that in previous cases the Court required primary jurisdiction “because the enquiry [was] essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the [relevant agency].”<sup>50</sup>

As agencies outsource more functions, primary jurisdiction may play an increasingly important role in litigation. Plaintiffs who seek redress from a private company that works for an agency will most likely want to have their cases heard by a court rather than the agency, which some scholars have described as having a possible bias in favor of the regulated industry, or in this case, the contracting company.<sup>51</sup> Therefore, in the prototypical case, the plaintiff will initially file suit with a court, and the contracting company or the regulated industry will most likely petition the court to invoke primary jurisdiction.<sup>52</sup> A court’s decision to apply the doctrine and

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46. *Am. Tie & Timber Co.*, 234 U.S. at 142-43.

47. *See id.* at 146 (holding that the Interstate Commerce Commission’s power to regulate tariffs necessitated the referral of the issue to the agency).

48. *See* *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 294 (1922) (determining that there was no reason to allow the exercise of administrative discretion because no evidential or ultimate facts were in question).

49. *See id.* at 289-90 (rejecting a claim that the court did not have proper jurisdiction until the agency acted).

50. *Id.* at 291, 294-95.

51. *See* Daniel Keating, Comment, *Employee Injury Cases: Should Courts or Boards Decide Whether Workers’ Compensation Laws Apply?*, 53 U. CHI. L. REV. 258, 263 (1986) (explaining that a plaintiff in a worker compensation suit would prefer a potentially more sympathetic jury, whereas employers would prefer the fact finder to be an agency that frequently deals with injured workers); Nagareda, *supra* note 39, at 364 (concluding that “commentators have long expressed the fear that the highly concentrated interests typified by regulated industries might wield inordinate political influence”); Jerome Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 35 (1976) (stating that a “built-in bias for regulated industries” may influence an agency’s factual determinations).

52. *See, e.g.*, Keating, *supra* note 51, at 263 (citing *Sewell v. Clearing Mach. Corp.*, 347 N.W.2d 447 (Mich. 1984) and *Scott v. Indus. Accident Comm’n*, 293 P.2d 18 (Cal. 1956) for support of the proposition that injured employees typically file actions in a court, and “just as typically, the employer seeks to dismiss the court action by arguing that the issue of jurisdiction should properly be resolved by the [agency]”).

require parties to present the issue to an agency will increase the time and, consequently, the costs of litigation for the plaintiff.<sup>53</sup> If the agency does have bias towards the regulated industry, it may ultimately lead to a more favorable decision for the regulated industry.

*C. Primary Jurisdiction Distinguished from Exclusive Jurisdiction  
and Exhaustion of Remedies*

Primary jurisdiction is not the same as exclusive jurisdiction,<sup>54</sup> although both doctrines may result in the court dismissing a case.<sup>55</sup> Unlike primary jurisdiction, exclusive jurisdiction is a jurisdictional issue and requires the court to dismiss the case so that it can go before an agency because the court does not have the power to hear the case.<sup>56</sup> In cases where the court applies primary jurisdiction, the court has jurisdiction to decide the issue. One court succinctly summarized the difference: “[d]espite similar terminology, primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional.”<sup>57</sup>

Exhaustion of remedies is “conceptually analogous” to primary jurisdiction.<sup>58</sup> One commentator described the similarities of the doctrines by stating that “[b]oth are prudential doctrines created by the courts to allocate between courts and agencies the initial responsibility for resolving issues and disputes in a manner that recognizes the differing responsibilities and comparative advantages of agencies and courts.”<sup>59</sup> Exhaustion of remedies mandates that no party “is entitled to judicial relief for a[n] . . . injury until [the party exhausts] the prescribed administrative remedy . . . .”<sup>60</sup> By contrast, where primary jurisdiction is applicable, the

53. See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §14:1, at 271-72 (3d ed. 1994) (explaining that the court may have to wait for the agency to make a ruling if the issue referred to the agency is critical to the litigation).

54. The Supreme Court has confusingly used the term “exclusive primary jurisdiction” when referring to primary jurisdiction. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684 (1965) (using the terminology “exclusive primary jurisdiction”); *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956) (referring to primary jurisdiction as “exclusive primary jurisdiction”); see also *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220-21 (Tex. 2002) (explaining that Texas courts have often confused the doctrines of primary jurisdiction and exclusive jurisdiction and then distinguishing the two doctrines).

55. See *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (explaining that upon application of primary jurisdiction, a court may “dismiss the case without prejudice”).

56. See J. Bruce Bennett, *Primary Jurisdiction in Texas: Has the Texas Supreme Court Clarified or Confused It?*, 5 TEX. TECH. J. TEX. ADMIN. L. 177, 178 (2004) (explaining that “[e]xclusive original jurisdiction over a claim or issue cannot exist in both the agency and a trial court”).

57. *Subaru of Am., Inc.*, 84 S.W.3d at 220.

58. 2 DAVIS & PIERCE, *supra* note 53, § 14:1, at 271.

59. *Id.* at 271-72.

60. *Id.* §15:2, at 307 (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

party has a right to bring a case before a court, but because some issue of the case falls within the jurisdiction of an agency, the court delays the proceedings pending a decision on the issue from the agency. What distinguishes primary jurisdiction from exhaustion of remedies is that, in cases where primary jurisdiction applies, there is a claim “enforceable by *original* judicial action,” while exhaustion of remedies demands that parties first exhaust the prescribed administrative remedy “before seeking judicial interference.”<sup>61</sup>

## II. THE CURRENT CIRCUIT SPLIT

Several commentators<sup>62</sup> and at least one circuit court<sup>63</sup> have noted the discord among federal courts as to the proper standard of review for a district court’s determination of whether an agency has primary jurisdiction. Some circuits claim that a *de novo* standard of review is appropriate while other circuits use an abuse of discretion standard.

### A. *The Abuse of Discretion Standard*

The Third, Fourth, Fifth, Tenth, and D.C. Circuits apply an abuse of discretion standard to the review of a district court’s determination on the doctrine of primary jurisdiction.<sup>64</sup> These courts emphasize that the courts and agencies have concurrent jurisdiction, and tend to view primary jurisdiction as a prudential doctrine that courts, in their discretion, may use to promote the doctrine’s twin goals of regulatory uniformity and deference to agency expertise.<sup>65</sup>

The Third and Fourth Circuits have rejected treating primary jurisdiction as a question of law rather than a discretionary option, implying that treating it as a question of law seems to treat it more similarly to a truly jurisdictional question.<sup>66</sup> The courts reasoned that in primary jurisdiction

61. *Primary Jurisdiction Reconsidered*, *supra* note 45, at 579.

62. See *Current Circuit Splits*, *supra* note 1, at 521 (summarizing the jurisdictional differences in reviewing the application of the primary jurisdiction doctrine by lower courts); Huntsman, *supra* note 1, at 910 (identifying the split and concluding that the majority of courts use a *de novo* standard of review for whether a lower court should have applied the doctrine of primary jurisdiction).

63. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) (identifying the split among the circuit courts and then adhering to the Tenth Circuit’s standard of review).

64. See *supra* notes 6-10.

65. See, e.g., *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) (describing primary jurisdiction as “a discretionary tool” and a “flexible concept” that the courts use to “integrate the regulatory functions of agencies into the judicial decision making process”).

66. See *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 & n.24 (4th Cir. 1996) (rejecting a parties invitation to review the district court’s refusal to apply primary jurisdiction and stating that primary jurisdiction “does not speak to the jurisdictional power

cases, the question is not whether the court can hear the case, but rather, whether in its discretion it can defer to an agency.<sup>67</sup> That is to say, the court does not give up its jurisdiction; it merely delays proceedings until an agency has had the chance to provide the court with its expertise in the resolution of an issue in the case. In this way, the doctrine is procedural and similar to the discretion that judges have in setting hearing dates and running their courtrooms, as opposed to a strict, substantive rule of law that courts must impose in certain circumstances.

### B. *The De Novo Standard*

The Second, Eighth, and Ninth Circuits review a district court's determination of whether primary jurisdiction is applicable *de novo*.<sup>68</sup> However, the Ninth Circuit does not appear to be consistent with the standard of review it applies to primary jurisdiction.<sup>69</sup> Courts that use a *de novo* standard tend to view primary jurisdiction as a matter of law.

In *United States v. General Dynamics Corp.*, the Ninth Circuit reasoned that primary jurisdiction was a matter of law by stating that the Supreme Court "frequently" used language of a requisite rather than discretionary nature,<sup>70</sup> and then held that the standard of review for primary jurisdiction is "unequivocally" *de novo*.<sup>71</sup> The Ninth Circuit also directly addressed the district court and the dissent's view that the doctrine was discretionary.<sup>72</sup> The majority first rebuffed the district court, writing, "[t]he district court apparently thought that there is an element of discretion in the use of the primary jurisdiction doctrine."<sup>73</sup> The court then reasoned that "an issue either is within an agency's primary jurisdiction or it is not, and, if it is, a court may not act until the agency has made the initial determination."<sup>74</sup>

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of the federal courts" (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993)).

67. See *id.* at 789 n.25 (noting that the judicial discretion is designed to create an "orderly and sensible coordination" between agencies and the courts).

68. See *supra* notes 2-4.

69. Compare *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (stating the correct standard of review for primary jurisdiction is "unequivocally" *de novo*), with *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (citing *Gen. Dynamics Corp.*, 828 F.2d at 1362, but stating that "the doctrine of primary jurisdiction is committed to the sound discretion of the court . . .").

70. See *Gen. Dynamics Corp.*, 828 F.2d at 1364 n.15 ("In discussing the doctrine, the Supreme Court frequently has used language at odds with the notion of discretionary application.").

71. See *id.* (concluding that *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985), "unequivocally" states that primary jurisdiction "is a question of law, reviewed *de novo*").

72. See *id.* (admitting that some of the cases that the dissent cites have ambiguous language as to whether primary jurisdiction is discretionary or requisite but concluding that precedent mandates that the doctrine is a question of law).

73. *Id.*

74. *Id.*

The Second Circuit seemed to take a more pragmatic approach to the determination of the appropriate standard of review. It stated that “[a]lthough sometimes framed in terms of whether the district court abused its discretion, the standard of review is essentially *de novo*.”<sup>75</sup> The court did not shed any light on the reasoning behind its conclusory statement that *de novo* was the correct standard, but its ignoring the discretionary language of prior holdings indicates that the court was less interested in the prior usage of the label “abuse of discretion” than it was in the way the courts have treated or should treat the doctrine.

Consistent with the Second Circuit’s view, one commentator observed that in cases reviewing lower courts’ application of primary jurisdiction, the review was invasive “regardless of the label applied to the standard of review,” except where the lower court was seeking the aid of the agency and the necessity of that aid was unclear from the regulatory scheme.<sup>76</sup> The commentator continued that “[a]lthough the circuit court may label the review abuse of discretion review, what appears from the case is, if not *de novo* review, something very near it.”<sup>77</sup>

### III. DE NOVO REVIEW IS MORE APPROPRIATE

Although the doctrine of primary jurisdiction has prudential elements to it, *de novo* is the better standard of review for three reasons. First, primary jurisdiction is a matter of law because it requires statutory interpretation.<sup>78</sup> Second, the language of the Supreme Court in applying the doctrine is of a requisite nature rather than a discretionary nature.<sup>79</sup> Finally, appellate

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75. See *Nat’l Commc’ns Ass’n, v. AT&T*, 46 F.3d 220, 222 (2d Cir. 1995) (holding that the district court “applied an incorrect legal standard and thereby exceeded [its] discretion” (citing *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848, 854 (2d Cir. 1988))).

76. See 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 14.08, at 14-26 to -27 (3d ed. 1999) (explaining the differing standards of review among circuit courts). Professors Childress and Davis concluded that:

The variety of reasons for application [of primary jurisdiction] leads to somewhat confusing review, the decision to turn to the agency for its wisdom as to a given issue turning more on whether the reviewing court considers the district court’s decision right or wrong than on whether the district court acted within its discretion.

*Id.*

77. *Id.* at 14-26.

78. See *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (holding that primary jurisdiction is a question of law and rationalizing the ruling by explaining that primary jurisdiction requires statutory construction).

79. See *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (“[Primary jurisdiction] requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.”); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202 (1978) (“The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.”); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 353 (1963) (holding that the doctrine of primary jurisdiction “requires judicial abstention in cases where protection of the integrity of a

courts should not give the district court the amount of deference the abuse of discretion standard of review requires because the Supreme Court has held that the doctrine of primary jurisdiction does more than set the timetable of the courts,<sup>80</sup> which makes it more than merely procedural, and the district court has no advantage over the circuit court in applying the doctrine.

#### A. Statutory Interpretation

In *Subaru of America, Inc. v. David McDavid Nissan, Inc.*, the Texas Supreme Court gave a compelling argument as to why a de novo standard is appropriate, reasoning that the determination of whether to apply the doctrine of primary jurisdiction requires the interpretation of statutes.<sup>81</sup> Although the Texas Supreme Court was applying the primary jurisdiction doctrine to state courts and state agencies, its reasoning that primary jurisdiction requires statutory construction is also relevant to federal courts and agencies because statutory construction is also a necessary step in the way federal courts decide to apply the doctrine.<sup>82</sup>

The Ninth Circuit gave insight into the need for statutory interpretation to determine whether primary jurisdiction is applicable when the court held that based on the Supreme Court's language primary jurisdiction applies where there is a need for "protection of the integrity of a regulatory

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regulatory scheme dictates preliminary resort to the agency which administers the scheme"); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) ("We now reach the question whether . . . the over-all regulatory scheme of the Act requires invocation of [the] primary jurisdiction doctrine."); *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922) ("Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."). *But see Reiter*, 507 U.S. at 268-69 ("Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has *discretion* either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." (emphasis added)).

80. *See United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (describing primary jurisdiction as "a doctrine allocating law-making power over certain aspects' of commercial relations" (quoting *Primary Jurisdiction Reconsidered*, *supra* note 45, at 583-84)); *see also Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) ("The doctrine of primary jurisdiction promotes proper relationships between the courts and administrative agencies." (citing *Nader v. Alleghany Airlines, Inc.*, 426 U.S. 290, 303 (1976))). *But see Sears, Roebuck & Co.*, 436 U.S. at 199 n.29 (stating that primary jurisdiction "governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue" (quoting 3 DAVIS, *supra* note 24, § 19.01, at 3)).

