ARTICLES

MAKING LAW OUT OF NOTHING AT ALL:* THE ORIGINS OF THE *CHEVRON* DOCTRINE

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* With acknowledgement to the genius of Jim Steinman and the vocal elegance of G. Russell and Russell H.

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INTRODUCTION: LOOKIN' FOR LAW IN ALL THE WRONG PLACES[1]

For more than a quarter of a century, federal administrative law has been dominated by the so-called *Chevron* doctrine, which prescribes judicial deference to many agency interpretations of statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[2] for which the doctrine is named, has become the most cited case in federal administrative law, and indeed in any legal field,[3] and the scholarship on *Chevron* could fill a small library.[4] Love it[5] or hate it,[6] *Chevron* virtually defines modern administrative law.

Anyone who has ever taken a course in administrative law or legislation knows the *Chevron* mantra:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. 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.[7]

Even after almost thirty years and thousands of recitations, unanswered questions about this *Chevron* framework abound. Does this framework involve two distinct analytical steps or just one unitary decision about the

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1. With acknowledgment to the one-shot country cool of Johnny Lee.

2. 467 U.S. 837 (1984).

3. *See* Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 NW. U. L. REV. 551, 551–53 (2012).

4. A simple Westlaw search of the "Journals & Law Reviews" database for "(467 /2 837) & Chevron" yielded 8,656 hits on August 17, 2012. For a similar search involving article titles, see generally Peter L. Strauss, Essay, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (2012).

5. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–21 ("[I]n the long run *Chevron* will endure . . . because it more accurately reflects the reality of government, and thus more adequately serves its needs.").

6. *See, e.g.*, Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010) ("[T]he *Chevron* doctrine . . . has proven to be a complete and total failure, and thus the Supreme Court should overrule it at the first possible opportunity.").

7. 467 U.S. at 842–43 (internal footnotes omitted).

reasonableness of an agency's interpretation?[8] When is the intent of Congress "clear" on a "precise" question of statutory interpretation?[9] What might make an agency's statutory interpretation something other than a "permissible construction"?[10] To what class of agency legal interpretations does this framework apply?[11]

We do not intend to answer any of these questions here. Our goal is, rather, to help explain why such questions have proven so contentious and seemingly intractable despite decades of prodigious case law and scholarship on judicial review of agency legal interpretations. We suggest part of the problem is the continuing insistence, even by people who know better, on answering questions about the *Chevron* doctrine by invoking the *Chevron* decision. The two have very little to do with each other. The modern doctrine of federal court review of federal agency interpretations of

8. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) (advocating the one-step position); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 884 n.78 (1992) (noting the *Chevron* framework can be formulated easily as one question); Matthew C. Stephenson & Adrian Vermeule, Essay, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that the two-step inquiry is an "artificial division" that leads to confusion). *But see* Kenneth A. Bamberger & Peter L. Strauss, Essay, Chevron*'s Two Steps*, 95 VA. L. REV. 611 (2009) (defending the two-step formulation, which continues to dominate the case law).

9. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 608–57 (6th ed. 2012) (discussing ambiguities in *Chevron*'s first step); Melina Forte, *May Legislative History Be Considered at* Chevron *Step One? The Third Circuit Dances the* Chevron *Two-Step in* United States v. Geiser, 54 VILL. L. REV. 727, 728 n.11 (2009) (comparing judicial and scholarly opinions on the amount of ambiguity needed for statutory meaning to be unclear).

10. There is no universally accepted test for determining when an interpretation is impermissible or, as modern cases tend to frame it, unreasonable. It is particularly unsettled whether an interpretation can be unreasonable only when it deviates too far from the statute or also when it is inadequately explained by the interpreting agency. *See* LAWSON, *supra* note 9, at 779–85 (noting agency interpretations rarely fail at the reasonableness stage of *Chevron* analysis unless the interpretations "fail completely to advance the goals of the underlying statute" or are too "bizarre" to warrant closer analysis); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 316 (1996) ("Participants in and observers of the federal administrative scene have not adequately distinguished among judicial review of the *outcome* of the agency proceeding, the *procedures* employed by the agency in reaching that outcome, and the *process of decisionmaking*, or *chain of reasoning*, by which the agency reached its conclusions.").

11. This is the now famous "step zero" problem, first given that label by Thomas W. Merrill and Kristin E. Hickman. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (introducing the initial inquiry needed to determine if *Chevron* analysis is necessary). For other surveys of the step-zero inquiry, see LAWSON, *supra* note 9, at 551–608 (reviewing the types of agency legal interpretations given *Chevron* deference); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006) (arguing that the Supreme Court's step-zero analysis is overly complex and should be abandoned in favor of a simpler approach favoring ordinary *Chevron* analysis).

statutes does not stem in any substantive way from *Chevron.* Rather, it comes from a series of lower court decisions in the mid-1980s that converted a narrow Clean Air Act case about imaginary bubbles over factories into a generalized doctrine of administrative law. The Supreme Court adopted the doctrine from that line of decisions essentially by default. Accordingly, there is no canonical decision systematically laying out either the theory or practice of *Chevron*. The *Chevron* decision itself is a very poor well from which to draw because it did not create, or purport to create, the doctrine that bears its name. The result of this unsystematic origin of the *Chevron* doctrine is a great many unanswered questions about the *Chevron* methodology, a great deal of wiggle room for a wide range of answers to those questions, and no chance whatsoever of finding definitive answers in the place in which too many people continue to look.

At one level, everyone already knows that the issuing Court, and the arguing parties, did not view the *Chevron* decision as having any broad implications for administrative law. However, for some odd reason, people seem unwilling to follow through on the obvious conclusion that referring to the *Chevron* decision to answer questions about the *Chevron* doctrine is pointless and counterproductive.

Our goal in this Article is to rid the administrative law world of references to the *Chevron* decision—except in cases involving the Clean Air Act and imaginary bubbles over factories, to which it surely continues to have strong relevance. We do so by tracing in detail the origins of the *Chevron* doctrine, primarily in the D.C. Circuit in the years immediately following the *Chevron* decision. We believe the process by which the *Chevron* doctrine developed is a fascinating piece of legal history in its own right, and that story deserves to be told even if it fails to lay the ghost of *Chevron* to rest.

In Part I, we set out some preliminary matters, including the state of the law in 1984 when *Chevron* was decided, and some methodological problems related to our survey of both pre- and post-*Chevron* case law. We show that the best account of pre-*Chevron* law involved classifying agency legal decisions as either "pure" or "mixed/law-applying" questions and then employing rebuttable presumptions of de novo judicial review to the former and deferential judicial review to the latter. The precise contours of those classifications, the strength of the presumptions, the circumstances that would overcome the presumptions, and the degree of deference due to mixed or law-applying interpretations are impossible to specify—which in part explains the attractiveness and ultimate success of the *Chevron* revolution.

In Part II, we briefly revisit the oft-told story of the *Chevron* decision, explaining that the Court in 1984 saw itself as restating and applying the

long-settled law described in Part I. We add very little to the seminal and definitive work of Professor Thomas Merrill on this subject, which has justly and correctly elevated this view of *Chevron* to the status of conventional wisdom.

Part III then shows how lower courts molded the narrow, unpromising *Chevron* decision into a revolutionary doctrinal engine. We trace the evolution of *Chevron* through every significant lower court decision in the first year-and-a-half after *Chevron* was decided, illuminating the many ups and downs in the breadth of the courts' readings and applications of *Chevron*. This non-linear developmental process was hardly complete by 1986, but at that point one could meaningfully speak of a "*Chevron* doctrine"—uncertain, unelaborated, in many ways protean, but a doctrine nonetheless—that was surely not on the mind of anyone on the Supreme Court in 1984 and that had the potential to transform administrative law practice.

Part IV describes how those lower court developments uneasily found their way into Supreme Court jurisprudence, where they continue to guide doctrine in the misguided name of the *Chevron* decision. This process of incorporation, or more precisely migration, was hardly what one normally expects from landmark Supreme Court doctrines.[12] The Court never straightforwardly faced down the crucial questions posed by the *Chevron* framework. Instead, the Court stumbled into the *Chevron* doctrine in a series of cases that avoided, rather than confronted, the major issues. Perhaps no one should see how laws, sausages, or the *Chevron* doctrine are made, but we are going to discuss the latter nonetheless.

Part V briefly concludes with some implications of this research for modern doctrine, most of which amount to the proposition that judges, lawyers, and scholars should stop talking about *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* However, we do not argue here that any particular aspect of modern doctrine is substantively correct or incorrect. We express no view on whether the *Chevron* doctrine in general is a step forward or backward from what preceded it. We argue only that any debate on such questions should take place without reference to the *Chevron* decision itself.

In sum, we come not to praise (or criticize) *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, but to bury it.

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12. *But see* Gary Lawson, Katharine Ferguson & Guillermo A. Montero, *"Oh Lord, Please Don't Let Me Be Misunderstood!": Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1 (2005) (showing that both the *Mathews* and *Penn Central* three-part tests did not stem from the cases for which they are named).

I. BEFORE THE DAWN

In order to evaluate the impact of *Chevron* on administrative law doctrine and practice in the years shortly following the decision, one needs to (1) discern the pre-*Chevron* baseline for judicial review of agency legal determinations, (2) determine any changes to that baseline that *Chevron* was seen by at least some legal actors to require, and (3) evaluate the extent to which lower courts actually treated *Chevron* as effecting changes in legal practice. None of these tasks is easy or straightforward. There is considerable ambiguity about both the pre-*Chevron* baseline and the nature of any changes to that baseline prescribed by *Chevron*. Indeed, scholars and courts disagree about almost every aspect of those inquiries except for the fact of ambiguity in both of them. To make matters more complicated, the process by which *Chevron* became law—a series of lower court decisions and then default acceptance in the Supreme Court—prevented those ambiguities from being vented and resolved in an authoritative forum; instead, they remain to this day largely submerged and unaddressed. In addition, what matters for historical purposes is not what either *Chevron* or pre-*Chevron* law actually said, but rather what lower courts in the months before and after *Chevron believed* it to say. However, those courts almost never articulated their beliefs, leaving much of the historical inquiry to speculation and inference about matters that it is possible the judges poorly understood themselves.

Nonetheless, we think it is possible to give accounts of the pre-*Chevron* practice, the *Chevron* decision, and the understandings of that practice and decision evinced by lower courts that permit at least tentative judgments about the development of the *Chevron* revolution. We do not maintain that such accounts are the only possible ones—though we think they are the best available—nor do we maintain that they explain or are consistent with all reported decisions. But to the extent that a reasonably coherent account of the evolution of *Chevron* in its early days can help modern courts and scholars wrestle with the problems that still plague judicial review of agency legal conclusions, we think that we can provide at least a starting point for further research.

A. State of Confusion[13]

In an article written on the eve of the *Chevron* decision, Professor Colin Diver noted, "Two competing traditions in American jurisprudence address the issue of the appropriate allocation of interpretive authority between

13. With acknowledgement to the sheer brilliance of The Kinks.

agencies and courts."[14] One tradition, he observed, "views matters of statutory interpretation as questions of 'law' reserved for independent determination by the judiciary,"[15] while the other "views agencies as delegates, empowered by the legislature to exercise legislative power to articulate and implement public goals,"[16] and therefore calls for deferential judicial review of agency legal determinations. This seeming duality in judicial approaches had been a staple of administrative law scholarship long before Professor Diver's article.[17] Also, while the Supreme Court said relatively little about it in the pre-*Chevron* era, lower courts were often vocal in identifying the apparent inconsistencies in Supreme Court pronouncements about review of agency legal conclusions.

Perhaps the most famous judicial expression along these lines came from Judge Henry Friendly in 1976:

> We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[ ] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis . . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.[18]

Other courts echoed Judge Friendly's sentiments. In *Hi-Craft Clothing Co. v. NLRB*,[19] a Third Circuit panel in 1981 stated the court's role in reviewing agency legal determinations "is an uncertain one."[20] After surveying a substantial number of Supreme Court decisions, including a slew specifically involving the National Labor Relations Board (NLRB), the court agreed with Judge Friendly that "it is time to recognize that there are

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14. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985). This article was published after *Chevron* but obviously written beforehand.

15. *Id.*

16. *Id.*

17. *See, e.g.*, Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955) (refuting that agencies have no lawmaking abilities and positing that agencies share the ability to determine questions of law with their "senior partner[s]," the courts); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950) (advocating judicial deference toward reasonable agency interpretations of ambiguous statutory language when courts retain ultimate responsibility for interpreting statutory meaning).

18. Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (internal footnote omitted), *aff'd sub nom.* Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

19. 660 F.2d 910 (3d Cir. 1981).

20. *Id.* at 912.

two lines of Supreme Court decisions on the subject which are analytically in conflict."[21] In 1984, just months before the *Chevron* decision issued, several panels of the D.C. Circuit weighed in on the subject. In *Natural Resources Defense Council, Inc. v. EPA*,[22] Judge Mikva, writing for a unanimous panel that included then-Judge Scalia, observed:

> The parties sharply contest the standard of review we are to apply to determine whether [the Environmental Protection Agency's (EPA's)] abnegation of all power to reach vessel emissions is "not in accordance with law." One reason for this dispute is that the case law under the Administrative Procedure Act has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agency interpretations of law. Instead, two "opposing platitudes" exert countervailing "gravitational pulls" on the law. At one pole stands the maxim that courts should defer to "reasonable" agency interpretive positions, a maxim increasingly prevalent in recent decisions. Pulling in the other direction is the principle that courts remain the final arbiters of statutory meaning; that principle, too, is embossed with recent approval.[23]

In *Trailways, Inc. v. ICC*,[24] a unanimous panel, consisting of Judges Wright, Wilkey, and Wald noted:

> The Commission suggests that, because the regulation at issue is an agency interpretation of one of its own governing statutes, it is entitled to great judicial deference. Trailways, on the other hand, argues that courts are the final arbiters of the meaning of statutes, and that this court therefore must exercise its own judgment . . . . The principle urged by the Commission and that advanced by Trailways, though conflicting, are both well-entrenched in the case law.[25]

It is, of course, one thing to say that there are competing lines of authority, and quite another that those lines are irreconcilable or that there

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21. *Id.* at 913–14.

22. 725 F.2d 761 (D.C. Cir. 1984).

23. *Id.* at 767 (internal citations omitted). The court determined that it did not need to decide the appropriate level of deference because the decision to remand the case to the agency

> is not based upon our assessment of the accuracy of the result reached by the agency, but rather upon the agency's complete failure to consider the criteria that should inform that result; as a consequence, whatever deference might be owing to the agency's conclusions under other circumstances, on this issue none at all is warranted.

Id. at 768. In other words, the agency decision was held to be "arbitrary or capricious" because there was a defect in the agency's decisionmaking process. *See* LAWSON, *supra* note 9, at 706–08 (describing the differences among judicial review of agency outcomes, procedures, and decisionmaking processes).

24. 727 F.2d 1284 (D.C. Cir. 1984).

25. *Id.* at 1287 (internal citations omitted).

are no principles determining when one or the other is appropriate. While some notable figures in the pre-*Chevron* period were prepared to state the latter,[26] there were also plenty of others who sought some kind of order in the seeming chaos of conflicting standards of review.[27]

We do not believe any single principle can either account for all pre-*Chevron* Supreme Court decisions or—more to the point for this study—describe the views of all pre-*Chevron* lower courts about the law prescribed by pre-*Chevron* Supreme Court decisions, but we do think that such decisions and views converge on the key inquiry, implicit in Judge Friendly's description in *Pittston Stevedoring*: whether the legal question decided by the agency and under judicial review is a *pure question of legal interpretation* or a *mixed question of law application to a particular set of facts*. In the former, reviewing courts would *presumptively* conduct de novo review, subject to modification by various factors counseling deference in specific cases. In the latter, courts would *presumptively* grant great deference to the agency, reviewing its decision only for reasonableness, and again subject to modification by various factors counseling against deference. Before we present the evidence in favor of this account of pre-*Chevron* law, which is hardly original with us,[28] several preliminary issues about the nature of administrative deference must be addressed.

First, the word "deference" is used in many different senses, and its usage is not always consistent even within individual opinions.[29] A full exploration of the concept of deference would require a book (which one of us is currently planning), but certain ideas central to the *Chevron* saga must be clarified at the outset.

Deference can mean anything from complete entrustment of

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26. *See* Kenneth Culp Davis, *"Judicial Control of Administrative Action": A Review*, 66 COLUM. L. REV. 635, 670–71 (1966) (emphasizing the Supreme Court's use of both analytical and practical approaches to distinguish between questions of law and fact).

27. For notable efforts to rationalize the varying approaches, see Diver, *supra* note 14, at 599 (arguing that the choice of a standard of review involves dividing interpretive power between "the bureaucracies of court and agenc[ies]"); Jaffe, *supra* note 17, at 275 (noting judicial review should ensure not only that agency decisions comport with the governing statute but also with the statutory scheme, common law, and Constitution); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 63 (1985) (positing that disagreement over the scope of judicial review can be a result of underlying judicial uncertainty over the substantive law at issue); Nathanson, *supra* note 17, at 491–92 (finding judicial deference to rational administrative judgments can comport with the Administrative Procedure Act).

28. This is more or less the schema Nathaniel Nathanson identified more than half a century ago. *See* Nathanson, *supra* note 17, at 470 (identifying a doctrine of judicial review that does not require courts to decide if the agency's decision is right, but only if it is reasonable).

29. For similar observations, see Strauss, *supra* note 4, at 1145.

decisionmaking authority to another—essentially the absence of review—to a simple acknowledgment that someone else has an opinion on the subject. This possible range in the scope of deference afforded administrative legal interpretations has been an important part of administrative law doctrine at least since *Skidmore v. Swift & Co.*,[30] and whenever one sees the word "deference," one must accompany it with the question: "How much?" The answer to the question is critical: "reasonableness review" and "careful respect" can both legitimately be called "deference," but it is wildly misleading to lump them together for purposes of a scholarly study. A good portion of the time, however, judges who use the term "deference" may not have thought very hard about its different meanings, which makes generalizations about deference based on scrutiny of judicial opinions very treacherous.[31] We do not have a solution to this problem other than to acknowledge it openly and to tease out the usage intended in any given context.

More importantly for this study, there can be very different *reasons* for affording deference, in any particular degree, to agency decisions—or indeed to any kind of decisions.[32] Sometimes, one might defer to the views of another because one thinks the other's decision is good evidence of the right answer. That is, one sets out with the express goal of determining the correct answer to a problem but concludes along the way that someone else is better situated to resolve all or some portion of that problem. For lack of a better term, we call this kind of evidence-based deference *epistemological deference*.

On other occasions, one might give deference to another's decision simply because it is their decision, without regard to whether it is good or bad evidence of the right answer. Consider the treatment of jury verdicts. Jury decisions get deference—and in the case of acquittals in criminal cases, absolute deference—simply because they are jury decisions, with no case-by-case assessment of whether any particular jury was likely to have gotten the right answer. Again, for lack of a better term, we call this kind of deference based simply on the *identity* of the prior decisionmaker *legal deference.* Of course, a well-functioning legal system is unlikely to craft a regime of legal deference unless there are plausible reasons to think the actors to whom deference is given are likely to reach right answers in a wide range of cases, but once the system of legal deference is in place, there is no

30. 323 U.S. 134 (1944).

31. *See* Diver, *supra* note 14, at 565–67.

32. The foregoing typology of reasons for deference was given in Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1271, 1278–79, 1300–02 (1996) (listing and elaborating upon *legal* deference, *pragmatic* deference, and *epistemological* deference).

need to consider whether any given decision shows specific indicia of correctness.

Epistemological deference, as we have described it, does not require any specific doctrine for implementation. It is simply common sense applied to the task of figuring out right answers. If the views of another actor are relevant for the correct resolution of a dispute, it would be bad judgment not to consider those views for whatever they are worth.[33] So-called *Skidmore* deference,[34] in which agency views expressed in such non-binding instruments as amicus briefs and interpretative rules are given whatever respectful consideration their reasoning and pedigree warrant,[35] is a species of epistemological deference. It makes no more sense to treat *Skidmore* deference as a "doctrine" than it would to formulate a doctrine called "Lawson deference" for giving weight to Gary Lawson-authored amicus briefs to reflect (if one wisely deems it a fact) that Gary Lawson is more likely to be right about certain matters that he has studied in great depth than would be a judge who has not engaged in that study.

