

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

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INTRODUCTION

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹ the Supreme Court decided what may well become the most cited case in legal history.² Interestingly, neither the bench nor the bar considered the case revolutionary at the time.³ 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.⁴ 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.”⁵ 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.⁶ At the time it was decided, many scholars believed that *Chevron* had clearly and simply delineated the appropriate framework for agency deference:⁷ first, determine whether Congress had decided the issue, and if not, then defer to any reasonable agency interpretation.⁸ 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.

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.⁹ 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."¹⁰ 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 convoluted¹¹ case of *Mississippi Poultry Ass'n v. Madigan*.¹² In that case, the choice of approach—textualist or intentionalist—proved to be outcome determinative.¹³ The majority adopted a textualist approach:¹⁴ an approach "in which the statutory language directs interpretation."¹⁵ 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.¹⁶ The dissent applied an intentionalist approach:¹⁷ an

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.”¹⁸ 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.’”¹⁹ These are different questions.

Chevron itself was relatively clear about which approach to take.²⁰ 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.²¹ 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.²² Today, many of the Justices routinely equate step one of *Chevron* with a simple search for statutory clarity;²³ 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.”²⁴ 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

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,²⁵ 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.²⁶ 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.²⁷ Beginning relatively soon after the textualist

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.²⁸

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*.²⁹ Next, Part II discusses *Chevron* itself and the Court's original vision of *Chevron*.³⁰ 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.³¹ This part reviews a number of cases from each time period, identifies the Court's description of *Chevron's* first step in each case,³² 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.³³ 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.³⁴ 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*³⁵ 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.

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).³⁶ 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.”³⁷ 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.”³⁸ The Mississippi Poultry Association, Inc. and the National Broiler Council filed a lawsuit alleging that the agency’s interpretation was arbitrary and capricious.³⁹ The trial court agreed.⁴⁰ Finding clarity in the statutory language, the trial court refused to give the agency interpretation any deference.⁴¹

The agency appealed, and a three judge panel heard the case.⁴² The majority framed the issue as “whether Congress [had] clearly expressed its intent *in the plain language* of the statute.”⁴³ 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.”⁴⁴ Further, the majority said, when the statute is “ambiguous or silent,” a reviewing court should proceed to *Chevron*’s second step.⁴⁵ 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.⁴⁶ The majority reviewed the dictionary⁴⁷ and the statute

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,⁴⁸ the majority reasoned that when Congress wanted to use an equivalency standard, it knew how to do so.⁴⁹ Thus, the majority focused its attention almost exclusively on the text and structure of the statute at issue.⁵⁰

In response, the dissent chastised the majority for recasting *Chevron*’s first step as a search for statutory clarity.⁵¹ 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.⁵² 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.⁵³ 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.”⁵⁴ Either meaning was a fair reading of the language.⁵⁵

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.⁵⁶ 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;⁵⁷ by regulation, the agency had interpreted this language to require standards “at least equal to” those in the United States.⁵⁸ Hence, foreign countries could export poultry products to the United States so long as that exporting country’s standards were the “substantial equivalent of”⁵⁹ federal standards.

In 1985, the Senate Agriculture Committee⁶⁰ 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.⁶¹ 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.”⁶² The Senate adopted the new language without debate, discussion, comment, or recorded vote.⁶³ Later, the Conference Committee adopted the Senate version of the bill—the House bill contained the “at least equal to” language⁶⁴—without any recorded consideration of this rather substantive change.⁶⁵

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.⁶⁶ While Senator Helms indicated (perhaps less than truthfully)⁶⁷ 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.⁶⁸ 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."⁶⁹ 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."⁷⁰ 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.⁷¹

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

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.”⁷² Perhaps because of this schizophrenic legislative enactment, the Fifth Circuit ordered, *on its own motion*, that *Mississippi Poultry* be reheard en banc.⁷³

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,⁷⁴ while the dissent accused the majority of “exacting literalism” and of issuing “a flood of legalisms” to avoid the “textual command.”⁷⁵ According to the dissent, “[t]his case [was] simple.”⁷⁶ 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.⁷⁷ The dissent accepted as reasonable the agency’s interpretation of