81. *See Subaru of Am., Inc.*, 84 S.W.3d at 220 (implying that statutory interpretation is a matter of law).

82. *See* Aaron J. Lockwood, Note, *The Primary Jurisdiction Doctrine: Competing Standards of Appellate Review*, 64 WASH. & LEE L. REV. 707, 730-31 (2007) (explaining that the first steps in applying primary jurisdiction is for the court to decide the scope of its jurisdiction and the scope of the agency's jurisdiction, which involve matters of statutory interpretation).

scheme.”<sup>83</sup> The court reasoned that “it is the extent to which Congress, in enacting a regulatory scheme, intends an administrative body to have the first word on issues arising in judicial proceedings that determines the scope of the primary jurisdiction doctrine.”<sup>84</sup> Therefore, statutory interpretation is a necessary component of the doctrine, which is a matter of law.<sup>85</sup>

### B. *Requisite Language of the Supreme Court*

As the Ninth Circuit has stated,<sup>86</sup> the Supreme Court has often used language that indicates a requisite nature to the doctrine rather than a discretionary nature.<sup>87</sup> The Ninth Circuit supported its statement by quoting language of the Supreme Court that primary jurisdiction “requires judicial abstention in cases where protection of the integrity of a regulatory scheme *dictates* preliminary resort to the agency which administers the scheme,”<sup>88</sup> reaching “the question whether . . . the over-all regulatory scheme of the Act *requires* invocation of the primary jurisdiction doctrine,”<sup>89</sup> and “[w]henver a rate rule or practice is attacked as unreasonable or unjustly discriminatory, there *must* be preliminary resort to the commission.”<sup>90</sup> The Supreme Court has also said, “[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the [agency], it must be presented to the [agency].”<sup>91</sup> The Court’s use of words such as “requires”<sup>92</sup> and “must”<sup>93</sup> in developing and applying the doctrine of primary jurisdiction indicates that the Court did not intend for a district court to freely use its discretion.

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83. *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1364 n.15 (9th Cir. 1987) (quoting *Phila. Nat’l Bank*, 374 U.S. at 353).

84. *See id.* at 1362 (citing *Radio Corp. of Am.*, 358 U.S. at 339).

85. *See* Michael H. Ditton, *The Doctrine of Primary Jurisdiction and Federal Procurement Fraud: The Role of the Boards of Contract Appeals*, 119 MIL. L. REV. 99, 117 (1988) (“Perhaps the most that can be said is that statutory interpretation is a necessary complement to the doctrine of primary jurisdiction.”).

86. *See Gen. Dynamics Corp.*, 828 F.2d at 1364 n.15 (noting that “the Supreme Court frequently has used language at odds with the notion of discretionary application [of the doctrine of primary jurisdiction]”).

87. *See supra* note 79.

88. *Gen. Dynamics Corp.*, 828 F.2d at 1364 n.15 (quoting *Phila. Nat’l Bank*, 374 U.S. at 353).

89. *Id.* (quoting *Radio Corp. of Am.*, 358 U.S. at 346).

90. *Id.* (quoting *Great N. Ry. Co. v. Merchs. Elevator Co.*, 259 U.S. 285, 291 (1922)).

91. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 202 (1978) (explaining primary jurisdiction but declining to apply it because the agency lacked jurisdiction).

92. *See, e.g., supra* notes 88-91 and accompanying text (providing examples of the Court using requisite language).

93. *See Great N. Ry. Co.*, 259 U.S. at 291 (“Whenever a rate, rule or practice is attacked as unreasonable or unjustly discriminatory, there *must* be preliminary resort to the Commission.” (emphasis added)).

In *Reiter v. Cooper*, the Supreme Court used language indicating that in addition to the doctrine's requisite nature, the doctrine also had a discretionary aspect.<sup>94</sup> The Court explained that, "[r]eferral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice."<sup>95</sup> The Court's discretionary language, however, refers not to whether the referral to the agency was discretionary, but instead, whether the appropriate remedy is to delay proceedings or dismiss the case. That is to say, the remedy of delaying proceedings or dismissal is discretionary, not the doctrine itself. Further, in the sentence immediately preceding the Court's use of discretionary language, it uses requisite language and states, "[the doctrine of primary jurisdiction] requires the court to enable a 'referral' to the agency."<sup>96</sup> Moreover, the discussion of primary jurisdiction in *Reiter* is dicta and consequently does not carry as much weight as previous Supreme Court cases where the Court created, developed, and applied the doctrine.<sup>97</sup>

Some courts and commentators have used the terms "flexible"<sup>98</sup> and "prudential"<sup>99</sup> to define and explain primary jurisdiction. However, these

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94. See *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993).

95. *Id.*

96. *Id.* at 268 (emphasis added).

97. See *id.* at 268-70 (instructing respondents that the remedy they seek would be possible through exhaustion of administrative remedies, not the primary jurisdiction doctrine, and then refusing to apply either).

98. See *U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 34 (1st Cir. 2003) ("Although sometimes treated as a mechanical and rigid requirement, the modern view [of primary jurisdiction] is more flexible." (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956))); *Lipton v. MCI WorldCom, Inc.*, 135 F. Supp. 2d 182, 191 (D.C. Cir. 2001) ("The doctrine of primary jurisdiction is a flexible tool used to allocate 'business between court and agency', and should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution." (quoting *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984))); *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. Aug. 1981) ("[Primary jurisdiction] is a discretionary tool of the courts, a flexible concept to integrate the regulatory functions of agencies into the judicial decision making process . . ."); *Nat'l Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 821 (1st Cir. 1979) ("The doctrine of primary jurisdiction is a flexible tool for the allocation of business between court and agency and should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution." (quoting *Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334, 340 n.5 (1st Cir. 1970))).

99. See *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005) ("Primary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies."); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 18 (1st Cir. 2005) ("[P]rimary jurisdiction . . . invokes prudential doctrines, and 'does not implicate the subject matter jurisdiction of the federal court.'" (quoting *P.R. Mar. Shipping Auth. v. Fed. Mar. Comm'n*, 75 F.3d 63, 67 (1st Cir. 1996))); *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002) (explaining that primary jurisdiction does not implicate subject matter jurisdiction, "[r]ather it is a prudential doctrine . . ."); *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 565 (2d Cir. 1993) ("The primary jurisdiction of the Board does not deprive the courts of jurisdiction, rather, it raises prudential concerns about whether to exercise it."



terms do not necessarily imply that the court has discretion whether to apply the doctrine. “Flexible” can mean that courts may apply the doctrine in a number of circumstances, and therefore, the doctrine is flexible in that courts can invoke it in a number of contexts.<sup>100</sup> This interpretation is consistent with the idea that the doctrine has no fixed rule for application and that courts should apply it where doing so would promote the doctrine’s twin goals.<sup>101</sup> Prudential means “exercising prudence, good judgment, or common sense.”<sup>102</sup> In modifying the doctrine of primary jurisdiction, this likely means that courts created the doctrine to fill a pragmatic need. Moreover, to interpret “flexible” or “prudential” as implying discretion would directly contradict the frequent use of the Supreme Court’s requisite language in developing the doctrine.

### C. Lack of a Need for a High Level of Deference

Courts that view primary jurisdiction as a discretionary doctrine liken it to a doctrine that merely sets the timetable for the proceedings.<sup>103</sup> These courts seem to reason that because the abuse of discretion standard is generally appropriate for a court’s determinations on its procedure,<sup>104</sup> it is also appropriate for primary jurisdiction.<sup>105</sup> However, the Supreme Court has expressly rejected this view of the doctrine, having stated,

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(quoting 1 THE DEVELOPING LABOR LAW 975 (Patrick Hardin et al. eds., 3d ed. 1992)); *Nat’l Tank Truck Carriers, Inc.*, 608 F.2d at 821 (“Properly understood, the doctrine is not jurisdictional per se, but rather is a means of procuring ‘harmony, efficiency, and prudence’ in areas of overlapping judicial and administrative concern.” (quoting *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 n.1 (1st Cir. 1979))); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 220 (Tex. 2002) (“Despite similar terminology, primary jurisdiction is prudential whereas exclusive jurisdiction is jurisdictional.”).

100. Jaffe, *supra* note 19, at 1037 (quoting *Civil Aeronautics Bd. v. Modern Air Transp., Inc.*, 179 F.2d 622, 625 (2d Cir. 1950)) (“[T]he outstanding feature of the doctrine [of primary jurisdiction] is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies.”).

101. See *W. Pac. R.R. Co.*, 352 U.S. at 64 (dismissing any fixed rule for applying the doctrine and establishing the rule that the doctrine is applicable where its application will further its goals).

102. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1412-13 (4th ed. 2000).

103. See, e.g., *United States v. Bessemer & Lake Erie R.R. Co.*, 717 F.2d 593, 599 (D.C. Cir. 1983) (“The doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts. It simply structures the proceedings as a matter of judicial discretion, so as to engender an ‘orderly and sensible coordination of the work of agencies and courts.’” (quoting *Cheyney State Coll. Faculty v. Hufstедler*, 703 F.2d 732, 736 (3d Cir. 1983))).

104. See Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 34-35 (1994) (citing Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 653-54 (1971)) (explaining the reasons for applying “abuse of discretion” review).

105. See *Env’tl. Tech. Council v. Sierra Club*, 98 F.3d 774, 789 n.24 (4th Cir. 1996) (“[Primary jurisdiction] simply structures the proceedings as a matter of judicial

The doctrine of primary jurisdiction thus does “more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects” of commercial relations. “It transfers from court to agency the power to determine” some of the incidents of such relations.<sup>106</sup>

In addition to the argument that primary jurisdiction is more than merely procedural, another reason a reviewing court should not give deference to the district court’s determination is that the district court is not in a better position than the reviewing court to decide whether the doctrine applies. The abuse of discretion standard is generally applicable where lower courts are in a better position to make a certain determination than are the higher courts.<sup>107</sup> However, *de novo* review is appropriate because the district court is in no better position to determine whether the doctrine of primary jurisdiction applies than a reviewing court. The decision of whether the doctrine applies does not require factual findings or findings of credibility, for which the district court is in a better position to decide. Rather, the decision to apply the doctrine requires statutory interpretation and reasoning whether application of the doctrine will further the doctrine’s twin goals.<sup>108</sup> A district court has no advantage over a court of appeals in making these determinations. Since reviewing courts are in as good a position to make a determination, the high level of deference that the abuse of discretion standard calls for would be inappropriate.

One commentator writing on the proper standard of review for primary jurisdiction has averred that evaluation of whether the implication of the doctrine will further its twin goals and whether the implication of the doctrine will benefit the court appear to weigh against any deference to the lower court.<sup>109</sup> The commentator goes on to state that the only factor which

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discretion . . .” (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1162 (3d Cir. 1993)).

106. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956) (quoting *Primary Jurisdiction Reconsidered*, *supra* note 45, at 584); *see also supra* note 80.

107. *See Kunsch*, *supra* note 104, at 35 (asserting that the abuse of discretion standard of review “is appropriate when (1) concerns of judicial economy dictate that the trial court be responsible for the decision, or (2) the trial judge is in a better position to make the decision because he or she can observe the parties” (citing *State v. Oxborrow*, 723 P.2d 1123, 1133 (Wash. 1986))).

108. *See W. Pac. R.R. Co.*, 352 U.S. at 64 (enunciating that the test to apply primary jurisdiction is “whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application . . .”); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002) (“[W]hether an agency has primary jurisdiction requires statutory construction.”).

109. *See Lockwood*, *supra* note 82, at 731-36 (explaining that appellate courts can determine whether there is a need for regulatory uniformity from the pleadings, that the courts using agency expertise base their decisions on what the typical judge knows—not a particular judge’s knowledge—and thus, appellate courts can determine as easily as the lower courts, and whether the court will be aided by administrative action is a mixed

may justify increased deference to the lower court is the evaluation of the burden that application of the doctrine places on the parties.<sup>110</sup> He then compares the evaluation of the burden on the parties of deferral with the general equitable power of courts to “mitigate the rigidity of strict legal rules.”<sup>111</sup> However, the relevance of this factor in determining whether the doctrine applies is questionable as only a minority of Supreme Court justices have mentioned this factor in a dissent, and only a minority of courts of appeals have used this factor in their determinations.<sup>112</sup> Furthermore, the statement of the Court in *Western Pacific Railroad Co.*—that “[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation”—seems to preclude this type of reasoning.<sup>113</sup> Although the need to maintain regulatory uniformity and utilization of agency expertise are both relevant to “whether the reasons for the existence of the doctrine are present,” and the factor of whether administrative action would benefit the court is relevant to “whether the purpose it serves will be aided by its application,” the burden on the parties seems to go beyond the rule and, therefore, is of questionable relevance.

#### CONCLUSION

Although the doctrine of primary jurisdiction is almost 100 years old, courts are currently split on whether the doctrine is discretionary or a matter of law. No doubt this split stems from the unusual nature of the doctrine, blending prudential elements as well as elements generally accepted as matters of law.<sup>114</sup> However, the better standard of review for

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question of law and fact over which appellate courts have not given lower courts any deference).

110. See *id.* at 731, 736-37 (describing this factor as “so unique that it may, by itself, demand trial court discretion”).

111. *Id.* at 737 n.238 (quoting Kevin C. Kennedy, *Equitable Remedies and Principled Discretion: The Michigan Experience*, 74 U. DET. MERCY L. REV. 609, 609 (1997)).

112. See *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 321 (1973) (Marshall, J., dissenting) (“Wise use of the doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay.”); *Lockwood*, *supra* note 82, at 737 & n.237 (citing *Am. Auto Mfrs. Ass’n v. Mass. Dep’t of Env’tl. Prot.*, 163 F.3d 74, 81-82 (1st Cir. 1998)); *Nat’l Commc’ns Ass’n v. AT&T*, 46 F.3d 220, 223, 225 (2d Cir. 1995); *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988) (stating that a majority of the Court has not accepted the burden on the parties as a factor in the determination of whether primary jurisdiction applies but that “a number of courts of appeals have”).