In this Article, we are primarily concerned with *legal* deference: the extent to which courts are *obliged* to give a certain degree of deference to agency legal decisions simply because they are the legal decisions of agencies. That is plainly the kind of deference about which the various debates over *Chevron* are concerned. To be sure, courts do not draw, and have never drawn, the distinction between legal and epistemological deference as sharply as we do here. Indeed, that particular distinction is not even part of formal legal vocabulary. But it is analytically crucial to understanding both the theoretical and practical scope of any doctrine of deference, and we will do our best to isolate aspects of court decisions that are best explained in terms of one or the other kind of deference. Because we are layering this framework on top of decisions that probably did not think about what they were doing in those terms, we are surely "contaminating" our sample in the process. Again, we do not see any way out of this problem other than to acknowledge it.

Second, both pre-*Chevron* and post-*Chevron* case law distinguish statutes

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33. This observation is subject to the qualification that such epistemological deference would be inappropriate if the costs of considering someone else's views, including the costs involved in discovering, interpreting, and processing those views, exceed the likely benefits. In that circumstance, it would be poor reasoning to engage in such deference.

34. Named for *Skidmore*, 323 U.S. 134, and invigorated in modern times by *Christensen v. Harris County*, 529 U.S. 576 (2000).

35. *See generally* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007) (arguing that modern *Skidmore* deference is conceptualized as on a sliding scale, falling either way depending on factors such as respecting an agency's expertise and avoiding its arbitrariness).

administered by agencies from statutes *applied* by agencies. Roughly speaking, agencies *administer* those statutes for which they have some special responsibility, as when an agency interprets the substantive provisions of its own organic act. They often *apply* and interpret statutes for which they have no such responsibility, either because all or many agencies equally apply those statutes,[36] because some other agency administers the statute,[37] or because the statutes are primarily entrusted to (administered by) courts rather than agencies.[38] In this study, we confine ourselves only to the interpretation of statutes administered by agencies. Because this particular distinction predates *Chevron*, it should have little or no effect on the course of doctrinal development. All cases upon which we focus involve statutes obviously administered by the agencies in question, under either pre- or post-*Chevron* law.

Third, agency conclusions of *law* are, at least formally, reviewed differently from agency determinations of *policy*. Policy decisions are subject to review under § 706(2)(A) of the Administrative Procedure Act (APA), which tells courts to reverse agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[39] Technically, one could use this same provision as the statutory source for review of agency legal conclusions (and one encounters some cases that do so), but the application of this provision to agency policy determinations is quite different from any application to agency legal conclusions. As the law has developed over the past half-century, agency policy decisions—or at least policy decisions of threshold consequence—are reviewed under the so-called "hard look doctrine," which requires agencies to articulate the reasons behind their actions and requires courts to ensure agencies have

36. *See, e.g.*, Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 237 (1946) (codified in scattered sections scattered of 5 U.S.C.); Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164 (1980) (codified in scattered sections of 5 U.S.C.); Back Pay Act of 1966, Pub. L. No. 89–380, 80 Stat. 94 (codified in 5 U.S.C. § 5596 (1966)); Federal Tort Claims Act, Pub. L. No. 79–601, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

37. For example, a ratemaking agency may well have to apply and interpret the Internal Revenue Code, but only the Internal Revenue Service administers the code.

38. The U.S. Department of Justice, for example, does not administer (in the specialized administrative law sense) the federal criminal code; the courts do. Provisions in organic acts for judicial review of agency decisions also fall into this category. *See* Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior, 252 F.3d 473, 478–80 (D.C. Cir. 2001) (holding congressionally imposed jurisdictional limits to preclude *Chevron* deference to an agency). One might think the same of statutes of limitations in organic acts, but the case law on that point is oddly inconclusive. *See* AKM LLC v. Sec'y of Labor, 675 F.3d 752, 754–55 (D.C. Cir. 2012) (leaving the question open); *id.* at 764–69 (Brown, J., concurring) (arguing, forcefully, that agencies do not administer such provisions).

39. 5 U.S.C. § 706(2)(A) (2006).

seriously considered both the problems before them and their relevant factors.[40] This review, which focuses on the process by which agencies reach and justify conclusions, is quite different from substantive review that focuses on whether the agency's outcomes accord with external sources, such as the record in the case of agency fact-finding or statutes in the case of agency law-finding. Unfortunately, the line between agency policymaking and agency law-finding is anything but sharp, especially in a world from which the nondelegation doctrine has been largely expunged.[41] If a statute is sufficiently vacuous, an agency's "interpretation" of that statute simply cannot be described as interpretation. The task of giving meaning to an empty shell of a statute is legislative rather than legal or interpretative. For example, if an agency administers a statute instructing the agency to award licenses for the "public interest, convenience, or necessity," all agency actions under that statute formally are "interpretations" of the statute, but in reality the agency is *constructing* rather than *construing* the law through its actions. The statute empowers the agency but does not constrain it in any serious way. But because the form of the agency's action is "interpretation" of a statute, a reviewing court might cast its analysis in terms of reviewing an agency's statutory construction, when in fact the court is (or should be) reviewing the agency's exercise of policymaking discretion.

There is no clear line describing when agency action taking the form of statutory interpretation is instead best treated as an instance of agency policymaking. We here exercise some measure of ill-defined judgment when deciding which cases to include in our sample of decisions involving review of agency legal conclusions. We do not believe that changing our sample at the margins would alter our results in any noticeable way, but we think it necessary to note the problem.

B. From the Beginning[42]

Consider three noteworthy cases involving agency interpretations of statutes decided between 1941 and 1951: *Gray v. Powell*,[43] *NLRB v. Hearst Publications, Inc.*,[44] and *O'Leary v. Brown–Pacific–Maxon, Inc.*[45] Each case reflects a pattern of judicial review that serves as a framework for the law

40. See LAWSON, *supra* note 9, at 697–709.
41. *See id.* at 786–87.
42. With acknowledgement to the artistry of Emerson, Lake, and Palmer.
43. 314 U.S. 402 (1941).
44. 322 U.S. 111 (1944).
45. 340 U.S. 504 (1951).

leading to *Chevron* and beyond.[46]

Gray involved an interpretation of the Bituminous Coal Act of 1937[47] by the Director of the Bituminous Coal Division of the Department of the Interior. The Act authorized the Agency to prescribe a detailed code for the regulation (really the cartelization) of the bituminous coal industry. To coerce coal producers to submit to the regulatory scheme, the Act imposed a punitive 19.5% tax "upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof,"[48] with a blanket exception from the tax for any producer who was a "code member"[49] under the statute and whose transaction complied with the code.[50] For purposes of the tax provision, the Act defined "disposal" of coal to "include[ ] consumption or use . . . by a producer, and any transfer of title by the producer other than by sale,"[51] but then carved an exception from the terms of the coal code for "coal consumed by the producer or . . . coal transported by the producer to himself for consumption by him."[52] The effect of these provisions was to exempt from the code, and therefore from the punitive tax for non-compliance with the code, coal that was consumed by its producer.

Seaboard Air Line Railway Company was a large coal consumer. If it had bought coal on the open market from a mine, there is no doubt that such a transaction would have come within the purview of the statute and thus would have needed to comply with the code provisions to avoid the tax penalty. If it had owned its own mine, hired its own employees to mine coal, and then consumed the coal from its own mines, there is no doubt it would have fallen within the statute's producer/consumer exception. Seaboard did neither of these things. Instead, it leased coal lands and then hired an independent contractor to mine the coal and deliver it to Seaboard.[53] Seaboard owned the coal, for all common-law purposes, from ground to locomotive, but at some point the coal had to be transferred from the possession of the independent mining company that dug it up to Seaboard. Seaboard (through its receiver) asked the Director of the

46. The discussion in this section draws upon material found in Professor Lawson's casebook. *See* LAWSON, *supra* note 9, at 502–33. He is profoundly grateful to Thomson/Reuters for permission to use and adapt that material.

47. Pub. L. No. 75–48, 50 Stat. 72 (codified but repealed at 15 U.S.C. §§ 828–52 (2006)).

48. *Id.* § 3(b), 50 Stat. at 75.

49. *Id.*

50. There was also an exception from the tax for any coal sold exclusively to a governmental entity. *Id.* § 3(e), 50 Stat. at 75–76.

51. *Id.* § 3(a), 50 Stat. at 75.

52. *Id.* § 4(*l*), 50 Stat. at 83.

53. *See* Gray v. Powell, 314 U.S. 402, 407–09 (1941).

Bituminous Coal Division to declare these transactions exempt from the coal code, but the Director refused.[54]

On appeal, Seaboard advanced two arguments. First, it argued that it was the actual producer of the coal, as if it had hired its own employees rather than independent contractors to mine it.[55] If that argument had been correct, Seaboard would clearly be exempt from the code as a producer or consumer. Second, it argued that even if its independent contractor was the coal's actual producer, the coal's transfer of possession from the contractor to Seaboard was not a "sale or other disposal" subject to tax for non-compliance because the coal's title never changed hands.[56] The Supreme Court ruled in favor of the agency on both counts—but did so for very different reasons and with very different accounts of agency deference.

Regarding whether Seaboard was the coal's actual producer, the Court declared after examining in detail the contractual arrangements between Seaboard and one of its contractors:

> The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.[57]

This is very strong deference indeed. The Court reviewed the agency decision for reasonableness rather than correctness.[58]

Regarding whether transactions between a producer (assuming, as the agency and Court found, that the independent contractor was the producer) and Seaboard were outside the scope of the Act because there was no transfer of title to the coal, and therefore no "sale or other disposal" within the statute, the Court affirmed the agency in a lengthy discussion

54. *See id.* at 403–05.

55. *See id.* at 411.

56. *See id.* at 414–15.

57. *Id.* at 413.

58. Three Justices would have reviewed this decision de novo. *See id.* at 417–18 (Roberts, J., dissenting).

that made no reference to deference.[59] The Court simply determined, after what appears to be strict de novo review, that the agency had construed the statute correctly. The shift in both the opinion's analysis and tone from one issue to the other is inescapable.

There is an obvious difference between those issues that readily explains their treatments.[60] The question whether a "sale or other disposal" of coal within the meaning of § 3(a) of the Bituminous Coal Act of 1937 requires a transfer of title to the coal is a question requiring no special knowledge of the coal industry to answer. A law professor in an ivory tower who has never seen a lump of coal could apply ordinary tools of statutory interpretation (language, structure, legislative history, purpose, etc.) to discern the best construction of the statute. The legal question involved is abstract, or *pure*, in the sense that it can be addressed in principle using nothing more than conventional tools of legal analysis. By contrast, the question whether Seaboard was a "producer" of coal when it leased the mines but hired contractors to mine them is not necessarily answerable abstractly from an ivory tower. One *could* conclude that any arrangement in which the consumer owns the mine makes that consumer the "producer," in which case one needs only the same legal skills necessary to determine whether a transfer of title is a statutory prerequisite for a "sale or other disposal" of coal. But one could also believe the Act's failure to provide a definition of "producer" suggests a more calibrated inquiry, in which case "producer" status other than at the obvious poles (open-market purchases and own-employee mining) may turn on subtleties in the particular arrangements between the mine-owning consumer and the workers who mine the coal. In that circumstance, detailed knowledge and expertise in the coal industry may be essential to a reasoned determination of whether any particular entity is a "producer." More precisely, figuring out whether an entity such as Seaboard is a producer may require an *inductive* rather than *deductive* form of inquiry. Instead of fixing the meaning of the statute and then asking whether Seaboard maps onto that meaning, one might instead define the statute precisely by a common-law-like process of inclusion and exclusion, based on detailed study of the specific facts governing Seaboard's transaction. This kind of inquiry is best described as *law application*—the application of legal terms to specific factual settings—rather than *law determination*—the abstract ascertainment of statutory meaning. In that context, it makes sense to give deference to the

59. *See id.* at 414–17 (basing their decision strictly on a de novo review).

60. We do not mean to suggest that the Court's differential treatment of these issues was inevitable, or even doctrinally correct. Three Justices in 1941 obviously thought otherwise. We mean only that the Court's differential treatment is understandable.

supposedly expert agency charged with the task of applying that particular statute.

So understood, *Gray v. Powell* describes a framework in which the deference afforded agencies in their legal interpretations depends to a great degree upon the *kind* of legal interpretation involved. Pure, abstract, "ivory tower" legal questions call for de novo review, while fact-bound, inductive, law-application questions call for a good measure of deference.

This pattern was at work in many pre-*Chevron* cases. In *NLRB v. Hearst*, one of the most famous of the New Deal-era administrative law cases, the NLRB determined that newsboys—generally adult vendors with fixed sales locations—were "employees" for purposes of the mandatory-bargaining provisions of the Wagner Act. The statute unhelpfully defined (and still defines) an "employee" as "any employee."[61] The newspaper company refused to bargain with the newsboys' union on the ground that the Wagner Act incorporated the common law distinction between employees and independent contractors and that the newsboys were independent contractors rather than employees under generally accepted common law principles. The Court affirmed the agency decision, but as in *Gray* did so in two distinct steps.

First, the Court rejected the newspaper's claim that the Wagner Act's definition of "employee" incorporated common law standards for determining employee status. The Court's discussion of that statutory interpretation point was lengthy, employing a range of considerations including the need for national uniformity, the uncertainty of the common law standard(s), and the purposes of the policies of the Wagner Act.[62] At no point did the Court indicate as relevant that the NLRB had already construed the statute in that fashion. Rather, the Court engaged in de novo review—as one would expect from the framework set forth in *Gray v. Powell*. After all, the question whether the word "employee" in the Wagner Act is meant to incorporate pre-existing common law standards for determining employee status is a classic pure, abstract, ivory tower legal question. One can ask and answer it without knowing anything about the newspaper industry—and indeed without knowing there is a controversy involving the newspaper industry. One only needs traditional tools of statutory interpretation.

Once one has decided that the common law does not determine the statute's meaning, there still remains the problem of interpreting and applying the statute in the case at hand. The newspaper likely would have won (as it did in the lower court) if the common law controlled, but that

61. 29 U.S.C. § 152(3) (1940).

62. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120–29 (1944).

does not mean that the newspaper necessarily must lose if the common law does not control. One must still determine whether the newsboys at issue were "employees" under whatever non-common-law meaning of the term applies in the Wagner Act. On that question, the Court said:

> [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.[63]

As with the determination of who is a "producer" under the Bituminous Coal Act, the determination of who is an "employee" under the Wagner Act seems to require an inductive process of inclusion and exclusion based on detailed understanding of factual settings. The process of filling out the meaning of "employee," after abstractly concluding that it cannot be deduced from the common law, is a process of law application rather than strict law determination, and that process plausibly warrants deference to the agency charged with administering the statute.

This framework also appeared in *O'Leary v. Brown–Pacific–Maxon, Inc.*[64] John Valak was an employee of the defendant company in Guam. The company provided a recreation center that was near a channel "so dangerous for swimmers that its use was forbidden and signs to that effect erected."[65] While at the recreation center one day, Valak braved the channel in an attempt to rescue some men trapped on a reef, but drowned in the process. His mother brought a claim under the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA), which requires the company to provide benefits for "accidental injury or death arising out of and in the course of employment."[66] The agency awarded a death benefit under the statute. The company objected that the statutory term "in the course of employment" was meant (shades of *Hearst*) to incorporate pre-existing common law standards, and that Valak's actions, however noble, were surely a frolic and detour under common law and not subject to the statutory compensation provisions, as the Court of Appeals concluded.

The Court agreed with the agency that the statute extended beyond the common law meaning of "course of employment,"[67] but, as in *Gray* and

63. *Id.* at 131.
64. 340 U.S. 504 (1951).
65. *Id.* at 505.
66. 33 U.S.C. § 902(2) (1946).
67. *O'Leary*, 340 U.S. at 506–07.

Hearst, did so with no mention of agency deference. The question whether the LHWCA meant to define "course of employment" by strict reference to the common law is clearly a pure and abstract "ivory tower" legal question requiring no special expertise in employment relations to resolve. One could ask and answer it without knowing whether any specific dispute turns on the answer.

Once one extends the statute beyond the common law, however, there remains the problem, as there was in *Hearst*, of determining whether this particular action by this particular employee fell within the expanded boundaries of the statute. The resolution of that problem, as with establishing the statutory meanings of "producer" and "employee," is the kind of inductive, fact-specific, law-application question for which deference is appropriate under the *Gray* framework; and the agency got plenty of deference on that point.[68]

The *Gray/Hearst/O'Leary* framework provides a workable and plausible, even if not inevitable or incontestable, mechanism for reviewing agency legal determinations. It is not always easy to determine whether a legal question is a "pure" question of law determination or a "mixed" question of law application, but it is often a straightforward inquiry. Once that classification is made, the appropriate deference rule seems to follow automatically.

Of course, this Article would probably be unnecessary if things were that simple. The framework was never that simple, so understanding pre-*Chevron* law requires attention to several modifications to the framework.

C. Burning Down the House[69]

The need for some kind of modification to the framework became very clear in 1947 when the Court decided *Packard Motor Car Co. v. NLRB*.[70] As in *Hearst*, the question concerned whether a particular class of persons were "employees" under the Wagner Act. This time, the class of persons was a

68. *See id.* at 507–09. The Court's discussion was a bit muddled by its willingness to indulge the agency Deputy Commissioner's labeling of the question of "course of employment" as a question of fact. Of course, it is not a question of fact, and of course Justice Frankfurter, who authored the majority opinion, knew that it was not a question of fact. The best reading of the opinion, given that it was issued on the same day as *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), is that Justice Frankfurter meant that the degree of deference afforded agency applications of law is comparable in scope to the degree of deference afforded agency findings of fact under the "substantial evidence" standard of review. *See* 5 U.S.C. § 706(2)(E) (2006).

69. With acknowledgement to the Talking Heads, who Professor Lawson does not think were as brilliant as The Kinks or as artistic as Emerson, Lake, and Palmer.

70. 330 U.S. 485 (1947).

group of foremen at an auto plant, who the NLRB determined were an appropriate bargaining unit under the statute. The company countered that the foremen—with responsibility for managing, disciplining, and making recommendations concerning line employees—were part of the "employer" under the statute rather than employees. By a 5–4 vote, the Court agreed with the NLRB—but Congress agreed with the company and promptly passed the Taft–Hartley Act, overruling the decision.

For our purposes, whether the Court correctly or incorrectly interpreted the Wagner Act does not matter. All that matters is that the Court affirmed the agency without resorting to any deference. Indeed, the only mention of the agency's prior decision was a recitation offered by *the company* of the agency's checkered history of "inaction, vacillation and division . . . in applying this Act to foremen."[71] The Court's response was that "[i]f we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark,"[72] but that making such reference in this case was unnecessary "in deciding the naked question of law whether the Board is now . . . acting within the terms of the statute."[73]

If the relevant issue of statutory meaning really was a "naked question of law," the conclusion of "no deference" followed logically from the *Gray* framework. That characterization would only be accurate, however, if the relevant legal issue was whether all people who bore the label "foreman" at all times and under all circumstances were outside the coverage of the Act. That was not the issue. No one believed that a company could simply apply the label "foreman" to someone and thereby remove that person from the statute. The real question was whether persons with the responsibilities, duties, and status of the people labeled "foremen" in this particular case were "employees" within the statute. One could resolve even that issue as a "naked question of law" by saying, as the majority opinion at some points seemed to say, that anyone who draws a salary from the company is an "employee." But that would have the intriguing consequence, as the dissenting opinion pointed out, of making corporate executives, including the president of the company, employees subject to the Wagner Act.[74] Charity demands that one not attribute such a position to the Court. Accordingly, the best interpretation of the opinion is that it really was treating the relevant issue as more akin to the inductive, fact-specific, law-applying process involved in deciding whether newsboys are

71. *Id.* at 492.
72. *Id.*
73. *Id.* at 493.
74. *See id.* at 494 (Douglas, J., dissenting).

"employees." On that understanding, one would expect the agency decision to receive a great deal of deference, amounting essentially to reasonableness review.

A long tradition of viewing *Packard* and *Hearst* in tension with each other is explicable only by viewing *Packard*, despite its language, as a case involving law application rather than law determination.[75] If that is the correct characterization of the case, then *Packard* does represent a break, and a fairly sharp one at that, with the *Gray* framework. Why defer to the agency's inductive construction of the term "employee" in *Hearst* but not in *Packard*?