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.”⁷⁸ 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.⁷⁹

Ultimately, which holding was right, the majority’s or dissent’s, is unimportant to the point of this article.⁸⁰ 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,⁸¹ 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

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.⁸² 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*.⁸³ “It is emphatically the province and duty of the judicial department to say what the law is.”⁸⁴ 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.⁸⁵ Courts would give deference

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.”⁸⁶ 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.”⁸⁷ Thus, while some deference was accorded, the amount of deference varied depending on the circumstances surrounding the interpretation.⁸⁸ 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.⁸⁹ 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.⁹⁰ 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.⁹¹ Deference,

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.⁹² 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.'"⁹³ As for the deference issue, the parties did not argue the issue;⁹⁴ the lower court did not address the issue;⁹⁵ and Justice Stevens, who authored *Chevron*, later claimed that the case was merely a "restatement of existing law, nothing more or less."⁹⁶ He cited *Hearst* for support of the two-step process.⁹⁷ The *Hearst* court

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.⁹⁸

The facts of *Chevron* are straightforward; *Chevron* involved a challenge to the Clean Air Act, which Congress amended in 1977.⁹⁹ 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.¹⁰⁰ The statute did not specifically define "stationary sources;"¹⁰¹ so, the Environmental Protection Agency (EPA) filled the gap.¹⁰² 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."¹⁰³ A plant could increase emissions on one device so long as it commensurately decreased emissions on another so that plant emissions remained constant.¹⁰⁴

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

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,¹⁰⁷ explaining that the lower court had applied the wrong standard,¹⁰⁸ and held that the agency's interpretation was "permissible."¹⁰⁹ In so holding, the Court developed the now boiler-plate, two-step framework used to evaluate agency interpretations.¹¹⁰ 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."¹¹¹ If Congress had spoken to the issue, a court need only determine whether the agency's interpretation was consistent.¹¹² 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.¹¹³

In developing its two-step framework, the Court articulated three reasons to justify its decision to defer to the agency: implicit delegation,¹¹⁴ agency expertise,¹¹⁵ and political accountability.¹¹⁶ 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.¹¹⁷ 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

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.”¹¹⁸ 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.¹¹⁹ 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.”¹²⁰ The implicit delegation rationale expanded “the sphere” of legitimate agency lawmaking.¹²¹ Before *Chevron*, agencies could legitimately make “law” only when Congress explicitly delegated.¹²² 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.¹²³ The Court in *Chevron* reasoned that “[j]udges are not experts,” at least not in these technical areas.¹²⁴ In contrast, agency personnel are highly qualified to make technical determinations and are charged with making these determinations.¹²⁵ Regardless of whether Congress actually intended to delegate to the agency, it simply makes sense to defer to such expertise.¹²⁶

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.¹²⁷ Thus, it is more appropriate for this political branch of the government to resolve conflicting policies “in light of everyday realities.”¹²⁸ “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”¹²⁹ This rationale was important for a number of reasons. Prior to *Chevron*, not every agency opinion was entitled to deference.¹³⁰ But *Chevron* established an all-or-nothing default rule:¹³¹ 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.¹³² The Court reasoned that agency interpretation was preferable to judicial interpretation because agencies were politically accountable; the Judiciary was not.¹³³

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,¹³⁴ 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

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,”¹³⁵ on the other, it asked whether “the *intent* of Congress [was] clear.”¹³⁶ 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,¹³⁷ the Court applied *Chevron*’s two-step framework broadly. The Court analyzed the enactment history,¹³⁸ the legislative history,¹³⁹ and the statutory text¹⁴⁰—none of which it found conclusive.¹⁴¹ Indeed, the Court did not

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.¹⁴² Only after perusing all sources did the Court finally determine that Congress had no specific intent on the bubble-concept issue.¹⁴³ At that point, the Court turned to the agency's interpretation and found it to be a "permissible construction of the statute."¹⁴⁴ The Court's application of its framework was unequivocal: the Court searched broadly for legislative intent rather than narrowly for textual clarity.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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