113. 352 U.S. at 64.

114. See *Huntsman*, *supra* note 1, at 923 (reasoning that because there are both elements of discretion and matters of law in the doctrine of primary jurisdiction, every court of appeals must choose the standard of review to apply because the courts could not split up the doctrine and review each part under a different standard).

the doctrine is de novo because it requires statutory interpretation,<sup>115</sup> the Supreme Court has developed the doctrine using requisite language,<sup>116</sup> and there is no need to give the lower courts as much deference as the abuse of discretion standard requires.<sup>117</sup>

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115. *See supra* notes 81-85 and accompanying text.

116. *See supra* notes 86-102 and accompanying text.

117. *See supra* notes 103-13 and accompanying text.

DETERMINING DUE DEFERENCE:  
EXAMINING WHEN COURTS SHOULD  
DEFER TO AGENCY USE OF  
PRESIDENTIAL SIGNING STATEMENTS

NICHOLAS J. LEDDY\*

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## INTRODUCTION

In December 2005, Congress passed, with broad bipartisan support, an amendment to the Department of Defense's 2006 Appropriations Act prohibiting the federal government from engaging in cruel, inhuman, and degrading treatment of detained persons, regardless of their location or nationality (McCain Amendment).<sup>1</sup> In a signing statement dated December 30, 2005, President Bush reserved the right not to enforce the provisions of the law that he deems an unconstitutional infringement on his Commander in Chief powers,<sup>2</sup> effectively permitting both the armed forces and federal agencies to circumvent the McCain Amendment's prohibition of torture. This controversial statement sparked a renewed interest in the legality of signing statements and their appropriate usage.<sup>3</sup>

Ever since the Reagan Administration's increased use of presidential signing statements almost twenty years ago, the debate on the legality and utility of these statements has raged on in academia and popular media.<sup>4</sup> President George W. Bush uses signing statements with particular frequency, and has challenged more laws than all of his predecessors

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1. 42 U.S.C.A. §§ 2000dd-2000dd-1 (2007). Notably, one provision of this law requires the President to take action to ensure compliance with the prohibition of cruel, inhuman, and degrading treatment, including the establishment of administrative rules and procedures. 42 U.S.C. § 2000dd-0(3) (2007).

2. Statement of President George W. Bush on Signing of H.R. 2863, 2005 U.S.C.C.A.N. S50 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> [hereinafter McCain Amendment Statement].

3. See Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, available at [http://www.boston.com/news/nation/articles/2006/04/30/bush\\_challenges\\_hundreds\\_of\\_laws/](http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/) (citing the concern of many legal scholars that President Bush's use of signing statements to challenge over 750 laws violates constitutional separation of powers). Savage won the 2007 Pulitzer Prize in National Reporting for "his revelations that President Bush often used 'signing statements' to assert his controversial right to bypass provisions of new laws." See The Pulitzer Prize, Winners 2007, <http://www.pulitzer.org> (last visited July 4, 2007) (noting Savage's work analyzing the use and abuse of presidential signing statements).

4. The debate focuses mostly on signing statements that challenge a law as unconstitutional, consider the law "advisory" only, or interpret the law to mean something substantially different from its original purpose. See, e.g., Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 366 (1987) (arguing that the Reagan Administration used signing statements as a tool of statutory interpretation that attempted to usurp power from the Judiciary and the Legislature); AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, REPORT WITH RECOMMENDATION, 5 (2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf) [hereinafter ABA TASK FORCE REPORT] (opposing, as contrary to "our constitutional system of separation of powers," a President's use of signing statements to deem a law unconstitutional or to refuse to enforce a law); see also Savage, *supra* note 3 (voicing concern amongst legal scholars over the negative impact of signing statements on the constitutional separation of powers).

combined.<sup>5</sup> As of June 20, 2006, President Bush had issued signing statements that question the constitutionality of 110 bills.<sup>6</sup> Although some argue that “constitutional” signing statements permit the President not to enforce a law that he deems unconstitutional,<sup>7</sup> many believe signing statements have little or no legal effect—similar to a press release detailing the Executive’s interpretation of a law or his intention to enforce the law.<sup>8</sup> However, when executive agencies explicitly rely on these statements in promulgating regulations, signing statements have a clearer and more direct effect in shaping law because those statements become the primary rationale for agency policy.

When federal courts refer to signing statements, they often cite to them as a minor piece of legislative history or use them as one factor in analyzing a particular statute.<sup>9</sup> Rarely, if ever, do courts use the signing

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5. See ABA TASK FORCE REPORT, *supra* note 4, at 14-15 (contrasting President George W. Bush’s use of signing statements to challenge over 800 laws with that of all his predecessors combined, who challenged fewer than 600 laws in this manner).

6. See *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Michelle E. Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice), available at <http://judiciary.senate.gov/hearing.cfm?id=1969> (reporting that President Bush has issued “constitutional” signing statements with respect to 110 bills as of June 20, 2006).

7. See *infra* notes 20-21, 25, and accompanying text; see also Savage, *supra* note 3 (referencing several signing statements in which President Bush declared that “he does not need to ‘execute’ a law he believes is unconstitutional”).

8. One observer noted that

[t]he President has full discretion whether to issue a [s]igning [s]tatement and as to its contents. That action is neither required nor limited by law; it is simply one of a number of mechanisms available by which the President may choose to communicate with the public. As such, [s]igning [s]tatements have no legal force or effect. They have the same standing as other informal mechanisms through which the President makes his views known, such as remarks at photo opportunities or answers at press conferences.

John F. Cooney, Venable LLP, PRESENTATION TO THE 2006 ADMINISTRATIVE LAW CONFERENCE, AM. BAR ASS’N SECTION ON ADMINISTRATIVE LAW AND REGULATORY PRACTICE: SIGNING STATEMENTS: A PRACTICAL ASSESSMENT 3 (2006) [hereinafter Cooney Memo] (report on file with author); see also Garber & Wimmer, *supra* note 4, at 367-68, 381 (arguing that courts interpreting the intent of Congress should give no weight to signing statements and that courts “must declare that the President lacks the constitutional authority to speak for Congress and that a President’s signing statement simply contains the views of the Executive Branch issued pursuant to its executive—and not legislative—authority”).

9. See, e.g., *United States v. Perlaza*, 439 F.3d 1149, 1163 (9th Cir. 2006) (incorporating both a House Conference Report and President Clinton’s statement upon signing a particular amendment as evidence of the amendment’s legislative history); *Mark H. v. Lemahieu*, 372 F. Supp. 2d 591, 599 (D. Haw. 2005) (exploring the legislative history of the Handicapped Children’s Protection Act and examining the Senate Report, the House Conference Report, and the presidential signing statement); *S. Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411, 1427 n.23 (M.D. Fla. 1998) (citing in a footnote the signing statements of both President George H.W. Bush and President Clinton in interpreting the Magnuson Act and its amendments as not permitting Congressional encroachment into the Executive’s powers to conduct foreign relations); *Clemmer v. Enron Corp.*, 882 F. Supp. 606, 609 (S.D. Tex. 1995) (recognizing President George H.W. Bush’s statement upon signing the Americans with Disabilities Act as indicative of the bill’s broader legislative history with respect to the phrasing in of the Act).

statement's interpretation of legislation as controlling.<sup>10</sup> The level of deference courts give agency actions that rely on signing statements is unclear, likely because courts give inconsistent levels of deference to signing statements generally.<sup>11</sup> Some observers argue that presidential signing statements that interpret legislation deserve a similar level of deference as that given to legislative history<sup>12</sup> or even an agency's interpretation of a statute.<sup>13</sup> Despite these arguments, no established doctrine or level of scrutiny exists to accord these statements a particular legal status.

This piece explores the level of deference courts should give to agency action when the agency specifically relies in whole or in part on a presidential signing statement in making policy. Part I of this Comment examines the history of signing statements and their emergence as justifications for administrative regulations and policy. Part II analyzes the rationale for deference to agency action in common law doctrines developed in *Skidmore v. Swift & Co.*,<sup>14</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>15</sup> *Motor Vehicle Manufacturers Ass'n*

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10. For some of the few cases where signing statements were a central factor in the court's reasoning, see for example *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 152 (D.D.C. 2002) (relying on President George W. Bush's signing statements as one factor in determining that the signed bill did not abrogate a bilateral treaty), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003); *Nat'l Audubon Soc'y v. Evans*, No. Civ. A. 99-1707 (RWR), 2003 WL 23147552, at \*8 (D.D.C. July 3, 2003) (citing to presidential signing statements on the Magnuson Act and its amendments in determining that executive action falling under the political question doctrine is not justiciable).

11. Although federal courts have in a few instances granted the statements some deference, the U.S. Supreme Court refused to give any deference to the McCain Amendment Statement, *supra* note 2. Compare *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006) (ruling that federal courts have the congressional authority to decide matters related to military commissions in the war on terror), and *id.* at 2816 & n.5 (Scalia, J., dissenting) (denouncing the majority for giving no weight to the President's signing statement that sought to preclude federal courts from hearing matters related to the military's detainees in the war on terror), with *Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 824-25 (D.C. Cir. 1993) (relying on a presidential signing statement that declared invalid a congressional limitation on the President's constitutional authority).

12. See generally *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Prof. Christopher S. Yoo, Vanderbilt University Law School) [hereinafter Yoo testimony], available at <http://judiciary.senate.gov/hearing.cfm?id=1969> (arguing that "recognizing Presidential signing statements as legislative history would better promote the democratic process. . . . [T]he President's understanding of the meaning of the statutory language is entitled to no less respect than the House's or the Senate's"). But see, Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 598-99 [hereinafter *Context-Sensitive Deference*] (challenging the assertion that signing statements should be treated as legislative history or accorded *Chevron* deference, and arguing that they should, at most, receive *Skidmore* deference).

13. See Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT'L L.J., Nov. 10, 1986, at 13 (likening judicial reliance on signing statements to reliance on agency interpretation of ambiguous statutes).

14. 323 U.S. 134 (1944).

15. 467 U.S. 837 (1984).



v. *State Farm Mutual Automobile Insurance Co.*,<sup>16</sup> and *United States v. Mead Corp.*,<sup>17</sup> and concludes that the primary justification for judicial deference to agency action is an agency's expertise. Accordingly, Part II argues that *Chevron* and *Skidmore* deference cannot be given to agency action that relies solely on a signing statement because the President generally lacks the expertise the common law requires for that deference. Part II further examines several federal agency rules that rely fully or partially on presidential signing statements for their justification, and analyzes whether and to what extent deference should be given to those rules. Part III explores legislative proposals to clarify the legal status of signing statements and their impact on federal agencies. This Comment concludes that federal agencies should not rely solely on a presidential signing statement for their reasoning because doing so would fail to merit deference under the common law standards developed in *Skidmore*, *Mead*, and *Chevron*, and could arguably be considered arbitrary and capricious under *State Farm*.

#### I. HISTORICAL BACKGROUND

The presidential signing statement has existed within the U.S. political landscape since at least the early nineteenth century.<sup>18</sup> In the past, a signing statement would, for example, thank a Congressman for his support or promote the benefits of legislation.<sup>19</sup> These relatively innocuous statements contrast with the signing statements of today, which often reserve the right not to enforce a law, either by refusing enforcement altogether on the basis of the law's perceived unconstitutionality<sup>20</sup> or by treating the law as "advisory" only.<sup>21</sup>

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16. 463 U.S. 29 (1983).

17. 533 U.S. 218 (2001).

18. See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 210-11 (recognizing that Presidents Andrew Jackson, John Tyler, and Ulysses S. Grant issued signing statements upon signing new bills into law).

19. Cooney Memo, *supra* note 8, at 2.

20. See, e.g., McCain Amendment Statement, *supra* note 2 and accompanying text; Statement of President Ronald Reagan in Signing the Deficit Reduction Act of 1984, 2 PUB. PAPERS 1053 (July 18, 1984) (objecting vigorously to the provisions of a bill he finds unconstitutional). See generally ABA TASK FORCE REPORT, *supra* note 4, at 7-18 (detailing the history and usage of presidential signing statements, particularly those that deem a part of a law unconstitutional).

21. See Statement of President George W. Bush on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2993-94 (Dec. 17, 2004) [hereinafter IRTPA Statement] (citing the President's constitutional authority to conduct foreign relations as the reason for viewing "as advisory" the interview requirement for foreign diplomats and officials); see also ABA TASK FORCE REPORT, *supra* note 4, at 16 (citing a presidential signing statement to the Intelligence Authorization Act of 2002, treating as "advisory" the requirement that Congress be provided with certain special reports).

Current Supreme Court Justice Samuel Alito developed the idea of using signing statements in this manner in a 1983 memorandum written during his tenure in the Reagan White House Office of Legal Counsel (OLC).<sup>22</sup> The Reagan Administration believed signing statements should be considered as an element of legislative history, and as evidence of this belief, arranged for their publication in the United States Code Congressional and Administrative News (U.S.C.C.A.N.) through an agreement with West Publishing Company.<sup>23</sup>

Working for the OLC under President Clinton in the early 1990s, Walter Dellinger described four functions of presidential signing statements: explaining the bill to the public, directing subordinate officers on how to implement the bill, declaring a bill's constitutionality, and creating legislative history.<sup>24</sup> In a memorandum the following year, Dellinger further refined the argument for the President's ability not to execute laws he signs but deems unconstitutional.<sup>25</sup> After these memoranda, the number

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22. See Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel to the Litigation Strategy Working Group 1 (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> (describing his memorandum as a preliminary proposal to make "fuller use" of presidential signing statements, particularly in the field of statutory interpretation, and arguing that "the President's understanding of the bill should be just as important as that of Congress"). The memorandum also emphasizes a central advantage of interpretive signing statements as increasing the power of the Executive to shape the law. *Id.* at 2. Interestingly, Justice Alito poses a "theoretical problem" in this memorandum, wondering, "[i]f presidential intent is of little or no significance when inconsistent with congressional intent, what role is there for presidential intent? Is it entitled to deference comparable to that customarily given to administrative interpretations?" *Id.* at 3. This Comment attempts to answer that question in the negative. See *infra* Part II.