There are many reasons for doubting the agency's judgment in *Packard*. As the company explained, the agency had vacillated for a long term. The NLRB had also developed a reputation for being blatantly pro-labor, and while that might not matter too much to anyone other than newsboys and newspapers in a case like *Hearst*, the decision in *Packard* threatened to re-make industrial relations across the country.[76] From the standpoint of *epistemological deference*, these are all plausible reasons to refuse to defer to the agency. But how can they be relevant from the standpoint of *legal deference*?

The answer must be that the framework set forth in *Gray, Hearst*, and *O'Leary* was a *presumptive* framework: normally, a court defers to an agency's exercise of law application while reviewing de novo agency exercises of law determination, but if certain epistemologically relevant factors are present, those default rules could be altered. Under the right circumstances, agencies might fail to get deference in law application, as in *Packard*, or receive deference in pure law determination, as arguably happened much later in *FEC v. Democratic Senatorial Campaign Committee*.[77] What circumstances are those? In 1985, Professor Diver famously identified no fewer than ten factors that Supreme Court decisions had appeared to regard as relevant for determining whether to grant deference to agency legal interpretations.[78] Sometimes one could find many of those factors at work in a single opinion.[79] Accordingly, the seemingly simple framework of

75. Or at least, as explained above, the law determination aspect of the case was so obvious that it did not warrant Supreme Court attention.

76. *See* Jaffe, *supra* note 17, at 255 (arguing the difference of interpretations in *Hearst* and *Packard* to be in substance rather than form).

77. 454 U.S. 27 (1981) (deferring to the agency's view that a statute forbidding political committees from making expenditures on behalf of candidates did not prevent those committees from acting as spending agents for other organizations).

78. *See* Diver, *supra* note 14, at 562 n.95 (listing factors such as contemporaneousness, duration, consistency, reliance, significance, complexity, rulemaking authority, self-execution, congressional ratification, and quality of explanation as used in determining the role of agency discretion).

79. *See* 454 U.S. at 37–38.

Gray was subject to override by a mélange of factors, with no clear metric for determining how much or when those factors weigh in the balance.

Another important modification to the *Gray* framework stems from the language of certain kinds of statutes. On occasion, Congress will specifically and expressly indicate that an ambiguous term is to be defined by the agency, even where defining it could involve abstract law determination rather than inductive law application. For example, in *Batterton v. Francis*,[80] the relevant statute expressly gave the Secretary of Health, Education, and Welfare the power to determine, through rulemaking, the standards for "unemployment" by referring to "unemployment (as determined in accordance with standards prescribed by the Secretary)."[81] While defining such a term through a rulemaking would ordinarily involve abstract law determination, the Court noted that Congress

> *expressly delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC–UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.[82]

Once it is settled that assigning this law-determining power to agencies does not violate the nondelegation doctrine,[83] express congressional grants of this kind amount to a command to courts to afford legal deference to agency decisions pursuant to such statutes. Conceivably, one might be able to infer such a command from language less than express, but presumably that would require some kind of unusual, statute-specific evidence indicating Congress intends agencies rather than courts to provide statutory meaning.

Accordingly, we think the best account of pre-*Chevron* law is that it required reviewing courts to conduct roughly the following inquiry:

> (1) Does the agency administer the statutory provision at issue? If not, then the agency gets, at most, epistemological deference pursuant to *Skidmore v. Swift & Co.* if warranted by all of the facts and circumstances. If yes, then:

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80. 432 U.S. 416 (1977).

81. 42 U.S.C. § 607(a) (1976).

82. 432 U.S. at 425 (first emphasis added).

83. That has been settled, however wrongly, for quite some time. *See generally* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

(2) Is the agency's legal interpretation a pure, abstract, "ivory tower" legal question that can be asked and answered without knowing anything about the particular dispute before the agency? If no, the agency presumptively gets a strong measure of deference, tantamount to reasonableness review, unless a constellation of factors counsels against it. If yes, the court presumptively reviews the matter de novo, against subject to a constellation of factors that might counsel against it.

(3) Also, if Congress has *expressly* entrusted the law-determination function to the agency, then courts must honor the congressional allocation of authority and give the agency's decision great deference regardless of the classification of the legal question involved.

D. Is This the Real Life? Is This Just Fantasy?[84]

Assume that we are right about the best account of pre-*Chevron* law as articulated by the Supreme Court. There still remains the question whether that account was explicitly or implicitly accepted and applied by lower courts in the period leading to *Chevron*. We cannot say every lower court decision we have encountered is consistent with this understanding, but the lower courts generally appeared to act in accordance with this framework.

We looked through the *Federal Reporter* at every reported decision from the D.C. Circuit Court of Appeals decided between 1982 and the issuance of *Chevron* on June 25, 1984. (We looked at a non-random sample of cases from other circuits as well, but that number is too small to change any of our conclusions.) We selected from that sample all cases that seemed to involve review of agency legal determinations of statutes administered by the agency. We have possibly wrongly omitted some decisions by misclassifying cases involving statutory interpretation (which are relevant to our sample) as cases involving policy determinations (which are not), but given our results, we cannot believe that any such errors could make a difference.[85] It is also possible that the D.C. Circuit did not represent the practices of lower courts generally, but there are strong theoretical and anecdotal reasons to doubt whether this is a serious problem: the D.C. Circuit set the tone for administrative law during that era—as it continues to do today—and a quick glance at cases from other circuits does not reveal

84. With acknowledgement to the virtuosity of Queen.

85. Could we also have wrongly included some decisions that are best understood as policy calls rather than interpretations of statutes? Of course. As we noted earlier, the line between questions of law and questions of policy is fuzzy at best. Again, however, we see no way any such marginal errors could affect the validity of our overall results.

any great differences in approach across federal courts. Accordingly, we think these D.C. Circuit cases give a good flavor for how lower courts generally understood the law governing review of agency legal determinations in the two years leading up to *Chevron*.

A significant majority of these cases involved what we would classify as pure or abstract legal questions, and relatively few involved mixed questions of law application. That is not surprising: appeals from rulemakings, particularly pre-enforcement appeals, are very likely to involve such "purely legal" questions, and in adjudications, parties are likely to focus at the appellate level on pure legal questions. If we are right that agencies presumptively received great deference on mixed questions of law application but not on pure questions of law determination, it makes sense for parties challenging agency decisions primarily to contest pure legal questions in the courts of appeals. To be sure, courts very seldom expressly identified the legal questions involved as being either pure or mixed. The classifications are ours, not theirs, and conceivably a different set of eyes would put at least some of the cases into a different category. Some of them seem to be very close calls that could go either way. Accordingly, we do not claim any empirical rigor for our observations. We simply offer them for what they are worth.

Most courts facing pure or abstract questions of law decided those issues with no significant deference, of either the legal or epistemological variety, to the interpreting agencies. The courts often did not mention the concept of deference, whether they were affirming the agencies[86] or reversing

86. *See, e.g.*, Multi-State Commc'ns, Inc. v. FCC, 728 F.2d 1519, 1522 (D.C. Cir. 1984) (affirming, with no mention of deference, FCC's determination that the word "allocate" does not necessarily mean "assign"); Action on Smoking & Health v. Civil Aeronatics Bd., 699 F.2d 1209 (D.C. Cir. 1983) (affirming, with no mention of deference, the board's determination that a statute enabling it to ensure "safe and adequate service" included the power to regulate the quality of service and hence to regulate smoking on aircraft); B.J. McAdams, Inc. v. ICC, 698 F.2d 498 (D.C. Cir. 1983) (affirming, with no mention of deference, ICC's conclusion that it could pass on an application to remove restrictions on service without considering issues that go back to the original license grant); Duquesne Light Co. v. EPA, 698 F.2d 456 (D.C. Cir. 1983) (affirming, with no mention of deference, Environmental Protection Agency (EPA) regulations implementing pollution penalties); Process Gas Consumers Grp. v. FERC, 712 F.2d 483 (D.C. Cir. 1983) (affirming, with no mention of deference, Federal Energy Regulatory Commission's (FERC's) decision to consider cost and not simply availability of alternative fuels when setting gas priorities); Cont'l Seafoods, Inc. v. Schweiker, 674 F.2d 38, 42–43 (D.C. Cir. 1982) (statute giving the Food and Drug Administration (FDA) jurisdiction over "added" substances does not refer solely to substances added by humans rather than by natural processes that occur after production of the regulated item); Int'l Union of the United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local Unions Nos. 141, 229, 681 & 706 v. NLRB, 675 F.2d 1257 (D.C. Cir. 1982) (affirming, by a 2–1 vote, the NLRB's conclusion

them.[87] A few courts gave very brief nods to what today we call "*Skidmore* deference" (or epistemological deference) in connection with pure questions of law, but said nothing to suggest any legal deference in those circumstances.[88]

On some occasions, the courts engaged in quite substantial discussions of statutory interpretation methodology without mentioning deference as an element in that analysis. For example, in *National Insulation Transportation Committee v. ICC*,[89] the court affirmed the Interstate Commerce Commission's (ICC's) conclusion that it had the discretion not to order refunds when it found unreasonable a carrier's practice, but not the carrier's ultimate rate. The court consumed four pages of the *Federal Reporter* discussing statutory interpretation, but it made no reference to deference to the agency.[90] In *National Soft Drink Ass'n v. Block*,[91] the court similarly held that the Department of Agriculture did not have statutory

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that state right-to-work laws foreclosed bargaining over provisions assessing union representation costs against non-union workers, with no mention of deference to the agency even in response to a vigorous dissenting opinion); McIlwain v. Hayes, 690 F.2d 1041 (D.C. Cir. 1982) (affirming, with no mention of deference, FDA's conclusion that there is no implicit statutory time limit on how long the agency can delay requirement of proof of safety of food additives in light of changing technology); Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982) (affirming, with no mention of deference, an Interstate Commerce Commission (ICC) determination that it need not retroactively impose labor-protective conditions on terminations of lines by state-run railroads); U.S. Lines, Inc. v. Baldridge, 677 F.2d 940, 944–45 (D.C. Cir. 1982) (affirming, with no mention of deference, an agency determination that a shipping line had to repay a portion of government construction subsidies when ships were used for domestic rather than foreign commerce, even when the domestic use was under a military charter).

In *Ashton v. Pierce*, 716 F.2d 56 (D.C. Cir. 1983), the court (and evidently the parties as well) treated the relevant question—whether an "immediate hazard" includes lead in unchipped paint—as a pure question of law, see *id.* at 60, and gave no deference to the agency. *See id.* at 60–63. This seems to be a paradigmatic "mixed" question of law application, but if treated as a pure question of law, the court's analysis is consistent with the usual pattern for such questions.

87. *See, e.g.*, Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983) (reversing, with no mention of deference, ICC conclusion that the "fitness" for a license of a company can include considering the "fitness" of its owner as an individual); Kennecott Corp. v. EPA, 684 F.2d 1007 (D.C. Cir. 1982) (reversing, without mentioning deference, an EPA interpretation of the Clean Air Act that allows use of certain technologies only when use of alternative technologies would force a plant closure).

88. *See, e.g.*, Interstate Natural Gas Ass'n of Am. v. FERC, 716 F.2d 1 (D.C. Cir. 1983); Am. Fed'n of Gov't Emps., Local 2782 v. FLRA, 702 F.2d 1183 (D.C. Cir. 1983); United Food & Commercial Workers Int'l Union Local No. 576 v. NLRB, 675 F.2d 346, 351 (D.C. Cir. 1982); Ry. Labor Execs.' Ass'n v. United States, 675 F.2d 1248, 1254 (D.C. Cir. 1982).

89. 683 F.2d 533 (D.C. Cir. 1982).

90. *See id.* at 537–40.

91. 721 F.2d 1348 (D.C. Cir. 1983).

authority to restrict sales of snack foods at all times during the school day and at all places within schools. Rather, said the court, "An examination of the legislative history leads to the conclusion, *albeit inconclusively*, that the [c]ongressional intent was to confine the control of junk food sales to the food service areas during the period of actual meal service."[92] The court explained the methodology of statutory interpretation in depth[93] but never invoked deference to the agency, even though it admitted the legal question was close. Both of these cases involved pure or abstract legal questions, involving the statutory authority of the relevant agencies, and deference played no role in the decisions.

Under the model we have laid out, deference would be appropriate, even for pure questions of law, if the statute clearly or expressly allocated authority to make those determinations to the agency. We found no cases in our sample in which the D.C. Circuit invoked this doctrine as grounds for deference. The court did, however, once refer to that doctrine, while finding it inapplicable to the case at hand, because there was insufficient evidence Congress had granted the agency such specific law-determining authority.[94]

A number of cases granted agencies deference on questions of law application or mixed questions of law and fact, precisely as our proposed model predicts. These cases involved matters such as whether promulgation of work performance standards were management prerogatives under the federal labor laws,[95] whether commercial paper—specifically "prime quality commercial paper, of maturity less than nine months, sold in denominations of over $100,000 to financially sophisticated customers rather than to the general public"[96]—are "securities,"[97] whether a rail carrier has an "interest" in a water carrier if the stock is held in a

92. *Id.* at 1353 (emphasis added).

93. *See id.* at 1352–53 (analyzing the statute by evaluating the plain meaning and legislative history).

94. *See* Vanguard Interstate Tours, Inc. v. ICC, 735 F.2d 591, 595–97 (D.C. Cir. 1984) (finding Congress held itself as the authority in determining the right of intervention in route application proceedings).

95. *See* Nat'l Treasury Emps. Union v. FLRA, 691 F.2d 553, 554, 558–59 (D.C. Cir. 1982) (following the Federal Labor Relations Authority's (FLRA's) interpretation that Title VII of the Civil Services Reform Act of 1978 guarantees work performance standards to federal agencies' management officials).

96. A.G. Becker, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 693 F.2d 136, 151 (D.C. Cir. 1982).

97. *See id.* at 140 (noting specifically that "deference to an agency's construction of the statute is called for because the agency's decision applies general, undefined statutory terms—'notes and securities'—to particular facts" (emphasis omitted)).

voting trust,[98] whether treating classes of utility customers differently results in "discriminatory" rates,[99] whether a certain job was "temporary,"[100] and whether a certain facility counted as a "mine."[101] These questions involve clarifying the meaning of ambiguous statutory terms through case-by-case determinations on particular facts, which are precisely the kinds of questions that *Gray*, *Hearst*, and *O'Leary* presumptively entrusted to agencies.

On some occasions, courts would refuse to defer to agencies on purely legal matters, while deferring to them on questions of law application within the same case. For example, in *Western Union Telegraph Co. v. FCC*,[102] the court reversed the agency on a pure question of law by holding that a domestic carrier who initiates a call eventually transmitted overseas by an international carrier is the carrier that "originated" the call under the statute and is therefore responsible for tariffing, billing, and collecting on that call. The court made no mention of deference to the agency's view that the international carrier could be tasked with billing and collecting functions.[103] But with respect to a separate question of law application—how to allocate revenues when more than one carrier is involved in a call—the court explicitly gave "considerable deference"[104] to the Federal Communications Commission (FCC) and found it had not acted "unlawfully or unreasonably."[105]

We do not suggest that every decision during this period neatly fell within the framework laid out by pre-1984 Supreme Court case law. That

98. *See* Water Transp. Ass'n v. ICC, 715 F.2d 581, 591–92 (D.C. Cir. 1983) (holding that, despite being contingent on ICC's approval, a rail carrier's stock in the voting trust is an "interest").

99. *See* City of Bethany v. FERC, 727 F.2d 1131, 1138–39 (D.C. Cir. 1984) (reiterating that FERC's decision to charge "the Coops" and "the Cities" different rates did not qualify as discrimination).

100. *See* Moon v. U.S. Dep't of Labor, 727 F.2d 1315, 1317 (D.C. Cir. 1984) (contending that the Secretary did not have a reasonable basis for defining a job position as temporary).

101. *See* Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1552–53 (D.C. Cir. 1984) ("We have before us just the sort of determination the Secretary was empowered by Congress to make. That determination is well within the bounds of reasonableness . . . and we accord it the deference it deserves.").

102. 729 F.2d 811 (D.C. Cir. 1984).

103. *See id.* at 814–15 (concluding that the statutory language and the legislative history provide no rationale for distinguishing between domestic carriers that initiate calls transmitted to international carriers).

104. *Id.* at 816. To be sure, the court emphasized that the agency had to act quickly with very little information, see *id.*, which could be taken to suggest that the court would find the mere classification of the issue as one of law application to be insufficient to find deference.

105. *Id.*

most assuredly did not happen. There was a substantial number of cases in which courts spoke at length about deference when reviewing pure questions of law,[106] though it was never clear whether the courts meant epistemological deference—which should always be on the table regardless of the kind of legal question at issue—or legal deference. In one especially intriguing case, the court managed to defer and not defer at the same time. In *Conference of State Bank Supervisors v. Conover*,[107] the comptroller construed § 4(a) of the International Banking Act (IBA), which authorizes the comptroller to permit foreign banks to operate within a state when "establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law,"[108] to allow the comptroller to approve specific foreign operations, unless the relevant state would prohibit *all* foreign operations of that kind. The states instead urged an interpretation that would allow them to adopt policies that might allow some foreign banks but not others to operate within the state; New York, for example, sought to deny Australian banks branching rights they would grant to other countries' banks because of a state policy to grant rights only when the relevant foreign country extended reciprocal rights to New York banks. The parties thus essentially disagreed about whether the phrase "a foreign bank" in § 4(a) means "any foreign bank"—the comptroller's view—or the specific foreign bank applying for a federal license—the states' view. The court noted, "The language of section 4(a) does not preclude either of the proffered interpretations" and "the legislative history of the IBA does not offer clear guidance on the meaning of section 4(a)."[109] "In short," said the court, "we find two arguably correct interpretations of an ambiguous statutory provision."[110] The court nonetheless resolved the question in the agency's favor solely by reference to the perceived purposes of the statute, with no mention of agency deference.[111] In the next breath, however, the

106. *See, e.g.*, ITT World Commc'ns, Inc. v. FCC, 725 F.2d 732, 741–42 (D.C. Cir. 1984) (emphasizing that the court must determine if FCC's interpretation of the statute was arbitrary and capricious); Bargmann v. Helms, 715 F.2d 638, 641 (D.C. Cir. 1983) (acknowledging that while deference is usually given to an agency's interpretation, Federal Aviation Administration's (FAA's) interpretation of the statute was unreasonable); Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 655 (D.C. Cir. 1983) (recognizing courts typically defer substantially to an agency's statutory interpretation); *cf.* N. Colo. Water Conservancy Dist. v. FERC, 730 F.2d 1509, 1517 (D.C. Cir. 1984) (holding FERC's interpretation unreasonable and therefore reversible even if deference was granted).

107. 715 F.2d 604 (D.C. Cir. 1983).

108. 12 U.S.C. § 3102(a) (Supp. V 1982).

109. 715 F.2d at 614.

110. *Id.* at 615.

111. *See id.* at 615–17 (determining that the legislative history references congressional intent to give foreign banks national treatment, which aligns with the comptroller's

court granted deference to the comptroller's interpretation of § 5(a) of the IBA, which forbids federal chartering of a foreign bank unless "its operation is expressly permitted by the State in which it is to be operated."[112] The comptroller construed "operation" to mean allowance of banks per se rather than specific "operation[s]," or practices, of the bank. Again, as with the comptroller's interpretation of § 4(a), this allowed federal licensing of foreign banks unless states prohibited the entire category of activities in which those banks sought to engage. The court had dealt, at considerable length, with the § 4(a) issue without even a nod to deference, but on this matter, which seems every bit as pure and abstract as the interpretation of § 4(a), the court felt "obliged to defer to the Comptroller's interpretation of the IBA because 'the interpretation of an agency charged with the administration of a statute is entitled to substantial deference.'"[113] Additionally, on another pure legal issue—whether foreign banks could accept deposits from non-United States citizens under § 4(d) of the IBA—the court chastised the district court, which upheld the comptroller's affirmative answer to that question, because it "believe[d] the District Court deferred to the Comptroller when no deference was due."[114] Our model has no explanation for this case, but we defy *any* model to accommodate it.

Notwithstanding the nontrivial, but nonetheless small, number of "outlier" cases, the general pattern in the D.C. Circuit from 1982 to 1984 was broadly consistent with the scheme of review that we have attributed to the pre-*Chevron* Supreme Court. The decisions generally did not speak openly about whether they addressed pure questions of law or law application, nor did they distinguish legal deference from epistemological deference in any meaningful fashion. But the cases correspond reasonably well to a framework that puts those concepts front and center. The courts behaved *as though* the relevant inquiry required identification of the kind of legal question at issue. Indeed, the pattern is strong enough to make what followed even more remarkable than it might seem.