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.¹⁴⁸

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

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."¹⁵⁰ 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.'"¹⁵¹

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

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.¹⁶⁰

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.”¹⁶¹ 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.¹⁶²

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.¹⁶³ 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.”¹⁶⁴ True to its word, the majority examined the language, the legislative history, and the purpose of the statute¹⁶⁵ to conclude that none of these sources were determinative of Congress’s intent on this issue.¹⁶⁶ 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.¹⁶⁷

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

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.¹⁶⁸ Like the majority, Justice Marshall looked for "the clear intent of Congress"¹⁶⁹ 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."¹⁷⁰

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.¹⁷¹ Many have discussed Justice Scalia's resurrection of textualism, advanced initially from his position on the D.C. Circuit Court.¹⁷² 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."¹⁷³

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.¹⁷⁴ 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."¹⁷⁵ Such limits were known as "tolerance levels." The FDA had refused to promulgate

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

In analyzing the case, Justice O'Connor was not clear in describing her *Chevron* approach; she simply quoted *Chevron's* equivocal direction.¹⁷⁸ But in applying the two-step process, she was very clear; she used a textualist approach, reviewing the text of the statute only.¹⁷⁹ 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,¹⁸⁰ she ultimately deferred to the agency.¹⁸¹

Justice Stevens dissented and criticized the majority opinion as lacking “judgment and . . . judging.”¹⁸² Justice Stevens did not find the language ambiguous; nor did he find the interpretation to be supported by the legislative history.¹⁸³ 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.¹⁸⁴

The battle over the appropriate approach had begun.

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*.¹⁸⁵ 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.”¹⁸⁶ 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.¹⁸⁷

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

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

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*.¹⁹²

Justice Scalia was particularly troubled by the majority’s use of legislative history.¹⁹³ According to Justice Scalia, when a statute has a plain meaning, courts must accept that meaning and not search for “unenacted legislative intent.”¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ Justice Kennedy soon parroted Justice Scalia’s textualist approach. For example, in *K Mart Corp. v. Cartier, Inc.*,¹⁹⁸ 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.¹⁹⁹ 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:

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.²⁰⁰

After describing *Chevron* in this way, Justice Kennedy applied the two-step test consistently by reviewing only the statute.²⁰¹ 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.²⁰² Justice White agreed.²⁰³

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.'"²⁰⁴ 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.²⁰⁵

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

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

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.²⁰⁹ 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."²¹⁰ Justices Rehnquist, O'Connor, and Blackmun signed onto Justice Scalia's dissent.²¹¹

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.²¹² 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.²¹³ 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,²¹⁴ at other times, it spoke and acted intentionally.²¹⁵ And, at least once, the Court applied *Chevron's* second step first.²¹⁶ It seems that the Justices were learning to work with *Chevron* during this period.

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*,²¹⁷ Justice Kennedy—writing for Chief Justice Rehnquist, and Justices White, Blackmun, Stevens, O'Connor, and Scalia²¹⁸—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.²¹⁹ The Act forbade public and private employers from discriminating against employees on account of age. Under an exception,²²⁰ 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.²²¹ 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.²²² 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."²²³

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.²²⁴ After rejecting the agency's interpretation as invalid,

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.”²²⁵ 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.²²⁶ The majority then turned to the legislative history and a related statute—Title VII.²²⁷ 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]²²⁸

Because the dissent found the text and structure of the act ambiguous,²²⁹ the dissent reviewed the legislative history and found it to be quite clear.²³⁰ Coincidentally, the agency interpretation was consistent with congressional intent in this instance: the statute meant exactly what the agency said it meant.²³¹ 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.²³²

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*.²³³ Justice Brennan—writing for Justices Marshall, Blackmun, Stevens, O'Connor, Kennedy, and (very surprisingly) Scalia²³⁴—rejected the agency's interpretation. The Court held that the Paperwork Reduction Act of 1980²³⁵ 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.²³⁶ The statute applied whenever “obtaining or soliciting facts by an agency through . . . reporting or recordkeeping requirements” took place.²³⁷ 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.²³⁸ 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.²³⁹ 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.”²⁴⁰

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.²⁴¹ 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.²⁴² Additionally, the Court reviewed the legislative history and found that

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."²⁴³ "Because we find that the statute, as a whole, clearly expresses Congress's intention, we decline to defer to OMB's interpretation."²⁴⁴ 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.²⁴⁵ 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;²⁴⁶ therefore, deference to the agency was due under *Chevron*.²⁴⁷ 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*.²⁴⁸

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.²⁴⁹ And it would not be the last.