23. See PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 202-03 (2002) (citing Edwin Meese III, MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDWIN MEESE III, 1985-1988, 78-79 (Washington, D.C.: Government Printing Office, 1989)) (describing Attorney General Edwin Meese's success in securing a publishing agreement with West Publishing Company with the goals of improving statutory interpretation by clarifying the President's understanding of a bill, recognizing the signing statement as legislative history, and making these statements more available to the Bench and the Bar); see also ABA TASK FORCE REPORT, *supra* note 4, at 10 (noting that the Reagan Administration was the first to view signing statements as a "strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives" in a Democratically-controlled Congress). The issuance of signing statements that interpret the law acquires even more significance when an opposition political party controls Congress because the President can use signing statements to preserve his party's policy objectives over those of the other party.

24. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Bernard M. Nussbaum, Counsel to the President, *The Legal Significance of Presidential Signing Statements* (Nov. 3, 1993), available at <http://www.usdoj.gov/olc/signing.htm>.

25. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Abner J. Mikva, Counsel to the President (Nov. 2, 1994), available at <http://www.usdoj.gov/olc/nonexecut.htm> (arguing that a President's decision not to enforce a law is consistent with his constitutional obligation to faithfully execute the laws, but that "[w]here possible, the President should construe provisions to avoid constitutional

of signing statements reserving the right not to enforce the law at issue, for constitutional or other reasons, rose dramatically.<sup>26</sup>

Perhaps taking note of this increase, federal agencies have begun to cite signing statements as justification in their rulemaking and policy statements.<sup>27</sup> This Comment examines several instances where agencies cite signing statements as their reasoning, in whole or in part, for making a particular policy decision, and whether that reasoning is sufficient to merit judicial deference. This Comment discusses two instances where an agency relied in full on a signing statement in deciding policy: a 1990 Department of Interior (DOI) policy statement,<sup>28</sup> and a 1995 Office of Management and Budget (OMB) rule.<sup>29</sup>

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problems”). Ultimately, the Constitution is silent on the issue of whether the President should enforce laws he deems unconstitutional. *See* U.S. CONST. art. II, § 3 (requiring only that the President “take [c]are that the [l]aws be faithfully executed”).

26. The increased use of signing statements to controvert legislative intent by refusing to enforce the law or deeming it unconstitutional was one reason why the American Bar Association created a task force to investigate the issue. *See generally* ABA TASK FORCE REPORT, *supra* note 4, at 7-18 (detailing the history of presidential signing statements that reserve the President’s right not to enforce part of a law, and noting President George W. Bush’s substantial increase in usage of this type of signing statement); Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, HUM. RTS. BRIEF, Fall 2006, at 21 (noting that “President Reagan challenged 71 legislative provisions, President George H.W. Bush challenged 232, and President Clinton challenged 140,” and that some scholars have identified over 800 challenges to laws through the signing statements of President George W. Bush).

27. Some agencies cite presidential signing statements as the central reasoning for their decision-making, and some only mention them in a subsidiary point. *See infra* Part II.B.1-2. By contrast, the Food and Drug Administration once implemented a regulation as required by the Prescription Drug Marketing Act that completely ignored the objections of President Reagan’s statement upon signing that bill into law. *Compare* Guidelines for State Licensing of Wholesale Prescription Drug Distributors, 21 C.F.R. § 205.5(a) (2007) (requiring states to adhere to federal minimum standards for wholesale drug distribution), *with* Statement on Signing the Prescription Drug Marketing Act of 1987, 1 PUB. PAPERS 505-06 (Apr. 22, 1988) (objecting to the provision requiring state adherence to federal licensing standards for wholesale drug distributors as “contrary to fundamental principles of federalism upon which our Constitution is based”).

28. *See* Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9,233, 9,233 (Mar. 12, 1990) [hereinafter Indian Water Rights Policy]. The Indian Water Rights Policy noted the Administration’s policy

as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.

*Id.* at 9,233; *see also* Statement on Signing the Puyallup Tribe of Indians Settlement Act of 1989, 1 PUB. PAPERS 771-72 (June 21, 1989) (affirming that the Administration is “committed to establishing criteria and procedures to guide future Indian land and water claim settlement negotiations”).

29. *See* 5 C.F.R. §§ 1320.5(a)(1)(iii)(E), 1320.8(a)(5) (2007) (requiring agencies to determine whether collection of documents can be done electronically, to evaluate whether the burden of document collection can be reduced through the use of electronic means, and to notify OMB of these findings); Remarks on Signing the Paperwork Reduction Act of

By contrast, this Comment examines instances where an agency relies in part on a signing statement and in part on its expertise in making a rule, as was the case with a 1997 Legal Services Corporation (LSC) rule.<sup>30</sup> Lastly, in considering a military and foreign affairs exception to the notion that agency reliance on a signing statement alone does not merit judicial deference, this Comment examines a 2006 State Department rule that establishes visa interview requirements in accordance with a presidential signing statement.<sup>31</sup>

The propriety of these agencies' decisions is beyond the scope of this Comment. Instead, this Comment focuses primarily on agency reasoning and explores the level of judicial deference that should be given to agency action based solely or in part on a signing statement. Partly due to the newness of agency use of signing statements, courts have not yet clearly stated the weight such usage deserves.<sup>32</sup> Lack of judicial resolution on the issue has led legal scholars and observers to argue both for and against judicial deference to signing statements.<sup>33</sup> Although this Comment argues

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1995, 1 PUB. PAPERS 733-35 (May 22, 1995) (noting President Clinton's view that "[f]rom this point forward, I want all of our agencies to provide for the electronic submission of every new Government form or demonstrate to OMB why it cannot be done that way"). OMB reliance on President Clinton's signing statement is demonstrated in the relevant notice of proposed rulemaking. Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act, 60 Fed. Reg. 30,438, 30,440-42 (June 8, 1995) [hereinafter OMB Rule].

30. See 45 C.F.R. pt. 1643 (2006) (prohibiting the use of LSC funding for any litigation, advocacy, or other activities related to assisted suicide, euthanasia, or mercy killing); Statement on Signing the Assisted Suicide Funding Restriction Act of 1997, 1 PUB. PAPERS 515-16 (Apr. 30, 1997) (citing First Amendment concerns in directing Federal agencies to construe the law to "prohibit federal funding for activities and services that provide legal assistance for the purpose of advocating a right to assisted suicide . . . and not to restrict Federal funding for other activities, such as those that provide forums for the free exchange of ideas"). LSC reliance on this signing statement is demonstrated in the relevant final rule. Restriction on Assisted Suicide, Euthanasia, and Mercy Killing, 62 Fed. Reg. 67,746, 67,747-48 (Dec. 30, 1997) [hereinafter Euthanasia Rule] (reiterating the First Amendment concerns in President Clinton's signing statement as the rationale for not restricting funding to other activities such as those that "provide forums for the free exchange of ideas").

31. See 22 C.F.R. § 41.102(b) (permitting a consular official to waive the personal appearance requirement for diplomatic or official visa applicants); IRTPA Statement, *supra* note 21 (treating as "advisory" the personal interview requirements for diplomatic visa applicants). State Department reliance on the presidential signing statement is described in the relevant final rule. Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act, as Amended, 71 Fed. Reg. 75,662, 75,662 (Dec. 18, 2006) [hereinafter Visa Rule].

32. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* 3 (Univ. of Chicago Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 133), available at <http://www.law.uchicago.edu/academics/publiclaw/index.html> (observing that "courts pay little attention [to signing statements and, as a result,] it is not clear how they can increase the President's authority vis-à-vis Congress").

33. See *Context-Sensitive Deference*, *supra* note 12, at 598-99 (arguing that "[c]ourts should adopt a flexible approach to the amount of deference accorded signing statements," and that at most, signing statements should receive *Skidmore* deference, but never *Chevron* deference); Kmiec, *supra* note 13, at 32 (claiming that "[w]hether a court *should* rely on a

a different premise—namely, that agency reliance on signing statements alone violates the common law doctrines that permit judicial deference to agency action—such reliance can also violate the constitutional separation of powers in certain circumstances.<sup>34</sup>

## II. ARGUMENT

Several common law doctrines govern the level of judicial deference granted to agency fact-finding and statutory interpretation. These doctrines, founded primarily on deference to agency expertise, give the agency more or less deference depending on the presence of congressional intent in delegating powers to an agency in its enabling statute. One doctrine also permits a court to strike down agency action if it is deemed arbitrary and capricious.<sup>35</sup>

### *A. Agency Expertise is the Primary Basis for Judicial Deference to Agency Action at Common Law*

Common law doctrines provide for varying levels of judicial deference to agency judgment depending on whether the issue in question is one of law or fact.<sup>36</sup> Both categories of doctrines, those for questions of fact and those for questions of law, are primarily based on the rationale that deference is due to agencies because of their expertise.<sup>37</sup> Of those

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signing statement in a given case depends on the context . . . but there can be no claim—and there is none by anyone—that a court *must* rely”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376-77 (2000) (suggesting that *Chevron* deference to agency action can be linked to presidential involvement and that according to one interpretation, “courts could apply *Chevron* when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes”).

34. For example, if the President signs into law a bill he deems unconstitutional, declares an intent not to enforce all or part of a bill, or interprets a bill in a manner clearly inconsistent with Congressional intent, he is effectively disapproving of that bill and should not sign it—as Article I of the U.S. Constitution requires. Article I explicitly requires the President return a bill to Congress if he disapproves of it:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

U.S. CONST. art. I, § 7. For the past twenty years, Presidents have issued hundreds of signing statements to this effect. Agency reliance on such statements in their rulemaking would uphold an unconstitutional lawmaking process.

35. See *infra* Part II.A.4 (describing the arbitrary and capricious standard developed in *State Farm*).

36. See STEPHEN G. BREYER, ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 191-403 (6th ed. 2006) [hereinafter *ADMINISTRATIVE LAW*] (separating the analysis of judicial review of fact and law).

37. See *infra* Part II.A.1-4 (arguing that *Chevron*, *Skidmore*, *Mead*, and *State Farm* all cite to agency expertise as the primary basis for judicial deference).

doctrines discussed below, *Skidmore*, *Chevron*, and *Mead* generally apply to questions of law, whereas *State Farm* applies to questions of fact.

### 1. *Skidmore v. Swift & Co.*

As the oldest of the doctrines of judicial review of agency action, *Skidmore v. Swift & Co.* permits limited deference when an agency issues an interpretive rule, policy statement, or guideline, based on its “power to persuade.”<sup>38</sup> The level of deference will vary on the facts of each case.<sup>39</sup> In reaching its decision, the *Skidmore* Court focused on the expertise of the administrator and his important role in regulating industry according to Congress’s mandate.<sup>40</sup>

### 2. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*

In perhaps the most famous doctrine of judicial deference to agency action, the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* required that deference be given to reasonable agency interpretations of statutes they administer if the statutory language is ambiguous.<sup>41</sup> This relatively broad standard does not apply if Congress has spoken clearly or unambiguously on the issue—in which case Congress’s interpretation controls.<sup>42</sup> This notion of statutory ambiguity is

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38. 323 U.S. 134, 140 (1944). *Skidmore* held:

[T]he rulings, interpretations and opinions of the [agency] Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Id.*; see also Cross, *supra* note 18, at 234 (proposing the standard established in *Skidmore* as the standard of judicial deference for signing statements that interpret the law).

39. See *Skidmore*, 323 U.S. at 140 (declaring that “[e]ach case must stand on its own facts”).

40. See *id.* at 137-38 (remarking that Congress “did create the office of Administrator, impose upon him a variety of duties, [and] endow him with powers [to regulate industry]. . . . Pursuit of his duties has accumulated a considerable experience . . . and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere”) (emphasis added).

41. 467 U.S. 837, 866 (1984) (holding that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail”).

42. See *id.* at 842-43. The *Chevron* Court ruled that:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

central to the decision in *Chevron*, and the Court noted the important role agency expertise plays in clarifying those ambiguities.<sup>43</sup> In contrast to *Skidmore* deference, which applies to policy statements or other interpretive rules or documents, *Chevron* deference applies to legislative rules, which are those agency interpretations made in exercise of congressionally-delegated legislative authority.<sup>44</sup>

*Chevron* also reinforces the frequent congressional practice of “punting,” whereby Congress intentionally leaves bills ambiguous to facilitate their passage, thus permitting the agency to define the legislation’s terms more narrowly.<sup>45</sup> The reason for this punting, and the subsequent deference it entails, is that the agencies’ expertise in making complex policy choices with widely varying factual bases outweighs the ability of Congress or the Judiciary to make the same judgments.<sup>46</sup>

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question for the court is whether the agency’s answer is based on a permissible construction of the statute.

*Id.*

43. *Id.* at 865 (recognizing that where Congress has failed to specifically define the relevant terms, “the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies”) (footnotes omitted); see also Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 591 (2005) [hereinafter *Statutory President*] (emphasizing the agency’s “greater expertise” as the justification for deference in *Chevron* and that presidents and their staff cannot be as experienced in a regulatory area as an agency).

44. See ADMINISTRATIVE LAW, *supra* note 36, at 239 (describing legislative rules as “the product of an exercise of delegated legislative power to make law through rules,” and interpretive rules as those without exercising that authority (citing K. Davis, 2 ADMINISTRATIVE LAW TREATISE 36, 51-52 (1979))).

45. See *Chevron*, 467 U.S. at 865 (proposing the idea that Congress “consciously desired the Administrator to strike the balance . . . thinking that those with *great expertise* and charged with responsibility for administering the provision would be in a better position to do so”) (emphasis added); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989) [hereinafter *Judicial Deference*] (acknowledging that “Congress now knows that the ambiguities it creates . . . will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known”).

46. See, e.g., ADMINISTRATIVE LAW, *supra* note 36, at 247 (opining that “*Chevron* is best understood as reflecting an understanding that Congress, as a general rule, has given administrative agencies authority to resolve ambiguities in statutes” and also that *Chevron* represents “the judgment that agencies have comparative advantages over courts in interpreting statutory terms, because political accountability and technical specialization are relevant to interpretation”); Oren Eisner, Note, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 426-27, 434-35 (2001) (noting “expertise” as one of the three rationales for judicial deference to agency action in *Chevron*); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2087-88 (1990) (remarking that “*Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges. . . . [A]dministrators are in a far better position than courts to interpret ambiguous statutes in a way that takes account of new conditions”).

