THE EMERGING OUTLINES OF A REVISED *CHEVRON* DOCTRINE: CONGRESSIONAL INTENT, JUDICIAL JUDGMENT, AND ADMINISTRATIVE AUTONOMY

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INTRODUCTION

The Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[1] was widely seen as a major alteration in the relations between courts and administrative agencies. *Chevron* dealt with one of the issues that courts have found most perplexing in this relationship: the extent to which courts should defer to agency interpretations of statutory terms and the extent to which courts should construe those terms independently.[2] On the one hand, the courts are obligated under the Constitution and the Administrative Procedure Act to construe the law and, on the other hand, the courts are obliged by that same Constitution to refrain from interfering with the tasks of administration.[3]

Prior to 1984, the governing precedent dealing with this issue was *Skidmore v. Swift & Co*.[4] Under *Skidmore*, a court inquired into the persuasiveness of the agency interpretation. *Skidmore*, and the cases that followed it, identified a number of factors that helped in the assessment of the persuasiveness of the agency interpretation. If, and only if, the court found the agency interpretation persuasive, it deferred.[5] *Chevron*, however, changed all of that. *Chevron* established its now famous two-step format. Under step one, the court determines whether the congressional intent is clear. If it is, the court follows that intent.[6] If the congressional intent is unclear, however, and the statutory term thus remains ambiguous, then the court, in step two, defers to the reasonable interpretation of the agency.[7]

Within the last several years, the Court began rewriting the so-called *Chevron* doctrine in ways that are not yet fully understood, but whose broad outlines are becoming increasingly clear. *Chevron* is being rewritten because in its original or "strong" form, it was unstable. Initially, the Court largely ignored this instability, but ultimately needed to address it. This instability is related to the problematic nature of step one, the presumption of congressional delegation of interpretive authority to the administering agency, the relation between *Chevron* and *Skidmore*—including the scope

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1. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
2. *Id.* at 842-43.
3. 5 U.S.C. §§ 551-559, 701-706 (2000).
4. 323 U.S. 134 (1944).
5. *See id.* at 140 (weighing the thoroughness of evidence, validity of reasoning and consistency with earlier and later rulings, along with other factors to determine the persuasive power of an agency interpretation).
6. *Chevron*, 467 U.S. at 842-43.
7. *Id.* at 843.

or "domain" of the *Chevron* doctrine[8]—and the interplay of the *Chevron* doctrine with stare decisis. These and other aspects of this instability are addressed in Part III below.

Occasionally during the first decade and a half of the *Chevron* doctrine, some of these matters influenced the decisions of the Court. In the last five years, however, the Court has begun to confront the problems inherent in the *Chevron* doctrine head on. The resulting series of decisions are reshaping that doctrine in ways that trouble some who have embraced the original version. They trouble others who would revise the *Chevron* doctrine in directions different from that in which the Court appears to be headed. Yet the new revision of the *Chevron* doctrine may lend the doctrine both strength and stability.

This Article examines the way that the Supreme Court is currently rewriting the *Chevron* doctrine. The Court appears to be heading generally in a direction long favored by Justice Breyer, although the emerging case law is adding layers of richness to the *Chevron* doctrine beyond those earlier contemplated by any of the Justices. In one dimension, the new direction appears generally to require mandatory deference in the more routine or interstitial interpretations, but not necessarily in matters at the core of the statutory design. In another dimension, it also appears to allow the courts greater freedom to decide when deference would be inappropriate. But the Court is also incorporating into its new design additional elements that enrich it in ways that none of the prior commentators have publicly discussed.

Because the deference issue is part of the overall set of relationships between courts and agencies, this Article begins with a brief review, in Part II, of the models that have governed the relationships between courts and agencies during the nineteenth and twentieth centuries. In Part III, the Article examines the contemporary model governing those relationships, exploring the new contours of that model now being developed under the recent glosses that the Court has been imposing on the *Chevron* doctrine. With the Supreme Court's decisions in *Alaska Department of Environmental Conservation v. EPA*[9] in January of 2004 and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[10] in June of 2005, the new model may be approaching its completion. *Brand X* can be understood not only as ensuring that agencies possess continuing

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8. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 837 (2001) (discussing the scope of the *Chevron* doctrine).

9. 540 U.S. 461 (2004).

10. 545 U.S. 967 (2005).

flexibility in addressing policy issues over time, but also as reinforcing a newly-recognized judicial role that courts play in the application of *Chevron* as articulated in *Barnhart v. Walton*.[11]

I. REGULATORY DECISION-MAKING AND JUDICIAL REVIEW

The story of how the seemingly ever-expanding regulatory activities of the government have been accommodated within a framework of judicial review is a complex one. It is a story in which the courts have sought to uphold the rule of law and yet respect the constitutional autonomy of the Executive. This task was relatively easy during the early years of the Republic when administration was relatively simple and direct government action affected few individuals. It became more complex as government regulation expanded. Over the course of American history, several identifiable models of the court/administrator relationship have emerged, each reflecting an adjustment in the relations between these institutions that seems to have worked in a particular time period. The principal factors that have determined the workability of a given adjustment are the scale and intrusiveness of government regulation and the political landscape.

A. The Nineteenth Century Model

From its earliest years, the U.S. government administered tasks such as the collection of customs duties, the operation of the post office, the payment of pensions, and other core governmental tasks. The officials administering the underlying statutes necessarily interpreted them while performing their duties. Early in the nineteenth century when government tasks were simple and peripheral to the lives of most citizens, courts accorded a broad autonomy to the executive branch, normally avoiding direct review of its operations.[12] Courts recognized that officials would have to construe the statutes that they were administering, and they allowed them to do so. Justice Marshall, in *Marbury v. Madison*, referred to a broad range of activity that the courts would consider "political" and thus beyond their competence to review.[13] In Marshall's view it was only when official actions created rights in private property that the courts could become involved.[14] Marshall's broad distinction between private rights and the administrative action of government came to be embodied in an early nineteenth century working model of the relationship between the courts and government administration.

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11. 535 U.S. 212 (2002).
12. 5 U.S. (1 Cranch) 137, 164-66 (1803).
13. *Id.*
14. *Id.* at 155, 165.

Marshall's choice of language merits our attention. In addition to championing judicial power and successfully asserting the Court's power to review legislation for constitutionality in *Marbury*, Marshall laid the groundwork for further judicial constraints upon the exercise of executive power when he seized upon the "property rights" language to describe the interest Marbury asserted.[15] The language of property would have resonated in post-colonial America. Indeed, the new Constitution had accorded special protection to "property" at least twice.[16] Marshall's choice of words seems keyed towards engendering broad support for his assertion of judicial power vis-à-vis the executive. Just as he asserted the power of the courts against the Congress (in declaring the obligation of the courts to review legislation for constitutionality), he also asserted the power of the courts against the Executive (in asserting judicial power to protect property rights even against the government).

A few decades after *Marbury*, the relationships between the courts and the administration evolved to what might be called the nineteenth-century model. This model is illustrated by the 1840 case of *Decatur v. Paulding*.[17] That case involved a situation in which Congress, on the same day, enacted general pension legislation and also passed a resolution providing for a particular pension to the widow of Stephen Decatur, a naval officer and war hero. When Mrs. Decatur claimed benefits under both the statute and the resolution, the Secretary of the Navy was required to determine whether she was entitled to benefits under both.[18] When Mrs. Decatur challenged the Secretary's negative determination in court, the Supreme Court ruled that in administering the pension laws, the Secretary of the Navy was required to exercise "his judgment upon the construction of the law and the resolution" and refused to interfere with his determination.[19]

Gaines v. Thompson[20] provides another example. In that case, the Supreme Court refused to interfere with a decision of the Commissioner of the Land Office to cancel the issuance of a land patent. Although the action taken by the Commissioner depended upon on his interpretation of the statute, the Court took the view that interpretation was an essential part of his task with which the courts would not interfere.[21] Subsequently, after

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15. *See id.* at 165 ("Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").
16. U.S. CONST. amend. V.
17. 39 U.S. (14 Pet.) 497 (1840).
18. *Id.* at 517.
19. *Id.* at 515.
20. 74 U.S. (7 Wall.) 347 (1868).
21. *Id.* at 352.

the Land Office had done its work and conveyed title to a private party, the courts could review the Land Office's statutory interpretation in a legal action between rival claimants to the land.[22]

In these early cases, the Court appears to have operated on a relatively simple separation-of-powers model. The work of administration is part of the task of the Executive branch in which the courts would not interfere. Construing and interpreting statutes is an essential part of administration. Although the courts would not interfere with interpretations made by officials in the course of their work, the courts would not be bound by those interpretations. When disputes came before the courts, the courts would make their own interpretations of the matters in question. Generally, these disputes would arise in litigation between private parties, because, as in the question of land title, the law provided "rights" in the land enforceable against others, but rarely recognized enforceable rights against the government. Indeed, a private right was created only at the moment that the government's administrative activity ceased, as illustrated in the land patent cases cited above.[23] This, of course, was the exact approach employed by Justice Marshall in *Marbury v. Madison*: had the Court possessed original jurisdiction, mandamus would have been the proper remedy because the process of appointing Marbury to the office of Justice of the Peace was completed when President Adams signed his commission. With the completion of that process, a property right had arisen in *Marbury*.[24]

This relegation of the judicial concern to the protection of property would, in time, be recast into the law of standing. Traditionally, no one possessed standing to complain of government action unless that action impaired a person's property rights. Occasionally, however, that stringent requirement was met as shown by the cases cited below. The courts also managed to allow suits for refunds of customs duties through the fiction that the collectors were individually liable for improperly collected amounts. Thus invoking common-law remedies like assumpsit as vehicles for suit without formally impinging on an otherwise general government immunity from suit.[25] And the Supreme Court used a property-rights rationale as a basis for upholding injunctions against the federal

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22. *See generally* Johnson v. Towsley, 80 U.S. (13 Wall.) 72 (1871). For a discussion of this point, see Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 411 (1958).

23. *See supra* notes 17 and 20 and accompanying text.

24. 5 U.S. (1 Cranch) 137, 157-58, 162 (1803).

25. Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836). This procedure was subsequently established by statute. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (1845). *See Developments in the Law: Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 839 (1957).

government in *United States v. Lee*.[26] The Court's ruling in *Ex parte Young*,[27] upholding an injunctive action against a state government, was also based upon a property-rights rationale. Although the latter case was based upon the Due Process Clause of the Fourteenth Amendment, its applicability to the federal government through the Due Process Clause of the Fifth Amendment was apparent.

B. The Mid-Twentieth Century Model: Its Emergence and Characteristics

1. Modern Regulation and the Incorporation of Progressive Ideology

The emergence of pervasive regulation over various sectors of the economy revealed the inadequacies of the simple constitutional model described above for a complex modern economy. That model was not necessarily inaccurate in its basic outline, but required elaboration. A critical step in the emerging breakdown of the original paradigm took place when Congress established the Interstate Commerce Commission (ICC) to oversee the regulation of railroad rates.[28] The ICC—widely perceived as a tribunal that would resolve railroad-rate issues—provided the basic blueprint for the regulatory institutions that would later be known as "independent agencies." Of key significance for later developments, ICC decisions would form a body of precedents that were in fact rules governing railroad operations. Later, the ICC would be given power to approve or disapprove rates prospectively, further consolidating its position as an overall regulator.[29] Conceptually, the practicing bar and the courts came to understand the ICC's power to set rates for the future as "legislative" acts. That these "legislative" acts would be performed, for the most part through trial-like procedures appropriate to its structure as a tribunal, contributed to an evolving complexity in the legal vocabulary of regulation.

In 1914, when Congress wanted to extend regulation over business behavior generally, it created the Federal Trade Commission (FTC) and modeled its structure upon the ICC.[30] Like the ICC, the FTC took the form of a multi-member body charged with administering a statutory prohibition

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26. 106 U.S. 196, 210-23 (1882), *superseded by statute*, Quiet Title Act of 1972, Pub. L. No. 92-562, 86 Stat. 1176, 1176-77 (codified as amended at 28 U.S.C. § 2409a), *as recognized in* Block v. North Dakota *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983).

27. 209 U.S. 123, 167-68 (1908).

28. An Act to Regulate Commerce, ch. 104, §§ 11-12, 24 Stat. 379, 383 (1887).

29. Act to Amend an Act Entitled "An Act to Regulate Commerce," ch. 3591, § 4, 34 Stat. 584, 589 (1906).

30. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914).

on "unfair methods of competition."[31] Congress intentionally legislated in broad terms so that the FTC, through the process of adjudicating individual cases, might build up a body of precedents that would provide detailed content to that prohibition.[32] In employing the structure of the ICC to design the FTC, Congress was attempting to make the latter as nonpartisan as possible. Indeed, the structure of both the ICC and the FTC reflected the ideology of the progressive movement—in ascendancy during the late nineteenth and early twentieth centuries. In the progressive view, because much regulation was technical, its administration could be taken out of the political arena and be entrusted to nonpartisan experts in the relevant field.