In 1992, the Court moved further toward textualism in *National Railroad Passenger Corp. v. Boston & Maine Corp.*²⁵⁰ The Court reviewed the Interstate Commerce Commission's interpretation of the Rail Passenger Service Act,²⁵¹ which was made during an informal adjudication.²⁵² Whether *Chevron* appropriately applies to agency interpretations made during informal adjudication remains unclear today.²⁵³ But, at the time this case was decided, the majority relied on *Chevron* as if there were no doubt.²⁵⁴ 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.²⁵⁵

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.²⁵⁶ 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."²⁵⁷ In essence, Justice Kennedy

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.²⁵⁸ In any event, the Court soon backed away from this overly simplified articulation of *Chevron's* first step.²⁵⁹

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.²⁶⁰ 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.²⁶¹

In contrast, in *MCI Telecommunications Corp. v. AT&T Co.*,²⁶² 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,²⁶³ applied *Chevron* in a textualist manner. The statute at issue provided that the

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.²⁶⁴ The FCC interpreted the word “modify” to allow it to make a tariff filing requirement optional.²⁶⁵ 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.²⁶⁶ 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.²⁶⁷ 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.”²⁶⁸

Justice Stevens, writing for himself and Justices Blackmun and Souter, disagreed.²⁶⁹ 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,”²⁷⁰ Justice Stevens focused on the purpose of the statute and found that the FCC’s interpretation was a permissible construction of the statute.²⁷¹ 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.”²⁷²

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.

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.²⁷³ 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.²⁷⁴ 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.*²⁷⁵ 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.²⁷⁶ The Comptroller had determined that such sales were "incidental" to "the business of banking."²⁷⁷ In reviewing the Comptroller's determination under *Chevron's* first step, Justice Ginsburg simply repeated *Chevron's* equivocal direction.²⁷⁸ 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

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."²⁷⁹ 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*.²⁸⁰ One of the issues²⁸¹ 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.²⁸² 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.'"²⁸³ 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.²⁸⁴ 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*.²⁸⁵ 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."²⁸⁶ 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.²⁸⁷ 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."²⁸⁸ The Ninth Circuit reversed without applying *Chevron*.

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.’”²⁸⁹ 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.²⁹⁰ 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.²⁹¹

Three years later in *Yellow Transportation, Inc. v. Michigan*,²⁹² Justice O’Connor—writing for Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, Souter, Ginsburg and Breyer²⁹³—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.’”²⁹⁴ The issue in *Yellow Transportation* was whether a state that waived a registration fee actually “collected or charged” the fee that it waived.²⁹⁵ Through its regulations, the agency interpreted the statute to require that the fee actually be collected, not waived.²⁹⁶ 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.²⁹⁷ Justice Stevens wrote separately to concur because he believed that the statute gave the ICC the authority to regulate as it did.²⁹⁸ Because the delegation was explicit, he did not view the interpretation as one requiring *Chevron* deference.²⁹⁹

Similarly, in *Barnhart v. Thomas*,³⁰⁰ 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

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.”³⁰¹ Justice Scalia, delivering the opinion for a unanimous Court,³⁰² 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.”³⁰³ 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.³⁰⁴ No justice disagreed or dissented.