3. United States v. Mead Corp.

In *United States v. Mead Corp.*, the Court held that a “ruling letter” issued by the United States Custom Service Headquarters merited *Skidmore* and not *Chevron* deference because there was no indication that Congress intended the letter’s tariff classification to carry the force of law.<sup>47</sup> Citing the benefit of the agency’s “specialized experience” and its “thoroughness, logic and *expertness*,” the Court applied *Skidmore* deference to the ruling letter’s tariff classifications.<sup>48</sup> In effect, this holding revived *Skidmore* deference and applied it to agencies’ interpretive rules.<sup>49</sup>

4. Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.

In *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, the National Highway Traffic Safety Administration (NHTSA) revoked a rule that new cars be equipped with passive restraints to protect passengers.<sup>50</sup> Addressing a question of fact, the Court struck down NHTSA’s rescission of the rule as arbitrary and capricious.<sup>51</sup> In articulating the arbitrary and capricious standard, the Court held that the “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>52</sup> While acknowledging the agency’s duty to utilize its expertise,<sup>53</sup> the Court found that the agency failed to do so and thus reversed the agency action.<sup>54</sup> The arbitrary and capricious standard of

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47. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (holding that a “tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore* . . . the ruling is eligible to claim respect according to its persuasiveness”) (citations omitted).

48. *Id.* at 235 (emphasis added).

49. See *id.* at 240-41 (Scalia, J., dissenting) (observing that *Skidmore* now applies when the *Chevron* doctrine does not).

50. 463 U.S. 29, 38 (1983).

51. See *id.* at 46 (explaining that the question at issue is “whether NHTSA’s rescission of the passive restraint requirement . . . was arbitrary and capricious” and concluding that it was). Notably, the Court found that “[a]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Id.* at 42.

52. *Id.* at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

53. *Id.* at 54 (noting that NHTSA “must bring its expertise to bear on the question” at hand if it sought to rescind an old rule).

54. *Id.* at 56 (holding that because NHTSA’s did not consider highly relevant studies, NHTSA “failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard”).



judicial review applied in *State Farm* is also codified in the Administrative Procedure Act (APA), and applies to all agency action, findings, and conclusions.<sup>55</sup>

A review of the doctrines discussed above reveals that whether addressing a question of law or fact, an interpretive rule, or a legislative rule, the Supreme Court consistently cites agency expertise as a primary rationale for deferring to agency action.<sup>56</sup>

*B. When an Agency Relies on a Presidential Signing Statement, and Not on its Own Expertise, Courts Should Not Defer to That Agency Action*

Given that federal agencies generally have a superior understanding of important technical concepts and terminology in their area of specialty,<sup>57</sup> it makes sense for judges to defer to their policy decisions. In fact, Congress creates federal agencies and assigns them powers and functions through enabling statutes in order to handle specialized, complex issues that Congress itself does not have the time or capacity to address.<sup>58</sup> The scope of this congressionally-delegated authority is crucial because it defines those areas in which an agency can act with the force of law, and those in which it cannot—a distinction often characterized as the difference between legislative and interpretive rules.<sup>59</sup> Logically, whether Congress intended for the courts to defer to agency judgment can depend on whether the agency's expertise is related to the question of law at hand.<sup>60</sup>

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55. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000) (requiring a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

56. See *Judicial Deference*, *supra* note 45, at 514. Justice Scalia observed that: the cases, old and new, that accept administrative interpretations, often refer to the ‘expertise’ of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. In other words, they are more likely than the courts to reach the correct result.

*Id.*

57. See Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 309-10 (1986) (emphasizing the “advantages of agency expertise” in “an era of burgeoning judicial caseloads,” and that “[a]gency administrators, who have extensive expertise . . . are much better placed than generalist judges to make the policy decisions”).

58. See Melissa M. Berry, *Beyond Chevron's Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 543-44 (2007) (noting that Congress leaves ambiguities in enabling statutes that agencies and courts must resolve); Carl N. Pickerill, Note, *Specialized Adjudication in an Administrative Forum: Bridging the Gap Between Public and Private Law*, 82 NOTRE DAME L. REV. 1605, 1623 (2007) (noting that “Congress may impose additional rules on individual agencies in their enabling statutes”).

59. See *supra* note 44 and accompanying text.

60. See ADMINISTRATIVE LAW, *supra* note 36, at 240 (describing “the nature of the agency's specialized experience in relation to the legal question and the practical implications” as relevant to whether Congress intended the court to pay special heed to agency views).

When an agency cites a presidential signing statement as the sole justification for a particular policy, the agency essentially contravenes the common law requirement to use its own expertise, thus risking judicial sanction. In contrast, when an agency only relies in part on a presidential signing statement, and in part on its own expertise, courts should be more deferential to that action under the common law and less likely to deem that reliance arbitrary and capricious.

### 1. *Full Reliance on a Signing Statement*

As a branch of the Department of the Interior (DOI), the Bureau of Indian Affairs (BIA) handles all federal relations with the Indian tribes.<sup>61</sup> The DOI's enabling act permits the Secretary of the Interior to supervise all public business related to Indian tribes.<sup>62</sup> A 1990 DOI policy statement relied completely on one of President George H.W. Bush's signing statements as the basis for developing procedures for the negotiation and settlement of claims concerning Indian water resources.<sup>63</sup>

As demonstrated earlier, both *Skidmore* and *Mead* require an agency to use its expertise in promulgating interpretive rules and policy statements.<sup>64</sup> Given President George H.W. Bush's lack of expertise in negotiating or litigating Indian water rights relative to that of the DOI,<sup>65</sup> the DOI's acceptance of the President's policy choice to negotiate instead of litigate substitutes his opinion for the agency's own expertise. The DOI's use of its expertise is important here because the agency has decades of experience in handling complex policy decisions affecting hundreds of Indian tribes, and in contrast to the inexpert President, is more likely to make a better policy choice, especially in identifying those conflicts that

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61. See generally 25 U.S.C. §§ 1-2 (2000) (creating the Bureau of Indian Affairs and delegating powers to the Commissioner of Indian Affairs).

62. 43 U.S.C. § 1457 (2000) (charging the Secretary of the Interior with the "supervision of public business" related to, *inter alia*, "Indians").

63. See *supra* note 28 and accompanying text.

64. See *supra* Parts II.A.1, II.A.3.

65. See Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 309 (2006) [hereinafter *Statutory Powers*] (noting that "Presidents are generalists. But presidents' position at the apex of administration puts them in a good position to demand the expertise of executive branch officers."); Alfred R. Light, *Environmental Federalism in the United States and the European Union: A Harmonic Convergence?*, 15 ST. THOM. L. REV. 321, 331-32 (2002) (opining that a "group of environmental specialists more likely holds similar perspectives among themselves that are different from generalists (such as Presidents or Governors with responsibility over a large number of different policy areas)"); see also *Statutory President*, *supra* note 43, at 591 (noting that agencies have more expertise in their regulatory field than a president's staff).

are better resolved through litigation.<sup>66</sup> A reviewing court would therefore likely find this interpretive rule lacked the “relative expertness” and the “power to persuade” required for *Skidmore* deference.<sup>67</sup>

Similarly problematic, in 1995 the OMB issued a notice of proposed rulemaking that cited one of President Clinton’s signing statements as the sole basis for parts of its rule that directs agencies to permit electronic submission of documents.<sup>68</sup> While allowing electronic submission of documents appears to be within the OMB’s statutory authority, the signing statement provides the only justification for the rule in this instance.<sup>69</sup> The OMB therefore undermined Congress in that it circumvented the authority Congress specifically delegated to the OMB, and not to the President. The correct procedure would have been to rely on OMB expertise, as required by *Chevron*,<sup>70</sup> instead of relying fully on the President for decision-making in an area outside his expertise.<sup>71</sup> The portion of the rule relying

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66. See Bureau of Indian Affairs, <http://www.doi.gov/bureau-indian-affairs.html> (last visited Oct. 24, 2007) (noting the BIA’s expertise in conducting relations with 561 federally recognized tribal governments; the “administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives[;] . . . [d]eveloping forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development,” and providing education to 48,000 students).

67. See *supra* note 38 and accompanying text.

68. It is important to note here that this lengthy proposed rule contained several subsections with several different justifications. See OMB Rule, *supra* note 29, at 30,438-44 (proposing amendments to 5 C.F.R. §§ 1320.1-1320.19 and for some subsections, relying on various legislative and judicial sources for its reasoning). Those subsections that relied on the presidential signing statement, however, relied on nothing else for their reasoning and are thus individually suspect for lack of expert justification. See *id.* at 30,440-42 (responding to President Clinton’s signing statement and incorporating its proposals into the new regulation).

69. See *id.* at 30,440-42; see also 31 U.S.C. § 503(b)(6)(B) (2000) (permitting the Deputy Director for Management of the OMB to adopt modern technologies to more efficiently and effectively manage federal agencies).

70. See *supra* notes 41-46 and accompanying text.

71. See *Statutory President*, *supra* note 43, at 591 (noting that agencies generally have more expertise than Presidents). At least two scholars have noted that agency statutory interpretation deserves some judicial deference whereas signing statements do not, because the former utilizes agency expertise and congressional delegation, and the latter does not. See Garber & Wimmer, *supra* note 4, at 386 n.125. Those scholars contended that:

[I]n most cases where the Executive Branch acts in making an initial interpretation of a statute, it is the agency trusted with implementing the act that makes the decision. Because of agency expertise and congressional delegation, these decisions are given appropriate deference by the courts. However, the presidential signing statements should be accorded no deference as an agency interpretation. Presidential signing statements go much further, and with much less justification, than traditional executive interpretation of statutes made in the course of implementing a congressional program.

*Id.* (citations omitted).

exclusively on a signing statement could arguably be struck down as arbitrary and capricious for failure to consider relevant factors within the agency's expertise.<sup>72</sup>

## 2. *Partial Reliance on a Signing Statement*

The Legal Services Corporation (LSC) is the main federal body that distributes government funding to provide free legal assistance in civil matters, as Congress mandated in the Legal Services Corporation Act.<sup>73</sup> In 1997, the LSC issued a final rule prohibiting the use of federal funds to advocate for a legal right to or to seek assistance in performing euthanasia in accordance with the Assisted Suicide Funding Restriction Act of 1997 (ASFRA).<sup>74</sup> Although the LSC was within its statutory authority to issue this rule (and was required by Congress to do so in the ASFRA),<sup>75</sup> the LSC relied on a presidential signing statement that limited the scope of the rule so as not to restrict First Amendment rights.<sup>76</sup> The question thus arises whether a reviewing court should defer to this agency action.

Despite the fact that this rulemaking relied in part on a presidential signing statement, the LSC ruling would likely receive *Chevron* deference for two reasons: (i) the signing statement was only used as a basis for including a limitation in the commentary of the rule and not in the rule itself;<sup>77</sup> and (ii) the LSC Board contributed heavily to the development of the rule,<sup>78</sup> thereby injecting its expertise into the rulemaking process.

Thus, when an agency uses its expertise to critically evaluate a signing statement and relies only in part on that signing statement in its rulemaking, a reviewing court should grant deference to the agency action because the agency's expertise played a significant role in the decision making process—thus fulfilling its congressionally-delegated mandate. The LSC

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72. See *supra* notes 51-55 and accompanying text.

73. Legal Services Corporation Act, 42 U.S.C. §§ 2996b-2996f (2000) (detailing the LSC's purpose, powers, and duties to provide legal assistance in civil matters to those who cannot afford it and noting that "the legal services program must be kept free from the influence of or use by it of political pressures").

74. See 45 C.F.R. pt. 1643 (2006) (implementing the Assisted Suicide Funding Restriction Act of 1997); see also Assisted Suicide Funding Restriction Act, 42 U.S.C. § 14404(a)(3) (2000) (prohibiting the use of federal funds in law suits to advocate a legal right to euthanasia or to compel any person or institution to provide or fund euthanasia).

75. 42 U.S.C. § 14404(b)(1)(E) (directing the LSC to incorporate the ASFRA into its policy scheme).

76. See *supra* note 30 and accompanying text.

77. See Euthanasia Rule, *supra* note 30, at 67,747-48 (noting the LSC Board's decision to insert the President's suggestion into the rule commentary and not the final rule itself).

78. See *id.* (detailing the LSC Board's substantial input in reviewing the comments and structuring the new rule, and the Board's critical analysis of the signing statement's proposal).

rule represents an agency's legitimate use of a presidential signing statement, and one to which courts will likely defer, given the importance of agency expertise in the common law deference doctrines and in fulfilling duties set forth in the agency's enabling statute.<sup>79</sup>

### 3. *Military and Foreign Affairs Exceptions*

The State Department has the statutory authority to issue both immigrant and nonimmigrant visas.<sup>80</sup> Under President George W. Bush, the State Department issued a final rule, which now has the force of law, relaxing interview requirements for nonimmigrant visas.<sup>81</sup> The rule treats as "advisory" the requirement that foreign diplomats personally appear before a consular officer when seeking a visa — a policy decision based solely on a presidential signing statement.<sup>82</sup> Although this rule may merit deference because of the generally protected status foreign affairs enjoys under the common law and the APA,<sup>83</sup> it nonetheless illustrates how a presidential signing statement can become law without passing through Congress or without the input of agency experts.

When issuing signing statements related to foreign affairs or military issues, the President often uses boilerplate language to reserve the right not to enforce a law to the extent that it infringes on his Commander in Chief

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79. See *supra* Part II.A.

80. 8 U.S.C. § 1201(a) (2000).

81. See 22 C.F.R. § 41.102(b)(4) (2007) (permitting a consular officer to "waive the requirement of personal appearance in the case of any alien who the consular officer concludes presents no national security concerns requiring an interview and who . . . is an applicant for a diplomatic or official visa").