Under the progressive approach, regulatory agencies were designed to weigh technical expertise over politics by insulating the agency from direct presidential control and ensuring that they were headed by persons representing both political parties. Both the ICC and the FTC were insulated from presidential control by according their members tenure in office for fixed statutory terms.[33] No more than a bare majority of members could be from the same political party, thus ensuring minority-party membership on the respective commissions. In addition, independence and nonpartisanship were furthered by staggering the terms of the members, so that membership changes would come gradually.[34]

The ICC/FTC model was followed in 1927 when Congress enacted the Federal Radio Act.[35] That Act—the predecessor of the Communications Act of 1934—created the Federal Radio Commission, a regulatory agency charged with governing the uses of the radio spectrum. There were five members appointed by the President with Senate confirmation, staggered terms, and no more than three Commissioners could be from the same political party.[36] The Federal Water Power Act of 1920 was originally administered by a Federal Power Commission composed of the Secretaries of War, Interior, and Agriculture.[37] In 1930, however, Congress restructured the Federal Power Commission on the ICC/FTC model, with five commissioners, staggered terms, and a maximum of three commissioners from any one political party.[38] In the New Deal era when regulation proliferated, its administration was repeatedly entrusted to

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31. *Id.* § 6(b) (codified as amended at 15 U.S.C. § 45(b) (2000)).
32. S. REP. NO. 597, at 10 (1914).
33. *See* Act to Amend an Act Entitled "An Act to Regulate Commerce," ch. 3591, § 8, 34 Stat. 584, 595 (1906); Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 717-18 (1914).
34. *See supra* note 33.
35. Radio Act of 1927, ch. 169, § 3, 44 Stat. 1162, 1162-63 (1927).
36. *Id.*
37. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920).
38. Act to Reorganize the Federal Power Commission, ch. 572, 46 Stat. 797 (1930).

independent agencies. Motor carrier regulation was entrusted to the ICC.[39] Regulation of labor relations was entrusted to a National Labor Relations Board (NLRB).[40] Securities regulation was initially entrusted to the FTC, but subsequently reassigned to the newly created Securities and Exchange Commission, an agency modeled on the FTC.[41] Newly established airline regulation was assigned to a Civil Aeronautics Board whose structure also conformed to the ICC/FTC model.[42]

2. The Elements of the Mid-Twentieth Century Model

During the New Deal period, Congress subjected large segments of business behavior to regulation supervised by regulatory agencies or officials. Former Harvard Law School dean and Roosevelt advisor, James Landis, probably best articulated the prevailing ethos of that period as one that saw extensive government intervention in the economy as necessary both for the welfare of society as a whole and for the welfare of business itself.[43] Indeed, Landis and other New Deal thinkers believed that government planning was necessary to supplement market incentives, because the market did not take adequate account of the future nor of needed structural changes.[44]

Regulation during the New Deal period made extensive use of the independent regulatory agency mechanism that developed during the preceding half century. Where the progressives believed that this model could incorporate nonpartisan technical expertise, the Roosevelt Administration saw its potential for policy implementation. The NLRB was one of the most active New Deal agencies implementing policy. But, in the context of the major efforts of the administration and Congress to reshape the American economy, that agency demonstrated the flaws inherent in the progressive vision. Politics and political ideology cannot be separated from administration like the progressives wanted to believe. Indeed, a conscious and visible incorporation of politics into administration may have been a healthy adaptation of the constitutional scheme at this

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39. Motor Carrier Act, 1935, ch. 498, 49 Stat. 543 (1935).

40. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).

41. Securities Exchange Act of 1934, ch. 404, § 210, 48 Stat. 881, 908-09 (1934).

42. Civil Aeronautics Act of 1938, ch. 601, § 201, 52 Stat. 973, 980-81 (1938).

43. *See* JAMES LANDIS, THE ADMINISTRATIVE PROCESS 15-16 (1938) ("The creation of [administrative] power is . . . the response made . . . to the demand that government assume responsibility not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state.").

44. *See id.* at 23-24 (explaining that the administrative process ensures that business is regulated by experts in particular industries able "to shift requirements as the condition of the industry may dictate, . . . [pursue] . . . energentic measures upon the appearance of an emergency, and . . . realize conclusions as to policy" through enforcement).

period of time, helping to bring into widespread focus the challenge posed by modern regulation for the simple constitutional scheme envisioned by the Framers.

The elements of the mid-twentieth century model were worked out during a period spanning the late 1930s through the early 1950s. Except for judicial review specifically provided under a regulatory statute,[45] the government was largely immune from suit. Standing doctrine continued to present a major barrier to people challenging government actions in court. To bring such an action, a plaintiff had to be prepared to prove that the action impaired or threatened one or more of his legal rights. Since most government action did not affect anyone's property or legal rights (however much it adversely affected them in fact), agency administration was largely immune from judicial challenge.[46] When agency rules were applied in a way that might affect how a person used her property, they were subject to minimum rationality review under the arbitrary and capricious standard.[47] Pre-enforcement review was rare, because controversies with an agency were not considered ripe until the agency commenced an enforcement proceeding. During this period, agencies employed adjudication as the principal enforcement tool and as the primary means for developing policy. Agency adjudications were generally subject to judicial review under the substantial-evidence standard pursuant to the agency's enabling act.

Agencies' aggressive use of the adjudicatory process in the late 1930s combined with unclear procedural rules ultimately persuaded President Roosevelt to appoint the Attorney General's Committee to Study Administrative Procedure whose Final Report (Report) was issued in 1941.[48] In 1946, Congress enacted the Administrative Procedure Act (APA)[49] based upon a synthesis of that Report's majority and minority

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45. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (construing the provision now found in 47 U.S.C. § 402(b)(6) (2000)). Another exception is contractual claims where the government consented to be subject to suit before the court of claims.

46. *See, e.g.*, Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118, 137-39, 141, 143-44 (1939) (denying public utility companies standing to challenge the damaging competition posed to their enterprises by a government program for generating, distributing, and selling electric power harnessed from the Tennessee River Valley, holding that the program neither invaded the utility companies' property interest in their franchises nor violated the companies' constitutional rights).

47. *See* Pac. States Box & Basket Co. v. White, 296 U.S. 176, 181-82 (1935) (upholding a state regulation over strawberry and raspberry containers against constitutional challenge on the ground that it was not arbitrary or capricious because the prescription of the form and dimensions of horticultural containers bore a reasonable relation to the protection of buyers and to the preservation and shipment of the fruit).

48. COMM. ON ADMIN. PROCEDURE, ADMININSTRAIVE PROCEDURE IN GOVERNMENT. AGENCIES, S. DOC. NO. 77-8, at 109 (1st Sess. 1941).

49. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2000)).

positions. In the early 1950s, the Supreme Court and a prestigious panel of the Second Circuit elaborated upon the meaning of the widely-used substantial evidence standard as applied to judicial review of regulatory agency decisions.[50]

The Report, the APA, and court decisions identified public concern over the fairness of administrative adjudications but provided reassurance that adjudications would indeed be fair to the parties, while carefully preserving administrative control over policy. Overzealous enforcement, especially in NLRB adjudications, may sometimes have resulted in the skewing of evidentiary-fact determinations to achieve policy objectives. In order to halt such abuses, the new administrative model—carefully outlined in the Report, the APA, and later judicial decisions—provided for impartial determinations of evidentiary facts by newly independent hearing officers, while preserving the power of the regulatory agency to develop and implement policy free from judicial interference. In regulation through adjudication—which was the norm during this period—agency policy was largely developed and applied in the process of converting evidentiary facts into ultimate ones.[51]

In the mid-twentieth century model, judicial review of agency adjudications left broad authority for regulatory agencies to develop policy in the course of adjudications. Congress seems to have had this model of judicial review in mind when it enacted the Federal Trade Commission Act in 1914. Congress expected that the FTC would gradually develop a body of administrative precedents defining the "unfair methods of competition" that the Act prohibited.[52] Yet for a time, the Supreme Court exhibited hostility to this kind of judicial review. In its 1920 *FTC v. Gratz* decision,[53] for example, the Court declared that interpreting the meaning of that phrase was ultimately the responsibility of the courts, rather than the FTC.

Two decades later, however, the authority of administrative agencies to resolve ambiguities in statutory terms had become a feature of the mid-twentieth-century model. Several Supreme Court decisions illustrated this

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50. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-91 (1951) (explaining that the "substantial evidence" standard incorporated in the Administrative Procedure Act requires appellate courts to consider the entire record behind an agency's decision, including evidence opposed to the agency's view, and to overturn an agency's decision if it "cannot conscientiously find that the evidence supporting [the agency's] decision is substantial" in light of the entire evidentiary record), *rev'g* 179 F.2d 749 (2d Cir. 1950); *see also* NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951) (discussing the roles of agencies and reviewing courts).

51. *See infra* text accompanying notes 52-61.

52. *See supra* text accompanying note 32.

53. 253 U.S. 421, 427-28 (1920) ("The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include.").

model: *NLRB v. Hearst Publications, Inc.*,[54] *Unemployment Compensation Commission of Alaska v. Aragon*,[55] and *Gray v. Powell*[56] on one hand, and *Packard Motor Car Co. v. NLRB*[57] on the other. In the *Hearst*, *Aragon*, and *Gray* opinions, the Court insisted upon judicial deference to agency determinations of ultimate fact. As the Court articulated in *Hearst*, the courts must accept an agency's determination about how to apply an ambiguous statutory term "if it has 'warrant in the record' and a reasonable basis in law."[58] Conversely, as the Court emphasized in *Packard*, the courts themselves retained exclusive control over questions of law, which in this context meant the limits of agency authority. Indeed, in *Gray*, the Court elaborated upon this model, pointing out that the ambiguity in the statutory term at issue would permit a wide range of applications.[59] The Court's role was to identify the limits of the ambiguity and, therefore, the limits of the agency's decisional authority. Where the ambiguity ended, so did the agency's authority. In each of the above cases, the Court exercised its role of deciding the relevant question of law, such as whether the statutory term at issue was ambiguous and the extent and limits of its ambiguity, determinations that set the scope for agency exercises of their authority in applying the term.[60]

During this period, courts and agencies allocated authority through the language of "law" and "fact." Courts decided questions of law while agencies decided questions of fact. Of course, many agency decisions, such as the NLRB's determination in *Hearst* of whether the statutory term "employee" extended to street newspaper vendors, whose complex relationships with their supplier partially resembled common-law master-

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54. 322 U.S. 111 (1944).
55. 329 U.S. 143 (1946).
56. 314 U.S. 402 (1941).
57. 330 U.S. 485 (1947).
58. *Hearst*, 322 U.S. at 131.
59. In *Gray*, a railroad had sought to escape regulation under the Bituminous Coal Act of 1937, ch. 127, 50 Stat. 72, by claiming an exemption that provided for "coal consumed by the producer." 314 U.S. at 405 n.1. The Director of the Interior Department's Bituminous Coal Division had ruled against the railroad. The Court ruled that coal purchased on the open market clearly fell outside of the exemption, but that coal extracted by the user from its own land with its own employees was clearly within the exemption. Within these limits, however, the Director had authority to determine the applicability of the exemption to the factually complex cases like the one in issue, where the railroad leased a coal mine and hired an independent contractor to extract the coal. 314 U.S. at 403, 414-17.
60. In *Hearst*, the Court determined that the master/servant rule that governed employment relationships in other contexts was not incorporated into the National Labor Relations Act's definition of "employee." 322 U.S. at 124-25. In *Packard*, the Court decided that the term "employee" was broad enough to include foremen. 330 U.S. at 491-94. In *Aragon*, the Court decided that the agency had no authority to determine that a labor dispute was in active progress for purposes of the Alaska unemployment compensation statute when that company would have been closed for independent reasons. 329 U.S. at 152-53.

servant relationships and partially resembled an independent contractor relationship, were not decisions on simple evidentiary-fact questions. Instead, there was a policy component to the NLRB's decision in *Hearst*, as the Court recognized in describing the NLRB's task as determining "[w]here all the conditions of the relation [between the workers and the company] require protection."[61] However, in the law/fact language then employed, this determination was still considered one of ultimate fact.

In short, the substantial-evidence review standard recognized a broad scope for agency policy development and implementation. In so doing, it continued a long judicial tradition of respecting administrative autonomy over setting policy. Courts recognized this administrative autonomy in a host of other administrative law doctrines, such as exhaustion, ripeness, and standing. The exhaustion doctrine kept the courts from interfering with agency processes for policy development; the ripeness doctrine insulated agency policies from challenge until they were applied; and the standing doctrine of the period barred challenges to agency policies unless and until those policies impaired a legal right of the challenger.

II. THE CURRENT MODEL: REGULATION BY RULE AND THE *CHEVRON* COMPONENT

A. The Shift to Rulemaking and the Emergence of the Chevron *Doctrine*

By the late twentieth century, the mid-century model of court-agency relations had evolved into a new paradigm. Standing to challenge government action had been extended to persons who were injured in fact by government action; impairment of a legal right was no longer required.[62] Even so, the challenger would only be able to test the lawfulness of the government action; underlying administrative policy choices remained immune.

The more important shifts in the model, however, were related to the growing tendency of agencies to regulate by rule. Congress increasingly conferred substantive rulemaking power on regulatory agencies and courts construed earlier enacted statutes as conferring that authority.[63] In line with

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61. *Hearst,* 322 U.S. at 129.

62. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152-54 (1970) (distinguishing the question of whether a complainant has a legal interest that merits protection from the "case or controversy" analysis of whether a complainant has standing to sue); Barlow v. Collins, 397 U.S. 159, 164-65 (1970) (upholding the standing of tenant farmers to challenge agency action under the Food and Agriculture Act under the new approach).

63. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973) (holding that the Federal Trade Commission Act conferred upon the FTC broad powers to make substantive rules and regulations to carry out the purposes of the Act).

the new importance of rulemaking, courts reinterpreted the ripeness doctrine to permit broad pre-enforcement review.[64] The Court essentially redefined arbitrary and capricious review to mandate review of an actual or constructed record that included the information that the agency had when it acted,[65] an interpretation that carried immense consequences for rulemaking. This approach was incorporated in the newer regulatory statutes which explicitly authorized judicial review of agency rulemaking decisions, some of which defined the record on which that review would take place. Consistent with this new approach, these statutes required rulemaking proceedings to be reviewed within a set period—often ninety days—from the conclusion of the rulemaking proceedings.[66] The model embodied a major shift from the earlier model in its approach to the judicial review of rules and rulemaking. Whereas rules could be reviewed under the earlier model only when they were applied, the late twentieth century/early twenty-first century model subjected rules to almost immediate review as a matter of course.

The Court's decision in *Chevron*[67] was a part of this adaptation of the older model of a regulatory system that emphasized regulation by rule. The *Chevron* decision involved agency rulemaking in a regulatory context in which administrative powers were shared between federal and state environmental agencies. The Clean Air Act required those states that were not yet in compliance with Environmental Protection Agency (EPA)-set national air quality standards to establish a regulatory program under which permits would be required for all new or modified "stationary sources."[68] In that case, the Reagan-Administration EPA had issued a regulation that

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64. Abbott Labs. v. Gardner, 387 U.S. 136 (1967) (holding that a challenge to regulations having an immediate and significant impact on an industry that presented only a legal issue was ripe for judicial review); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967) (same); Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967) (holding pre-enforcement challenge to regulation not ripe where the legal issue was unsuited to pre-enforcement challenge and where the immediate impact of the regulation on petitioners was not severe).

65. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (holding that reviewing courts must consider whether agency action was "based on a consideration of relevant factors and whether there has been a clear error of judgment").

66. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1)-(2) (2000) (providing for a 120 day period for review); Clean Air Act, 42 U.S.C. § 7607(b)(1)-(2) (2000) (allowing review of actions taken pursuant to the Act only within 60 days of promulgation or 60 days after grounds for review arise); Noise Control Act, 42 U.S.C. § 4915(a) (2000) (stipulating a 90 day review period); Occupational Safety and Health Act, 29 U.S.C. § 655(f) (2000) (providing for a 60 day review period); *see also* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 734-35 (1983) (explaining that "prototype statutes contain an explicit preenforcement review 'statute of limitations' that restricts appeals . . . to sixty or ninety days after promulgation . . . [whereas a] larger group of statutes provides for time limited preenforcement review, but does not forbid review at the enforcement stage").

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

68. *See* 42 U.S.C. § 7502(c)(5) (2000).

permitted states to employ a plant-wide definition of the statutory term "stationary source." The definition excluded plant modifications that did not increase the plant's total amount of emissions. The issue before the Court was whether the agency's new definition of the statutory term was valid.

In its decision, the Court first observed that the term "stationary source" was ambiguous. It then ruled that Congress confers interpretive authority on a regulatory agency when it employs imprecise or ambiguous terms in legislation whose administration is entrusted to that agency. Accordingly, the Court required courts to defer to an agency construction of such a term so long as the agency's construction was reasonable. The judicial duty to defer to an agency's construction of an ambiguous statute mandated in *Chevron* is similar to the judicial duty to defer to an agency's application of an ambiguous statutory term required by *Hearst*, *Aragon*, and *Gray*. Consistency seemed to require the extension of the judicial deference to agency interpretations contained in adjudications to judicial deference to agency interpretations in rulemaking (and perhaps other) contexts, now that rulemaking had become the regulatory tool of choice. Yet, however consistent it was with *Hearst*, *Aragon*, and *Gray*, the *Chevron* decision carried consequences that earlier decisions did not. Earlier decisions required courts to defer to agency applications of regulatory statutes to particular cases. The narrowness of those decisions was reflected in the judicial practice of referring to them as ones of (ultimate) fact. No individual agency decision of that kind was likely to have major consequences. *Chevron*, however, required deference to agency interpretations that—like the one in *Chevron* itself—were widely applicable. The old fact/law language was no longer useful in allocating functions between courts and agencies. Now both courts and agencies were deciding issues of law.[69]

Scholarly literature widely discussed *Chevron*. Some commentators thought that the Court had improperly conferred on agencies the judicial function of deciding questions of law. If it had, then that would appear to be in conflict with the APA as well as the traditional (and constitutional) role of courts.[70] Some commentators argued that the courts were

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69. Early in the *Chevron* period, however, Justice Stevens (author of the *Chevron* opinion) exhibited uncertainty over the scope of the new deference doctrine. In his opinion for the Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), Stevens used language implying that courts owe more deference to an agency's interpretation in cases where the agency is applying the statute in question to a particular set of facts.

70. *See* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 24 (1996); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 142-43 (1990);

inconsistent in their application of *Chevron*: sometimes courts deferred when they should not have; at other times courts refused to defer when they should have.[71] Some commentators contended that *Chevron* was a device by which a conservative Supreme Court sought to compel liberal lower court judges to defer to the conservative policies of a Republican administration.[72]

B. The Instability of the Original Chevron *Doctrine*

Chevron purported to provide an easily administrable technique for courts to deal with deference issues. Under its mandate, courts would engage in a two-step analysis. In step one, a court would determine whether congressional intent was "clear." If that intent was unclear, then under step two, the court would defer to the agency's interpretation so long as that interpretation was reasonable. Yet while the *Chevron* formula is easily stated, it was inherently unstable in its original form because it did not address many critical issues.

First, in *Chevron* step one, the court determines whether the congressional intent is "clear." But merely asking the question in this way obscures the fact that ambiguity is a matter of degree, that there is sometimes a subjective element to ambiguity, and that interpretive judgments are often probabilistic. In perhaps most of the cases in which *Chevron* has been employed, the statutory term has been ambiguous to some degree. Even in cases that proceeded no further than *Chevron* step one, there was enough of an issue about the meaning of the statutory term that the parties chose litigation. In cases where a court has been able to conclude that the term is unambiguous, it may have been resolving a facial ambiguity by using an array of interpretive tools. The canons of construction are widely used to resolve facial ambiguities. Sometimes courts make reference to legislative history. Justice Scalia—the leading proponent of a broad reading of *Chevron*—has argued that whether a particular judge is likely to find a challenged term ambiguous or not may depend upon that judge's interpretive approach: the judge who takes a

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Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074 (1990) [hereinafter Sunstein, *Law and Administration*] ("The *Chevron* principle . . . is quite jarring to those who recall the suggestion, found in *Marbury v. Madison* and repeated time and again in American public law, that it is for judges, and no one else, to 'say what the law is.'"); Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 367-68 (1987) (Cass R. Sunstein, speaking).

71. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-85 (1992).

72. Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431 (1996).

textualist approach is more apt to find the meaning of a statutory term clear while one who resorts to legislative history may be more apt to find the term ambiguous.[73] A judge who employs a purposive approach may discover ambiguities that would be unseen using a plain meaning approach, or, conversely, the judge may find textual uncertainties resolved by resort to purpose. Ambiguity is certainly a matter of degree. When more than one interpretation is possible, how certain must a judge be when discarding competing interpretations in favor of one believed to "clearly" reflect congressional intent? Is the judge 80% certain? Could the judge's certainty be analogized to the array of standards governing certainty over issues of fact (such as preponderance, clear and convincing, a definite and firm conviction)? Ambiguity thus runs in a range and it can become greater or less as the tools of interpretation vary. It is also subjective in that it reflects the interpreter's approach, tools of construction, sensitivity, and perceived need to reach a determination. The literature complaining that courts are inconsistent in their application of *Chevron* reflect these facts. Because ambiguity is a matter of degree and tends to vary with the interpretive approach employed, there will always be inconsistencies in the way courts handle *Chevron* step one.

Second, *Chevron* sets forth a rule for deferring, despite the fact that deference issues arise in widely varying circumstances. Sometimes interpretive issues will be entwined with administration; sometimes they will not. Often the agency has given considerable thought and attention to its interpretation; in other cases it has not. Sometimes representatives of those affected may have provided their input to the agency; sometimes they may not have done so.

Third, *Chevron* provides an unsatisfactory rationale for deference. Its rationale is an implied delegation. By using an ambiguous term in the statute, Congress—according to the *Chevron* opinion—implicitly delegates authority to interpret that term to the administering agency. When Congress uses an ambiguous term, it surely has abdicated the power to construe that term itself. But the power to construe the meaning of the ambiguous term may have lodged in the courts. How do we know whether the courts or the administering agency should have the last word in construing the ambiguous term? Restated in terms of delegation, how do we know when Congress intends to delegate that interpretive authority to the agency and when it does not? Justice Scalia, perhaps the strongest defender of *Chevron*, suggests that we should accept a presumption that Congress always delegates interpretive authority to the agency

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73. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520-21; *see also* Sunstein, *Law and Administration*, *supra* note 70, at 2094.

administering the statute in question.[74] He states quite frankly that this presumption is not likely to accord with the facts, but that it provides a practical tool for dealing with a recurrent issue. By contrast, Justice Breyer has long maintained that while the *Chevron* doctrine is useful, it should not be employed in a way that prevents us from trying to ascertain whether it is likely that Congress would have approved of delegating final interpretive authority to agencies.[75]

Fourth, although the *Chevron* decision commanded deference to the interpretation of the administering agency, it surely did not mean that courts should defer to all interpretations that emanated from the agency, regardless of the internal consideration that was given to the interpretation, the rank of the agency officials issuing the interpretation, and the formality of the interpretation. If some interpretations deserve mandatory deference and others do not, how should courts distinguish them? These issues were inherent in the *Chevron* doctrine from the beginning. From the early years of the doctrine, Justice Scalia would have courts defer to the "authoritative" interpretations of the relevant agency. Yet by at least 1991, the Court's decision in *EEOC v. Arabian American Oil Co*.[76] had made clear that not all agency interpretations deserved mandatory deference. In that case, the Court had ruled that the Equal Employment Opportunity Commission's (EEOC) guidelines were not entitled to *Chevron* deference because Congress had not conferred rulemaking power upon that agency.

Fifth, immediately after the *Chevron* decision, it was unclear whether the Court's earlier decision in *Skidmore* retained any vitality. In *Skidmore* the plaintiffs brought suit under the Fair Labor Standards Act, claiming pay for three or four nights a week in which they had agreed to stay within hailing distance of a fire station.[77] During this period, they were expected to answer fire alarms, but otherwise were free to do anything they wished, so long as they remained in the area.[78] The statute required payment for "working time" but that phrase was undefined.[79] The Act was enforced both by private actions and suits brought by the Act's Administrator seeking injunctions against violations.[80] The Court referenced the Administrator's experience and indicated that his interpretations were

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74. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 198-205 (2006) [hereinafter Sunstein, Chevron *Step Zero*] (distinguishing Justice Scalia's simplistic view of *Chevron* with Justice Breyer's case-by-case analysis).

75. *Id.*

76. 499 U.S. 244, 257 (1991). In so ruling, the Court relied upon *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976), a pre-*Chevron* precedent.

77. Skidmore v. Swift & Co., 323 U.S. 134, 135-36 (1944).

78. *Id.*

79. *Id.*

80. *Id.* at 135-38.

entitled to respect.[81] Although the lower court was not bound by the Administrator's interpretations, the Court said that the weight that should be given to his interpretations in any particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[82] If *Chevron* applied to any "authoritative" agency interpretation as Justice Scalia contended, then *Skidmore* had little continuing relevance. But if *Chevron*'s application was narrower—as *Arabian American Oil Co.* indicated in 1991—then *Skidmore* had a wider scope.

Finally, how would the deference mandated by *Chevron* play out against the rule of stare decisis and judicial interpretation? If a court interprets a statute first, would an agency be bound by the court's interpretation? Until recently, answers to these questions were unclear. Several Supreme Court decisions indicated that the latter question should be answered affirmatively. But if agencies are so bound, what becomes of the agency flexibility that was a hallmark of the *Chevron* decision?

All of the questions set forth above were implicit in *Chevron* from the beginning. They carried the potential of destabilizing the so-called *Chevron* doctrine. Yet the Court did not begin to address these questions in earnest until the new millennium. In a series of decisions, the Court has moved haltingly and somewhat inconsistently. Nonetheless, this body of decisions may be outlining a new and more stable *Chevron* doctrine. In the next section, we examine these recent cases.

III. MOVING TOWARDS A REVISED *CHEVRON* DOCTRINE

A. Christensen *and* Mead*: The Force of Law Standard*

In the early 2000s, the Court engaged in a series of decisions that would revise our understanding of *Chevron*. The first such decision was *Christensen v. Harris County*.[83] The Court ruled in *Christensen* that an agency opinion letter was not entitled to mandatory deference.[84] Speaking for the Court, Justice Thomas indicated that the lack of rulemaking or formal adjudicatory procedures made *Chevron* deference unwarranted.[85]

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81. *Id.* at 140.
82. *Id.* at 140.
83. 529 U.S. 576 (2000).
84. *Id.* at 587-88.
85. *Id.*

He followed up by observing that opinion letters and other interpretations made outside of these procedures did not carry the force of law.[86] Justice Thomas noted that:

> Here . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.[87]

In 2001, the Court decided *United States v. Mead Corp*.[88] The Court again determined that an agency—this time the Customs Bureau—was not exercising congressionally-delegated power to resolve statutory ambiguity.[89] The interpretation at issue concerned a statutory tariff classification that was issued in a ruling letter.[90] The Court observed that forty-six Customs offices issue 10,000 to 15,000 classification rulings annually.[91] In language that made *Chevron* deference dependent upon whether the agency interpretation carried the "force of law"—a phrase used by Justice Thomas in *Christensen*—Justice Souter's majority opinion ruled that classification rulings did not carry the force of law and hence did not merit *Chevron* deference.[92] The sheer volume of classification rulings indicated to the Court that they could not carry the force of law.[93] The Court suggested that delegation by Congress to an agency to make rules carrying the force of law could be inferred when the agency was construing a statute in the course of an adjudication or a rulemaking proceeding.[94] It left open the possibility that an agency might be exercising such delegated power in other contexts as well, but it provided little help on how to identify these other situations.