And again in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,³⁰⁵ the majority conflated the two steps. Justice Thomas, speaking for Chief Justice Rehnquist and Justices Stevens, O’Connor, Kennedy, and Breyer,³⁰⁶ 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.”³⁰⁷

True to his directive, Justice Thomas did not review sources beyond the text.³⁰⁸ 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.³⁰⁹

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*,³¹⁰ workers whose benefits were cut brought a reverse age discrimination claim under the Age Discrimination in Employment Act.³¹¹ 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.³¹² Rather, even

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*.”³¹³ Then Justice Souter reviewed “the text, structure, purpose, and [legislative and social] history of the [Act], along with its relationship to other federal statutes”³¹⁴ to find that the statute did not mean what the agency said it meant.³¹⁵ 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.’”³¹⁶ 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.”³¹⁷

Justice Thomas also dissented. He agreed that the plain language of the statute mandated the agency’s interpretation.³¹⁸ 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.”³¹⁹ 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”³²⁰

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*.³²¹ Justice Scalia, writing for the plurality—Chief Justice Roberts, and Justices Thomas and Alito³²²—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.³²³ 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.'"³²⁴ 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.'"³²⁵ The term "waters" contemplates "relatively permanent, standing or flowing bodies of water,"³²⁶ not tributaries where "water occasionally or intermittently flows."³²⁷ "The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."³²⁸ Moreover, Justice Scalia continued, even if the language were ambiguous, the EPA's interpretation would be unreasonable.³²⁹

Justice Stevens, in dissent—joined by Justices Souter, Ginsberg, and Breyer³³⁰—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."³³¹ 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,³³² but looked also at the purpose of the statute.³³³ 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."³³⁴

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.³³⁵ The Chief Justice noted that the agency had

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.³³⁶ 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.³³⁷

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.³³⁸ 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*.³³⁹ 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."³⁴⁰ 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.*'"³⁴¹ The Department interpreted the emphasized language as allowing it to consider

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.³⁴² 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.³⁴³ 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."³⁴⁴ 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.³⁴⁵ 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.³⁴⁶

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.³⁴⁷

Despite the clarity of the text in *Zuni*, Justice Breyer reasoned that because the language was technical, it was capable of multiple meanings.³⁴⁸ 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.

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.³⁴⁹ 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."³⁵⁰ In contrast, Justice Kennedy's concurrence, which Justice Alito joined, agreed that *Chevron*'s first step is textualist,³⁵¹ 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.³⁵²

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,"³⁵³ Justice Scalia returned to "Statutory Interpretation 101"³⁵⁴ by focusing first on the text.

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.³⁵⁵

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,³⁵⁶ 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.³⁵⁷

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.³⁵⁸ Only recently did Justice Alito author a *Chevron* opinion: *National Ass'n of Home Builders v. Defenders of Wildlife*.³⁵⁹ 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."³⁶⁰ 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.³⁶¹

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.³⁶² Justice Scalia, for example, refuses to use legislative history in virtually all statutory interpretation cases,³⁶³ not just *Chevron* cases. Other Justices, such as Stevens and Breyer, disagree with him and view legislative history as relevant to meaning.³⁶⁴ 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,³⁶⁵ while those who believe the Court should be "faithful agents"³⁶⁶ to the Legislature might prefer intentionalism. In any event, the intentionalists seem to have lost the battle, at least for now.

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.”³⁶⁷ Although some argue that *Chevron*'s imprint is widening,³⁶⁸ 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.”³⁶⁹ Professor Merrill reviewed all the cases in which at least one Justice cited *Chevron*.³⁷⁰ 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*,³⁷¹ *S.D. Warren Co. v. Maine Board of Environmental Protection*,³⁷² and *Gonzales v. Oregon*.³⁷³ Additionally, the dissent mentioned *Chevron* in another case solely to support the notion that an agency could issue a regulation if it chose.³⁷⁴ In the 2004-2005 Term, the majority cited *Chevron* only once, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,³⁷⁵ while dissenting and concurring Justices cited *Chevron* two more times.³⁷⁶

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*,³⁷⁷ *General Dynamics Land Systems, Inc. v. Cline*,³⁷⁸ *Alaska Department of Environmental Conservation v. EPA*,³⁷⁹ and *Barnhart v. Thomas*.³⁸⁰ In one additional case, Justice Scalia cited *Chevron* in his concurrence.³⁸¹ And, in one case, the dissent cited *Chevron*, but the case did not involve an agency deference question.³⁸² Thus, the Court has reduced its citations from ten to twenty per year to approximately three to five.³⁸³

To be fair, the Court generally appears to be hearing fewer cases.³⁸⁴ 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.³⁸⁵ But because the Court controls its own docket,³⁸⁶ the distinction between these

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.”³⁸⁷ 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.³⁸⁸ 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.³⁸⁹ However, general applicability is no longer the rule.