82. See Visa Rule, *supra* note 31; see also IRTPA Statement, *supra* note 21, at 2994 (citing the President's constitutional authority to conduct foreign relations as the reason for viewing "as advisory" the interview requirement for foreign diplomats and officials).

83. Courts generally give broad deference to the Executive branch's conduct of foreign affairs. See Administrative Procedure Act, 5 U.S.C. § 553(a)(1) (2000) (exempting all matters related to military and foreign affairs from rulemaking requirements); *id.* § 701(b)(1)(G) (2000) (excluding military authority exercised in the field in time of war or in occupied territory from the definition of "agency," thus exempting that action from judicial review under the APA); see also *Dep't of the Navy v. Egan*, 484 U.S. 518, 526-27 (1988) (holding that the strong presumption of appellate review in the absence of a statute precluding review does not apply to national security matters); *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (finding that the presumption of judicial review does not apply to national security or foreign affairs issues).

powers.<sup>84</sup> A court could conceivably strike down agency reliance on such signing statements and find the agency's use of boilerplate language—with nothing else—arbitrary and capricious under *State Farm* or the APA.<sup>85</sup>

### III. PROPOSED LEGISLATIVE SOLUTIONS

The fundamental role of agency expertise in our system of government should not be underestimated.<sup>86</sup> Congress routinely and deliberately crafts ambiguous legislation to punt difficult or politically sensitive questions to federal agencies so that agency experts might resolve the complex policy questions to the best of their abilities.<sup>87</sup> When an agency substitutes the non-expert opinion of the President in the place of the opinion of its own experts, the agency risks a court overturning its subsequent action for failing to meet the expertise rationale underlying the *Chevron* and *Skidmore* common law standards of deference.<sup>88</sup> Legislators, lawyers, and academics have proposed both legislative and judicial solutions that can solve this problem.<sup>89</sup>

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84. President Bush made the same reservation in the IRTPA signing statement and the signing statement to the McCain Amendment, among others. See IRTPA Statement, *supra* note 21, at 2995 (noting “[t]he executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation’s foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch”); McCain Amendment statement *supra* note 2 (declaring that “[t]he executive branch shall construe Title X . . . in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power”); Statement on Signing the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 43 WEEKLY COMP. PRES. DOC. 31-32 (Jan. 12, 2007). The latter statement pronounced that the

executive branch shall construe provisions of the Act that purport to direct or burden the conduct of negotiations by the executive branch with foreign governments or international organizations in a manner consistent with the President’s constitutional authority to conduct the Nation’s foreign affairs, including the authority to determine which officers shall negotiate for the United States with a foreign country, when, in consultation with whom, and toward what objectives, and to supervise the unitary executive branch.

*Id.*

85. See *supra* notes 51-55 and accompanying text.

86. See *Christensen v. Harris County*, 529 U.S. 576, 597 (2000) (Breyer, J., dissenting) (noting that “[i]f statutes are to serve the human purposes that called them into being, courts will have to continue to pay particular attention in appropriate cases to the experienced-based views of expert agencies”).

87. See *supra* notes 45-46 and accompanying text (discussing the rationale for the judicial deference to agency actions).

88. See *supra* Part II.

89. See *infra* notes 90-94 and accompanying text (discussing legislative proposals). Furthermore, the ABA Task Force Report urged Congress to:

[E]nact legislation requiring the President promptly to submit to Congress an official copy of all signing statements, and to report to Congress the reasons and legal basis for any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret

In an attempt to clarify the legal status of signing statements, Congressional leaders introduced bills in the House<sup>90</sup> and the Senate<sup>91</sup> in 2006 and 2007 that present sweeping measures designed to strictly limit the influence of signing statements on executive agencies.<sup>92</sup> Both House bills sought to restrict all funding for the production of signing statements as well as to prohibit all federal entities from considering any presidential signing statement when construing or implementing any act of Congress.<sup>93</sup> If passed, the latest bill would prevent the President from influencing federal agencies through signing statements, and prohibit federal courts from using signing statements in their legal analysis.<sup>94</sup> Similarly, the

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such a law in a manner inconsistent with the clear intent of Congress, and to make all such submissions be available in a publicly accessible database.

. . . [And] enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review of such signing statements to the extent constitutionally permissible, and urge Congress and the President to support a judicial resolution of the President's claim or interpretation.

ABA TASK FORCE REPORT, *supra* note 4, at 5.

90. H.R. 5486, 109th Cong. (2d Sess. 2006); H.R. 264, 110th Cong. (1st Sess. 2007).

91. S. 3731, 109th Cong. (2d Sess. 2006); *see also* S. Res. 22, 110th Cong. (2007) (resolving to reject "any interpretation of the President's signing statement on the Postal Accountability and Enhancement Act (Public Law 109-435) that in any way diminishes the privacy protections accorded sealed domestic mail under the Constitution and Federal laws and regulations" and reaffirming "the constitutional and statutory protections accorded sealed domestic mail").

92. In effect, these measures attempt to limit what some observers describe as the President's improper attempts to control agency action. *See* Editorial, *The Imperial Presidency 2.0*, N.Y. TIMES, Jan. 7, 2007 (questioning the legality of one of President George W. Bush's most recent signing statements on a Postal Service Bill that uses boilerplate language to, *inter alia*, reserve the right to open first-class mail without a warrant during "exigent circumstances" or for the purposes of foreign intelligence collection). With a similar eye towards increasing his authority over federal agencies, President George W. Bush recently issued an executive order requiring each agency to have a political appointee running a regulatory policy office that supervises agency decision-making. *See* Robert Pear, *Bush Directive Increases Sway on Regulation*, N.Y. TIMES, Jan. 30, 2007, at A1 (observing that the new executive order "gives the White House much greater control over the rules and policy statements that the government develops to protect public health, safety, the environment, civil rights and privacy").

93. The bills' proposed language reads:

None of the funds made available to the Executive Office of the President, or to any Executive agency . . . , from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President . . . . [And] a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act.

H.R. 264 §§ 3-4, 110th Cong. (1st Sess. 2007); H.R. 5486, 109th Cong. (2006).

94. While those who criticize the current use of signing statements may welcome this bill, if implemented, the law may have the effect of pushing presidential influence of agencies more underground. *See* Yoo testimony, *supra* note 12, at 10 (suggesting that banning reliance on signing statements would only redirect the President's interpretive process towards the agencies, while maintaining presidential influence over agency statutory interpretation). In theory, a President without effective signing statements may use one of

Presidential Signing Statements Act of 2006, introduced by Sen. Arlen Specter (R-PA), proposed to “forbid judicial reliance on presidential signing statements as a source of authority in the interpretation of Acts of Congress.”<sup>95</sup>

In effect, each bill proposes to bring the conclusions of this Comment into law by prohibiting judicial deference to agency action based solely on a presidential signing statement.

#### CONCLUSION

This Comment demonstrates that agencies should not rely solely on a presidential signing statement for their reasoning in making a rule or policy decision because doing so would fail to merit deference under the common law standards developed in *Skidmore*, *Mead*, and *Chevron* and could arguably be considered arbitrary and capricious under *State Farm*.<sup>96</sup> When an agency relies on a presidential signing statement as its rationale in making interpretive or legislative rules, it is relying on the Office of the President that, with a few exceptions, lacks the requisite expertise for judicial deference.<sup>97</sup> If federal agencies want reviewing courts to defer to their actions, they must include their own expertise in the development of the rules and policy.<sup>98</sup>

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the other ways to influence agency action (e.g. executive orders, directives, or political appointments), but could also resort to less transparent, and thus less accountable, methods. The possibility also remains that the President may issue a signing statement claiming his intention to treat the law limiting the use of signing statements as “advisory” only, a paradoxical outcome that likely would require judicial resolution.

95. S. 3731 §§ 2(10), 5, 109th Cong. (2d Sess. 2006).

96. See *supra* Part II.A.

97. See *Statutory President*, *supra* note 43; *Statutory Powers*, *supra* note 65 (noting that Presidents are generalists without the same level of expertise as executive agencies). *But see supra* Part II.B.3 (discussing the broad deference given to the President’s exercise of his foreign affairs powers).

98. As demonstrated in Part II.B, *supra*, federal agencies under all presidents since President Reagan have cited to signing statements in ways that, if challenged in court, would not merit judicial deference under the common law. While this Comment notes, in particular, the current administration’s abuses of signing statements, the conclusions of this Comment should apply equally to all administrations—past, present, and future.



# RECENT DEVELOPMENTS

## AGENCY-CENTERED OR COURT-CENTERED ADMINISTRATIVE LAW? A DIALOGUE WITH RICHARD PIERCE ON AGENCY STATUTORY INTERPRETATION

JERRY L. MASHAW\*

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### INTRODUCTION

In an earlier Article in this Review, I attempted to jump-start a conversation about agency statutory interpretation.<sup>1</sup> I argued first for the importance of agency interpretive practice—asserting that agencies are “the primary official interpreters of federal statutes”<sup>2</sup>—and lamented the paucity of secondary literature analyzing agency statutory interpretation as an independent or autonomous enterprise.<sup>3</sup> The Article then investigated, in a very preliminary way, both the normative and positive features of agency statutory interpretation. I first asked what norms a responsible

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1. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

2. *Id.* at 502-03.

3. *See id.* at 501-02 (positing queries such as how agencies interpret statutes, whether there are distinctive interpretive methodologies that appeal to administrators, and with what effects).

administrator should observe when interpreting statutes,<sup>4</sup> and second, how agencies interpret statutes in the actual practice of implementing the statutes in their charge.<sup>5</sup>

I limited the latter positive inquiry to a very brief foray into interpretive practices at the Environmental Protection Agency (EPA) and the Department of Health and Human Services (HHS) when issuing formal legislative rules.<sup>6</sup> But, as my prior Article noted, this was surely only the tip of the proverbial iceberg.<sup>7</sup> Most agency interpretation is much less formal and much less accessible than these two examples. Agencies interpret in a wide range of contexts, speak to multiple audiences, and promulgate their interpretations in myriad forms, including the silence of decisions not to act.<sup>8</sup>

Although little could be concluded from this limited empirical investigation, it did uncover some striking discontinuities between agency interpretive practice and the interpretive approaches of reviewing courts during judicial review. Although the EPA—the agency involved in the now iconic *Chevron* case<sup>9</sup>—constantly invoked *Chevron* and emphasized the “reasonableness” of its interpretations, both the EPA and HHS based much of their agency interpretation on past agency practice, technical or scientific understandings of statutory terms, and on legislative history.<sup>10</sup> Because some of the rules that I investigated had been subject to judicial review, it was possible in a few instances to directly compare agency and judicial interpretive methods in the same case. As the prior Article put it:

Perhaps most striking are the cases in which an agency’s highly nuanced interpretation—based on text, legislative history, statutory history, past agency practice, the balance of competing congressional purposes, and industry or scientific understandings—was rejected in favor of judicial approaches based on pure textual analysis, plain meaning or the invocation of grammatical rules.<sup>11</sup>

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4. See *id.* at 504-24 (bifurcating the analysis of interpretive norms into constitutional demands and prudential concerns).

5. See *id.* at 524-36 (querying the occasions, forms, and processes for agency statutory interpretation and the administrators’ interpretive methodologies).

6. See *id.* at 527-36 (selecting these agencies because they each had a substantial number of issuances and engage in different administrative tasks and politico-legal contexts).

7. See *id.* at 528 (analogizing the Article’s findings to the notes of an “explorer in uncharted territory”).

8. See *id.* at 524-27 (discussing the difficulties of empirical investigation of agency interpretive practice).

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

10. See Mashaw, *supra* note 1, at 535 (observing the agencies’ meager use of judicial precedent).

11. *Id.*

This practical divergence between agency and judicial styles of interpretation reinforced a concern more fully developed in the Article's normative analysis. Arguing largely from the standpoint of the institutional position of agencies in the American constitutional legal order, I developed a series of possible "canons of construction" for agency statutory interpretation.<sup>12</sup> Although I put forth these "canons" tentatively as the basis for further discussion, they revealed some substantial differences between our constitutional expectations for agency interpretive practice and the parallel normative expectations that we might have in relation to the judiciary.<sup>13</sup> For example, it seems normatively appropriate for agencies to give significant deference to presidential directions concerning how they should interpret their statutes. By contrast, a court would be perfectly justified in treating presidential pronouncements on statutory meaning as quite irrelevant to its interpretive task, save in those cases where the President is the direct administrator. Similarly, while we might think that agencies have a responsibility to interpret in order to give energy and effectiveness to the legislative programs for which they are responsible, courts have no parallel responsibility for implementation. Although courts often interpret to avoid raising constitutional questions, an agency taking this approach risks under-implementing its legislative programs and short-circuiting the constitutional conversation.<sup>14</sup>

These and other possible normative divergences between agency and court interpretive methodologies led me to conclude that deference to agencies' statutory interpretation, as mandated by the Supreme Court in *Chevron* and its progeny, might be a much more complicated task than previously imagined. As I put the matter in the prior Article:

[M]y construction of parallel universes of interpretive discourse on the foundation of divergent institutional roles seems to undermine the very possibility of an authentically deferential judicial posture. How can a court's determination of "ambiguity" or "reasonableness" at *Chevron*'s famous two analytical "steps" be understood as deferential when that determination emerges from the normative commitments and epistemological presumptions of "judging" rather [than] "administering"? How could *Mead*'s resuscitation of *Skidmore* deference make sense as deference at all when the discourse, to be persuasive, would presumably have to be within the terms of a judicial conversation about meaning that ignores, if not falsifies, the grounds

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12. See *id.* at 521-24 (qualifying the canons as needing commentary, qualification, examples, and modification to reflect the complexity of the differences between judicial and agency statutory interpretation).