The Court in *Mead* observed that just because the mandatory deference required by *Chevron* was not applicable, a court might still defer to an agency interpretation because it found the interpretation persuasive, referring to the Court's 1944 decision in *Skidmore*.[95] The issue in *Skidmore* involved an interpretation of the Fair Labor Standards Act, an

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86. *Id.*
87. *Id.* at 587.
88. 533 U.S. 218 (2001).
89. *Id.* at 231-32.
90. *Id.* at 225-27.
91. *Id.* at 233.
92. *Id.* at 226-27.
93. *Id.* at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").
94. *Id.* at 227.
95. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

Act that was enforceable in the courts.[96] The workers themselves or the government could bring these actions (through the Administrator of the Fair Labor Standards Act). In *Skidmore*, the Court pointed out that the Administrator had accumulated extensive experience in the administration of the Act through his issuance of rulings, interpretations, and opinions. Accordingly, the Court ordered lower courts to consider those agency interpretations for their persuasive effect.

In his *Mead* dissent, Justice Scalia pointed out that the majority ruling appeared to undermine agency flexibility over policy, a flexibility that the Court had recognized in *Chevron*. *Chevron* had allowed the Reagan-Administration EPA to construe the term "stationary source" in the Clean Air Act on a plant-wide basis.[97] Yet the EPA had construed that term differently during the prior Carter Administration, rejecting such a plant-wide construction. Nonetheless, the Court had both required courts to defer to the agency's interpretation and allowed the agency to revise its interpretation (within the bounds of reasonableness) as the agency saw fit. Now that all agency interpretations were not governed by *Chevron*, Scalia saw a greater risk that courts would interpret statutory terms before the agency was called upon to construe them in adjudications or rulemaking proceedings. If a court construed the term first, then under the prevailing view[98] the court interpretation would be a precedent, binding on the agency under the doctrine of stare decisis.[99] Stare decisis would impede the courts

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96. *Id.* at 135-36.

97. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 862-63 (1984).

98. For the then-prevailing view that agencies would be bound by a court's prior construction of the statutory term at issue, Justice Scalia cited three cases: Neal v. United States, 516 U.S. 284, 295 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992); and Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990). These decisions were explained in *Brand X* as *Chevron* step one decisions—a prior (or later) judicial interpretation binds an agency when the court determines that the congressional intent is clear. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

99. Justice Scalia's concern about the stare decisis effect of a prior judicial interpretation of an ambiguous statutory term was not reflected in at least some of the lower court decisions that gave *Chevron* deference to agency interpretations that conflicted with prior judicial interpretations. *See, e.g.*, Satellite Broad. & Commc'ns Ass'n of Am. v. Oman, 17 F.3d 344, 347 (11th Cir. 1994) ("Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as 'the agency's answer is based on a permissible construction of the statute.'" (quoting *Chevron*, 467 U.S. at 844)); Schisler v. Sullivan, 3 F.3d 563, 568 (2d Cir. 1993) ("New regulations at variance with prior judicial precedents are upheld unless 'they exceeded the Secretary's authority [or] are arbitrary and capricious.'") (alteration in original) (internal citation omitted). Prior to the Court's decision in *Brand X* but after its decision in *Edelman*, Richard Murphy had proposed the use of the arbitrary and capricious review standard as a vehicle for preserving agency flexibility over policy. Under Murphy's proposal, a subsequent agency interpretation would constitute a new "relevant factor" for purposes of judicial review, thus freeing the court from the stare decisis constraint exerted by its own earlier decision. *See* Richard W. Murphy, *A "New" Counter*-Marbury*: Reconciling* Skidmore *Deference and*

from correcting their own interpretive mistakes. Agency control over policy, exercised through the interpretation of imprecise statutory terms, would be subject to the hazard that the interpretive issue might reach a court before an agency had a chance to deal with it. The agency flexibility recognized in *Chevron* would be impaired.

Mead engendered a widespread discussion in the academic literature about when *Chevron* would require unconditional deference to agency interpretations and when, on the contrary, judicial deference to agency interpretations would have to be earned by their persuasive power under *Skidmore*.[100] *Mead* indicated that courts should defer to agency interpretations that were issued after notice-and-comment rulemaking proceedings and to those that were embodied in adjudications. *Mead* also indicated that *Chevron* deference might be required in other situations, without providing guidance for identifying them. *Mead* provided a helpful framework necessary for determining when *Chevron* would and would not apply, but it left open a number of pressing issues. In addition to the uncertainty over the circumstances in which *Chevron* would apply in the absence of rulemaking or adjudicatory proceedings, Justice Scalia's argument that *Mead* facilitated judicial intrusion into agency policy development needed a response. Finally, Justice Breyer hinted in *Barnhart v. Walton*[101] that the line separating *Chevron* mandatory deference and *Skidmore* persuasive deference might not be a sharp one.[102]

Agency Interpretive Freedom, 56 ADMIN. L. REV. 1, 48-49 (2004). Shortly after the Court's decision in *Mead*, Kenneth Bamberger proposed a theory of provisional precedent based upon a federalism model: just as the decisions of a federal court construing state law is a precedent until a state court decides to the contrary, so a federal court interpretation of a statutory term would act as a precedent until the relevant agency adopted a different interpretation. Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1306-15 (2002).

100. *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Michael P. Healy, *Spurious Interpretation Redux:* Mead *and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1547-48 (2006); Cooley R. Howarth, Jr., United States v. Mead Corp.*: More Pieces for the* Chevron/Skidmore *Deference Puzzle*, 54 ADMIN. L. REV. 699 (2002); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002) [hereinafter Merrill, *The* Mead *Doctrine*]; Murphy, *supra* note 99; Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877 (2006).

101. 535 U.S. 212 (2002).

102. *Id.* at 219-22 (using *Skidmore* factors to support the application of *Chevron*); Mayburg v. Sec'y of Health & Human Servs., 740 F.2d 100, 106-07 (1st Cir. 1984) (analogizing the choice between *Chevron* and *Skidmore* as governing precedents to the choice between *Hearst* and *Packard* as governing precedents).

B. Ways of Understanding Mead

Although *Mead* purported to delineate the boundaries of *Chevron*'s application, it spoke in unclear language and, as a result, has generated its own uncertainty. It has also generated a wave of law review articles that attempt to resolve that uncertainty. Indeed, because *Mead* has set the parameters in which the application of *Chevron* deference is debated, the language in which those parameters were cast is critical to an understanding of that current debate. First, Justice Souter said: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[103]

In his next sentence, the Justice wrote: "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."[104] A few pages further in the opinion, Justice Souter stated: "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[105] In setting the bounds of the judicial obligation to defer to agency statutory interpretations, *Mead* thus invoked the criterion that the agency be entrusted with the power to issue rules carrying the force of law and went on to say that delegation of that power can be inferred from an agency's power to engage in notice-and-comment rulemaking, adjudication, or other formal procedure that fosters fairness and deliberation.[106]

Thomas Merrill has been one of the most prolific writers on the issue of how we should understand the limitations on *Chevron* mandated by *Christensen* and *Mead*. He and Kristin Hickman wrote a highly-regarded article after the Court's decision in *Christensen*, but before its decision in *Mead*, arguing that *Chevron* deference should be limited to cases in which agency rules carried the "force of law."[107] Justice Souter cited the article with approval in his majority opinion in *Mead*.[108] Although that opinion adopted "force of law" as indicative of *Chevron* deference, it did not cite

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103. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).
104. *Id.* at 227.
105. *Id.* at 230 & n.11 (citing Merrill & Hickman, *supra* note 8, at 872).
106. *Id.* at 230.
107. Merrill & Hickman, *supra* note 8, at 837, 877-82.
108. *Mead*, 533 U.S. at 230 n.11.

the Merrill and Hickman article for that proposition. Rather, Justice Souter cited the article as supporting his statement (quoted above) that Congress contemplates deference with the effect of law when it provides for a formal procedure tending to foster fairness and deliberation.[109] Subsequently, Merrill, taking a formalist approach towards *Mead*'s "force of law" criterion, has argued in a number of law review articles that, during the early part of the twentieth century, Congress followed a convention under which rules were understood to carry the force of law only when Congress attached a penalty for their violation.[110] Based upon this convention, Merrill has suggested the adoption of a meta-rule for determining the obligation of courts to apply *Chevron* deference: only agencies whose rulemaking authority meets the standard of that convention would merit *Chevron* deference.[111] Otherwise, deference would be governed by *Skidmore* and would have to be earned by its persuasive power.

Merrill's approach carries the attraction of simplicity and ease of application. He emphasizes this simplicity by referring to the initial determination—whether a *Chevron* analysis is applicable at all as "step zero."[112] Several factors appear to undercut his position: First, it is not clear that Merrill is attributing the same meaning to the phrase "force of law" as the Court. As Einer Elhauge observes, that phrase is "hardly self-defining."[113] Merrill's understanding of a rule carrying the force of law is keyed to the existence of a penalty for violation. Indeed, Merrill describes his understanding as Austinian, referring to the nineteenth-century legal philosopher who saw punishment as an essential component of law.[114] This understanding appears to be different from Justice Souter's understanding of a rule carrying the force of law. Justice Souter explicitly stated that an agency's authority to issue rules carrying the force of law can be shown, among other things, by an agency's power to engage not only in rulemaking, but in adjudication as well.[115] Under Merrill's Austinian

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109. *Id.* (citing Merrill & Hickman, *supra* note 8, at 872).

110. Merrill, *The* Mead *Doctrine*, *supra* note 100, at 807; Merrill & Hickman, *supra* note 8, at 837, 877-82; Thomas W. Merrill & Katherine Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002); *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2111-14, 2171-75 (2004).

111. Merrill, *The* Mead *Doctrine*, *supra* note 100, at 819-26.

112. Merrill & Hickman, *supra* note 8, at 876-78.

113. Einer Elhauge, *Preference Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139 (2002); *see also* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1013 (2005) (complaining that in *Mead*, "the Court's discussion and application of this concept ['force of law'] were incoherent"); Sunstein, *Chevron Step Zero*, *supra* note 74, at 222 (identifying two possible meanings of the phrase).

114. *See* JOHN AUSTIN, LECTURES ON JURISPRUDENCE, Lectures 11-12 (Robert Campbell ed., 1875) (asserting the laws are commands, disobedience of which results in punishment).

115. United States v. Mead Corp., 533 U.S. 218, 229 (2001).

understanding, the decisions of the NLRB do not carry the force of law, because they require the assistance of a court in enforcing them.[116] Souter, however, said nothing about whether the adjudication to which deference was owed did or did not require judicial assistance in its enforcement.[117] Indeed, he cited with apparent approval a case involving an NLRB adjudication as one in which the Court had previously applied *Chevron* deference.[118] Souter thus appears to understand a "rule" to include a generalizable pronouncement encompassed in an adjudicative decision without regard to the process by which that decision is enforced. As referenced below, Robert Anthony argued more than a decade ago that *Chevron* deference was co-extensive with agency interpretations having the force of law, but Anthony's interpretation of the force-of-law phrase appears to be closer to that of Justice Souter.[119]

Second, as Merrill himself admits, the enabling statutes of most agencies contain a general grant of rulemaking authority, and there is a host of judicial precedent to the effect that power to issue rules with the force of law is presumed from such general grants.[120] Thus, almost all agencies have power to issue rules with the force of law. Several Supreme Court decisions, moreover, either hold or assume that general grants of rulemaking authority confer the power to issue rules carrying the force of law. So again, most agencies possess that power.

Third, Merrill is not entirely clear on his understanding of the "force of law" phrase. At one point he says that NLRB rules would carry "legislative effect" because "they announced how the NLRB would exercise its enforcement authority in the future."[121] But Merrill also repeatedly says that neither the NLRB's rules nor its adjudications carry the force of law, the former because Congress provided no penalty for their

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116. Merrill, *The* Mead *Doctrine*, *supra* note 100, at 832. Merrill recognizes that Souter's understanding of the phrase "force of law" is different from his own Austinian understanding. *See id.* at 813 ("[T]he Souter opinion implicitly treats 'force of law' as an undefined standard that invites consideration of a number of variables of indefinite weight."); Merrill & Hickman, *supra* note 8, at 892.

117. *See Mead*, 533 U.S. at 227. These passages are quoted above in text at notes 104 & 105. Elhauge also reads Justice Souter's language as suggesting that an agency interpretation acquires the force of law when it has been issued in a rulemaking or adjudicative proceeding or otherwise in a way that provides for significant comment opportunities. *See* Elhauge, *supra* note 113, at 2139-40.

118. *See Mead*, 533 U.S. at 230 n.12 (citing Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996)).

119. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 38 (1990). Anthony argued, for example, that NLRB interpretations bound the courts because indicators such as "the large numbers of these cases, the relative level of detail involved, the potential waste of requiring reinterpretation by the courts, and the lodgement of direct review in the courts of appeals" pointed in that direction. *Id.* Thus, they carried the force of law. *Id.*

120. Merrill & Hickman, *supra* note 8, at 890.

121. Merrill & Watts, *supra* note 110, at 568.

violation and the latter because its adjudicative orders require judicial assistance for enforcement.[122] Nor is it clear why a rule that is enforced in an adjudication, rather than in a court proceeding, is not a rule carrying the force of law.[123]

Fourth, there is a danger of using the convention in a misleading way. If the convention is used to mean that the only rules that carry the force of law are those to which Congress has attached a penalty, then it would be simpler to omit reference to the convention and merely say that only rules with a statutory penalty carry the force of law. Merrill's discussion of the convention also fails to adequately address the differences between rules enforced in the courts and rules enforced in agency adjudications.

Cass Sunstein agrees with Merrill that *Chevron* deference should be determined by an easily applicable rule.[124] In contrast with Merrill, however, Sunstein would not engage in a "step zero" inquiry into whether the agency has been authorized to issue rules with the force of law. Rather, Sunstein would have the courts defer to agency interpretations under the *Chevron* rubric whenever they carry the force of law—understood in the Austinian sense—or are the result of notice-and-comment or trial-type procedures.[125] Sunstein's preference for a straightforward rule governing the application of *Chevron* aligns him, to a large extent, with Justice Scalia as well. The primary difference between Sunstein and Scalia is that Sunstein would limit *Chevron*'s application to situations where the agency employed participatory procedures, whereas Justice Scalia would apply *Chevron* to any "authoritative" agency interpretation, regardless of the underlying procedures.[126]

These approaches towards integrating *Mead* into the newly dynamic *Chevron* doctrine are further discussed after we consider Justice Breyer's opinion for the Court in *Barnhart v. Walton*.[127] In that case, Justice Breyer offered a somewhat more complex and nuanced understanding of *Mead* and *Chevron* than any of the approaches discussed above. His *Barnhart* opinion eschews a rule-based approach to the application of *Chevron*. The

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122. Merrill, *The* Mead *Doctrine*, *supra* note 100, at 832; Merrill & Hickman*, supra* note 8, at 892.

123. Merrill cites *Pacific Gas & Electric Co. v. FPC* as stating the legal effects test which he equates with "force of law." 506 F.2d 33, 38 (D.C. Cir. 1974). But the court's definition appears to embrace a rule that is enforced in an adjudication. *See* Merrill, *The* Mead *Doctrine*, *supra* note 100, at 827. This approach appears to recognize "force of law" in rules of the NLRB, contrary to Merrill's position elsewhere. *See* discussion *supra* notes 114 & 120 and accompanying text.

124. Sunstein, Chevron *Step Zero*, *supra* note 74.

125. *Id.* at 228.

126. *Compare* Sunstein, Chevron *Step Zero*, *supra* note 74, *with* Scalia, *supra* note 73.

127. 535 U.S. 212 (2002).

Barnhart approach, accordingly, differs from the rule-based approaches endorsed by Justice Scalia and Professors Merrill and Sunstein. We now turn to *Barnhart*.

C. Barnhart*'s Gloss on* Chevron

Barnhart v. Walton was, among other things, an attempt by the Court to address the issues left unanswered in *Mead*.[128] In that case, Walton sought disability benefits for an impairment that prevented his gainful employment for a period of less than one year.[129] The statute defined a compensable disability as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . has lasted or can be expected to last for a continuous period of not less than twelve months."[130] The Social Security Administration construed the statute to require the inability to engage in gainful activity for twelve months, rejecting Walton's interpretation that the twelve months referred only to the underlying impairment, and not to the inability. The agency also rejected Walton's interpretation that an inability to engage in gainful activity that was initially expected to last for twelve months qualified under the definition, even though the inability in fact lasted for a lesser period.[131] Following notice-and-comment procedure, the agency construed the statute as providing that no disability exists if the claimant is doing "substantial gainful activity."[132] The agency had construed that regulation as denying the presence of disability if within twelve months of the onset of the impairment, the impairment no longer prevented the claimant from engaging in substantial gainful activity.[133]

Walton challenged the agency determination in court. He lost before the district court but prevailed in the Fourth Circuit. That Circuit ruled that under the clear language of the statute, the twelve-month duration requirement applied to the impairment, and not to the inability to engage in gainful employment.[134] The Supreme Court granted certiorari and reversed. Justice Breyer, writing for the majority, ruled that the statute was ambiguous and that the agency's interpretation was a plausible one which required deference under *Chevron*.[135]

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128. *See id.*
129. *Id.* at 215.
130. *Id.* at 214 (emphasis omitted) (quoting 42 U.S.C. § 423(d)(1)(A) (1994)).
131. *Id.* at 218-20.
132. *Id.* at 214.
133. *Id.* at 223.
134. Walton v. Apfel, 235 F.3d 184, 190 (4th Cir. 2000), *rev'd sub nom.* Barnhart v. Walton, 535 U.S. 212 (2002).
135. *Barnhart*, 535 U.S. at 222.

Walton urged the Court to disregard the agency's interpretation of its regulations on the ground that the regulations were only recently enacted. Justice Breyer's opinion, after summarily rejecting that contention, went on to bolster its ruling to defer by observing that the agency had long interpreted the statute in this way.[136] The long standing history of the agency interpretation was a reason for according it *Chevron* deference, even if the agency had not initially issued it through notice-and-comment proceedings. Referring to *Christensen*, Justice Breyer said that any language in that case indicating that notice-and-comment proceedings were essential to *Chevron* deference had been effectively overturned in *Mead*.[137] Finally, Justice Breyer gave the following explanation of why *Chevron* should apply:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute . . . and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[138]

Some of this language is unremarkable. Cases applying *Chevron* deference have often referred to the technical and complex nature of the issue before them,[139] as well as agency expertise.[140] This language is somewhat different because it references the "interstitial" nature of the legal question as a criterion for applying *Chevron* deference. The Court had previously employed that phrase in a *Chevron* context only once.[141]

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136. *Id.* at 221.
137. *Id.* at 222.
138. *Id.*
139. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005); Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327, 339 (2002); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 697 (1991); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (noting that the complexity of such administrative matters is a reason for judicial deference to agencies and administrators); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (stating that the court must give deference to agency interpretation of the agency's own regulation).
140. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651-52 (1990) ("This practical agency expertise is one of the principal justifications behind *Chevron* deference."). Of course, an agency's practical expertise often supports the persuasive force of an agency interpretation under the *Skidmore* framework.
141. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), the Court (through Justice O'Connor) quoted Justice Breyer's law review article in support of its decision denying deference to a Food & Drug Administration interpretation, a decision in which Justice Breyer dissented. *See* discussion of *Brown & Williamson*, *infra* notes 164-67 and accompanying text. Justice Breyer has recently employed that term in two opinions that mandate *Chevron* deference. *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2346 (2007); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1541 (2007).

Yet insofar as that phrase connotes a legal question involved in the administration of a regulatory scheme, it seems an appropriate one to which courts should render *Chevron*-like deference.

Yet Breyer may be suggesting more than the particular appropriateness of mandatory deference in this case. He may also be suggesting that the more a legal issue departs from routine administration, the less likely Congress would want the administering agency's interpretation to govern. Indeed, Breyer may be incorporating into the *Chevron* framework an indicator long employed by courts reviewing agency adjudications: to determine whether an issue should be treated as one of ultimate fact, and therefore within the province of the agency under *Hearst*, or as one of "law," and therefore within the responsibility of the reviewing court to decide independently under *Packard* in the pre-*Chevron* world.[142]

Breyer used similar language in referring to *Chevron* in the past. He did so in determining whether *Chevron* or *Skidmore* would govern the obligation of a court to defer to an agency determination. In *Mayburg v. Secretary of Health & Human Services*,[143] then First Circuit Judge Breyer employed that language to distinguish *Chevron* a few months after it had been decided. In that case, Breyer wrote:

> The less important the question of law . . . the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative or substantive expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views . . . . Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.[144]

Breyer followed his opinion in *Mayburg* with a law review article elaborating that approach.[145] In his law review article, Justice Breyer wrote:

> A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.[146]

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142. *Compare* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944), *with* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

143. 740 F.2d 100 (1st Cir. 1984).

144. *Id.* at 106; *see also* Constance v. Sec'y of Health & Human Servs., 672 F.2d 990, 995-96 (1st Cir. 1982) (Breyer, J.) (employing similar language to justify persuasive deference under *Skidmore*).

145. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

146. *Id.* at 370. Justice Breyer distinguishes major issues from more routine ones, which he refers to as interstitial issues. This usage has the potential for confusion, since a number of cases describe agency authority to make rules as involving interstitial matters and

Thus Justice Breyer, in *Barnhart*, may be providing a response to the question left open in *Mead*. His understanding of *Chevron*'s applicability is the one that he propounded in *Mayberg* immediately in the wake of the *Chevron* decision, and later in the *Administrative Law Review*. That understanding is apparent in his dissenting opinion in *Christensen* where he articulated his understanding of the close relationship between *Skidmore* and *Chevron*.[147] Breyer has repeatedly contended that deference should be accorded to agency interpretations in situations where Congress intends to accord such deference.[148] This is the ostensible rationale of *Chevron*, but *Chevron* and the later cases applying the *Chevron* precedent generally presume a congressional intent to delegate rather than inquire into what Congress would likely want on the particular interpretive issues before it.[149] Breyer believes that Congress would prefer increasing deference to agency interpretations as the interpretive issue becomes closely connected with everyday administration.[150] Factors such as the technical nature of the issue and its complexity reinforce the need to defer. *Chevron* deference is therefore analogous to the deference traditionally accorded to routine agency applications of statutory terms in agency adjudications. Deference in those situations is given because Congress wants the courts to accord administering agencies the scope to carry out the statutory program. Deference, however, ceases to be mandatory when issues attain levels of importance that affect the basic design of the regulatory scheme. These "boundary" issues differ from so-called "jurisdictional" issues,[151] which

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warning courts against usurping this interstitial authority. *See, e.g.*, Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 244 (2004); Babbitt v. Sweet Home Chapter of Cmtys., 515 U.S. 687, 733 (1995) (Scalia, J., dissenting); Ford Motor Co. v. Milhollin, 444 U.S. 555, 568 (1980); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (quoting SEC v. Chenery Corp., 332 U.S. 194, 202 (1947)). But interstitial actually means "between the gaps" and therefore agency "interstitial" authority to make rules means making rules to fill gaps in statutory meaning. References in the cases describing agency authority as interstitial accurately describe the underlying understanding of *Chevron.* Justice Breyer's assertion that agency authority to interpret extends to interstitial matters is, literally, a truism.

147. *See* Christensen v. Harris County, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting).

148. Stephen Breyer, Lecture, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002); *see* Breyer, *supra* note 145, at 370, 372, 382 (contending that deference varies with the context as Congress would intend).

149. *See, e.g.*, *Christensen*, 529 U.S. at 578; United States v. Mead Corp., 533 U.S. 218 (2001).

150. Breyer, *supra* note 145, at 369-72.

151. The question of whether *Chevron* deference applies to the resolution of "jurisdictional" issues has proved troublesome to courts. *Compare* Lyon County Landfill v. EPA, 406 F.3d 981, 983-84 (8th Cir. 2005) (*Chevron* deference), *and* Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1279 (D.C. Cir. 2007) (Chevron deference), *with* N. Ill. Steel Supply Co. v. Sec'y of Labor, 294 F.3d 844, 847 (7th Cir. 2002) (de novo review). *See also* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 380-81 (1988) (Scalia, J. concurring); Dole v. United Steelworkers of Am., 494 U.S. 26, 54 (1990) (White, J., dissenting). Professor Sunstein had argued (consistent with the argument here) that deference should not "be accorded to the agency when the

can vary widely in their regulatory significance. Justice Scalia was right when he said (concurring in *Mississippi Power & Light Co. v. Mississippi*) that "there is no discernable line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."[152] But clearly there are issues that do press the boundaries of statutory design and thus are for judicial resolution, as Justice Scalia himself conceded when he argued that Congress would expect an administering agency to be responsible for resolving ambiguities "within broad limits,"[153] thus precisely acknowledging these limitations on the *Chevron* presumption. As the issues become less routine and rise in importance, it becomes less clear whether Congress would want the courts to defer to the agency interpretation. Sometimes an interpretive issue rises to a level that Judge Breyer had called "central to the statutory scheme" in *Mayburg*.[154] In his *Brand X* concurrence, Justice Breyer referred to such an interpretive issue as raising "an unusually basic legal question."[155] Issues of this magnitude, he asserts, are for the courts because Congress expects the courts, rather than agencies, to oversee the broad outlines of its statutes. In rendering its own interpretation, the court may be interested in the agency's views, but whether or not the court accepts them depends upon the persuasiveness of the agency's rationale.

As referenced below, this approach is neither radical nor new. It can be restated in terms of the responsibility of courts to ensure that agencies operate within the boundaries established in their enabling statutes.[156] Issues entwined with routine administration are generally for agencies. But the courts are obliged to determine the boundaries within which the agencies operate. Breyer's citations in *Mayburg* to the old *Hearst* and *Packard* cases reference that distinction. The former symbolizes the wide latitude of agencies to control their approaches to administration within the boundaries of their delegated authority, while the latter symbolizes the

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issue is whether the agency's authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determinations of fact and policy." Sunstein, *Law and Administration After* Chevron, *supra* note 70, at 2100. He appears, however, no longer to hold that view. *See* Sunstein, Chevron *Step Zero*, *supra* note 74, at 247 ("There is no sufficient reason for a 'major question' exception to *Chevron*.").

152. 487 U.S. at 381 (Scalia, J., concurring).

153. *Id.* at 382.