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interpretation of the statute).

112. 12 U.S.C. § 3103(a).

113. 715 F.2d at 622 (quoting Blum v. Bacon, 457 U.S. 132, 141 (1982)); s*ee also id.* at 623 (making clear that the court was reviewing the agency's decision only for reasonableness).

114. *Id.* at 626. To be sure, the court held the statute's plain language, which says flatly that "a foreign bank shall not receive deposits or exercise fiduciary powers at any Federal agency," 12 U.S.C. § 3102(d), required reversal, which would render any deference to the agency irrelevant, since no amount of deference can turn "shall not receive deposits" into "shall not receive deposits unless the depositor is not a United States citizen."

II. *CHEVRON* RISING

"Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided."[115] However, when *Chevron* was briefed and argued in the Supreme Court, no one thought it was a case involving any serious, general question about the standard of review for questions of law. Instead, all the parties and the Justices understood the case to be an important but relatively narrow dispute about the permissibility of the "bubble concept" under the Clean Air Act, with no broader implications for administrative law doctrine. To understand the significance, or lack thereof, of the decision for scope of review doctrine, one needs a firm grasp on the actual controversy in *Chevron*.

Fortunately, Professor Tom Merrill has exhaustively explored the arguments and decision in *Chevron*,[116] and we leave the details of the *Chevron* decision to him. The following paragraphs essentially summarize and reference his analysis and conclusions, with little value added.

The Clean Air Act Amendments of 1977 required certain states with designated pollution problems to establish a permit program to regulate "new or modified major stationary sources" of air pollution.[117] Specifically, no permit for a new or modified stationary source could issue for so-called non-attainment states—states failing to meet national guidelines for specified pollutants—without meeting stringent criteria.[118] It was fairly clear that the paradigm of a "major stationary source" was something like a refinery, factory, power plant, or smelter. It was less clear, however, precisely how the statute required states to treat multiple pollution-emitting devices within a single facility. One possible interpretation of the statute would treat each distinct opening—for example, each smokestack of a factory or refinery—as a "major stationary source" so that no additions or modifications even to individual smokestacks could be made without complying with the tough permitting requirements. Alternatively, one could treat each integrated economic unit, such as a power plant, refinery,

115. Thomas W. Merrill, *The Story of* Chevron USA Inc. v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 168 (William N. Eskridge, Jr. et al. eds., 2011).

116. This article is an updated version of a prior study with which we suspect many readers are familiar. *See* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399 (Peter L. Strauss ed., 2006). For our purposes, the differences between these two versions are unimportant, and we equally well could have cited either.

117. 42 U.S.C. §§ 7502(b) (Supp. II 1979).

118. *See id.* § 7503 (listing criteria as decreasing total emissions, ensuring resulting emissions do not exceed the allowable pollutant amount for an area, and making a source's emissions amount to the lowest possible rate).

or other facility, as a single "source" so that modifications or additions to some segment of the unit would be permissible without triggering the stringent permitting requirements, as long as overall emissions from the entire unit did not increase. (If the modification or addition substituted a more efficient for a less efficient production process, the new or modified source could reduce overall emissions from the plant as a whole.) After vacillating for several years, the EPA adopted a rule embodying the latter definition of a "source," allowing an existing plant to obtain a permit for new equipment not meeting otherwise-applicable permit conditions if the overall plant output of omissions did not increase. This is the so-called "bubble concept," which treats each facility as if covered by an imaginary "bubble" within which pollution is measured.

The Natural Resources Defense Council and other environmental groups challenged the EPA's rule and won in the D.C. Circuit,[119] essentially on the strength of prior precedent in that court,[120] without much discussion of statutory interpretation. The Supreme Court granted certiorari.[121] The "Question Presented" on which it granted review said nothing of deference, scope of review, or even statutory interpretation. Rather, as framed by Chevron, U.S.A.'s merits brief, the question asked:

> Did the court of appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency
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> (1) to promulgate regulations which simply confirmed EPA's regulatory definition of "stationary source" to the definition set forth in the Clean Air Act; and
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> (2) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?[122]

The other merits briefs similarly framed the relevant questions without

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119. *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982) (holding that the EPA's use of the bubble concept, which led to decreased mandatory new source review in non-attainment states, was impermissible).

120. *See id.* at 725–26 (reiterating that the bubble concept is unsuitable for programs designated to improving ambient air quality).

121. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 461 U.S. 956 (1983).

122. Brief for Petitioner at 3, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 915 at *3. We have focused on the "Questions Presented" in the merits briefs rather than in the petitions for certiorari because the latter contained extraneous issues regarding the exclusive role of the D.C. Circuit in reviewing EPA regulations under the Clean Air Act. The substantive questions were framed identically at both the certiorari and merits stages. For discussion of the EPA's petition for certiorari, see Merrill, *supra* note 115, at 178–79 (articulating that the purposes of the 1977 Amendments were to improve air quality and further economic growth in dirty-air areas).

reference to broad (or even narrow) issues of statutory interpretation. The American Iron and Steel Institute, speaking for a wide range of industry groups, asked:

> 1. Whether the court below impermissibly intruded upon the discretion vested in the states by the Clean Air Act when that court deprived the states of the authority to define the term "source" as an industrial plant for their new source review programs in nonattainment areas, even where such a definition is demonstrated to be consistent with reasonable further progress toward, and timely attainment of, national ambient air quality standards.
>
> 2. Whether the court below wrongfully substituted its policy judgment for that of EPA, when it determined, without support in the language or legislative history of the Clean Air Act or in the record before it, that EPA had no authority to define "source" as an industrial plant or to allow the states to adopt a similar definition of "source" for the purposes of new source review programs in nonattainment areas.[123]

And the EPA's brief, filed by the Solicitor General, said that the issue was

> Whether the Clean Air Act prohibits EPA from allowing a state to adopt a plantwide approach to new source review in nonattainment areas in circumstances where the state can demonstrate that its State Implementation Plan contains all of the elements required by the Clean Air Act and provides for timely attainment and maintenance of air quality standards.[124]

Respondents, for their part, framed the issue as

> Whether the court of appeals, ruling on provisions of the Clean Air Act for meeting the health-based National Ambient Air Quality Standards where they are now violated, correctly held that the Administrator of the Environmental Protection Agency exceeded her authority when she redefined the term "source" to mean whole industrial plants only and thereby exempted from permit requirements the major industrial installations (such as boilers and blast furnaces) built within such plants.[125]

The substantive discussions in the briefs were similarly devoid of any broad references to deference doctrine. No one was preparing for a debate over general principles of administrative law.

As Professor Merrill has documented at considerable length, the oral argument, the conference voting, and the decision-writing process in the

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123. Brief for Petitioners at 2, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 917 at *2. There were two other questions identified in this brief, but they involved issues that ultimately played no role in the *Chevron* story.

124. Brief for the Administrator of the Environmental Protection Agency at 1, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 919 at *1.

125. Respondents' Brief in Opposition to the Petitions, *Chevron*, 461 U.S. 956 (Nos. 82-1005, 82-1247 & 82-1591), 1983 U.S. S. Ct. Briefs LEXIS 1127 at *1.

Court all similarly framed this case as a narrow but important question about environmental law and policy, with no consciousness that principles of deference were seriously at issue.[126] As far as statutory interpretation doctrine was concerned, all of the parties and Justices seemed to view the *Chevron* case as an application of well-settled law. That much is now beyond cavil.

The question is how the lower courts viewed the *Chevron* decision. We explore that question by focusing on cases involving review of what pre-*Chevron* law would have called pure or abstract legal questions because those are the cases in which the *Chevron* framework might make a difference. Agency decisions involving mixed or law-applying questions would be presumptively entitled to deference under pre-*Chevron* law, and no one has ever suggested that *Chevron* be construed to lower the amount of deference agencies would receive in that context.

III. *CHEVRON* ASCENDANT(?)

Chevron was decided on June 25, 1984. Obviously, a good many cases involving judicial review of agency decisions were briefed and argued in the courts of appeals before that date but decided after *Chevron* issued. Lower courts are certainly aware of major Supreme Court cases that bear on not-yet-issued opinions, so to gauge the impact of *Chevron*, it is reasonable to look at lower court opinions issued in the months after *Chevron*, even if *Chevron* was not part of the briefing and argument in those cases. Accordingly, our sample of cases includes decisions from late 1984 that were argued before the *Chevron* opinion was issued.

A. Where's the Beef?

Chevron got off to a very slow start. No court of appeals cited the case in decisions issued in either June or July of 1984. Citations in August of 1984 were limited to passing mentions involving deference to agencies in cases of law application, to which deference was already due under the pre-*Chevron* framework[127]: deference to the EPA in the application of criteria for

126. *See* Merrill, *supra* note 115, at 180–85 (suggesting the issue in the case centered on the bubble concept's legality).

127. *See* South Dakota v. Civil Aeronautics Bd., 740 F.2d 619, 621 (8th Cir. 1984) (citing *Chevron*, along with other authorities, for the uncontroversial proposition that the Civil Aeronautics Board deserves deference when defining "essential air transportation," 49 U.S.C. § 1389(a)(2)(B) (Supp. II 1979), for communities affected by airline deregulation); *see also* Cospito v. Heckler, 742 F.2d 72, 85 n.21 (3d Cir. 1984) (noting, in a footnote, that regulations defining "inpatient hospital services," 42 U.S.C. § 1396d(a)(14) (1982), need only be reasonable).

approval of State Implementation Plans under the Clean Air Act;[128] and, in a case that did not even involve agency interpretation of a statute, the broad proposition that policy arguments "are 'more properly addressed to legislators or administrators, not to judges.'"[129] There was certainly no consciousness in the lower courts that *Chevron* required any kind of immediate reassessment of their practices in administrative law cases.

Perhaps the best indication of the post-*Chevron* state of the law is found in a First Circuit opinion authored by then-Judge (and former administrative law professor) Stephen Breyer in a case argued six weeks before *Chevron* was issued, but decided on August 2, 1984. *Mayburg v. Secretary of Health & Human Services*[130] involved a Department of Health and Human Services's interpretation of provisions of the Medicare Act. At the time of the decision, Medicare would pay for ninety days of hospital inpatient care and one hundred days of post-hospitalization extended care during each distinct "spell of illness,"[131] which the statute defined as the period

> (1) beginning with the first day (not included in a previous spell of illness) (A) on which such individual is furnished inpatient hospital services or extended care services, and (B) which occurs in a month for which he is entitled to benefits under part A, and
>
> (2) ending with the close of the first period of 60 consecutive days thereafter on each of which he is neither an inpatient of a hospital nor an inpatient of a skilled nursing facility.[132]

The question was how to handle a person who lived in a nursing home but received only custodial, not medical, care. When that person was released from hospitalization—let us say after ninety days of inpatient care to make the example clear—to the nursing home, was she an "inpatient" of the nursing facility? If so, her spell of illness never stopped, because there was no period when she was "neither an inpatient of a hospital nor an inpatient of a skilled nursing facility," so if she again needed hospitalization, it would not be covered by Medicare because the ninety day limit on each spell of illness would have been exhausted. On this interpretation, persons who live in nursing homes would often be at risk of facing uncovered hospitalization. On the other hand, a contrary interpretation of the statute

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128. *See* Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984) (remarking on the particular importance of the EPA following enacted statutory procedures given the EPA's amount of discretion to do otherwise).

129. Pub. Inv. Ltd. v. Bandeirante Corp., 740 F.2d 1222, 1236 (D.C. Cir. 1984) (Mikva, J., concurring in part, dissenting in part) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).

130. 740 F.2d 100 (1st Cir. 1984).

131. 42 U.S.C. § 1395d(a) (1982).

132. *Id.* § 1395x(a).

that would try to distinguish nursing home stays that provide medical services from those that do not could produce many difficult cases in the administration of the laws; it surely would be much easier to treat all nursing home residents as inpatients rather than to adopt an interpretation requiring a case-specific inquiry to determine whether any particular resident was an inpatient.

The Department of Health and Human Services opted for the former interpretation that treats all nursing home stays as inpatient stays even when the resident received only custodial but not medical care, with the effect that a spell of illness does not stop when the patient went from a hospital to a nursing home. This interpretation of the term inpatient in the definition of a spell of illness arguably should be a pure question of law; whether one must receive medical services to be an "inpatient" does not require knowledge of the facts or circumstances of any particular case. Accordingly, a court under pre-*Chevron* law would decide this question without any legal deference to the agency, barring some special circumstance requiring it (which does not appear to be present here). If *Chevron* changed the law to require the two-step framework for all cases in which the agency administers the relevant statute, however, deference would be appropriate because the agency administers the statute.

Judge Breyer's opinion faithfully followed the pre-*Chevron* framework in rejecting the agency's interpretation. He noted multiple reasons, all grounded in traditional tools of statutory interpretation, why the agency's interpretation should not be followed: the weight of prior judicial authority, ordinary language, sound policy, canons of construction, and legislative history.[133] The agency responded to these arguments with a call for deference, though the case was argued before *Chevron* could formally provide support. Judge Breyer's answer to this call is telling, including his reference to the recently decided *Chevron* decision and his effectively distinguishing between epistemological and legal deference, and it merits full reproduction:

133. *See Mayburg*, 740 F.2d at 102–03 (agreeing with the district court, Judge Breyer detailed why the Department of Health and Human Services's interpretation should be rejected).

The Secretary also argues that this court should simply defer to HHS's interpretation of the statute. She points to a line of Supreme Court cases that, she argues, compel such deference. A different line of Supreme Court cases, however, cautions us that "deference" is not complete; sometimes a different, and more independent judicial attitude is appropriate. Moreover, the Administrative Procedure Act states that "the reviewing court," not the agency, "shall decide all relevant questions of law."

In order to apply correctly what Judge Friendly has described as conflicting authority, we must ask *why* courts should ever defer, or give special weight, to an agency's interpretation of a statute's meaning. And, here there are at least two types of answers, neither of which supports more than a modicum of special attention here.

First, one might argue that specialized agencies, at least sometimes, know better than the courts what Congress actually intended the words of the statute to mean. Thus, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court wrote

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The fact that a question is closely related to an agency's area of expertise may give an agency greater "power to persuade." Its interpretation may also carry more persuasive power if made near the time the statute was enacted when congressional debates and interest group positions were fresh in the administrators' minds. An interpretation that has proved to be administratively workable because it is consistent and longstanding is typically more persuasive, as is an interpretation that has stood throughout subsequent reenactment of the statute. All these factors help to convince a court that the agency is familiar with the context, implications, history and consequent meaning of the statute. But, still, under *Skidmore* the agency ultimately must depend upon the *persuasive power* of its argument. The simple fact that the agency *has* a position, in and of itself, is of only marginal significance.

In the case before us, the fact that the agency's interpretation is consistent, longstanding, and left untouched by Congress all count in its favor. Nonetheless, HHS points to no significantly adverse administrative consequences that might flow from the contrary interpretation. Under these circumstances, the considerations mentioned in Part I are simply more persuasive. They convince us, as they have convinced other courts, that in

> this instance, HHS has not interpreted the statute as Congress meant.
>
> Second, a court might give special weight to an agency's interpretation of a statute because Congress intended it to do just that in respect to the statute in question. In *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), for example, the Court noted that an agency, "when it interprets a statute" may act "as a delegate to the legislative power." And the Court added that "such interpretive power may be included in the agencies' administrative functions." If Congress *expressly* delegates a law-declaring function to the agency, of course, courts must respect that delegation. But, if Congress is silent, courts may still infer from the particular statutory circumstances an *implicit* congressional instruction about the degree of respect or deference they owe the agency on a question of law. *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). They might do so by asking what a sensible legislator would have expected given the statutory circumstances. The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.
>
> In this instance, the "spell of illness" provision is central to the statutory scheme. The interpretive skills called for seem primarily judicial, not administrative, in nature. The "administrative" implications seem trifling, or non-existent. And, nothing else suggests any specific congressional intent to place the power to construe this statutory term primarily in the agency's hands. Thus, the arguments for completely deferring to the agency's interpretation of the statute are not strong here.[134]

Judge Breyer treated *Chevron* as a case in which Congress effectively instructed courts to give legal deference to agencies on pure questions of law even without an explicit directive to that effect. However, one can only find in Judge Breyer's analysis such an implied instruction based on a careful, multi-factor, statute-by-statute analysis, in which the *more* important the question involved, the *less likely* one is to find an implicit instruction to defer. One can certainly question whether the issue of interpretation involved in *Chevron* was unimportant, but formally Judge Breyer simply worked *Chevron* into the preexisting structure for review of agency legal determinations and thereby gave it a very narrow construction. His response to the agency's call for deference would likely have been substantively identical had the *Mayburg* decision come out three months

134. *Id.* at 105–07 (some internal citations omitted).

earlier.

Judge Breyer reiterated this quite narrow view of *Chevron* a month after the *Mayburg* decision. In *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*,[135] the First Circuit held that a statute granting a private right of action to parties to enforce in district court "any order"[136] of the FCC did not encompass enforcement of FCC *rules*. The decision was issued on June 29, 1984. The plaintiff sought rehearing, and the FCC then supported the plaintiff's position that the term "order" included "rule," arguing on rehearing that its view of the statute should be given deference. Regardless of *Chevron*, the most the agency could claim was *Skidmore*-style epistemological deference. The agency expressed its view in an amicus brief, and it is very hard to see how it could be thought to "administer" the provisions of a statute authorizing private parties to bypass the agency and sue directly in court. In a denial of rehearing issued on September 10, 1984, the court correctly observed that "[w]hile [the agency] counsel's experience entitles his opinion to respect, it cannot bind a court as to the meaning of a jurisdictional statute."[137] Judge Breyer went on, however, to make the following enlightening comments:

> Moreover, the FCC's legal argument here threatens a highly anomalous result. Its view of statutory construction is one that would place primary authority to decide pure questions of statutory law in the hands of the agency. At the same time, its interpretation of the statute in question is one that would place considerable authority to decide questions of communications policy in the hands of the courts. Each institution—court and agency—would receive comparatively greater power in the area in which it, comparatively, *lacks* expertise. The resulting picture is one of classical administrative law principle turned upside down. At least, the position seems inconsistent with the sound court/agency working partnership that administrative law traditionally has sought.[138]

Note that Judge Breyer makes clear—almost three months after *Chevron*—that pure questions of law are primarily for the court. His position is grounded in a view of comparative institutional competence that clearly echoes the "legal process" view expressed most famously by Harvard Law School professors Henry Hart and Al Sacks[139]—which is not

135. 742 F.2d 1 (1st Cir. 1984).

136. 47 U.S.C. § 401(b) (1982).

137. 742 F.2d at 11.

138. *Id.*

139. *See* HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS (William Eskdrige, Jr. & Philip M. Frickey eds., 1994) (citing Hart and Sacks's groundbreaking work on legal process theory). On comparative institutional competence as an element of the legal process approach, see also Edward L. Rubin, Commentary, *The New Legal Process, the*

surprising because Judge Breyer was a former administrative law professor at Harvard Law School. That view is broadly consistent with what we have described as the pre-*Chevron* framework, in which agencies get primary interpretative responsibility when "interpretation" requires attention to facts, circumstances, and policy, while courts get principal responsibility for matters of pure legal interpretation.

It is clear that as of fall 1984, Judge Breyer and some other First Circuit judges did not view *Chevron* as more than modestly changing the methodology for review of agency legal decisions, perhaps by expanding in some slight fashion the range of cases in which one might find congressional delegations to agencies to interpret pure legal questions.

B. A Spark of Life

In the six months following its issuance, *Chevron* was cited by circuit court decisions that appear in the Westlaw database twenty-two times, eleven of which were issued by the D.C. Circuit. Therefore, examining D.C. Circuit opinions is the best starting point for determining whether and how *Chevron* actually influenced courts' methodology in deferring to agencies. The D.C. Circuit hears a disproportionate share of federal administrative law cases,[140] and is universally recognized as the leading court in shaping administrative law doctrine. It is also the source of the *Chevron* doctrine.

In examining the cases that emerged from that circuit in 1984 and 1985, we must engage in a bit of imaginative reconstruction. To know whether and how any particular understanding or application of *Chevron* affected case decisions, one would have to know how those cases would have been decided if there were no *Chevron* doctrine. This kind of counterfactual inquiry is particularly difficult given that the courts, both before and after *Chevron*, often said little about their employed methodology and assumptions. There is a very large risk of inferring reasons or frameworks that simply were not present. We see no way to avoid this risk other than to acknowledge it—and to discount to some degree whatever conclusions are drawn from analysis of the cases. Nonetheless, we think the story of *Chevron*'s evolution emerges with reasonable clarity.