13. See *id.* at 522 (displaying the canons in tabular form).

14. See *id.* at 507-10, 518-21 (explaining that a "[c]onstitutionally timid administration . . . potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command").

upon which much administrative interpretive activity is appropriately and responsibly premised?<sup>15</sup>

These rhetorical queries, of course, state the issues in their starkest forms, for I intended to provoke discussion and serious inquiry. Several authors accepted this invitation, which formed the basis for a brief symposium in the *Administrative & Regulatory Law News*.<sup>16</sup> More recently Professor Richard Pierce challenged the basic premises of my original Article.<sup>17</sup> In the final paragraph of his essay, Pierce summarizes his objections to my position:

I disagree with . . . Mashaw at the most fundamental level. Unlike . . . Mashaw, I do not believe that agencies are “the primary official interpreters of federal statutes.” Rather, all agency statutory interpretations are subject to de novo review and potential rejection by a court through application of *Chevron* step one. Further, I do not believe that agencies should use methods of statutory interpretation that differ from the methods courts use. Accordingly, I do not see the conflicts between legitimate agency interpretations and legitimate court interpretations that trouble Mashaw. It is certainly true that agencies have the power to give meaning to ambiguous provisions in the statutes they administer, subject only to the deferential form of judicial review described in *Chevron* step two and *State Farm*. When agencies undertake that important task, however, they are not involved in the process of statutory interpretation. Instead, they are engaged in a policymaking process, the end result of which is to choose which of several linguistically plausible meanings to give ambiguous language to further the purposes of the statute the agency is implementing.<sup>18</sup>

Richard Pierce’s entry into the conversation about agency statutory interpretation is particularly welcome. Pierce is one of the most knowledgeable and accomplished commentators on American administrative law and his critique of my position raises a broad, important, and generally neglected question: Should American administrative law be an agency-centered or a court-centered discipline? In Pierce’s view, both

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15. *Id.* at 537-38 (referring to *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

16. Symposium, *Roundtable: Statutory Interpretation in the Executive Branch*, 31 ADMIN. & REG. L. NEWS, Spring 2006, at 6.

17. See Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007). Pierce also disagreed with an earlier article by Peter Strauss, which argued that, whatever the position of courts concerning the relevance of legislative history to statutory interpretation, legislative history is a critically important source of information for agency interpreters. See Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322 (1990).

18. Pierce, *supra* note 17, at 204-05 (footnotes omitted).

courts and agencies should base legal interpretations on a judicial model.<sup>19</sup> Agency practice in construing statutes in the course of implementing them is not statutory interpretation—it is policymaking, a question perhaps best left to students of political science or public administration.<sup>20</sup>

Pierce's critique lies well within a long tradition in American administrative law scholarship. The emergence of administrative law as a separate field of study almost coincided with the transformation of American legal education by Langdell's case method. Since that time, notwithstanding the exhortations of legal realists, positive political theorists, and critical legal scholars of various stripes, we have studied administrative law primarily by looking at what judicial opinions say about it.<sup>21</sup> To be sure, there has been much recent attention to political control of administration in the Executive Branch, cost-benefit analysis, other clearance functions organized through the Office of Management and Budget, and so on. But my proposal goes beyond a focus on separation of powers questions as an integral part of administrative law. I am arguing for the study of agency statutory interpretation—and implicitly for the study of agency practice as a whole—as an autonomous enterprise. It seems to me not only odd, but perverse, that articles parsing the exquisite subtleties of *Chevron* or *Skidmore*<sup>22</sup> deference fill our law reviews, while virtually nothing is said about the ways in which agencies should and do interpret the statutes in their charge. On this point I remain unrepentant. Hence, I must grapple with Richard Pierce's criticisms.

### I. THE PIERCE CRITIQUE

Pierce disagrees with my position both with respect to the importance of agency statutory interpretation and with respect to its position as an autonomous legal enterprise. As to the former, Pierce believes that it is simply incorrect to describe agencies as “the primary official interpreters

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19. See *id.* at 204 (stating that Pierce does not believe that agencies should use different methods of statutory interpretation than courts use).

20. See *id.* at 204-05 (explaining that when agencies interpret ambiguous provisions in the statutes that they administer, they are making policy by choosing one of several plausible meanings to further the statute's purposes).

21. See generally WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982) (arguing that the rise of the case method as the only respectable approach to professional training overwhelmed attempts of Ernst Freund and others to explore administrative law by looking at administrative practice and administrative decisions). Somewhat ironically, this case method also tended to suppress the approach of a Harvard scholar, Bruce Wyman, whose early lectures on administrative law emphasized agency practice, which Wyman conceptualized as the “internal law” of administration. See BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* §§ 1-6 (1903) (explaining that the author devoted the most time in his lectures to the questions of what methods, practices, and processes the administration acts).

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

of federal statutes.”<sup>23</sup> As articulated in the paragraph quoted above, Pierce believes that this is false because “all agency statutory interpretations are subject to de novo review and potential rejection by a court through application of *Chevron* step one.”<sup>24</sup> This objection could, of course, be merely a linguistic quibble about whether “primary” refers to the quantity of interpretation done by agencies versus courts or to the relative finality of agency and judicial decisions about the meaning of statutes. But, it is not. As I shall explain below, my claim is that agencies are not only quantitatively more important interpreters, but they also interpret in the overwhelming number of contexts with complete finality.

The more interesting issue that divides us is the question of whether there is good reason to believe that agency and judicial interpretations should diverge because of their differing institutional positions in implementing statutory law. Pierce’s position is that courts and agencies are doing essentially the same thing when they “interpret,” and that when their roles diverge it is because the agency is no longer acting as an “interpreter.”<sup>25</sup> This is an interesting and complex position that will require further unpacking.

In some sense our two positions are so fundamentally different that they are a bit like two ships passing in the night—and in a dense fog. Pierce begins his critique by stating that he believes that I have “gone astray” in my effort “to understand and to explain the roles of agencies in the process of applying the two-step test the Court announced in *Chevron*.”<sup>26</sup> But, of course, that is exactly what my Article is *not* about. Courts apply the *Chevron* doctrine, at least some of the time,<sup>27</sup> but agencies have no responsibility to do so. At a conceptual level, a doctrine about judicial deference to agency interpretation is simply irrelevant to an agency’s job. My prior Article was about the question of how agencies should and do carry out the task of statutory implementation, not about how agencies apply *Chevron*.

But this is an incomplete and uninteresting response to Pierce’s basic claims. For in his view, if we organize the inquiry about agency statutory interpretation around the *Chevron* two-step process, we will see two

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23. Pierce, *supra* note 17, at 204 (quoting Mashaw, *supra* note 1, at 502-03).

24. *Id.* at 204.

25. *See id.* at 204-05 (reasoning that when agencies choose between several linguistically plausible meanings to a statute, they are policymaking).

26. *Id.* at 198.

27. *See* William N. Eskridge, Jr. & Lauren E. Baer, The Supreme Court’s Deference Continuum, an Empirical Analysis (from *Chevron* to *Hamdan*) 33-36 (May 11, 2007) (unpublished manuscript, on file with author). William Eskridge and Lauren Baer find that in a majority of cases involving statutory interpretation between 1984 and 2006, the Supreme Court failed to apply the *Chevron* doctrine, used a host of deference doctrines other than *Chevron*, and applied none of them consistently.

important things. The first is practical and strategic. When seeking to determine the extent to which the statute speaks with clarity—the question at *Chevron* step one—Pierce argues that “an agency must do its best to replicate the interpretive process courts use.”<sup>28</sup> This is not a conceptual or normative claim; it is a strategic one. As Pierce notes: “To the best of its ability, the agency should attempt to use exactly the same interpretive process a court would use—any intentional variation from that judicial interpretive process would be a self-defeating exercise in futility.”<sup>29</sup>

So much for *Chevron* step one. With respect to *Chevron* step two—that is, adopting policies that embody reasonable constructions of the relevant statutes—Pierce agrees with me that courts and agencies are engaged in quite separate endeavors.<sup>30</sup> Indeed, he goes much further. Because considerations that go well beyond disputes about the proper interpretation of the governing statutory language are likely to dominate the policy process, Pierce claims that agencies should not here be viewed as “involved in the process of statutory interpretation.”<sup>31</sup> In his words:

There is only one link between this policymaking process and the process of statutory interpretation. In the course of explaining why it made the decisions it made, the agency must refer to decisional factors that the underlying statute makes permissible. For that purpose, the agency must engage in statutory interpretation to the extent necessary to explain why it believes that a decisional factor it applies is statutorily permissible.<sup>32</sup>

From this perspective there is no “paradox of deference” as I suggested in my earlier Article. Because the agency and the court are doing fundamentally different things—the court interpreting the statute, the agency adopting a policy position—review for reasonableness at *Chevron* step two could not place agencies and courts in the awkward position of providing divergent interpretations based on their divergent institutional roles in the legal order.

## II. A RESPONSE TO PIERCE’S OBJECTIONS

I will not spend much time on the question of whether agencies are the “primary” interpreters of federal statutes. Whether one views “primary” as referring to “first,” “quantitatively most significant,” or “interpreting with final authority,” I do not believe that treating agencies as the primary

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28. Pierce, *supra* note 17, at 203.

29. *Id.*

30. *See id.* at 203-04 (explaining that agencies’ efforts to minimize the risk of judicial reversal in *Chevron* step two has less to do with statutory interpretation than with implementation of a comprehensive and transparent policymaking process).

31. *Id.* at 205.

32. *Id.* at 204.

interpreters of federal statutes is controversial. A number of other commentators have said as much.<sup>33</sup> Moreover, although courts can, as Pierce notes, decide individual cases with finality, courts never review the vast majority of administrative interpretive actions. This is not only because courts do not challenge most agency interpretations; many of them cannot be challenged. Lower level agency personnel receive a constant stream of interpretive advice from their superiors in the form of manuals, field letters, memoranda, and the like. Because these interpretations do not become the explicit basis for agency actions affecting private parties, courts almost never review them.

Similarly, a large proportion of agency interpretations are embedded in decisions not to act. These occasionally rise to the level of an explicit justification for agency inaction, as in the recent case of *Massachusetts v. EPA*.<sup>34</sup> But much more is buried in internal memoranda, unrecorded meetings, settlement agreements, consent orders, or the mental operations of responsible officials. Conventional administrative law doctrines of standing, reviewability, ripeness, and so on, will make most of these interpretive decisions unreviewable. And an unreviewable administrative decision is a final one.

Pierce may object to this account based on his view of what should properly be understood as “interpretation.” For him, only the abstract question of whether a statute speaks with clarity can be described properly as interpretive. But this seems an unjustifiably restrictive view. Pierce, for example, quotes the Supreme Court’s language in *Chevron*, stating that “the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives [of the Clean Air Act].”<sup>35</sup> For him, this is evidence that the proper way to describe the Court’s conclusion is as a determination that the agency has made a reasonable policy choice. But, of course, it is equally appropriate to describe the Court as having decided that the EPA made a reasonable, purposive interpretation of the Clean Air Act. For it is surely the Supreme Court’s view that the *Chevron* doctrine is about statutory interpretation. The Court’s position is

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33. See, e.g., Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 373 (1989) (arguing for abandoning the philosophical conception of law as rules of conduct in a world where much of the legislative landscape is populated with statutes that merely confer authority on agencies); Michael W. Spicer & Larry D. Terry, *Administrative Interpretation of Statutes: A Constitutional View on the “New World Order” of Public Administration*, 56 PUB. ADMIN. REV. 38 (1996); Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019-20, 1068 (1998) (arguing that administrative agencies are the principle interpreters of statutes and, as a matter of practice, have taken on the role of updating statutes that was long the providence of the common law court).

34. 127 S. Ct. 1438, 1462-63 (2007).

35. Pierce, *supra* note 17, at 200 (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984)).



not that interpretation disappears when policy intrudes, but that the connection between interpretation and policy choice is sufficiently close that courts should defer to the agency's interpretation. It seems to mischaracterize the process of interpretation, and the Supreme Court's view of it in *Chevron*, to treat agency decisions about policy choice, within the constraints of their governing statutes, as not involving statutory interpretation.

Contrary to Pierce's claim, agencies do more than merely refer to their statutes as a way of indicating, *à la State Farm*,<sup>36</sup> that they have used legitimate statutory considerations when making policy.<sup>37</sup> If agencies must explain to reviewing courts why their policy choices carry out the purposes of the statutes that they administer, they unavoidably must explain their interpretation of the statute. A statute's legislatively specified decision criteria are not self-interpreting. If the decision involved in *Massachusetts v. EPA*,<sup>38</sup> for example, returns to the Supreme Court, as I suspect that it will, an EPA decision that the Clean Air Act does not demand that it regulate carbon emissions from motor vehicles, would be an EPA interpretation of the statute. It will have determined that although the Clean Air Act authorizes such regulation, as the Supreme Court held in *Massachusetts v. EPA*, it does not demand it. And, if that is the EPA's determination, the Court may sustain it, not because no interpretation was involved, but because the interpretation was a reasonable one.

From the foregoing it seems that Pierce's initial claim that agencies are not primary interpreters of federal statutes is tightly connected to his further argument that policy choice is not properly understood as interpretive. The latter position goes directly to his claim that no paradox of deference exists. If agency policy choice never counts as statutory interpretation, then agency decisions and judicial review for reasonableness are entirely different activities. Hence, I need to say something more about what counts as interpretation.

From an agency's perspective, the first step in any process of policy implementation is to ask a basic interpretive question: What is it that we are meant to do? Further questions will follow in rapid succession, such as, what legal techniques are available to us for implementation, through what processes are we required to make our decisions, and so on. Only interpreting the statute's language within the context of the agency's understanding of the general purposes of the statute and the current state of the world can answer these questions. For an agency to adopt a policy that

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36. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

37. See Pierce, *supra* note 17, at 204.

38. 127 S. Ct. 1438 (2007).

it believes carries out the purposes of its statute—given its statutory powers, required statutory processes, available regulatory techniques, and understanding of the facts of the matter—is precisely to give concrete meaning to the abstract commands of the statute. And any explanation of how its action implements the statutory purposes for which it has responsibility will necessarily provide, or perhaps assume, an interpretation of the statute.

Let me put this point slightly differently. Agency implementing action is an instrumentally rational exercise. Administrative agency personnel must ask and answer at least five basic questions: (1) What are the goals of the statute that we are implementing? (2) How does the current state of the world differ from those goals? (3) What policy choices are likely to move the future state of the world closer to our statutorily specified goals? (4) What instruments have we been given with which to articulate and implement our chosen policies? (5) What constraints—procedural, analytic, temporal, etc.—have been placed on our development and implementation of our policies? Although questions two and three can be addressed without interpreting the agency's statute, the remaining questions are all saturated with interpretive issues. The notion that policy choice is not interpretive simply ignores many of the necessary mental operations involved in administrative implementation.