154. *See* Mayburg v. Sec'y of Health & Human Servs., 740 F.2d 100, 107 (1st Cir. 1984) (explaining that the "spell of illness" provision was "central to the statutory scheme").

155. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring).

156. *See, e.g.*, Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983) ("[T]he judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act."); *see also* Doug Geyser, *Courts Still "Say What the Law is": Explaining the Functions of the Judiciary and Agencies After* Brand X, 106 COLUM. L. REV. 2129, 2154-55 (2006).

responsibility of the courts to determine those boundaries. The more an issue rises in importance, the more likely it is that the courts may discover a judicially-ascertainable intent, and thus resolve the interpretive issue at *Chevron*'s step one. Congress typically focuses on a statute's main outlines and purposes and gives less attention to its details. There is more likely to be an ascertainable "intent" as the relative importance of the issues increase, because the legislative struggles over these issues will be reflected in definitions, the interrelations of provisions, and/or the structure as a whole. Struggles over the major issues are also likely to be reflected in the legislative history.

Breyer, however, is saying something more than that congressional intent is likely to be more easily ascertainable as an issue rises in importance. He is saying that because the judicial obligation to defer depends upon congressional intent, the courts should do their best to ascertain that intent. Since that intent may not be expressed, the courts should employ a number of factors that indicate whether Congress would want to pass final interpretive authority to the agency, or leave it with the court. Among the factors are the importance of the issue and its centrality to the statutory scheme. As the interpretive issue becomes more important and more central, it becomes increasingly likely that the interpretation raises major boundary issues. When it does, those major issues are for judicial determination. The critical notion is that such major boundary issues can be for judicial interpretation, even when the court cannot say with one hundred percent certitude that its conclusion is the only plausible one. This is the crux of Justice Scalia's question, "How clear is clear?" Clarity can exhibit degrees and extend over a range. The result may be clear to the court, but, perhaps only clear at an 80% confidence level. In any event, when the significance of the issue becomes sufficiently great, the interpretive responsibility becomes the court's.

Breyer's approach to *Chevron* deference takes the "force of law" criterion set forth in *Mead* as a touchstone of when mandatory deference is required. However, Breyer provides the "force of law" criterion with a meaning pregnant with the possibility of reconnecting the *Chevron* doctrine to its roots in the mid-century deference cases. Agency interpretations have the "force of law" when they bind the courts. Cass Sunstein suggests that such a definition is circular.[157] It is circular if a rule's having the "force of law" means that the rule binds the courts and the courts are bound when the rule carries the "force of law." Yet Breyer's approach is not circular at all. It is closely related to the traditional understanding that agencies are better equipped to deal with those interpretive issues that are

157. Sunstein, Chevron *Step Zero*, *supra* note 74, at 222.

closely connected with the more routine tasks of regulation than are courts. Concomitantly, courts are better at ferreting out statutory meaning when the issues are larger and more important, and therefore when it is more likely that Congress has addressed them in some way or at least would want interpretive differences to be resolved by the courts. Even though the statutory meaning remains ambiguous, the courts are institutionally better equipped to decide major issues than are more narrowly-focused regulatory agencies. Related to that understanding about judicial abilities is another traditional understanding: courts bear the primary responsibility for deciphering the basic outlines of the legislative design. As the interpretive issues appear to be more intertwined with legislative deals, Breyer indicates that the judges should be more free to resolve those issues on their own. The courts can read the statute objectively because they remain free from prior involvement in the legislative process. Conversely, courts are less capable of resolving statutory meaning as the issues become more entwined with the tasks of administration, tasks with which courts are generally novices. Breyer thus appears to be using the "force of law" phrase to refer to the contexts in which agency decisions have traditionally bound the courts. The ramifications of Breyer's approach are further developed below.

Not all commentators appreciate Justice Breyer's approach. Robert Anthony has described the quoted language from *Barnhart* as "little short of astounding."[158] Cass Sunstein believes that Breyer's approach is too uncertain. Thomas Merrill—like Sunstein and Scalia—wants to simplify *Chevron*'s application by resort to an easily-applicable rule. Kristin Hickman believes that Breyer's approach can be discounted because most other Justices do not share his views.[159] Yet these critics may overemphasize the difficulties in Breyer's approach or underestimate the impact that *Barnhart* may exert on the developing case law. Sunstein, for example, correctly observes that in many cases, there may be no apparent difference between applying *Chevron* and *Skidmore*.[160] As pointed out below, Justice Ginsburg's majority opinion in *Alaska Department of Environmental Conservation* blurs distinctions between *Chevron* and *Skidmore* along lines that are easily reconcilable with Justice Breyer's

158. Robert A. Anthony, *Keeping* Chevron *Pure*, 5 GREEN BAG 2D 371, 373 (2002) (reading the *Barnhart* opinion as endorsing "a loosely-cabined juggle of multiple and indeterminate factors for determining in each case whether *Chevron* governs").

159. *See* Hickman, *supra* note 100, at 1587-88 (asserting that a majority of the Justices do not share Justice Breyer's views on *Chevron*).

160. *See* Sunstein, Chevron *Step Zero*, *supra* note 74, at 229-30 (describing examples of cases where there was no need to choose between *Skidmore* and *Chevron*).

approach in *Barnhart*.[161] The relationship between *Chevron* and *Skidmore* is developing. As a result, the courts often may not need to engage in an extended analysis of which line of deference to follow.

Before assessing the merits of Breyer's language in *Barnhart*, it must be read it in its overall context. *Barnhart* is one of a series of cases over the last several years in which the Court has been recasting the *Chevron* doctrine. *Mead* held that judicial deference would be indicated when an agency interpreted a statutory term in a rulemaking proceeding, in an adjudication, or in some undefined third way.[162] In *Barnhart*, Breyer addressed, in part, the application of *Chevron* in this uncharted third area. Rather than criticize Breyer for suggesting the use of imprecise criteria for identifying when *Chevron* deference would be applicable, as Robert Anthony does,[163] Breyer's proposed analytical factors might better be welcomed as an attempt to throw light upon an area that *Mead* left completely indeterminate. Breyer's approach also ties in traditional court/agency relations to *Mead*'s understanding of *Chevron*'s applicability.

Breyer's *Barnhart* language, however, may have wider ramifications than merely offering a route through *Mead*'s unexplored third category. Because Breyer has always seen *Chevron* deference as blurring into *Skidmore* deference, one must assess both: (1) how the language that Justice Breyer employed in *Barnhart* might determine *Chevron*'s applicability in *Mead*'s third category; and (2) how that language might recast the entire *Chevron* doctrine, modifying the judicial obligation to defer in cases involving matters of major policy, even when the agency has employed rulemaking or adjudicatory procedures. Breyer's critics appear to be most concerned with the latter issue. Accordingly, an examination of the wider ramifications of that language is warranted. (Most of the discussion below can also be applied to the narrower issue as well.)

Justice Breyer's broad approach towards the applicability of *Chevron* does not furnish a mechanical rule, but it supplies a workable guideline. Courts have been using the *Hearst*/*Packard* distinction for many years to determine whether or not deference is required in an analogous circumstance. The criticisms directed against Justice Breyer's approach could, also, be directed against the distinction between mandatory deference in *Hearst*-type situations and non–mandatory deference in *Packard*-type situations. Yet courts have lived with that distinction for well over half a century.

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161. *See* discussion *infra* notes 180-92.

162. United States v. Mead Corp., 533 U.S. 218, 230-31 (2001) ("[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.").

163. *See* Anthony, *supra* note 158, at 373-74.

Justice O'Connor's majority opinion in *Brown & Williamson Tobacco Corp*.[164] of 2000 and to a lesser extent in *MCI Telecommunications Corp. v. AT&T Corp.* of 1994 provides some support for Justice Breyer's approach to distinguishing between major and minor issues in applying *Chevron*.[165] Justice O'Connor's opinion in *Brown & Williamson*, rejecting the Food and Drug Commission's (FDA) interpretation of the term "drug" in the Food, Drug, and Cosmetic Act, stated that *Chevron*'s assumption of an implicit delegation by the Congress to regulatory agencies to resolve the ambiguity of statutory terms may not extend to "extraordinary cases" involving major questions.[166] Since the FDA's interpretation would give it authority to regulate tobacco, this was "hardly an ordinary case" in Justice O'Connor's words.[167] In support of her position that the *Chevron* assumption of implicit delegation does not extend to major issues, Justice O'Connor cited Breyer's law review article on this subject (with an accompanying quotation). She also cited and quoted from *MCI*.

MCI involved the FCC's interpretation of the Communications Act. The Act obligated all long-distance telephone carriers (under § 203(a))[168] to file their tariffs with the Commission. Section 203(b)(2), however, gave the Commission authority to "modify" any requirement of § 203. Employing that authority, the Commission abolished the filing requirement for all carriers except AT&T, then the "dominant" long-distance carrier. Relying on an array of dictionary definitions of the term "modify," Justice Scalia's majority opinion ruled that the FCC's power to "modify" carriers' filing obligations did not extend to "fundamental changes." But in so ruling, Justice Scalia buttressed his opinion with the following language: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[169] After quoting this language in her *Brown & Williamson* opinion, Justice O'Connor continued: "As in *MCI*, we are confident that Congress could not

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164. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."). *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), is a mirror image of *Brown & Williamson* on the substantive issue of regulatory authority. In *Massachusetts v. EPA*, however, the majority was able to determine that the EPA possessed authority to regulate carbon dioxide from the "unambiguous" statutory text.

165. *See* 512 U.S. 218, 231 (1994) (noting that it would be "highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion").

166. *Brown & Williamson*, 529 U.S. at 159.

167. *Id.*

168. *See* 47 U.S.C. § 203(a)-(b) (2000) (requiring that telecommunications companies file certain charge schedules).

169. *MCI*, 512 U.S. at 231.

have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[170] The Justice concluded "based on the FDCA's overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products."[171] Justice O'Connor decided the case under *Chevron*'s step one. Thus in both *Brown & Williamson* and *MCI*, the Court took the extensive regulatory change that would have resulted from the agency's interpretation of a succinct statutory term as effectively raising a presumption against that interpretation.

The Court has not adopted a clear-statement canon for interpreting boundary terms, but it is moving in that direction. When an agency adopts an interpretation of a statutory term that would substantially expand that agency's authority, then the agency bears the burden of persuading the court that its interpretation is the correct one. Justice Kennedy's majority opinion in *Gonzales v. Oregon*[172] shows a concern with the extensive scope of the power asserted by the Attorney General in a regulation construing the Controlled Substances Act.[173] While the broad power asserted surely influenced the decision, that decision was supported by a traditional analysis relying upon statutory design.

Babbit v. Sweet Home Chapter of Communities[174] can also be read as providing support for Breyer's position. Justice Souter's extensive discussion of the statutory term "harm" in that case involved a judicial interpretation of a limiting statutory term, but one that concluded that the agency had not crossed the limits of its authority. As with *Brown & Williamson* and *MCI*, *Sweet Home* also illustrates an exercise of judicial responsibility over statutory limits. *Sweet Home* contained an extensive judicial investigation into the meaning of the term "harm," concluding that the agency's assertion of its authority fell within the authority delegated to it. Under the *Chevron* rubric, courts inquiring into the extent of agency authority must equate that authority with statutory ambiguity. That was exactly what the Court did in *Sweet Home*. Because the Court both took responsibility for interpreting the limits of the authority-conferring term (in the sense of determining that those limits had not been crossed) and upheld the agency's interpretation, *Sweet Home* was an analogue to the *Packard*

170. *Brown & Williamson*, 529 U.S. at 160.
171. *Id.* at 160-61.
172. 546 U.S. 243 (2006).
173. *Id.* at 257.
174. 515 U.S. 687 (1995).

case in which the Court ruled that the term "employee" was broad enough to permit the NLRB to extend the protections of the National Labor Relations Act to foremen.[175]

Breyer's critics have not adequately pointed out the correspondences between the *Chevron* steps one-and-two analyses and the determinations made in the *Hearst/Packard* line of cases about the scope of agency authority. In *Chevron* step one, the court determines whether the statutory term is ambiguous. In the *Hearst/Packard* line of cases, the court determines the boundaries within which the statutory term confines agency authority. Those boundaries are limited by the extent to which the statutory term is ambiguous. The same is true in the *Chevron* line of cases, as the discussion of the *Sweet Home* case shows. Moreover, the critics, and even the cases themselves, tend to focus their discussion of the *Chevron* doctrine on the presence or absence of a statutory ambiguity, rather than the equally important question of the extent of an identified ambiguity. However, the whole rationale of *Chevron* requires that the agency interpretation fall within the scope of the ambiguity, for it is the ambiguity that (in the *Chevron* rubric) constitutes the delegation of interpretive authority to the agency. Moreover, *Chevron* requires in step two that the agency interpretation be a reasonable one. In context, this means that the agency's interpretation be one that the statute allows: that is, the agency interpretation must be consistent with what the court can unambiguously determine about the statute's meaning and (for the reasons stated above) is confined to the resolution of the ambiguity in question.