The *Chevron* doctrine originates with *General Motors Corp. v. Ruckelshaus*,[141]

Synthesis of Discourse, and the Microanalysis of Institutions, 109 HARV. L. REV. 1393, 1396 (1996) (discussing comparative institutional competence as an element of the legal process approach).

140. *See* John G. Roberts, Jr., Lecture, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 376–77 (2006) (observing, "One-third of the D.C. Circuit appeals are from agency decisions" and "[t]hat figure is less than twenty percent nationwide").

141. 742 F.2d 1561 (D.C. Cir. 1984).

an en banc decision of the D.C. Circuit that issued on September 7, 1984—slightly more than four months after the case was argued on April 25, 1984. The case turned on § 207(c)(1) of the Clean Air Act, which provides:

> If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 7521 of this title [*i.e.*, EPA emission standards], when in actual use throughout their useful life (as determined under section 7521(d) of this title), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer.[142]

In essence, this provides for the EPA-ordered recalls of vehicle classes that fail to meet the EPA emissions standards. The EPA interpreted this provision to authorize recalling all members of a nonconforming class of vehicles, except those not "properly maintained and used," regardless of the age or mileage of any given member. General Motors, by contrast, insisted the phrase "throughout their useful life" limited the scope of permissible recalls to vehicles falling within the statutory criterion for a vehicle's useful life of "five years or fifty thousand miles (or the equivalent), whichever first occurs."[143]

This is a dispute over a pure question of law: it concerns whether the EPA's recall authority extends to vehicles exceeding their useful lives when a large part of their class has not done so. Under pre-*Chevron* methodology, there is no reason to depart from the presumptive baseline of de novo review regarding legal deference, leaving the Agency's reasoning to stand or fall on its merits. This was essentially the methodology of the three dissenting judges, who found that the usual mélange of case-specific factors governing the degree of (epistemological) deference to an agency counseled against upholding the Agency's rule:

> The rule was not a contemporaneous interpretation of the Clean Air Act, and there is no evidence that it reflects a longstanding interpretation of the Act by the agency. Nor, in my view, did the rule "simply restate[ ] the consistent practice of the agency in conducting recalls pursuant to section 207(c)"—a proposition upon which the majority places substantial weight. Finally—and this point can scarcely be overemphasized—the interpretative rule at issue in this case does not involve the kind of fact-intensive questions concerning which great deference need be given the agency's technical

142. 42 U.S.C. § 7541(c)(1) (1982).
143. *Id.* § 7521(d)(1).

> expertise; rather, as the agency itself concedes, "[s]ince the rule simply expresses an interpretation of the law based on the language, legislative history and policy of the Clean Air Act, no factual data need be analyzed or commented on."[144]

The majority, however, took a somewhat different approach. Writing for eight judges, Judge Wald seemed to view *Chevron* as changing and now governing the inquiry:

> The Supreme Court has recently outlined our proper task in reviewing an administrative construction of a statute that the agency administers. First, we must determine whether Congress "has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. National Resources Defense Council,* 467 U.S. 837, 842 (1984). If the administrative construction runs counter to clear congressional intent, then the reviewing court must reject it. *See id.* at 842–43 n.9. On the other hand, if the administrative construction does not contravene clearly discernible legislative intent, then the reviewing court "does not simply impose its own construction on the statute." *Id.* at 843. Instead, we then must conduct the "narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court."[145]

This is the first opinion in which *Chevron* was treated as a general statement of scope-of-review doctrine. This treatment significantly appears in a case presenting a pure legal question, which is precisely the context in which a broad reading of *Chevron* would likely make a difference. The rest of the majority opinion is filled with multiple references to the reasonableness of the agency's interpretation.[146] It seems the majority shifted away from classifying the relevant legal issue combined with a multi-factor epistemological deference inquiry toward a facially simpler "reasonableness" inquiry.

The dissenting opinion, authored by Judge Bazelon and joined by Judges Tamm and Wilkey, wrote as if *Chevron* changed nothing. The dissent's only citation to *Chevron* was for the proposition that "[t]he judiciary is the final authority on issues of statutory construction."[147] The only deference acceptable to the dissent was *Skidmore* epistemological deference,[148] under

144. 742 F.2d at 1574–75 (Bazelon, J., dissenting) (alteration in original) (footnotes omitted).

145. *Id.* at 1566–67 (alteration in original) (some internal citations omitted).

146. *See id.* at 1567 ("EPA reasonably mandated"); *id.* ("agency reasonably required"); *id.* at 1568 ("EPA reasonably reads"); *id.* ("the May 30 rule is not precluded by the statute's definition of 'useful life'"); *id.* at 1568 ("a reasonable method"); *id.* at 1570 ("a reasonable agency interpretation"); *id.* at 1571 ("agency therefore may reasonably require").

147. *Id.* at 1578 n.33 (Bazelon, J., dissenting) (alteration in original) (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

148. *Id.* at 1573–74 (clarifying what deference will be afforded to an agency contextual

which "[t]he EPA rule does not 'receive high marks'"[149] for reasons presented at the outset of this discussion.

Thus the seeds were planted, but there was a lot of growth to come. The majority did not expressly say *Chevron* materially altered prior law, nor did it elaborate on what any new *Chevron* framework might entail.

The seeds began to germinate in *Rettig v. Pension Benefit Guaranty Corp.*,[150] with arguably the first clear application of the "*Chevron* two-step" in the lower courts. The Employee Retirement Income Security Act of 1974 (ERISA)[151] required pre-retirement vesting for most employer pension plans and also provided a federal insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC),[152] to guarantee benefits to retirees if their plans terminated with insufficient assets to cover vested liabilities. As part of the transition to the new ERISA regime, the statute specified that to determine the amount of guaranteed retiree benefits, "any increase in the amount of benefits under a plan resulting from a plan amendment which was made, or became effective, whichever is later, within 60 months before the date on which the plan terminates shall be disregarded."[153] The evident purpose of this "phase-in" section "was to prevent abuse of the termination insurance program by plan administrators who might 'balloon' benefits, and thus unfunded plan liabilities, in anticipation of termination."[154]

The PBCG issued a rule defining "benefits increases" to be "not only increases in the amount of monthly benefits but also 'any change in plan provisions which advances a participant's . . . entitlement to a benefit, such as liberalized participation requirements or vesting schedules, reductions in the normal or early retirement age under a plan, and changes in the form of benefit payments.'"[155] This rule barred consideration of changes in vesting rules made within five years of plan termination, even when those vesting rules were mandated by other provisions of ERISA. Plaintiffs were employees of a company that changed its vesting rules within the five-year time period and then terminated its plan with insufficient assets. The PBGC ruled that it could not consider the vesting changes made within the five-year period, and the plaintiffs appealed.

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interpretation).

149. *Id.* at 1574 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)).

150. 744 F.2d 133 (D.C. Cir. 1984).

151. Pub. L. No. 93–406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

152. 29 U.S.C. § 1302(a) (2006).

153. *Id.* § 1322(b)(1)(B).

154. *Rettig*, 744 F.2d at 137.

155. *Id.* at 138.

Rettig presents a classic pure, "ivory tower" question of law: whether the phrase "increase in the amount of benefits" can include matters such as changes in vesting rules not directly changing the periodic amounts payable to retirees. One can ask and answer that question without reference to the specific facts of any particular case. Under the pre-*Chevron* regime, such a pure question of law would be addressed through a de novo standard of review, absent some special reason to defer to the PBGC.

Instead, the panel opinion authored by Judge Wald (as was the opinion in *General Motors v. Ruckelshaus*) and issued on September 11, 1984 laid out the now-familiar *Chevron* two-step framework:

> We are initially confronted with the familiar task of reviewing an agency's construction of the statute it is charged with implementing, a task which of course we undertake with due deference to the agency's congressional mandate and expertise. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As we understand the Supreme Court's most recent pronouncements in *Chevron*, our inquiry consists of two steps. First, we must determine whether Congress had a specific intent as to the meaning of a particular phrase or provision. *Id.* at 842–43. To do this, we analyze the language and legislative history of the provision. As the Court noted in *Chevron*, "[t]he judiciary is the final authority on issue of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n. 9. Thus, in ascertaining the congressional intent underlying a specific provision, we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history.
>
> However, if that inquiry fails to answer the precise question before us—if it appears that "Congress did not actually have an intent" regarding the particular question at issue, *id.* at 845—then we must seriously consider whether Congress implicitly delegated to the agency the task of filling the statutory gap. At this second stage, when policy considerations assume a prominent role, we must uphold the agency's interpretation if it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Id.* In this case, if we conclude that "Congress did not actually have an intent" with respect to the phase-in of mandatory vesting improvements, we are required to grant a considerable degree of deference to the PBGC's reconciliation of competing statutory policies.[156]

The court then engaged in a lengthy analysis of the statute's language, purpose, and legislative history, and while it said "we emerge from our foray into the statute and its history with the indubitable impression that Congress intended that the PBGC fully guarantee benefits to those

156. *Id.* at 140–41 (alteration in original) (internal citations omitted).

employees meeting the vesting standards,"[157] it found itself "unable to characterize as entirely clear and unambiguous the evidence reviewed here of the intent of Congress as to the precise question before us."[158] The court thus felt compelled to "proceed to the second stage of our task of statutory construction, and determine whether the PBGC's interpretation of the statute reflects 'a reasonable accommodation of conflicting policies . . . committed to the agency's care by the statute.'"[159] Somewhat anticlimactically, the court found the agency's interpretation failed to account for all the relevant factors, and it remanded the case to the agency for reconsideration.[160]

The court surely would have sided with the plaintiffs in the absence of *Chevron*,[161] so the precise framework employed likely did not affect the outcome of the case, but the court significantly couched its entire discussion in terms of what it thought *Chevron* prescribed. Also, it is significant that the court moved to step two and deferred to the agency despite believing there was a *best* interpretation of the statute. That was not enough to end the case at step one; the court in some manner understood the search for a "specific intent" of Congress to require some level of confidence in the statutory meaning beyond an "indubitable impression." Thus, not only was the court employing something recognizable as the *Chevron* framework; it was starting the long, difficult, and still radically incomplete path toward making that framework operational. The opinion at least reads as though *Chevron* changes the methodology for scope of review of agency legal conclusions.

C. Two Steps Back

The D.C. Circuit did not rush to embrace the framework set forth by Judge Wald in *General Motors* and *Rettig*. To the contrary, the D.C. Circuit's early reception to the *Chevron* two-step was decidedly mixed. On the court's next occasion to employ *Chevron*,[162] the majority ignored it entirely.

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157. *Id.* at 150.

158. *Id.*

159. *Id.* (quoting Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).

160. *See id.* at 155–56 (noting the disposition anticipated the still-vibrant debate of whether *Chevron*'s second step duplicates, overlaps with, or complements hard look review under the arbitrary or capricious test of § 706(2)(A) of the Administrative Procedure Act).

161. *See id.* at 152 (exhibiting the court's unwillingness to second-guess informed agency balancing of interests).

162. Along the way, *Chevron* was briefly cited, in a case plainly involving law application, for the general proposition that agencies receive deference subject to the ultimate authority of courts to pronounce the law. *See* Coal Exps. Ass'n of the U.S., Inc. v. United States, 745

Middle South Energy, Inc. v. FERC[163] concerned the Federal Power Act. In 1984, the Act required electric utilities subject to Federal Energy Regulatory Commission (FERC) jurisdiction to file rate schedules and to notify FERC of any changes in rates. It crucially provided, "Whenever any such new [rate] schedule is filed the Commission shall have authority . . . to enter upon a hearing concerning the lawfulness of such rate . . . ; and, pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule . . . ."[164] This provision gave FERC the authority to suspend changes in rates, pending a hearing. The agency claimed power under this provision to suspend, pending hearing, *original* rates even in the absence of any changes or new filings. The case essentially came down to whether the phrase "such new schedule" refers only to schedules *changing* rates or also to schedules *establishing* rates in the first instance. This is a pure question of law, so the agency would not have received legal deference pre-*Chevron*. But under the framework set out in *General Motors* and *Rettig*, both of which also involved pure questions of law, FERC would be entitled to some measure of legal deference regardless of the classification of the question, and the court should have decided only whether the Agency's view is reasonable.

The majority opinion, authored by Judge Bork and issued on November 6, 1984, rejected the Agency's position without mention of deference and without citation to *Chevron*. The court relied entirely on the statute's language, legislative history, and the Agency's prior interpretations.[165] This was not for lack of *Chevron* awareness: the case was argued on March 8, 1984, well before *Chevron* was decided, but Judge Ginsburg's dissenting opinion explicitly invoked *Chevron* for the proposition that "FERC's current interpretation merits deferential judicial consideration."[166] Judge Ginsburg found the reference in the statute to "such new schedule" to be ambiguous between original schedules and changed schedules, found the statute "bears the reading FERC now gives it,"[167] and would have affirmed the agency on that point. The majority evidently wanted no part of it.

Chevron was prominent, though not necessarily recognizably, in *Montana v. Clark*,[168] a case decided on November 20, 1984, after having been argued on September 25, 1984—making it the first case we discuss argued after

F.2d 76, 96 (D.C. Cir. 1984).

163. 747 F.2d 763 (D.C. Cir. 1984).

164. 16 U.S.C. § 824d(e) (1982).

165. 747 F.2d at 767–71.

166. *Id.* at 774 (Ginsburg, J., concurring in part and dissenting in part) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 841–45 (1984)).

167. *Id.*

168. 749 F.2d 740 (D.C. Cir. 1984).

Chevron. A statute provided for allocating funds from mine reclamation "in any State or Indian reservation . . . to that State or Indian reservation."[169] The Secretary of the Interior construed the statute as though the term "Indian reservation" meant "Indian lands," with the effect that Indian tribes could receive funds from reclamation projects on lands in which they had a beneficial interest, but which were not actually on their reservations. The State of Montana challenged the Agency's regulation and the D.C. Circuit affirmed.

The case involved a pure, abstract question of law, as the court (in a rare recognition of the categorization problem) expressly acknowledged: "Montana raises a pure question of law, whether the challenged regulation is inconsistent with the organic statute."[170] As such, the case brought into focus "two superficially conflicting principles of statutory interpretation."[171] On the one hand, Montana invoked "the principle that the judiciary is uniquely responsible for the final determination of the meaning of statutes,"[172] while the "federal appellees, on the other hand, acknowledge[d] the purely legal nature of the question but insist[ed] that [the] court should afford substantial deference to the Department of the Interior's construction of a statute it is entrusted to administer."[173]

Judge Wright found this conflict "more apparent than real,"[174] because:

> properly understood, deference to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation. Thus the court exercises its constitutionally prescribed function as the final arbiter of questions of law when it evaluates the breadth of congressional delegation and, in so doing, determines the degree of deference warranted in the particular controversy before it."[175]

Judge Wright saw *Chevron* as expressing this principle and prescribing "the appropriate methodology for ascertaining whether to afford deference to an agency construction of its governing statute."[176] After setting forth the standard elements of the *Chevron* two-step framework, however, Judge Wright explained that determining whether Congress had delegated interpretative authority to the agency, so that (legal) deference was warranted, required a multifaceted, statute-specific inquiry:

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169. 30 U.S.C. § 1232(g)(2) (1982).
170. 749 F.2d at 744.
171. *Id.*
172. *Id.* (citing FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965)).
173. *Id.*
174. *Id.* at 745.
175. *Id.* (internal citation marks omitted).
176. *Id.*

> [W]e must determine whether the agency's construction warrants deference by measuring the breadth of delegation . . . . [T]he absence of several of the typical indicia of broad congressional delegation to the agency counsels against deference. . . . [T]he construction . . . required no technical or specialized expertise . . . . Similarly, the statutory language at the center of this controversy is not "of such inherent imprecision . . . that a discretion of almost legislative scope was necessarily contemplated."
>
> On the other hand, . . . Congress expressly recognized that the jurisdictional status of Indian lands was too uncertain to permit effective allocation of regulatory authority for those regions. . . . Given this rather remarkably mixed message, we can only conclude that, pending congressional clarification, Congress afforded the Secretary substantial discretion in the administration of the fund on Indian lands. Thus deference is appropriate, and we will uphold the agency's interpretation provided only that it is not expressly foreclosed by congressional intent and that it is reasonable.[177]

The result seems like an application of the *Chevron* framework, complete with a "step-two" affirmance, but with a view of *Chevron*'s scope much narrower than the view reflected in *General Motors* and *Rettig*. Those cases did not find it necessary to conduct detailed inquiries into whether they involved the kinds of statutes for which Congress intended deference to agencies on pure law interpretation. Under pre-*Chevron* law, one could conceivably find case-specific reasons to defer to agencies in such circumstances—de novo review was presumptive, not absolute—but they were relatively rare. Accordingly, Judge Wright—like Judge Breyer three months earlier—fit a narrow understanding of *Chevron* into the preexisting legal order rather than seeing that *Chevron* mandated a significant change in legal practice.

After brief and uninformative appearances in cases involving agency policy decisions,[178] and a fairly flagrant agency misconstruction of a statute,[179] *Chevron* re-emerged in a major way in two decisions issued on December 5, 1984. Both, again, were authored by Judge Wald.

Railway Labor Executives' Ass'n v. United States Railroad Retirement Board[180] concerned two related statutes that provided retirement benefits to railroad

177. *Id.* at 746 (internal citations omitted).

178. *See* Walter O. Boswell Mem'l Hosp. v. Heckler, 749 F.2d 788, 801 (D.C. Cir. 1984) (holding that the Secretary of Health and Human Services's policy interpretation of the Medicare Act was not arbitrary and capricious).

179. *See* Am. Methyl Corp. v. EPA, 749 F.2d 826, 833–34 (D.C. Cir. 1984) ("[T]he legislative history is inconsistent with the standardless and open-ended authority to revoke waivers . . . .").

180. 749 F.2d 856 (D.C. Cir. 1984).

workers "in the service of one or more employers,"[181] including workers in foreign countries and non-resident and non-citizen workers, subject to the proviso that

> an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.[182]

The Railroad Retirement Board understood a 1978 Canadian immigration regulation to require the hiring of Canadian workers and accordingly held that the relevant statutes did not cover such workers. The petitioners, the Railroad Labor Executives' Association (RLEA), appealed.

Everyone agreed the Board should get no deference in the interpretation of Canadian law.[183] But the Board argued, and the court agreed, that this case did not simply involve an interpretation of Canadian law. Rather, RLEA insisted that the statutory word "required" had a strict, firm meaning of "mandated by law" and that a foreign "require[ment]" not imposing something like a hiring quota could not serve to activate the statutory exemption. Those are propositions about the meaning of American statutes administered by the Board, and they are pure, abstract legal questions that can be asked and answered outside the context of a specific controversy. So framed, the case looks like a prime candidate for the *Chevron* framework Judge Wald set forth in prior opinions.

Judge Wald thought so as well; her opinion set forth and applied the *Chevron* two-step analysis.[184] She found the statute ambiguous at step one: "[T]he plain words contained in the . . . exceptions to covered service do not compel us to adopt any particular meaning . . . [and] nothing in the legislative history of these provisions gives us any clue as to the meaning Congress intended."[185] Accordingly, "Our task in determining the reasonableness of the Board's decision is not to interpret the statutes as we think best but only to inquire as to whether the Board's interpretation is 'sufficiently reasonable' to be accepted by a reviewing court."[186] As happened in *Rettig*, however, the court found the agency had not sufficiently

181. 45 U.S.C. §§ 231(b)(1), 351(d) (1982).

182. *Id.* §§ 231(d)(3), 351(e).

183. Ry. Labor Execs.' Ass'n, 749 F.2d at 860 (noting that the court can independently reach its own determination of Canadian law since the issues are purely questions of law).

184. *See id.* (identifying that considerable deference is required under *Chevron* when an agency constructs its own governing statutes).

185. *Id.* at 861.