In 2000 and 2001, the Court decided two cases, *Christensen v. Harris County*³⁹⁰ and *United States v. Mead Corp.*,³⁹¹ 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.³⁹² 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

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.”³⁹³ 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.³⁹⁴ The agency said “no.” Harris County did it anyway, and the employees sued, asserting that the required use of compensation time violated the Act.³⁹⁵

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.”³⁹⁶ 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.’”³⁹⁷ Applying *Skidmore* deference, Justice Thomas refused to defer to this interpretation at all, finding it completely “backwards.”³⁹⁸

Justice Scalia concurred, but wrote separately to criticize the majority’s return to *Skidmore*.³⁹⁹ 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.⁴⁰⁰

Shortly after the Court decided *Christensen*, it affirmed its divergent approach to agency interpretations lacking the “force of law”⁴⁰¹ in *United States v. Mead Corp.*⁴⁰² 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.⁴⁰³ The Mead Corporation imported day planners, which the Customs Service had treated for several years as exempt from tariff.⁴⁰⁴ But in 1993, the Customs Service abruptly changed course and identified the day planners as “diaries” subject to a

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.⁴⁰⁵ When Mead protested, the agency sent a “carefully reasoned but never published”⁴⁰⁶ ruling letter to explain its change of course. Mead sued.

Justice Souter wrote the majority opinion.⁴⁰⁷ 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.⁴⁰⁸ 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.⁴⁰⁹ 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.”⁴¹⁰ He suggested that precedential value and binding character, while important, also do “not add up to *Chevron* entitlement.”⁴¹¹

Not surprisingly, Justice Scalia dissented in a lengthy opinion.⁴¹² He was critical of the majority’s confusing direction for *Chevron*’s application,⁴¹³ and he disapproved of the majority’s resurrection of *Skidmore*’s “totality of the circumstances” test.⁴¹⁴ “We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come.”⁴¹⁵ According to Justice Scalia, deference to agency opinions is all or nothing: either *Chevron* deference or no deference.⁴¹⁶ And *Chevron* applies when the agency interpretation is “authoritative,” meaning that it represents the agency’s final opinion on the issue.⁴¹⁷ 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.”⁴¹⁸

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*,⁴¹⁹ 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.⁴²⁰ 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."⁴²¹ 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."⁴²² 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"⁴²³

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.⁴²⁴ *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.⁴²⁵

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.⁴²⁶ End of debate.

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.⁴²⁷ 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 courts⁴²⁸ 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.⁴²⁹

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

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.⁴³⁰ “While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference means just the opposite.”⁴³¹

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.⁴³² But in a series of cases, starting with *FDA v. Brown & Williamson Tobacco Corp.*,⁴³³ 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.⁴³⁴

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.”⁴³⁵ The statute defined these terms as “articles . . . intended to affect the structure or any function of the body.”⁴³⁶ The FDA interpreted this language as allowing it to regulate tobacco and cigarettes.⁴³⁷ 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.”⁴³⁸ 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.⁴³⁹ In this case then, the majority held that while Congress may not have spoken on the precise

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.⁴⁴⁰

Six years later, in another highly political case, *Gonzales v. Oregon*,⁴⁴¹ 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.”⁴⁴² 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.⁴⁴³ 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.”⁴⁴⁴ Accordingly, because implicit delegation was unsustainable, the interpretation was entitled to *Skidmore* deference.⁴⁴⁵ 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.⁴⁴⁶

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.”⁴⁴⁷ 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.

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*.⁴⁴⁸ 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)."⁴⁴⁹ 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.⁴⁵⁰

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

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.⁴⁵¹

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."⁴⁵² 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.

451. See *supra* Part II.

452. Pierce, *supra* note 25, at 751.