Once we acknowledge in both the *Hearst/Packard* line of cases and the *Chevron* line of cases that judges confront ambiguities that may well exist in a range, we are likely to be more sensitive to the fact that the boundaries of these ambiguities may themselves be imprecise. Accordingly, at the margins, judges—who decide that congressional intent is "clear"—are sometimes making judgments that are less certain than they are matters of probability. Indeed, their very words often reveal that their judgments are matters of probability. Consider, for example, Justice Scalia's passage in

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175. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947). *Packard* is often cited for the proposition that the courts will independently resolve issues of law. True enough, but the issue in *Packard* was not whether the statutory term "employee" embraced foremen, but rather, whether its action fell within the scope of that ambiguity when the agency extended that term's application to foremen. In *Sweet Home*, as in *Packard*, the Court assessed the statutory boundaries and determined that the agency had not exceeded them. In both lines of cases, there is a step one: the court must determine whether the statutory term is, or is not, ambiguous. And in both lines of cases, when the court determines that the term is ambiguous, the court must determine whether the agency's interpretation falls within the scope of that ambiguity. *See, e.g.*, *Gonzales*, 546 U.S. at 284 (Scalia, J., dissenting) (referring to the invalidity of agency interpretations when "beyond the scope of ambiguity in the statute").

MCI, quoted above, in which he says that it "is highly unlikely" that Congress meant to confer power upon the FCC to abolish rate-filing. In emphasizing the assistance that the major or routine character of the interpretive issue can provide the courts, Breyer seems to be suggesting that these factors can weigh the probabilities with which judges make these *Chevron* step one determinations.

Finally, the critics overemphasize the difficulties in separating out the larger or "major" issues from the routine or interstitial ones. At the margins, the distinction is, of course, imprecise. However, many distinctions that are imprecise at the margins are workable ones. Some cases will fall fairly clearly into the category of the routine or interstitial while other cases will fall fairly clearly into the category of major issues. The middle area—where it is not clear whether the issue is a major or minor one—may be precisely where judicial judgment is needed. *Chevron* itself involved an issue that was an important one and certainly not routine. Whether the EPA interpretation was authorized by the statute depended upon how the statute's twin goals of cleaner air and economic growth were reconciled. The Court deferred to the EPA because it determined that the statute was ambiguous. Under Breyer's approach, the decision to defer to the agency might have been justified on the ground that allowance or disallowance of the bubble concept was more tied to issues of administration than to the overall statutory design. Yet the issue is a close one and could easily have been determined the other way. Perhaps this merely says that when competing decisional factors are in balance, a decision either way is an acceptable one.

One merit of Breyer's approach is that—unlike past approaches to *Chevron*—it is consistent with the recognition of degrees of clarity and ambiguity. A second merit of Breyer's approach is that it allows room for courts to exercise judgment. A third merit of his approach is that it is consistent with judicial economy: courts can continue to defer to agencies in routine cases.

Clarity and ambiguity can be matters of degree and an assessment that statutory terms are "clear" may involve probabilistic judgments.[176] As a result, *Chevron* step one is prone to inconsistent treatment. Justice Breyer's approach is one that recognizes that clarity and ambiguity are matters of degree. In looking to the importance of the issue and its centrality to the statutory scheme or conversely to its ties to routine administration, Breyer is employing factors that point in a given direction. These factors combine with others, such as the length of time that the agency has adhered to its interpretation, the consideration it has given to

176. *See supra* note 73 and accompanying text.

the issue, and the agency's expertise, as pointers. Most of the time these factors will reinforce the indications of the major/minor issue dichotomy, but not always. Breyer's process is one of weighing and judging: exactly the kind of process needed in an environment of multiple indicators. When the term at issue affects our basic understanding of the statute, we may prefer a judicial resolution, even as we admit that the term is not without ambiguity. Taking this approach might even foster more consistency among the courts, because judges would no longer be obliged to pretend that ambiguity did not come in shades. They could forthrightly explain how they assessed the factors indicative of an ambiguity and why they chose to resolve the ambiguity themselves or to refer it to the agency for resolution. The list of factors that Breyer has identified would probably be helpful to them, channeling their analysis along the lines of other judges confronting similar problems. *Barnhart* opens the way for judges to be honest in dealing with statutory ambiguities.

Second, Breyer's approach would allow courts openly to exercise judgment. Of course, courts always exercise judgment, but past approaches to *Chevron* tended to deny this obvious truth. Judges were supposed to determine whether congressional intent was "clear." If the intent was ambiguous, then the judges were required to refer the interpretive issue to the agency. Breyer's approach would allow courts to make judgments about the propriety of referring such an issue to an agency, considering the centrality of that issue to the statute, its importance, its relation to the issues of administration, the need for expertise, and like factors.

Third, Breyer's approach exploits the respective institutional competences of courts and agencies. His approach is keyed to according deference in the routine and less important issues that are the substance of agency workload and where the agency is likely to identify the relevant factors through its experience in administering its statutory program. By contrast, Breyer would find less of an obligation to defer where the issues are larger, less technical, and less routine. Optimal resolution of the latter kind of interpretive issue may require the broad perspectives of the judiciary. In the absence of direct evidence of congressional intent, allocating the interpretive task to the institution best equipped to handle it appears superior to a practice of allocating that task invariably to the administering agency.[177]

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177. Both the traditional approach to *Chevron* and Breyer's revisionist approach are broadly consistent with minimizing the impact of interest groups upon the law and its administration. Interest groups exert their maximum force in two circumstances: (1) when they are able to influence a sufficient number of legislators to block proposed legislation; and (2) when they are able to secure modifications of legislation by trading their support for the desired modifications. The setting for these circumstances is in the legislative process. Under the original version of the *Chevron* doctrine, courts would enforce the legislative

Finally, as observed above, the *Barnhart* opinion cannot be evaluated in isolation. We have already noted how it can be understood in relation to *Mead*. Now it remains to be seen how Justice Breyer's *Barnhart* opinion relates to other recent decisions of the Court. We continue with an examination of *Alaska Department of Environmental Conservation* and *Brand X*.

D. Understanding Chevron*,* Mead*, and* Barnhart *in their Historical Contexts*

1. The Role of Elastic (or Ambiguous) Statutory Terms

When the Court recognized an extensive scope for an agency's interpretive authority coincident with open-textured or elastic statutory terms in its *Chevron* decision, it did so at a time when rulemaking had become the primary mode of regulation. This was not surprising, since Congress has employed open-textured and elastic statutory terms as a means for conferring broad authority on regulatory agencies commensurate with the scope of the tasks assigned to them throughout the history of modern regulation. The Court did so during the middle years of the last century when adjudication was the primary means to carry out regulation, and it continued to do so when rulemaking became the primary means to carry out regulation.

2. The Contribution of Mead *to a Proper Understanding of* Chevron

Under the mid-century deference cases, courts were required to defer to agency determinations about how to apply ambiguous or elastic statutory terms in adjudications. That deference was concomitant with the agency's delegated responsibility to administer. Thus, deference was coincident with the agency's exercise of its administrative role.

The *Chevron* formulation of judicial deference initially was phrased in terms of the presence or absence of textual ambiguity. In *Chevron* itself, such a textual approach was adequate to uphold the EPA's interpretation because the relevant statutory term was ambiguous, and the EPA's interpretation emerged in its attempt to foster the installation of plants and

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deals that result from interest-group bargaining only to the extent that they are unambiguous, leaving all ambiguities to be resolved by the Executive Branch (broadly defined to include the independent agencies). The Executive appears to be somewhat less vulnerable to interest-group influences than members of Congress. Nonetheless, agencies, and especially independent agencies, may be vulnerable to interest-group influence exercised through members of Congress on oversight and appropriations committees. By contrast, the Breyer revision allows courts a greater role in resolving ambiguities in the original deal. Since courts can examine statutes objectively, their interpretations will not be skewed by interest group concerns.

equipment incorporating cleaner technologies, an attempt that lay close to the center of its regulatory responsibilities. *Mead*, however, was an important step on the path towards the articulation of the proper sphere for mandatory judicial deference. Indeed, if, as suggested above, the *Chevron* doctrine is a modern analogue to the *Hearst/Packard* doctrine, requiring courts to defer to agency interpretations exercising authority that Congress has conferred upon them, then *Mead*'s analytical steps follow. First is the question of whether Congress has conferred interpretive power on the agency. We can answer this in the affirmative when we find that Congress has conferred adjudicative or rulemaking power on the agency. (Observe that this issue was always implicit in the *Hearst/Packard* cases: Congress had necessarily conferred adjudicatory power on the agencies whose adjudicatory decisions were under review.) The second question is whether the agency exercised that power in issuing the interpretation under review. Again, an affirmative answer follows when the agency has issued its interpretation in an adjudication or in a rulemaking proceeding. Those are the most formal ways available to an agency to exercise its delegated interpretive power. They bring the full decision-making competence of the agency to bear on the interpretive issue. In addition, they incorporate critical input from outside the agency. In Justice Souter's phrase, these procedures tend "to foster the fairness and deliberation" on which agencies' exercise of their interpretive authority should be based.

3. Step Zero and the Viewpoints of the Justices

Justice Scalia's view that judicial deference should be accorded to all "authoritative" interpretations of an agency is not so far from a position that would require mandatory deference to agency interpretations that were part of decision-making by the highest echelons of the agency in the process of administering the regulatory scheme committed to its charge. As we know, Scalia would extend the obligation to defer to agency interpretations emanating from agency actions that are less structured than adjudication or notice-and-comment rulemaking. But even Scalia would require involvement by the agency head before he would be willing to view an interpretation as authoritative. We have observed above that Justice Souter's emphasis on rulemaking and adjudication as bases for agency interpretations meriting mandatory deference echoes the approaches employed in the mid-century deference cases. In both lines, deference is accorded to agency interpretations that issue from highly-structured agency procedures forming the core of its administrative tasks. Breyer takes a somewhat more flexible position, viewing adjudication and rulemaking as important indicators of mandatory deference, although he—like Justice Souter—seems willing to find deference required in other circumstances as

well when it appears that the agency is employing the interpretive power Congress conferred upon it. In summary, Souter and Breyer share with Scalia an understanding that "authoritative" interpretations merit judicial deference; they differ over the circumstances in which they are willing to find an authoritative interpretation. Justice Souter's reference to adjudication and rulemaking as indicators of mandatory deference resonates with the message of the mid-century deference cases that courts should defer when a regulatory agency is engaged in the core act of regulating.

4. The Force of Law Criterion

In the discussion above, it was said that agencies engaged in rulemaking or adjudication are engaged in core acts of regulating. It was also said that modern agencies engaged in rulemaking are acting analogously to the way traditional regulation was effectuated through adjudicating. This is the "force of law" criterion as the Court has employed it. Force of law is not an Austinian concept, as Thomas Merrill believes. Rather, as applied to agency interpretations, it is equatable with those interpretations that the agency makes in the process of performing its core regulatory tasks. Understood in this way, agency interpretations that merit mandatory deference under *Chevron* are analogous to the agency interpretations that traditionally merit judicial deference under the mid-century deference cases, such as *Hearst* and *Gray*.

5. Barnhart

The passage in *Barnhart* in which Justice Breyer suggested that the interstitial nature of the legal question, the agency's expertise, the importance of the question to administration, and the long consideration the agency has given to the issue were factors indicating that judicial deference under *Chevron* was appropriate and can be understood as suggesting that the scope of *Chevron* and that of *Skidmore* overlap to some extent. Most administrative law scholars recognize that the indicators of *Chevron* deference often point in the same direction as do the indicators of *Skidmore* deference.

Again, Justice Breyer's language in *Barnhart*—especially his reference to the "interstitial nature" of the legal question—can also be understood as suggesting that the factors that he mentioned are relevant in analogizing the respective interpretive roles of courts and agencies in modern contexts to their roles as elaborated in the mid-century deference cases. When these factors are indicative of an agency grappling with an interpretive issue lying at the core of its regulatory task, final interpretive authority lies in the agency. This is what the mid-century deference cases were about. Yet

those mid-century deference cases also firmly confirmed the responsibility of the courts to enforce the ultimate boundaries of agency authority and thus, to construe the statutory terms that marked the outer limits of that authority. The focus, as observed in the discussion above,[178] is not on "jurisdiction," at least in the ordinary sense of the term, because jurisdictional issues can vary widely in their importance and in the degree to which they are bound up or entwined with everyday administration. Breyer is suggesting (in the passage under discussion) not only that *Chevron* deference is analogous to the judicial deference demanded by *Hearst*, *Gray*, and similar cases, but also that courts are the ultimate interpreters of the boundaries of agency authority. Cass Sunstein has called this passage in *Barnhart* an "extraordinary triumph" for Justice Breyer,[179] but this reading of the events misses the analogies between *Chevron* and the earlier deference cases. Once those analogies are understood, then both *Barnhart* and *Mead* are seen to reflect deference standards that have always been latent in the cases.

E. Alaska Department of Environmental Conservation *and* Brand X *as the Completion of the Late Twentieth/Early Twenty-First Century Model*

In its 2004 decision in *Alaska Department of Environmental Conservation v. EPA*,[180] the Court provided another critical component for its new deference model. In that case, a zinc mining company was seeking necessary regulatory approval for increased electric generation in conjunction with the expansion of its mine.[181] The mine was located in an area designated as "unclassifiable" for purposes of the Clean Air Act's "prevention of significant deterioration" program.[182] Because the generators were expected to emit significant amounts of nitrogen oxides, the mining company was required to seek a permit from the Alaska department of Environmental Conservation.[183] For pollutant-emitting facilities constructed in unclassifiable areas, the Act imposes a requirement that the company install "best available control technology" (BACT) on those facilities as a precondition for a permit. The Alaska department issued the desired permit but authorized the company to proceed with control technology that reduced emissions by 30% instead of alternative technology that would reduce those emissions by 90%.[184] The EPA then

178. *See supra* notes 151-55 and accompanying text.
179. Sunstein, Chevron *Step Zero*, *supra* note 74, at 217.
180. 540 U.S. 461 (2004).
181. *Id.* at 474-75.
182. *Id.* at 471, 474-75.
183. *Id.* at 472.
184. *Id.* at 475.

determined that the Alaska department's decision was "both arbitrary and erroneous" and issued a series of orders that barred construction of the facility unless the Alaska department made a satisfactory case that it had correctly determined the BACT requirements.[185]

In the litigation that followed, both the mining company and the Alaska department contended that the EPA lacked authority under the Clean Air Act to review the reasonableness of the state agency's determination of BACT compliance under the Act. The EPA construed the Act's provisions as requiring that the state agency make its BACT determinations in a manner "faithful to the statute's definition" (and thus, in effect, to require use of the more effective technology) and that the Act's oversight provisions conferred on it the authority to "ensure that a State's BACT determination is reasonably moored to the Act's provisions."[186] The EPA prevailed on these points in both the Ninth Circuit and in the Supreme Court.