186. *Id.* at 862 (quoting FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)).

considered all relevant factors or adequately explained its statutory interpretation, and the Board's decision was vacated and remanded.[187] Nonetheless, the *Chevron* framework governed, which makes all the more puzzling the court's opinion in *Pennsylvania Public Utility Commission v. United States*.[188] *Pennsylvania Public Utility Commission* involved the Bus Regulatory Reform Act, which made it easier for bus companies to discontinue unprofitable routes—mainly serving small towns—by allowing ICC to override refusals by state regulators to permit the discontinuance of routes. (Under the prior law, essentially either the state commission or ICC could block discontinuance, but either agency could grant it under the new law.) ICC overrode the state agency on twelve routes, and the state agency appealed. The governing statute required ICC to consider such matters as "the public interest" and "an unreasonable burden on interstate commerce,"[189] so most issues that arose involved either agency policymaking or, at most, questions of law application. One important pure question of law, however, slipped through the cracks.

ICC was statutorily required to grant a request for discontinuance of a route

> unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that such discontinuance or reduction is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce.[190]

ICC granted a request because balancing the public interest—continuing service but burdening interstate commerce by forcing continuation of unprofitable service—weighed in favor of granting the request. The petitioners countered that ICC had to find *both* the public interest *and* economic efficiency would be served by discontinuance, and could not balance one against the other. That is a pure question of law, and it seemed ripe for the *Chevron* framework, which would affirm the agency's decision unless its interpretation was contrary to the statute's clear meaning or otherwise unreasonable.

The court briefly mentioned *Chevron* at several points in its lengthy opinion,[191] but it made no mention of *Chevron* when discussing what it termed the "substantial issues of statutory interpretation"[192] raised by ICC's

187. *Id.* at 862–64.

188. 749 F.2d 841 (D.C. Cir. 1984).

189. *Id.* at 844–45.

190. *Id.* at 844 (quoting the statutory language).

191. *See id.* at 847, 849 (referencing *Chevron*'s two-step framework and judicial deference toward agency interpretation).

192. *Id.* at 849.

decision. The court found the statute's legislative history, structure, and purpose contrary to the Agency's decision.[193] In theory, one could treat this as a finding under *Chevron* step one that the meaning of the statute was clear; the many references in the opinion to congressional intent—step one's touchstone as articulated in the *Chevron* decision—support this reading. But by December 1984, one might expect something more explicit from the court, especially in an opinion written by Judge Wald. Instead, the discussion in *Pennsylvania Public Utility Commission* could have been written precisely the same way, in both substance and form, if *Chevron* (and *General Motors* and *Rettig*) had never existed. There was nothing to suggest that *Chevron* was relevant to its analysis.

Perhaps most telling of *Chevron*'s status (or lack thereof) as a landmark is the large number of D.C. Circuit opinions in late 1984 and early 1985 involving agency interpretations of statutes in which *Chevron* was not mentioned. Such cases were legion, involving both pure questions of law[194] and questions of law application.[195] It is hard to say how any of those cases would have differed had *Chevron* supplied the analytical framework, but for our purposes the significance lies simply in the absence of that framework. It is true that almost all of them were argued before *Chevron*, and some long before *Chevron*,[196] but we have seen the court was capable of incorporating *Chevron* into the analysis of already-argued cases. *Chevron* simply was not seen as important enough to require inclusion. By the end of 1984, the D.C. Circuit thus was applying the *Chevron* two-step episodically at best. Even the judge who birthed the *Chevron* doctrine was not applying it consistently.

D. A Tale of Two Readings

1985 was the best of times and the worst of times for supporters of a

193. *Id.* at 851–53.

194. *See* Am. Fed'n of Gov't Emps. v. Fed. Labor Relations Auth., 750 F.2d 143 (D.C. Cir. 1984); Ill. Commerce Comm'n v. ICC, 749 F.2d 875 (D.C. Cir. 1984); Ctr. for Auto Safety v. Ruckelshaus, 747 F.2d 1 (D.C. Cir. 1984); City of Winnfield v. Fed. Energy Regulatory Comm'n, 744 F.2d 871 (D.C. Cir. 1984); E. Ark. Legal Servs. v. Legal Servs. Corp., 742 F.2d 1472 (D.C. Cir. 1984); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984).

195. *See* Ass'n of Civilian Technicians, Montana Air Chapter v. Fed. Labor Relations Auth., 756 F.2d 172 (D.C. Cir. 1985); Sierra Club v. U.S. Dep't of Transp., 753 F.2d 120 (D.C. Cir. 1985); Equal Emp't Opportunity Comm'n v. Fed. Labor Relations Auth., 744 F.2d 842 (D.C. Cir. 1984); Nat'l Treasury Emps. Union v. U.S. Merit Sys. Prot. Bd., 743 F.2d 895 (D.C. Cir. 1984); Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

196. Six of the cases cited *supra* notes 194 and 195 were argued in 1983.

broad reading of *Chevron*. The year began with a series of D.C. Circuit decisions that seemed to treat *Chevron* as settled law prescribing the methodology for review of agency legal determinations, without need for extended discussion of the point.[197] Those brief treatments raised more questions than they answered about the mechanics of *Chevron*, but they suggest the *Chevron* framework, however unelaborated, had taken hold. The same could not be said for decisions by other circuit courts, whose treatment of *Chevron* was far more equivocal and considerably less sophisticated than the D.C. Circuit's,[198] but nevertheless, one can still see in them outlines of an emerging "*Chevron* doctrine."

A pair of decisions by Judge Ken Starr did cast considerable doubt on this picture—notable because Judge Starr is often seen as one of *Chevron*'s progenitors.[199] The key decision was *American Federation of Labor & Congress of Industrial Organizations v. Donovan*.[200] The details of the case, involving challenges to eight separate rules implementing various provisions of the Service Contract Act, are not important here; instead, we focus on the case's scope of review principles. The Department of Labor urged, and the district court held, that the Agency's rules should be reviewed under the deferential arbitrary and capricious standard of § 706(2)(A) of the APA.[201] Judge Starr, writing for himself, Judge Bork, and Judge Ginsburg, begged to differ at least in part:

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197. *See* FAIC Secs., Inc. v. United States, 768 F.2d 352, 362–63 (D.C. Cir. 1985); Cent. & S. Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 314–17 (D.C. Cir. 1985); Atlanta Gas Light Co. v. Fed. Energy Regulatory Comm'n, 756 F.2d 191, 196 (D.C. Cir. 1985); Def. Logistics Agency v. Fed. Labor Relations Auth., 754 F.2d 1003, 1004, 1013–14 (D.C. Cir. 1985).

198. *See* Friends of the Shawangunks, Inc. v. Clark, 754 F.2d 446, 449–50 (2d Cir. 1985) (including *Chevron* in a string citation for deference to agency expertise); Kamp v. Hernandez, 752 F.2d 1444, 1453 (9th Cir. 1985) (citing *Chevron* with no discussion while holding that the EPA "reasonably" interpreted the Clean Air Act); Mattox v. Fed. Trade Comm'n, 752 F.2d 116, 123 (5th Cir. 1985) (finding, with little discussion, *Chevron* to be an "apt standard" for review of agency decisions); Phila. Gear Corp. v. Fed. Deposit Ins. Corp., 751 F.2d 1131, 1135 (10th Cir. 1984) (treating *Chevron* as requiring deference only in the case of express delegations of interpretative authority). Perhaps the one exception was *Washington Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985), which read *Chevron* quite broadly to prescribe the framework for review of at least EPA legal conclusions. *See id.* at 1469–70.

199. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1087 (2008).

200. 757 F.2d 330 (D.C. Cir. 1985).

201. *See* 5 U.S.C. § 706(2)(A) (1982) (instructing courts to strike down agency actions found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

> Not all agency determinations, of course, are due an equally high degree of deference. Agencies are of necessity called upon from time to time to interpret terms in the statute they are charged with implementing or enforcing. Ordinarily, such "administrative interpretations of statutory terms are given important but not controlling significance." "[A] court is not required to give effect to an interpretative regulation[, but v]arying degrees of deference are accorded . . . based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." In a word, when an agency interprets a statute, courts employ, in effect, a sliding scale of deference, taking into account a variety of deference-related factors such as those enumerated in *Batterton v. Francis*, 432 U.S. 416 (1977). *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130–31 (1944); *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 5 (D.C. Cir. 1984).[202]

This is an elegant statement of pre-*Chevron* scope of review doctrine. What about *Chevron*?

> Circumstances do exist, of course, under settled principles of law when an agency's view of a statute is still to be reviewed under the traditional "arbitrary and capricious" standard. Where Congress *delegates*, explicitly or implicitly, to an administrative agency the authority to give meaning to a statutory term or to promulgate standards or classifications, the regulations adopted in the exercise of that authority enjoy "legislative effect." *See Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). As *Chevron* teaches us, "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, supra, at 844.[203]

The key under this analysis is to figure out when Congress implicitly delegated interpretative authority to an agency, so that a deferential approach should govern. Judge Starr addressed that crucial topic in a footnote:

> Under the Supreme Court's decision last Term in *Chevron*, where Congress has delegated, *either expressly or implicitly*, to an agency the authority to interpret a statutory term, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. An implicit delegation is more difficult to recognize than an explicit delegation. However, such implicit delegations have been recognized where an undefined statutory term, such as "extreme hardship," constitutes the operative standard to guide Executive Branch action, and where the standard is one "of such inherent imprecision . . . that a discretion of almost

202. 757 F.2d at 340–41 (alterations in original) (some internal citations omitted).

203. *Id.* at 341 (alteration in original) (some internal citations omitted).

legislative scope was necessarily contemplated" . . . .[204]

This discussion limits *Chevron* essentially to those circumstances identified by pre-*Chevron* law as warranting deference: cases in which there are special circumstances in the statutory scheme prescribing deference, characterized (against a general background of de novo review for legal questions) by *highly* undefined or imprecise statutory language. In *Donovan*, the court said, "We have not divined in the matters before us an implicit delegation of authority to the Secretary,"[205] suggesting the court was serious when it described a narrow band of cases in which deference would be appropriate. This analysis for identifying instances in which legal deference is due agencies on pure questions of law does not differ noticeably from Judge Breyer's discussion in *Mayburg* and Judge Wright's discussion in *Clark*, both of which folded a very modest interpretation of *Chevron* into the preexisting methodology. If anything, Judge Starr's opinion gives a *narrower* scope to *Chevron* than did these other decisions by seemingly imposing a very strict standard for finding implicit delegations to agencies. If Judge Starr was *Chevron*'s friend, then in Spring 1985, it needed no enemies.

Four days after *Donovan* was issued, another opinion authored by Judge Starr was released. *Community Nutrition Institute v. Young*[206] concerned whether the Food and Drug Administration (FDA) could regulate the level of aflatoxins allowed in corn through informal "action levels" rather than formal, specified "tolerances." Under the statute, poisonous or deleterious food additives—which concededly included aflatoxin in corn—were generally deemed unsafe and prohibited, "but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health."[207] The petitioners argued that this provision mandated quantity-based regulations, while the FDA argued it authorized but did not require them. This is a classic pure question of law that would seem to require the *Chevron* framework. The court briefly cited *Chevron*, found Congress had directly spoken to the precise question at issue (*i.e.,* the meaning of the statute was clear), and held quantitative regulations were required.[208]

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204. *Id.* at 341 n.7 (some internal citations omitted).

205. *Id.* The court added that it "need not plumb deeply into those matters inasmuch as we find in each instance, for reasons to be set forth hereafter, the Secretary's interpretation to be concordant with the statutory scheme and provisions." *Id.* No deference was given, but no deference was needed in that case to affirm the agency.

206. 757 F.2d 354 (D.C. Cir. 1985), *rev'd*, 476 U.S. 974 (1986).

207. 21 U.S.C. § 346 (1982).

208. *See Cmty. Nutrition Inst.*, 757 F.2d at 357 (rejecting the FDA's statutory interpretation as "fl[ying] in the teeth of Congress' clear intent").

The case can be understood as a straightforward step-one decision cleanly within the *Chevron* framework. That is probably formally right—if a court really believes the meaning of the statute is clear, there is no occasion to talk about methodology, reasonableness, deference, or anything else, because the case is over.[209] Slightly more than a year later, however, the Supreme Court reversed the decision in *Community Nutrition Institute* by an 8–1 vote,[210] finding the statute ambiguous and the FDA's interpretation reasonable. (The lone dissenter in the Supreme Court was Justice Stevens.) If the D.C. Circuit's decision was an application of *Chevron*, it was an uncharitable one.

These decisions, neither of which puts the *Chevron* framework at center stage, make more puzzling another opinion from Judge Starr, issued on April 16, 1985, just weeks after his prior two opinions noted above. In *Eagle-Picher Industries, Inc. v. EPA*,[211] there were several challenges to the EPA's classification of certain sites as issuers of "hazardous substances."[212] In a footnote at the outset of his analysis, Judge Starr briefly set out the *Chevron* framework.[213] Most of the opinion was devoted to what seemed like a step-one argument in favor of the EPA's interpretation, though the decision never declared the meaning of the statute clearly supported the EPA. After considering the various arguments against the EPA's position, the court noted:

> The best case to be made for petitioners, upon analysis, is that when one examines the statute and the specific part of the legislative history upon which they rely, it becomes unclear as to what Congress' intent actually was. However, when Congress' intent is unclear, settled principles of law require us to determine whether EPA's interpretation is sufficiently reasonable for us

209. Such was obviously the case, for example, in *Wisconsin Electric Power Co. v. Department of Energy*, 778 F.2d 1 (D.C. Cir, 1985), in which the agency very neatly read out of the statute an express requirement that power be sold. No elaborate discussion of methodology was necessary to invalidate the agency decision.

210. Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986).

211. 759 F.2d 922 (D.C. Cir. 1985).

212. 42 U.S.C. § 9601(14) (1982).

213. Judge Starr wrote:

> In reviewing the interpretation of a statute by the agency that administers it, a court must first determine if Congress "has directly spoken to the precise question at issue," and if Congress' intent is clear, the court "must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842–43 (1984). If Congress' intent is not clear, however, the court "must conduct the 'narrower inquiry into whether the [agency's] construction was "sufficiently reasonable" to be accepted by a reviewing court.'"

See 759 F.2d at 927 n.5 (alteration in original) (some internal citations omitted).

to accept that interpretation.[214]

This was a straightforward application of the *Chevron* two-step as settled law.

Indeed, a companion case to the first *Eagle-Picher* decision—issued the same day and decided by the same panel of Judges Starr, Edwards, and Robinson—reinforced the notion of *Chevron* as settled law. The second *Eagle-Picher Industries, Inc. v. EPA*[215] concerned a challenge to the methodology employed by the EPA to construct its Hazardous Ranking System. The court, in an opinion by Judge Edwards, announced the *Chevron* formula,[216] found reasonable the Agency's interpretation of the governing statute,[217] and affirmed the Agency in a very brief discussion. The evident message of the two *Eagle-Picher* cases was that *Chevron* was a generally applicable doctrine.

By mid- to late-1985, near *Chevron*'s first anniversary, many decisions across many circuits could be cited for the proposition that the two-step *Chevron* framework—which does not mention whether the relevant legal question was pure or mixed and which does not look for statute-specific evidence of congressional intent to entrust the agency with interpretative authority over the former—was simply settled law.[218] This is enough authority to warrant the recognition of the "*Chevron* doctrine," but identifying its contents is no easy feat; the oft-recited two-step framework both raised and obscured as many questions as it answered. However, one could minimally and fairly say the distinction between pure and mixed

214. *Id.* at 930.

215. 759 F.2d 905 (D.C. Cir. 1985).

216. *Id.* at 920.

217. *Id.* at 920–21.

218. *See, e.g.*, FORMULA v. Heckler, 779 F.2d 743, 756 (D.C. Cir. 1985); Am. Fed'n of Gov't Emps., v. Fed. Labor Relations Auth., 778 F.2d 850, 856–58 (D.C. Cir 1985); Am. Fed'n of Gov't Emps., Local 3090 v. Fed. Labor Relations Auth., 777 F.2d 751, 754 n.14 (D.C. Cir. 1985); Ohio v. Ruckelshaus, 776 F.2d 1333, 1338–39 (6th Cir. 1985); Lugo v. Schweiker, 776 F.2d 1143, 1146–47 (3d Cir. 1985); S. Motor Carriers Rate Conference v. United States, 773 F.2d 1561, 1567 (11th Cir. 1985); Natural Res. Def. Council, Inc. v. Herrington, 768 F.2d 1355, 1369 (D.C. Cir. 1985); Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. EPA, 768 F.2d 385, 389 (D.C. Cir. 1985); Sudomir v. McMahon, 767 F.2d 1456, 1459 (9th Cir. 1985); Idaho Power Co. v. FERC, 767 F.2d 1359, 1363 (9th Cir. 1985); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 968 (D.C. Cir. 1985); Simmons v. ICC, 766 F.2d 1177, 1179 n.2 (7th Cir. 1985); Trailways Lines, Inc. v. ICC, 766 F.2d 1537, 1542 (D.C. Cir. 1985); Hudson Transit Lines, Inc. v. United States, 765 F.2d 329, 341–42 (2d Cir. 1985); Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep't of Energy, 764 F.2d 896, 905 (D.C. Cir. 1985); Callaway v. Block, 763 F.2d 1283, 1288 (11th Cir. 1985); Mo. Pub. Serv. Comm'n v. ICC, 763 F.2d 1014, 1017 (8th Cir. 1985); Storer Commc'ns, Inc. v. FCC, 763 F.2d 436, 440 (D.C. Cir. 1985); Black v. ICC, 762 F.2d 106, 114–15 (D.C. Cir. 1985); Schwartz v. Gordon, 761 F.2d 864, 868 (2d Cir. 1985); Lawrence v. Commodity Futures Trading Comm'n, 759 F.2d 767, 772 (9th Cir. 1985).

questions of law had lost much of its bite by 1986. It was now routine, not exceptional, for courts to grant deference—legal deference not justified by case-specific factors pertaining to agency expertise—when agencies interpreted pure questions of law. There was still disagreement over the precise range of extending deference. Some cases continued to search for statute-specific evidence of congressional intent to delegate interpretative authority to the agency, but many just proceeded to the *Chevron* framework. There is no rigorously empirical way to verify this claim, but there is good reason to think the law of judicial review looked very different in 1985 than in 1975.

There was still enough authority to allow doubt as to whether any major change in the law had really occurred. Cases often still arose in which the *Chevron* framework appeared to play no role. For example, *Amalgamated Transit Union International v. Donovan*[219] involved § 13(c) of the Urban Mass Transportation Act, which provides federal funds to public transit authorities that take over formerly private transit systems, but only if the Secretary of Labor certifies the public transit authority has made "fair and equitable" labor protective arrangements, including specifically "such provisions as may be necessary for . . . the continuation of collective bargaining rights."[220] The Secretary approved funds for an Atlanta transit authority, notwithstanding a state law removing important subjects from collective bargaining, on the ground that the authority's overall labor package was "fair and equitable."[221] The unions objected that the "fair and equitable" determination had to be *in addition to*, rather than *substituted for*, the preservation of collective bargaining rights. The D.C. Circuit agreed with the unions. The court's discussion of the language and legislative history of the statute is lengthy,[222] detailed, and likely correct. One could imagine seeing the court declare a union victory at step one of *Chevron* because the meaning of the statute was clear. One could not in fact see that in *Amalgamated Transit Union*, however, because the court did not mention *Chevron*, deference, the clear meaning of the statute, step one, or any related concept. It simply launched into an analysis of the relevant statute. The omission of *Chevron* from this discussion is intriguing because *Chevron* appeared in an earlier part of the opinion rejecting the Department's claim that the relevant inquiry was committed to agency discretion by law.[223] The case is not literally contrary to *Chevron* because there is no reason

219. 767 F.2d 939 (D.C. Cir. 1985).
220. 49 U.S.C. app. § 1609(c) (1982).
221. *Amalgamated Transit Union Int'l*, 767 F.2d at 941.
222. *See id.* at 946–50 (stretching across five pages of the Federal Reporter).
223. *See id.* at 944 n.7.

applying the *Chevron* framework would have changed the result. But it is striking that the *Chevron* framework did not merit a mention.

To much the same effect is *Norfolk & Western Railway Co. v. United States*,[224] authored by Judge Bork. The case was part of a long line of decisions, statutes, and agency rulings dealing with the shipping of recyclable materials. Railroads had previously been ordered to pay millions of dollars in refunds to shippers of recyclables based on territorial averages of variable shipping costs. In the latest iteration, the ICC ordered additional refunds to individual shippers who could show that the variable costs of shipping specific materials were below statutory maxima. The railroads claimed that this would result in double refunds to some customers. The court agreed the ICC ruling was contrary to § 204(e) of the Staggers Rail Act of 1980,[225] which reads in full:

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection.[226]

If it is not obvious to the reader how the ICC's interpretation contravenes the clear meaning of this statute, the reader is not alone. There is a plausible argument that the ICC's reading renders irrelevant the second sentence of the statute, as that sentence assumes that at least some rates might exceed the average revenue-to-variable cost ratio but still be lawful (though frozen), while the ICC's actions in this case suggested that *all* rates above that ratio were necessarily unlawful. But to foreclose the ICC's reading on that basis seems strongly contrary to *Chevron*; after all, as the

224. 768 F.2d 373 (D.C. Cir. 1985).

225. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 49 U.S.C.).

226. *Id.* § 204(e), 94 Stat. at 1905 (codified at 49 U.S.C. § 10731(e) (1982)).

ICC argued, perhaps the first sentence merely *authorizes* the ICC to declare all such rates unlawful without *requiring* it to do so, so the second sentence would have plenty of work to do if the ICC chose not to make such a declaration.

The court never did explain how its decision fit into the *Chevron* framework, because the court never cited or mentioned *Chevron*. Unlike *Amalgamated Transit Union*, this is a case in which employing the *Chevron* framework may well have changed the outcome, with its explicit focus on deferring to the agency absent a clear meaning of the relevant statute. Judge Starr in dissent certainly thought so.[227]

One more example will make the point.[228] In *American Cyanamid Co. v. Young*,[229] the petitioner argued that upon filing a *supplemental* new animal drug application, the FDA could consider only the safety and effectiveness of the marginal changes effected by the supplemental application and could not revisit the safety and effectiveness of the drug as shown by the original application. The court rejected this challenge and affirmed the Agency's action, largely by reference to canons of construction.[230] *Chevron* did not provide the framework for analysis and warranted only an unelaborated *see also* citation.[231] By the end of 1985, *Chevron* was thus clearly taking root, but with serious room for debate about its vitality and ability to survive.

One more thought: *Chevron* was decided by the Supreme Court in the middle of 1984, and the story thus far has taken us through 1985. What did the Supreme Court have to say about *Chevron* during this period?

Fortunately, the answer to that question (spectacularly little) is well-known and well-documented, thanks again to Tom Merrill. Professor Merrill famously tracked the use—or non-use—of *Chevron* in the Supreme Court in the half-dozen years after *Chevron* and showed that through 1990 *Chevron* was not consistently used by the Court as a framework for reviewing

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227. Judge Starr wrote in dissent:

> I think even the railroads would admit that Congress did not appear to have an intent as to whether only average rates, or some other rate methodology, should be employed. Under elementary principles, adequately obvious so as to require little elaboration, when Congress does not express an intent, the court's sole duty is to determine whether the agency's action in the context of its mission is reasonable; if so, then the agency's view must be upheld.

See Norfolk & W. Ry. Co., 768 F.2d at 382 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

228. A few more could be added. *See, e.g.*, Gen. Med. Co. v. FDA, 770 F.2d 214, 218 (D.C. Cir. 1985) (offering only a throwaway reference to *Chevron*).

229. 770 F.2d 1213 (D.C. Cir. 1985).

230. *See id.* at 1217–18 (deferring to the FDA's interpretation despite being inconsistent with prior interpretations).

231. *Id.* at 1217.

agency legal determinations.[232] The October 1984 term was particularly uninformative for lower courts looking for guidance about the scope and impact of *Chevron*. There were two decisions that arguably, if briefly and without discussion, suggested *Chevron* might prescribe a generally applicable framework,[233] but it is fair to say no case elaborated seriously on the *Chevron* framework—or even expressly identified something resembling a "*Chevron* framework" as a distinct legal entity. *Chevron* simply was not a major presence on the Supreme Court in the October 1984 term.

This is not an altogether surprising result. *Chevron*'s broad impact, if any, was on administrative law, and the Supreme Court circa 1985 was neither interested nor versed in the subject. Of the nine Justices at that time,[234] none could be said to have any special expertise or interest in administrative law.[235] Only one Justice—Warren Burger—had prior experience on the D.C. Circuit, with regular exposure to administrative law issues, and it is no great slap at him to note that he has never been regarded as a giant in the field.[236] The impact of *Chevron* on scope of review doctrine simply is not something to which one would expect the Supreme Court of 1985 to give much thought.

Through 1985, whatever was happening with *Chevron* was happening entirely in the lower courts. And something, however hard to define, was happening.

IV. COCONUTS DON'T MIGRATE . . . BUT DOCTRINES MIGHT

In a series of (unconnected) law review articles in 1986, judges on the D.C. Circuit described *Chevron* as a "landmark,"[237] a "far-reaching

232. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980–83 (1992) (finding the *Chevron* two-step framework to have been applied in only one-third of the cases in which a Justice recognized an issue of agency deference).

233. *See* Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985) (regarding the EPA's interpretation of Clean Water Act provisions); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) (again, regarding EPA and the Clean Water Act).

234. In order of seniority, they were: William Brennan, Byron White, Thurgood Marshall, Warren Burger, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, and Sandra Day O'Connor.

235. This is in stark contrast with the current Court, which includes three former administrative law professors (Justices Breyer, Kagan, and Scalia) and a former chairman of a federal administrative agency (Justice Thomas).

236. The current Court has four former D.C. Circuit judges (Chief Justice Roberts, and Justices Ginsburg, Scalia, and Thomas).

237. Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 ANTITRUST L.J. 191, 193–94 (1986).

development,"[238] and a "watershed."[239] Whatever *Chevron* stood for, by this time it had reached a noteworthy level of ascendancy in the lower courts. One could still find cases that downplayed it,[240] but they were becoming harder to find. It was much easier to find decisions reciting the "familiar two-step framework set forth in *Chevron*,"[241] *Chevron*'s "now familiar framework for analyzing interpretations of statutes by agencies charged with their administration,"[242] and the "now familiar dictates of *Chevron*."[243] We are unable to identify precisely when the dam burst, but by *Chevron*'s two-year anniversary, it had become the dominant methodology in the lower courts for review of agency legal determinations.[244]

If the *Chevron* framework really was supplanting the old regime for judicial review of agency legal determinations, there would be consequences. The extent of those consequences depended on what the "*Chevron* framework" prescribed, which was profoundly unclear in 1986. The *Chevron* framework has an air of simplicity. No need to think about whether the question of law is pure or mixed, whether the statute clearly delegates authority to the agency, or how to apply the "sliding scale of deference, taking into account a variety of deference-related factors,"[245] all of which dominated pre-*Chevron* law. One arguably need only ask whether the agency administers the statute, and a measure of legal deference flowed automatically. That deference was not absolute, of course—step one made that clear. But *Chevron* did potentially hold out the promise of a simpler, easier-to-administer scope of review doctrine. For lower courts that had openly complained for years in the pages of the Federal Reporters that the

238. Abner J. Mikva, Speech, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6 (1986).

239. Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 283–84 (1986).

240. *See, e.g.*, Am. Fed'n of Gov't Emps., Local 1738 v. Fed. Labor Relations Auth., 806 F.2d 1105, 1108 (D.C. Cir. 1986) (concluding, seemingly grudgingly, that *Chevron* entitles agency decisions to "some deference," but otherwise ignoring the decision).

241. Int'l Bhd. of Teamsters v. ICC, 801 F.2d 1423, 1426 (D.C. Cir. 1986).

242. Inv. Co. Inst. v. Conover, 790 F.2d 925, 932 (D.C. Cir. 1986).

243. Natural Res. Def. Council, Inc. v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986).

244. A full string citation of cases from this period that treat *Chevron* as settled law would get tedious even by the standards of string citations. *See, e.g.*, Kean v. Heckler, 799 F.2d 895, 899 (3d Cir. 1986); Prod. Workers Union of Chi. & Vicinity, Local 707 v. NLRB, 793 F.2d 323, 328 (D.C. Cir. 1986); Transbrasil S.A. Linhas Aereas v. Dep't of Transp., 791 F.2d 202, 205 (D.C. Cir. 1986); Coal. to Pres. the Integrity of Am. Trademarks v. United States, 790 F.2d 903, 907–08 (D.C. Cir. 1986); Humane Soc'y of the United States v. EPA, 790 F.2d 106, 115–16 (D.C. Cir. 1986); Reckitt & Colman, Ltd. v. DEA, 788 F.2d 22, 25–26 (D.C. Cir. 1986); Ry. Labor Execs.' Ass'n v. ICC, 784 F.2d 959, 963–64 (9th Cir. 1986).

245. Am. Fed'n of Labor & Congress of Indus. Orgs. v. Donovan, 757 F.2d 330, 341 (D.C. Cir. 1985).

Supreme Court had not given them a clear scope of review doctrine, *Chevron* offered possible reprieve from the darkness.

Whether *Chevron* actually, or could have, delivered on that promise of simplification is another question. It depends on how simple one makes the *Chevron* framework. If *Chevron*'s application required a detailed, statute-by-statute analysis of whether Congress intended the agency to have primary interpretative authority, as some cases held, *Chevron* would be of little consequence. If figuring out whether a statute's meaning is "clear" were no easier (and perhaps harder) than figuring out whether a question of law were pure or mixed, *Chevron* could make the courts' job harder rather than easier. And if the degree of agency deference continued to slide along many factors with or without *Chevron,* the marginal gain from the *Chevron* framework could be very small. None of these questions had answers in 1986, nor were courts even openly asking those questions. They would typically recite the *Chevron* framework and then proceed with little inquiry into the methodology's foundations or mechanics. The fullest treatment of *Chevron*'s methodology came in a case in which *Chevron* probably did not make a difference because the case involved a mixed question of law application.[246] The *Chevron* two-step was something of a black box—which perhaps helps to explain its success, as judges could pour into the still skeletal framework a wide range of preferences and predilections.

At least two other important consequences of *Chevron* were difficult to avoid and too plain to ignore. One was pointed out as early as 1984 by Judge Breyer:[247] To the extent *Chevron* increases the range of circumstances in which judges defer to agencies on pure legal questions, it seems to reverse the common-sense view of comparative institutional competence in which courts are generally better at determining the law and agencies are generally better at finding facts and making policy. Anyone who subscribes to the legal process approach, in which decisional authority should be allocated where best applied, will find a broad reading of *Chevron* troublesome at best and absurd at worst. Given the number of judges (and law clerks) trained either at Harvard Law School or by professors who were trained at Harvard Law School, where the legal process approach grew and flourished, it would not be surprising to find serious resistance to the *Chevron* revolution.

A second consequence was noted by Judge Wald in a 1987 article: "A broad reading of *Chevron*, of course, tilts strongly in the direction of the

246. *See Conover*, 790 F.2d at 931–36 (involving whether collective IRA trusts are "securities").

247. *See supra* pages 34–39 (discussing Judge Breyer's analyses in *Mayburg* and *New England Telephone*).

executive."[248] The more *Chevron* mandates deference, the more power flows from the judiciary to the executive. For those who place faith in the courts as the primary engine of justice, that is unwelcome. And in the mid- to late-1980s, the executive to whom power flowed was, and was widely expected to be in the future, a *Republican* executive. To be absolutely clear, the pro and con *Chevron* forces did not align along classic party lines. It is a fair guess that Judge Wald did not vote for Ronald Reagan, and it would be difficult to find a D.C. Circuit judge whose opinions showed less enthusiasm for *Chevron* than Robert Bork. One of *Chevron*'s earliest academic champions was Richard Pierce,[249] who no one would mistake for a conservative shill, and one of the most trenchant critiques of *Chevron* came from Tom Merrill.[250] Nonetheless, one need not have been a right-leaning law clerk in *Chevron*'s formative era (though, as one of this Article's authors can attest, it certainly does not hurt for this purpose) to appreciate how difficult it is to overestimate the importance of that particular partisan perception, especially among the behind-the-scenes law clerks who often drafted the opinions. This was in the era of the "electoral lock,"[251] when California was a reliably republican state and the Carter presidency was seen as a post-Watergate blip. President Clinton was not even a gleam in a pollster's eye. Battles over *Chevron* were battles over power, and it seemed obvious at the time to whom the power was going. Some kind of face-off about the future of *Chevron* was almost inevitable.

A. Enter the Dragon

The story of *Chevron* has so far been almost exclusively that of the D.C. Circuit. But as the *Chevron* doctrine gained steam, and its consequences for allocating decisionmaking power became increasingly apparent, opposition

248. Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 727 (1987).

249. *See* Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (noting the progression in administrative law due to *Chevron*); Richard J. Pierce Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 486–88 (1985) (advocating that EPA's interpretation was well within the confines of its congressionally bestowed power).

250. *See* Merrill, *supra* note 232, at 1032–33 (contending that *Chevron* has all the markings of a failure and a better solution could have been advanced).

251. The "electoral lock" or "electoral college lock" was a colloquial phrase for the supposed advantage of Republicans in the electoral college as a result of their wide geographical dominance. Thomas Brunell & Bernard Grofman, *The 1992 and 1996 Presidential Elections: Whatever Happened to the Republican Electoral College Lock?*, 27 PRESIDENTIAL STUD. Q. 134, 134 (1997). The facts did not necessarily fit the theory, *see id.* at 135; I.M. Destler, *The Myth of the "Electoral Lock"*, 29 POL. SCI. & POL. 491 (1996), but the theory was widely held.

began to build—and for reasons that did not need to involve the relative virtues and vices of strengthening Reagan Administration agencies. One need not be a devotee of the legal process school to recognize there is something odd about courts routinely deferring to agencies on legal interpretation—what were the appellate judges getting paid to do if not decide questions of law, for which they, not the agencies, are supposedly the experts?[252] Moreover, there is little evidence of this in reported judicial decisions, but as courts acquired more experience with the *Chevron* framework, the many unanswered questions about its mechanics (how clear is clear? how reasonable is reasonable? is deference now an all-or-nothing proposition?) were bound to loom larger. The more one thinks about those questions, the more complex the facially simple *Chevron* two-step framework becomes. Maybe the uncertain but fluid pre-*Chevron* law was not so bad after all.

Law clerks on the D.C. Circuit who dealt with *Chevron* daily, if not hourly, were awash in these controversies. As many of those law clerks moved to the Supreme Court, they took those still-unresolved controversies with them.

They also had company: on September 26, 1986, Antonin Scalia became an Associate Justice of the United States Supreme Court. Justice Scalia actually had very little to do with the *Chevron* doctrine's genesis while he was on the D.C. Circuit, but he brought interest and expertise in administrative law to the Supreme Court, along with a firsthand understanding of the significance of various interpretations of *Chevron*. The combination of Justice Scalia and a crop of law clerks with *Chevron* on the brain all but assured that the Supreme Court of 1987 would have something to say.[253]

The initial battle was fought in an unlikely context. Section 243(h) of the Immigration and Nationality Act provided in 1982 that "[t]he Attorney General shall not deport or return any alien . . . [with some exceptions not relevant here] to a country if the Attorney General determines that such alien's life or freedom *would be threatened* in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[254] If the otherwise-deportable alien could show he or she "would be threatened" in their country of return, which the Supreme Court construed to mean "more likely than not that the alien would be subject to

252. *See* Mikva, *supra* note 237, at 8 (noting that judges are better at "construing statutes" but that *Chevron* and its progeny deny and undermine their knowledge).

253. Tom Merrill has termed this explanation for the rise of awareness of *Chevron* in the Supreme Court the "reverse-migration hypothesis." Merrill, *supra* note 115, at 188.

254. 8 U.S.C. § 1253(h)(1) (1982) (emphasis added).

persecution"[255] upon return, the Attorney General—typically acting through the Immigration and Naturalization Service (INS)—was *required* to withhold deportation ("shall not deport"). Alternatively, the Refugee Act allowed the Attorney General, in his or her discretion, to grant asylum to a refugee,[256] defined as a person "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that [person's home] country because of persecution or *a well-founded fear of persecution* on account of race, religion, nationality, membership in a particular social group, or political opinion."[257]

In *INS v. Cardoza-Fonseca*,[258] the government argued the standard of proof for establishing refugee status, via a showing of a "well-founded fear of persecution," was the same "more likely than not" standard governing proof of entitlement to a withholding of deportation under the Immigration and Nationality Act.[259] The respondent argued one could have a "well-founded fear of persecution" even if such persecution was not "more likely than not" to occur[260]—meaning a forty-nine percent chance of imprisonment or execution upon return to one's home country is enough to ground a "well-founded fear." The case thus revolved around a pure question of law: whether the legislatively prescribed standards of proof under two different statutes were the same.

The Ninth Circuit had agreed with respondent that the standard for proving a "well-founded fear" was different, and more generous to the alien, than was the standard for showing that life or freedom "would be threatened"[261] upon return. The court made no reference to *Chevron* or deference to the INS, as prior circuit precedent controlled the case instead.[262]

In its brief to the Supreme Court, the government briefly but forcefully urged deference to the INS's views, though *Chevron* was only one of many cases cited and received no special attention.[263] The brief concentrated on statutory analysis and administrative policy. The respondent's brief argued,

255. INS v. Stevic, 467 U.S. 407, 429–30 (1984).

256. *See* 8 U.S.C. § 1158(a) ("The Attorney General shall establish a procedure for an alien . . . and the alien may be granted asylum in the discretion of the Attorney General.").

257. *Id.* § 1101(a)(42) (emphasis added).

258. 480 U.S. 421 (1987).

259. *Id.* at 423.

260. *Id*. at 425.

261. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1455 (9th Cir. 1985).

262. *See id.* at 1451–52 (citing cases from the Sixth, Seventh, and Ninth Circuits, but not *Chevron*).

263. *See* Brief for the Petitioner at 18–19, *Cardoza-Fonseca*, 480 U.S. 421 (1987) (No. 85-782), 1986 U.S. S. Ct. Briefs LEXIS 367. The string citation on page 18 was the brief's only mention of *Chevron*.

citing *Chevron* in a footnote, that deference to the INS was appropriate only when Congress specifically delegates interpretative authority, as had arguably occurred in some prior immigration cases,[264] and that § 208(a) of the Refugee Act delegates no such authority.[265] The discussion of deference was brief, and *Chevron* was decidedly in the background. The government's reply brief did not cite *Chevron*.[266]

The oral argument, held on October 7, 1986, raised the stakes. The government (through long-time Deputy Solicitor General Larry Wallace) opened its argument calling for deference to the INS, but intriguingly did not cite, invoke, or otherwise mention *Chevron*. The deference argument instead focused on the INS's expertise as "an active participant in the legislation as it developed,"[267] and its opportunity to "study the legislative background against the experience that it has had in applying the standards."[268] This was consistent with the position in the government's brief, which easily could have been written without any mention of *Chevron*.

Chevron was introduced into the oral argument in a question addressed to Dana Marks Keener, counsel for the respondent, who (perhaps ironically) later became an immigration judge. The first words out of Ms. Keener's mouth after "may it please the Court" were:

> Understandably, the Government is putting considerable emphasis on their deference argument. That's because it's the only argument that it has. Unfortunately, there are some—or fortunately for our side—there are some considerable problems with deference to the agency in this particular context.
>
> By reviewing the statutory canons that apply to deference, the first place you start is with the fact that a court is the expert in terms of statutory construction. The meaning of the "well-founded fear" standard is an issue of law. It's clearly within the traditional function of this Court to interpret. It is not an area . . . [269]

At that point, Ms. Keener was interrupted by a question from Chief Justice Rehnquist: "Are you suggesting that the INS in this case should be

264. *See, e.g.*, INS v. Wang, 450 U.S. 139, 145 (1981) (arguing that the Attorney General has "the authority to construe 'extreme hardship'" if he or she chooses to do so).

265. *See* Brief of Respondent at 38–39, 39 n.32, *Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782), 1986 U.S. S. Ct. Briefs LEXIS 362.

266. *See* Reply Brief for the Petitioner, *Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782), 1986 U.S. S. Ct. Briefs LEXIS 596.