Let us now turn to Pierce's final, and in many ways, most interesting claim: When agencies are authentically interpreting statutes—that is, when determining whether the statute is sufficiently vague or ambiguous as to bear multiple meanings—they should and do use precisely the same interpretive methodology as reviewing courts. Indeed, from Pierce's perspective, the positive and normative questions seem to be subsumed in a strategic one: how to avoid reversal at the hands of reviewing courts. Hence, in some sense, our arguments are once again flowing past each other without any necessary point of contact. My prior Article was about "oughts" and "ises," not about legal strategies, but I want to take Pierce's claim seriously. I argue that his strategic judgment is unwarranted and that, even if it were sound, taking a defensive, strategic approach to statutory interpretation would be normatively inappropriate for implementing agencies.

Imagine yourself in the position of an administrative agency, or the agency's general counsel, confronted with an interpretive issue. Assume further that you predict that the sort of decision that will be made will very likely be one of those minority occasions in which the agency's interpretation will be subjected to judicial oversight. You ask yourself a

strategic question: How should I predict the outcome of a judicial review proceeding in which a claim is made that the agency has violated its statutory mandate?

In approaching this question, a good first line of inquiry would be to ask under what standard the agency's interpretation of its mandate is likely to be tested. Pierce's assumption seems to be that the standard will be the one articulated in *Chevron*, starting with the step one inquiry. To the extent that the agency's action is neither § 553 legislative rulemaking nor formal adjudication, there is the question of whether *Chevron* applies. But, let us for the moment put that question aside. The more interesting initial question is whether the reviewing court will in fact even use *Chevron* in circumstances in which it is uncontroversially applicable.

The answer to this question is far from straightforward. My colleague, William Eskridge, and his co-author Lauren Baer, have undertaken a mammoth project to analyze the 1,014 Supreme Court decisions between 1984 and 2006 where a question of agency statutory interpretation was at issue.<sup>39</sup> Their preliminary findings demonstrate in a more rigorous way what many administrative lawyers have suspected from their own observations—there is only slightly more than a chance probability that the Supreme Court will mention and apply *Chevron* in cases raising issues of agency statutory interpretation. The only observed decisional regularity in the Eskridge and Baer study is that the Court will more likely cite and apply *Chevron* in cases in which the Court agrees with the agency's interpretation. The only doctrinal regularity, somewhat surprisingly, is that the Court almost always consults legislative history on the question of whether Congress has delegated interpretive authority to the agency or considered the precise question at issue. From earlier research on circuit courts' applications of *Chevron*, we also know that these courts seem quite confused about when *Chevron* applies, not to mention what it means.<sup>40</sup> In short, we can have little confidence that we could predict when *Chevron* step one would be relevant in judicial review. From this perspective alone, the failure of an agency to approach statutory interpretation from the perspective of what it anticipates a court's interpretive methodology will be can hardly be said to be "a self-defeating exercise in futility."<sup>41</sup>

But, even if the agency were assured that a reviewing court would decide interpretive issues, once raised, using the *Chevron* format, exactly what interpretive process should the agency imagine that the reviewing court will use? Over the past several decades no methodological issue has been

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39. See Eskridge & Baer, *supra* note 27, at 34.

40. See generally Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005).

41. Pierce, *supra* note 17, at 203.

so contentious amongst commentators or judges than the appropriate way to approach the interpretation of statutes. When the members of an appellate court panel agree that the issue before them is one of statutory interpretation, that *Chevron* applies, and that they will apply it in preference to some other ground of decision, they often differ notoriously and heatedly concerning the appropriate interpretive method. Nor is there any reason to predict that an agreement on interpretive methodology will necessarily lead to agreement on substantive interpretation. Interpretive issues do not normally make their way to an appellate court, and certainly not to the Supreme Court, unless those questions are in considerable doubt. Given all these uncertainties, I am tempted to conclude that an agency attempting to anticipate the method of interpretation that a reviewing court will use when interpreting its governing statute might itself face “a self-defeating exercise in futility.”<sup>42</sup>

But, that is not my primary objection to Pierce’s idea that agencies simply must act like courts when interpreting the statutes in their charge. The more basic problem is that he gives no normative justification for that claim, only a problematic strategic assessment.

Of course if we agree with Pierce that agency statutory interpretation is an exercise in applying the *Chevron* doctrine, then his claim would follow from that assertion alone. But, as I have said, agencies do not apply *Chevron*; reviewing courts do. Agencies simply must interpret those statutes in the course of applying them. What would justify their taking the extreme, possibly self-defeating, and risk-averse position that Pierce counsels? Or put another way, why should agencies, when given deference under the *Chevron* doctrine precisely because they are Congress’s chosen delegate for implementing statutory policies, constrain themselves to act like courts when going about their quite separate business?

I have no good answer to these questions. Indeed, as I explained in my prior Article, it seems that agencies have good reasons *not* to act like courts. One of those reasons is that agencies are politically accountable in ways that courts are not. For example, in the well-known *FDA v. Brown & Williamson Tobacco Corp.* case,<sup>43</sup> it was utterly irrelevant to the Supreme Court that the protection of children’s health through the regulation of the marketing of tobacco was a high priority for the Clinton administration.<sup>44</sup> But in a constitutional order that presumes some

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42. *Id.*

43. 529 U.S. 120 (2000).

44. See William J. Clinton, Remarks by President on FDA Rule on Children and Tobacco, (Aug. 23, 1996), <http://www.clintonfoundation.org/legacy/082396-remarks-by-president-on-fda-rule-on-children-and-tobacco.htm> (last visited Aug. 8, 2007) (announcing the creation of a “comprehensive strategy to kick tobacco out of the lives of children” and the President’s support of the FDA’s proposed rule).

executive control of administration (the President has the constitutional duty to see that the laws are faithfully executed), ignoring presidential preferences is surely not responsible agency behavior. It is perfectly appropriate, and indeed required by his or her oath of office, for an agency head to decline to carry out a President's instructions on the ground that the agency has no plausible legal arguments in support of the desired policy. But, it hardly seems appropriate for an agency head to decline to pursue presidential priorities on the grounds that, "If I were a court I might well not accept this interpretation of our statutory authority." Agencies who never lose in court are probably not doing their jobs.

Similarly, agencies are responsible politically to the Congress that empowers, funds, and oversees them. *Chevron* recognizes that agencies should be given deference precisely because they are the chosen agents of Congress. Moreover, because agencies are often involved in the drafting of the statutes that they implement, they have privileged access to understanding which aspects of congressional legislative history they should take seriously. Hence, even if we counterfactually assumed that all courts all the time declined to consider legislative history in interpreting statutes, strong normative and prudential grounds for claiming that agencies should do so still exist—as Peter Strauss has argued.<sup>45</sup> It simply will not do for "faithful agents" of the Congress to redefine their jobs as being courts—the institutions to which Congress might have delegated primary interpretive responsibility, but did not.

Numerous other approaches to the interpretation of statutes, as I detail in my prior Article, can produce legitimate divergence between agency and judicial interpretive methodologies. I need not retrace that ground here in order to further illustrate my basic position: Agencies have a different institutional role in our legal order than do courts. That institutional position generates plausible understandings of responsible agency behavior when interpreting the statutes that they implement. And many of those plausible interpretive positions point in directions that judicial bodies, who have a quite different institutional role, do not necessarily follow. Moreover, it would be inappropriate for them to do so.

I certainly agree with Richard Pierce that an agency without plausible legal arguments for its preferred interpretation of its statute should not attempt to implement that interpretation. That would be a counsel of irresponsibility, and, where judicial review was likely, of folly as well. Indeed, beyond strategic judgments, an agency that believes a particular action is not justified under the terms of its statutory authority should desist, even if a court might approve of its interpretation, or if the action is

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45. See Strauss, *supra* note 17, at 322, 352.

not susceptible to judicial review. Agencies have an independent obligation to obey the law as they understand it. But, I strongly object to the notion that agencies should turn themselves into—or attempt to turn themselves into—shadow judiciaries when interpreting and implementing their statutory programs. For, in my view, this carries the traditional court-centered approach of American administrative law to an extreme of constitutional inappropriateness.

Aphorisms, like metaphors, are dangerous in the law. It seems to me that we have taken too seriously for too long one of Chief Justice John Marshall's most famous ones, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>46</sup> Courts surely have that responsibility when deciding particular cases. But, administrative agencies share the responsibility of determining the law involving national programs. Because agencies are responsible for agenda setting, policy development, enforcement, and maintenance of the political legitimacy of their programs, the agencies' responsibilities far outstrip reviewing courts' responsibilities in relation to those same statutory provisions. We would do well to remember that agencies are not inferior courts. Court rulings are binding on an agency only in the litigated case, leaving the agency legally free to maintain its prior position and to litigate the matter further.<sup>47</sup> American administrative agencies have often declined to acquiesce to judicial rulings and have taken varying positions on how to manage this inevitable conflict with a fragmented appellate court system. Most lawyers probably believe that a Supreme Court decision would provide a final resolution to such conflicts; but even that is not free from doubt.<sup>48</sup>

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

47. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989) (defining agency nonacquiescence as an agency's selective refusal to conduct administrative proceedings according to adverse appellate rulings); see also Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 831 (1990) (discussing how agency nonacquiescence results from subjecting agencies' policymaking authority to regional court review across the country). But see Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 803 (1990) (critiquing legal scholars' acceptance of agency nonacquiescence).

48. See H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* xv (1999) (arguing that the Attorney General has the duty to give independent legal advice to the President and the heads of the executive branches); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 264-67 (3d ed. 2000) (asserting that "a judicial decree contrary to the Constitution arguably should not be given effect by the executive when exercising the power to take care that the laws be faithfully executed"); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359-61 (1997) (discussing the debate among constitutional scholars whether nonjudicial officials must follow Supreme Court interpretations of the Constitution); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994) (recommending "comparative institutional competence," whereby each institution has the authority to determine how much deference it must give to

This is one of those open and much-debated questions about the appropriate legal roles of courts and agencies that makes a positive contribution to our legal order. A system of separated powers and checks and balances better tolerates ambiguity about final legal authority, and accommodates multiple approaches to legal interpretation, than it could countenance the interpretive tyranny of either the executive or the judicial branches. What I have characterized as the paradox of deference is a signal of the strength of our legal order, not a weakness to be remedied by making the focus of administrative law even more *judicio-centric* than it currently is.

### III. A CODA ON RECONCILIATION

My position is straightforward: Agencies are responsible for implementing statutes; they are not responsible for applying judicial decisions, which, like *Chevron*, are directed to reviewing courts. In the process of implementation, federal administrative agencies are constantly engaged in statutory interpretation within the contexts of their unique institutional roles. This position makes them the primary interpreters of federal law, whose practices and normative commitments are worthy of independent study. Finally, because judicial and agency roles in the legal order diverge, their responsibilities may lead them to emphasize or employ divergent interpretive methodologies. Where methodology matters to substantive outcomes, this sets the stage for a paradox of deference where responsible judging may reject an interpretation generated by responsible administration.

But this final step in the argument is its least important practical implication. For the genius of American law—perhaps all law—is its capacity to reconcile logical antinomies through practical judgment. As I detailed in the last few pages of my prior Article, courts have a remarkable

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other institutions interpretations of the Constitution); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372 (1988) (arguing that the Executive and Legislative Branches are not required to follow judicial precedent when there is no binding judgment in a situation, but that doing so facilitates the smooth operation of government); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373-74 (1994) (stating that all institutional players should monitor their own behavior as well as the behavior of other institutional actors to ensure constitutional compliance); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 217 (1994) (suggesting that the Executive Branch has equivalent interpretive power to the judicial branch); Neal Devins, Foreword, *Elected Branch Influences in Constitutional Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1993, at 1 (discussing the role of elected branch officials in constitutional decisionmaking); John McGinnis, Introduction, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21, 21 (1993) (addressing executive branch interpretation of judicial branch decisions).

range of “paradox avoidance” techniques.<sup>49</sup> They used them long before *Chevron* entered the scene. In 1933, for example, the Supreme Court stated as a truism: “[A]dministrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. [And] . . . administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful.”<sup>50</sup>

The 1933 *Norwegian Nitrogen* formula is similar to the *Chevron* formula. The difference is that under the *Norwegian Nitrogen* formula the Supreme Court gave administrative practice almost conclusive weight in its otherwise “independent” interpretation of the statute. The Court harmonized agency and judicial construction by treating agency practices as a construction that should inform judicial construction and that courts should reject only for “cogent reasons.” The Court gave particular credence to agency construction because those that adopted it were “the men charged with the responsibility of setting [the statute’s] machinery in motion, of making the parts work efficiently and smoothly . . . .”<sup>51</sup>

We now view the *Norwegian Nitrogen* formula as less deferential than *Chevron*, and more in the line of cases now summarized as “*Skidmore* deference.” But in many ways, it seems to me that the *Norwegian Nitrogen* formula is the better, and more deferential, approach. It treated agency construction as grounded in the separate imperatives of effective administration. And although the Court found confirming evidence in the legislative and statutory history of the program, the *Norwegian Nitrogen* formula treated agency practice as presumptively persuasive of the proper construction of the relevant tariff act. This formula both gave weight to agency statutory construction as an autonomous enterprise, and left the courts free to disagree with agencies’ construction of statutes.

I agree with Richard Pierce that, in practice, the reconciling of agency and court interpretations must occur through a respectful consideration of the institutional roles of each. But my preference is to achieve that reconciliation by recognizing the differences between courts and administrators as interpreters and, like the *Norwegian Nitrogen* Court, by giving focused attention to how agency interpretation proceeds and how it is justified. For only through attention to those matters can we have a serious conversation about when judicial deference to agency action is appropriate. Formulaic incantations of the *Chevron* doctrine by reviewing courts are unlikely to decide cases, and that formula certainly should not guide agency statutory interpretation.

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49. See Mashaw, *supra* note 1, at 538-42.

50. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

51. *Id.*