267. Transcript of Oral Argument, *Cardoza-Fonseca*, 480 U.S. 421 (No. 85-782), 1986 U.S. Trans. LEXIS 30, at *8.

268. *Id.*

269. *Id.* at *18.

given no deference simply because it is construing a term of the statute?"[270] Her response included the argument's first mention of *Chevron*: "No. Of course the Court also looks at other factors, and deference cases talk about the fact, *Chevron* for example, that first always is Congress' intent."[271] That narrow view of *Chevron* incited an exchange that, for the first time in the *Cardoza-Fonseca* litigation, and indeed for the first time in quite a while in federal courts, brought to the fore the traditional, pre-*Chevron* distinction between pure and mixed questions of law:

> QUESTION (from Chief Justice Rehnquist): Well, my question to you was, which I don't think you've yet answered, is [ ] the agency entitled to no deference because what it is construing is a term of the statute?
>
> MS. KEENER: I think that answer is probably correct. But in arriving at whether deference is considered or not, the courts usually look at several factors, which include the legislative history, the plain language of the statute.
>
> QUESTION (from Chief Justice Rehnquist): Well, is deference one of those factors or not?
>
> MS. KEENER: Well, it can be if a standard is not a question of pure law, if it is an application of the law to a specific set of facts. And courts often look to the agency's expertise to decide whether or not that's the kind of situation presented. However, that's not the case here.
>
> QUESTION (from Justice Scalia): What was *Chevron*? Wasn't that a question of pure law? And didn't we say there that we, and in other cases, that we will accept the expert agency's interpretation of its governing statute where it's a reasonable one?
>
> MS. KEENER: There was a technical gap in *Chevron*, and it was involved in the implementation. So it was construing a term involved in implementing a standard.[272]

And with that the game was on.

By a vote of 6–3 (with Justices Powell, Rehnquist, and White dissenting), the Court agreed with respondent and the Ninth Circuit that the agency could not permissibly read the "well-founded fear" criterion in the discretionary withholding-of-deportation provision of the Refugee Act to require the same "more likely than not" standard of proof required by the "would be threatened" criterion in the mandatory withholding-of-deportation provision of the Immigration and Nationality Act. So framed, the decision's holding is an unexceptional and perhaps obviously correct bit of statutory interpretation. The fireworks were in the dicta.

As Justice Scalia noted in his concurring opinion, once one concluded—

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270. *Id.* at *19.
271. *Id.*
272. *Id.* at *19–*20.

as had the Court—that the statute's plain meaning foreclosed the government's interpretation, there was no occasion to discuss deference, *Chevron*, or anything else. No amount of deference can justify an agency position contrary to the clear meaning of a statute. Nonetheless, in an opinion authored by Justice Stevens—who not at all coincidentally authored *Chevron*—a clean majority of five Justices took the occasion to explicitly and pointedly comment on the *Chevron* framework:

> The INS's second principal argument in support of the proposition that the "well founded fear" and "clear probability" standard are equivalent is that the BIA so construes the two standards. The INS argues that the BIA's construction of the Refugee Act of 1980 is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress' intent. This argument is unpersuasive.
>
> The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide. Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we explained:
>
> > The judiciary is the final authority on issues of statutory construction and 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.
>
> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "'any gap left, implicitly or explicitly, by Congress,'" the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See *Chevron*, *supra*, at 843. But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.[273]

The implications of this passage in 1987 were potentially enormous. Justice Stevens, writing for five Justices all of whom were part of the *Chevron*

273. *Cardoza-Fonseca*, 480 U.S. at 445–48 (footnotes and some internal citations omitted) (brackets in original).

majority, effectively announced that the pre-*Chevron* distinction between pure and mixed questions of law still governed, which essentially adopted the position of Cardoza-Fonseca's counsel that the interpretation in *Chevron* partook more of law application than of law interpretation. The issue in *Cardoza-Fonseca* itself was characterized as "a pure question of statutory construction *for the courts to decide*." Any doubt Justice Stevens was taking specific aim at the emergent *Chevron* doctrine evaporates with a long footnote that we omitted from the quoted passage. Justice Stevens pointedly introduced the footnote by observing, "In view of the INS's heavy reliance on the principle of deference as described in *Chevron* . . . , we set forth the relevant text in its entirety"[274]—followed by four full paragraphs from the *Chevron* decision.[275] The wording of this sentence was not accidental. The INS did not rely on *Chevron* itself, as we have seen and as Justice Stevens surely knew. The footnote refers to the "principle of deference *as described* in *Chevron*," meaning Justice Stevens was clarifying the "principle of deference" that he, speaking for a unanimous Court, intended to prescribe in 1984. The fourth of the full paragraphs quoted from the *Chevron* opinion begins with the words, "[i]n light of these well-settled principles," indicating *Chevron* was applying settled law rather than setting forth any new conception of deference. The message to the lower courts that had fashioned—however sketchily—their own distinctive "*Chevron* doctrine" was clear: there is no "*Chevron* doctrine" beyond the principles that were "well-settled" in summer 1984, which required distinguishing between pure questions of law and mixed questions of law application.

The message was not lost on Justice Scalia. He agreed with the majority that the government's interpretation of the statute was unsustainable, and therefore concurred in the result, but he emphatically objected to the majority's characterization of *Chevron*:

> This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals—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 . . . implies that courts may substitute their interpretation of a statute for that of an agency whenever they face "a pure question of statutory construction for the courts to decide," rather than a "question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts." No support is adduced for this proposition, which is

274. *Id.* at 445 n.29.
275. *See id.*

> contradicted by the case the Court purports to be interpreting, since in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase "stationary source."
>
> In my view, the Court badly misinterprets *Chevron*. More fundamentally, however, I neither share nor understand the Court's eagerness to refashion important principles of administrative law in a case in which such questions are completely unnecessary to the decision and have not been fully briefed by the parties.[276]

Presumably, Justice Scalia was not telling Justice Stevens the latter misunderstood his own opinion. As the reference to *Chevron*'s prevalence in the lower courts illustrates, Justice Scalia instead was no doubt identifying that *Chevron* had taken on a life of its own, whether Justice Stevens so intended it in 1984; and to seek casually to alter or undo that structure—especially in a case in which no party was calling for a reconsideration or clarification of *Chevron*—could have serious doctrinal consequences.

No Justice joined Justice Scalia's concurring opinion. The three dissenting Justices found the agency's interpretation of the statute reasonable, but they did not engage in debate over the proper meaning of *Chevron*.

Was the *Chevron* revolution over before it actually began?

A substantial number of lower courts thought so, quite reasonably given the strong dictum of *Cardoza-Fonseca*. There was a surge of decisions in the courts of appeals announcing that deference—or at least legal deference—would no longer be given to agency decisions involving pure questions of law but only to agency applications of law to particular facts.[277] Not every case understood *Cardoza-Fonseca* to cut short the *Chevron* revolution,[278] and because the discussion in *Cardoza-Fonseca* was plainly dictum, there was no requirement that it be so understood, but there were enough decisions cutting down on *Chevron* to question *Chevron*'s future.

B. Exit the Dragon, Enter the Tiger

The stage was set for what promised to be one of the most profound

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276. *Id.* at 454–55 (Scalia, J., concurring) (internal quotations omitted).

277. *See, e.g.*, NLRB Union v. FLRA, 834 F.2d 191, 198 (D.C. Cir. 1987); FEC v. Sailors' Union of the Pac. Political Fund, 828 F.2d 502, 505–06 (9th Cir. 1987); Union of Concerned Scientists v. NRC, 824 F.2d 108, 113 (D.C. Cir. 1987); Regular Common Carrier Conference v. United States, 820 F.2d 1323, 1330 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587, 593–94 (9th Cir. 1987); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock, 816 F.2d 761, 764–65 (D.C. Cir. 1987).

278. *See, e.g.*, Grinspoon v. DEA, 828 F.2d 881, 884–85 (1st Cir. 1987) (holding that *Cardoza-Fonseca* in fact reaffirmed *Chevron*).

battles over administrative law doctrine in American legal history. The lower courts, on their own accord, had constructed a method for reviewing agency legal conclusions that, however uncertain at the margins and in the mechanics, was materially different from what preceded it. That method flew in the face of strongly and widely held precepts about sound allocation of institutional authority, but it offered some promise of a cleaner, simpler, and less intrusive judicial role in administrative review. There was ample room, and strong ammunition, on both sides of that divide. Once the issues raised by *Chevron* had migrated to the Supreme Court—which had happened by the time *Cardoza-Fonseca* was decided—it seemed inevitable that those issues would come to a head in something other than an exchange of dictum.

It certainly did not look good for Justice Scalia and other defenders of some version of the *Chevron* revolution. For one thing, as of 1987 there was still no clear, universally held conception about what *Chevron* entailed. Justice Scalia, in his *Cardoza-Fonseca* concurrence, thought it was an "evisceration of *Chevron*"[279] to say courts should rule against agencies whenever "traditional tools of statutory construction"[280] yield an answer. This reflects an implicit view about the meaning of *Chevron*'s first step, in which courts do not defer when the meaning of the statute is clear, but not necessarily a view that all other proponents of some version of *Chevron* would share. What does it mean to say a statute's meaning is "clear"? There was no answer to be found in the case law in 1987, and Justice Scalia did not offer one. Nor had the lower courts made progress on the other issues surrounding *Chevron*'s application. There were many cases applying the *Chevron* framework, but no cases explaining clearly what was being applied. It was hard to rally the troops around something as ephemeral as the *Chevron* doctrine. There also did not appear to be very many troops to rally. No Justice joined Justice Scalia in *Cardoza-Fonseca*. For all the world could see, he was the only person on the Supreme Court who was at all worried about revival of distinguishing between pure and mixed questions of law in administrative review. As it happened, there were some important things the world could not see.

In 1987, Justice Scalia was the only vote on the Supreme Court for the proposition that courts should routinely give some measure of legal deference to agencies even on pure questions of law interpretation. By 1988, the number had risen to four, with no change in the Court's membership other than the retirement of Justice Powell, who had not taken sides in the *Cardoza-Fonseca* controversy. *NLRB v. United Food & Commercial*

279. 480 U.S. at 454 (Scalia, J., concurring).
280. *Id.*

Workers Union, Local 23[281] concerned "whether a federal court has authority to review a decision of the National Labor Relations Board's General Counsel dismissing an unfair labor practice complaint pursuant to an informal settlement in which the charging party refused to join."[282] A unanimous Court of eight Justices—this was during the interregnum before Justice Kennedy became an active member—found the courts had no such authority. The case came down to whether the proceeding at issue was prosecutorial (not reviewable) or adjudicatory (reviewable). The Court's discussion of the scope of review for this question intriguingly invoked *Cardoza-Fonseca* but made no specific mention of distinguishing between pure and mixed questions of law. The Court's disposition on the merits observed:

> [T]he general congressional framework, dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line, is easy to discern. Some agency decisions can be said with certainty to fall on one side or the other of this line. For example, as already discussed, decisions whether to file a complaint are prosecutorial. In contrast, the resolution of contested unfair labor practice cases is adjudicatory. But between these extremes are cases that might fairly be said to fall on either side of the division. Our task, under *Cardoza-Fonseca* and *Chevron*, is not judicially to categorize each agency determination, but rather to decide whether the agency's regulatory placement is permissible.[283]

Justice Scalia highlighted the Court's deferential posture in a concurring opinion, this time joined by Chief Justice Rehnquist and Justices White and O'Connor:

> I join the Court's opinion, and write separately only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*. . . . Some courts have mistakenly concluded otherwise, on the basis of dicta in *INS v. Cardoza–Fonseca*. . . . If the dicta of *Cardoza–Fonseca*, as opposed to its expressed adherence to *Chevron*, were to be applied here, surely the question whether dismissal of complaints requires Board approval and thus qualifies for judicial review . . . would be "a pure question of statutory construction" rather than the application of a "standar[d] to a particular set of facts," as to which "the courts must respect the interpretation of the agency[.]" Were we to follow those dicta, therefore, we would be deciding this issue conclusively and authoritatively, rather than merely "decid[ing] whether the agency's regulatory placement is permissible[.]" The same would be true, moreover, of the many other decisions alluded to by the Court in which "we have

281. 484 U.S. 112 (1987).
282. *Id.* at 114.
283. *Id.* at 125.

> traditionally accorded the Board deference with regard to its interpretation of the NLRA." Those cases, and this, are decided correctly only because "the statute is silent or ambiguous" with respect to an issue relevant to the agency's administration of the law committed to its charge—which is the test for deference set forth in *Chevron*.[284]

The Court's opinion made no response to this concurrence. A response was certainly available: by describing the decision in terms of line drawing, the Court left open an ability to challenge Justice Scalia's characterization of the case as involving a pure question of law. Line drawing smacks of law application, so it would be possible to slot *United Food* into the circumstances in which deference was permitted by *Cardoza-Fonseca*. The Court made no such effort.

If one enjoyed reading tea leaves, by 1988 it looked as though there might be a 4–4 split on the Court concerning applying deference to pure questions of law, awaiting resolution by Justice Kennedy when he joined the Court. One needed only reasonably assume Justices Stevens, Brennan (who authored the opinion in *United Food*), Marshall, and Blackmun continued to adhere to the strong dictum of *Cardoza-Fonseca*. It remained only for the fully staffed Court to decide a case that squarely, neatly, and cleanly settled the status of Justice Stevens's dictum in *Cardoza-Fonseca*.

It never happened. No such decision came—or has come since. Through a process that we can observe but do not purport to explain, the 4–4 split in *United Food* was almost universally taken by the lower courts as a vindication of Justice Scalia's position in his concurrence, that *Chevron* would extend deference to agency determinations involving pure legal questions.[285] Litigants were still pushing, albeit unsuccessfully, the distinction between pure and mixed legal questions as late as 1991[286]—and Justice Stevens, joined by Justice Breyer, continued to fight the fight well

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284. *Id.* at 133–34 (Scalia, J., concurring).

285. *See, e.g.*, City of Boston v. U.S. Dep't of Hous. & Urban Dev., 898 F.2d 828, 831 (1st Cir. 1990); CSX Transp. v. United States, 867 F.2d 1439, 1444–45 (D.C. Cir. 1989) (Edwards, J., dissenting) (expressing dislike for *Chevron* but conceding it governs); Theodus v. McLaughlin, 852 F.2d 1380, 1382–84 (D.C. Cir. 1988); Ry. Labor Execs.' Ass'n v. U.S. R.R. Ret. Bd., 842 F.2d 466, 471–72 (D.C. Cir. 1988); Fernandez v. Brock, 840 F.2d 622, 631–32 (9th Cir. 1988); Mead Johnson Pharm. Grp. v. Bowen, 838 F.2d 1332, 1335–36 (D.C. Cir. 1988); Cablevision Syss. Dev. Co. v. Motion Picture Ass'n of Am., 836 F.2d 599, 607 n.12 (D.C. Cir. 1988).

286. *See* Wagner Seed Co. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991) (clarifying that even the Seventh Circuit, which had afforded a lesser degree of deference to agencies on purely legal issues in one case, had since retreated); Cent. States Motor Freight Bureau, Inc. v. ICC, 924 F.2d 1099, 1102 (D.C. Cir. 1991) (rejecting plaintiff's argument for less agency deference when jurisdictional issues are purely legal rather than a legal analysis of facts).

into the 21st century.[287] But at least some form of the *Chevron* revolution has dominated the lower courts for more than two decades now. As for the Supreme Court: following *United Food*, the law-application/law-determination dichotomy essentially vanished from the scene, to be oddly resurrected by Justice Stevens—perhaps as something of a swan song—in 2009.[288] Over the past quarter-century, *Cardoza-Fonseca* has been cited by the Court almost entirely in immigration cases or for very broad principles of statutory interpretation, aside from one backhanded reference intimating a potential distinction between pure and mixed legal questions.[289] The great debate over *Chevron*'s soul thus ended with nary a whimper, much less a bang.

V. SO WHAT?

The debate is effectively settled whether deference is generally due to agency legal interpretations even regarding pure or abstract legal questions, but *Chevron* continues to be a contentious subject across a wide range of other issues for which the resolutions are much less likely, clear, or both. We still do not know what it means for a statute to be "clear".[290] (That is not altogether surprising, for we still do not have consensus on what it means to talk about the meaning of a statute, clear or otherwise). Step two of *Chevron* remains a mystery, beyond the observation that agencies usually win when they get to it. Reconciling *Chevron* deference with prior judicial interpretations of statutes has plagued *Chevron* from an early time,[291] and it continues to splinter the Court today.[292] Figuring out to which agency

287. *See* Negusie v. Holder, 555 U.S. 511, 531, 534, 538 (2009) (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part). The Fourth Circuit, in *Barahona v. Holder*, distinguished an issue on the merits of immigration law and upheld the analysis from *Negusie* "under the familiar *Chevron* standard." Barahona v. Holder, 691 F.3d 349, 354 (4th Cir. 2012).

288. *See id.* (explaining the distinction as being "more faithful to the rationale" of *Chevron*).

289. *See* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) ("[W]e recognized in *Cardoza-Fonseca* . . . that the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'").

290. *Compare* Dole v. United Steelworkers of Am., 494 U.S. 26, 38 (1990) (suggesting that the meaning is clear when a particular interpretation is supported by very strong evidence), *with* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696–97 (1991) (suggesting that the meaning is clear when it emerges fairly obviously).

291. *See* Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1134–35 (9th Cir. 1988) (en banc) (referencing the conflicting precedent regarding agency deference).

292. *See* United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1842–44 (2012) (rejecting petitioner's proposed argument that as an alternative to *Chevron* deference, courts may adopt their prior construction of an unambiguous statutory term to trump an

interpretations the *Chevron* framework applies has produced a doctrine so perplexing that lower courts labor to avoid dealing with it.[293] One could easily fill an entire article simply listing, much less trying to resolve, the many important operational questions that still swirl about *Chevron*.

The history we have spun yields an important consequence for modern attempts to wrestle with these questions: parsing the prose of the *Chevron* decision for answers is a terrible idea. The *Chevron* decision did not spawn the *Chevron* doctrine, so there is no reason to expect it to clarify it. It would likely descend down very unproductive paths—as arguably happened with formulating the *Chevron* inquiry as a two-step approach (because that is how Justice Stevens wrote it in *Chevron*) rather than as a unitary, one-step inquiry into the reasonableness of the agency's interpretation (as common sense would dictate).[294] The fewer references to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the better.

If one should not read the *Chevron* decision to find the *Chevron* doctrine's proper mechanics, what decision should one read? There is no answer. The *Chevron* doctrine grew, and continues to grow, organically over a series of decisions, none systematically addressing the fundamental issues at its core. Even read as a whole, the corpus of decisions fails to come to conform or answer many important questions. For example, Professor Lawson has been waiting for almost thirty years for a court to openly acknowledge there is some uncertainty about how to determine the "clear" meaning of a statute—and he is still waiting patiently. If the post-*Cardoza-Fonseca* battle had come to a real head, we might have seen some decisions clarifying—for good or ill[295]—some of the fundamental issues surrounding *Chevron*. But the process by which the *Chevron* framework insinuated itself

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agency's new construction of the same term); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (acknowledging the lower court had incorrectly applied a different framework than that of *Chevron*).

293. *See* United States v. Mead Corp., 533 U.S. 218, 240–43 (2001) (Scalia, J., dissenting) (arguing the Court further complicated *Chevron* by construing it to effectually implement "th'ol' 'totality of the circumstances' test"); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464 (2005) (positing *Mead* and *Barnhart v. Walton*, 535 U.S. 212 (2002), as offering two alternatives for interpreting *Chevron*, with courts left to choose between the two).

294. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009) (proposing that an agency's reasonable interpretation can prevail without requiring the Court to inquire whether Congress had directly spoken to the contested issue).

295. *See Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting) (refuting as not actually a step forward the majority's clarification of when agency interpretations fit within the framework of *Chevron*); *see also* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 295 (2009) (Scalia, J., concurring in part and concurring in the judgment) (labeling *Mead Corp.*'s complication of the *Chevron* framework application as an "irrational fillip").

into the law effectively guaranteed a search for canonical decisions would fail.

What about reference to the underlying goals and purposes of *Chevron*? That would be effective if there were consensus about those goals and purposes, but there is not. What is the *Chevron* doctrine trying to accomplish? Is it trying to make the best guess about congressional intent regarding allocation of interpretative authority?[296] Is it reflecting that, in a post-delegation-doctrine world, most inquiries that look like statutory interpretation are really policy determinations?[297] Is it about making judicial review simpler, even though courts never said that openly? All of the above? The underlying rationale(s) for *Chevron* remain obscure, again partly because of its origins.

We do not propose any particular method for resolving questions about *Chevron* methodology. We simply point out that the *Chevron* decision itself is a dead end. We think it ought to be a dead letter as well.

296. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 454–55 (1987) (Scalia, J., concurring in the judgment) (arguing that the Court frequently misinterprets *Chevron*).

297. *See* Ashton v. Pierce, 716 F.2d 56, 61–62 (D.C. Cir. 1983) (interpreting congressional intent in favor of a policy to protect children from lead-based paint).