Justice Ginsburg's majority opinion held that because the EPA's interpretation was contained in internal guidance memoranda, it was not entitled to *Chevron* deference. Nonetheless, her opinion upheld the EPA's position, and much (but not necessarily all) of her language suggested that the court was allowing the EPA interpretation to prevail without incorporating the EPA interpretation into a judicial construction of the statute, as would have been expected under the traditional *Skidmore* format. The EPA interpretation was "permissible" without necessarily being a required interpretation. Thus, she wrote: "We hold . . . that the Agency has rationally construed the Act's text and that EPA's construction warrants our respect and approbation."[187] In rejecting the Alaska department's contention that the Act failed to confer reviewing authority on the EPA, Justice Ginsburg stated that: "[The Alaska Department of Environmental Conservation's] arguments do not persuade us to reject as impermissible EPA's longstanding, consistently maintained interpretation."[188] Later, Justice Ginsburg made this point again. Referring to the EPA's interpretation, she wrote: "That rational interpretation, we agree, is surely permissible."[189]

Thus, Justice Ginsburg's majority opinion treats the agency interpretation as not qualified for *Chevron* deference, but nonetheless accepts it. Although she is apparently accepting the agency interpretation under *Skidmore*, Justice Ginsburg is not following the *Skidmore* rubric as

185. *Id.* at 480.
186. *Id.* at 485.
187. *Id.*
188. *Id.* at 488.
189. *Id.* at 493.

commonly understood. Under *Skidmore*, the court accepts the agency interpretation if it finds it persuasive. If the court finds the opinion persuasive and follows it, then the interpretation is the court's and not the agency's. Here, however, the Court repeatedly refers to the agency's interpretation as permissible and/or rational. As Justice Kennedy points out in dissent, although the majority opinion rules that *Chevron* is inapplicable, it nonetheless employs "*Chevron*'s vocabulary." Kennedy then complains that: "In applying *Chevron de facto* under these circumstances . . . the majority undermines the well-established distinction our precedents draw between *Chevron* and less deferential forms of judicial review."[190]

Justice Ginsburg's majority opinion, however, may have been doing something slightly different from what Justice Kennedy was claiming. By explicitly disavowing *Chevron*'s application, she had placed the deference issue within the scope of *Skidmore*. However, by accepting an agency interpretation that she considered to be "permissible" rather than correct, she was suggesting the possibility of adding an element of flexibility to *Skidmore*. In so doing, she was coming close to meeting Justice Scalia's concern, expressed in his *Mead* dissent, that a judicial interpretation of a term before the agency has interpreted it in a manner entitled to *Chevron* deference would bar that agency from ever reaching its own inconsistent interpretation. Were she to have upheld the EPA's interpretation simply as permissible, Justice Ginsburg would have avoided a definitive interpretation of the provisions of the Clean Air Act at issue, thereby leaving the EPA free to formulate its own interpretation at a subsequent time in rulemaking proceedings that would qualify for *Chevron* deference.

Although Justice Ginsburg's opinion contains all of the above elements, it is more complex. Her opinion also employed language indicating that the Court itself was construing the relevant provisions of the Clear Air Act: "We credit EPA's longstanding construction of the Act and confirm EPA's authority . . . to rule on the reasonableness of BACT decisions by state permitting authorities."[191] Continuing, "we conclude that EPA has supervisory authority over the reasonableness of state permitting authorities' BACT determinations . . . ."[192] Thus Justice Ginsburg uses *Chevron*-like language referring to the agency's interpretation as permissible, while also employing the very different language of independent judicial interpretation. Why was she combining language from these apparently alternative approaches? Perhaps she is signaling that independent judicial interpretation blends into *Skidmore* deference and the latter into *Chevron* deference. Justice Breyer's opinion in *Barnhart*

190. *Id.* at 517-18 (Kennedy, J., dissenting).
191. *Id.* at 495 (majority opinion).
192. *Id.* at 502.

suggests a significant overlap between and among completely independent judicial interpretation, *Skidmore* deference, and *Chevron* deference. Justice Ginsburg may have intended to lend additional support to that position.

Two years before the decision in *Alaska Department*, the Court decided *Edelman v. Lynchburg College*,[193] a case involving an interpretation of the EEOC embodied in a regulation. As in *Alaska Department*, the Court ruled that the agency's interpretation was both reasonable and one that the Court "would adopt even if there were no formal rule and we were interpreting the statute from scratch."[194] Thus, according to the Court, "there is no occasion to defer and no point in asking what kind of deference, or how much."[195]

Perhaps *Alaska Department* falls into the decisional framework of *Edelman*. In both cases, the agency interpretation was "reasonable" or "permissible." In both cases, the Court interpreted the disputed statutory provisions, arriving at an interpretation that was the same as the agency's. The Court told us that *Chevron* deference was not involved in the *Alaska Department* case, although it used *Chevron*-like language. In *Edelman*, although the Court arrived at the same interpretation as the agency, it also denied that it was ruling that the agency's interpretation was the only one permissible. *Edelman* thus implies that the agency might well change its interpretation, even though the Court had already adopted its own interpretation, and that stare decisis might not bar a later inconsistent agency interpretation. Justice Ginsburg's opinion in *Alaska Department* suggests a similar result: the agency interpretation is permissible, the Court is adopting the same interpretation, but the Court's reference to the "permissibility" of the agency interpretation could be taken as implying that the agency may well be within its rights to change that interpretation in the future.

These two cases presage the developments in *Brand X* in 2005.[196] A narrow reading of *Edelman* merely suggests that because the Court arrived at the same interpretation as the agency, there was no need to resolve deference issues. A broader reading of *Edelman* suggests that a later agency interpretation can undo a judicial interpretation of a statutory term.

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193. 535 U.S. 106 (2002).

194. *Id.* at 114. *But see* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (deciding there was no need to consider issues of deference because the agency interpretation was clearly wrong). *General Dynamics*, however, differs from *Edelman* because when a court adopts an interpretation identical to the agency's, it need not decide whether the agency possesses final interpretive authority on that issue, whereas when a court rejects an agency's interpretation, the court is ruling that the agency lacked power to adopt such an interpretation.

195. *Edelman*, 535 U.S. at 114. The Court also stated that "We, of course, do not mean to say that the EEOC's position is the 'only one permissible.'" 535 U.S. at 114 n.8.

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

A broad reading of *Alaska Department* applies the latter model to the *Skidmore* context: judicial and agency interpretations can coincide, but a subsequent agency interpretation can supersede the current one. In that event, the court may well enforce a permissible agency interpretation that differs from the court's own.

Justice Ginsburg, however, appears to have been doing something more than merely preserving the agency's ability to invoke the *Chevron* doctrine in support of subsequent rulemaking. She was crafting a model in which judicial deference to an agency interpretation would not deprive the agency of the flexibility to reexamine its position, regardless of whether the deference occurred in a *Skidmore* or a *Chevron* context. Indeed, from this perspective, *Alaska Department* can be considered a precursor of—and a conceptual companion to—*Brand X*, since the concerns that appear to have underlain Justice Ginsburg's *Alaska Department* opinion were then addressed directly in Justice Thomas' *Brand X* opinion the following year, but in a *Chevron* (not *Skidmore*) context.

In *Brand X*,[197] the Court was confronted with a situation in which the Federal Communications Commission (FCC) had construed the term "telecommunications service" in the Telecommunications Act of 1996 as not including the provision of broadband internet service by cable companies. This interpretation freed the cable companies from the mandatory common-carrier regulation that the Act imposes upon all providers of telecommunications service. The FCC adopted its interpretation in a Declaratory Ruling, issued in March 2002, after notice-and-comment proceedings. The Ninth Circuit, however, vacated the Declaratory Ruling on the ground that the FCC's interpretation was inconsistent with that court's own earlier construction of "telecommunications service" in *AT&T Corp. v. Portland*,[198] a case in which the FCC was not a party.

In the majority opinion, written by Justice Thomas, the Court ruled that Congress entrusted the FCC with the administration of the legislation and that the statutory term in issue was ambiguous. *Chevron* therefore required the courts to accept the FCC's interpretation, so long as it lay within the bounds of reasonableness. On the critical issue involving the appellate court's own prior interpretation of the same term, the Court ruled that the FCC's interpretation prevailed, even if it was issued after the court had issued its own inconsistent prior interpretation.

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197. *Id.*
198. 216 F.3d 871 (9th Cir. 2000).

As Justice Thomas wrote, the Ninth Circuit's prior interpretation resolved a statutory ambiguity to the best of that court's ability. It may have been the "best" interpretation of the term, but it was not the only reasonable interpretation. So long as alternative interpretations were possible, the choice of how to interpret the statutory term would lie with the FCC. The court's interpretation was not "wrong." Rather, the agency—as the authoritative interpreter—was free to adopt a different interpretation.[199]

Brand X thus explicitly eliminates the hazard that troubled Justice Scalia in his *Mead* dissent. The fortuities of when an interpretive issue reaches a court will have no effect on the extent to which an agency is free to formulate its own interpretation. It recognizes the historic role that administering agencies have played in the development of policy. *Chevron* recognized that role, requiring courts to defer to agency interpretations, including those that were widely applicable, just as *Gray, Hearst*, and *Aragon* required courts to defer to agency applications of statutory terms to particularized sets of facts at mid-century. The agency's role as the authoritative interpreter—both before and after interpretive issues come before a court—thus brings the current paradigm of agency/court interaction closer to completion.

Justice Thomas explained away the cases that troubled Justice Scalia in his *Mead* dissent—*Neal*, *Maslin Industries*, and *Lechmere*—in terms of *Chevron* step one.[200] A court's determination of whether the statutory term is ambiguous always prevails. If the court determines that the statute is unambiguous, then there is no room for a different agency interpretation. But if a court determines that the statute is ambiguous, then—within the limits of the ambiguity—the agency is the authoritative interpreter. *Neal*, *Maslin Industries*, and *Lechmere* required that the agency abide by the court's prior interpretation, because in those cases the court had determined that the statute was unambiguous. They disposed of the interpretive issue in step one. By contrast, the judicial interpretation involved in the *Brand X* case was taken as not having decided that only one interpretation was reasonable. There was, accordingly, room for an agency determination within the bounds of reasonableness provided by the statute.

The technique adopted by the Court in *Brand X* could appropriately be described as an endorsement of a theory of provisional precedent, as applied to judicial interpretations of terms contained in an agency's organic

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199. *Brand X*, 545 U.S. at 979-80.
200. *See id.* at 984; *see also supra* note 98.

statute. Justice Scalia condemned that theory in his *Mead* dissent.[201] Professor Bamberger proposed such an approach in 2002, the year after the *Mead* decision, drawing an analogy to the provisional nature of federal court precedents construing state law.[202] Relying upon the analytical framework underlying the arbitrary and capricious review standard, Professor Richard Murphy made a slightly different proposal designed to allow reviewing courts to uphold agency interpretations at variance with judicial precedent.[203] These proposals reflected a widespread concern over the troublesome relation between *Chevron*'s call for agency flexibility and the doctrine of stare decisis, a relation that—as Justice Scalia pointed out—*Mead* appeared to worsen. In the end, however, the Court effectively adopted Bamberger's proposal, albeit without referring to him.

Brand X casts light not only on the agency flexibility issue highlighted by Justice Scalia's dissent in *Mead*, but also on the approach that Justice Breyer explicated in his *Barnhart* opinion. When Breyer brought the mid-century deference cases into the *Chevron* framework, he was not only offering a new framework for assessing the extent of the judicial obligation to defer, but also addressing Scalia's concern about preserving agency flexibility. When the Court insisted in its mid-century deference cases (*Hearst*, *Gray*, *Aragon*) that deference was due to the administering agency's applications of broad statutory terms, it was also implicitly recognizing agency flexibility. In those earlier deference cases, the judicial obligation to defer was cast in the language of "fact": courts were to defer to agency determinations of (ultimate) fact. Moreover, because facts varied with each case, the scope provided for agency flexibility over how to apply the statute was wide indeed. Nothing in these cases barred an agency from revising or modifying its interpretation, either from case to case, or from year to year.

The agency flexibility that Justice Thomas' *Brand X* opinion provides under *Chevron* confirms and reinforces the agency flexibility that *Alaska Department* had brought into the *Skidmore* context. Each of these decisions seems to recognize an area in which agency interpretations play important roles. *Brand X* concedes to agencies' scope revision of their interpretations within the area allocated to them under *Chevron*. *Alaska Department* anticipated *Brand X*'s route to preserving agency flexibility, when Justice Ginsburg employed the agency interpretation in her decision without incorporating it into a judicial precedent. Perhaps more important,

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201. United States v. Mead Corp., 533 U.S. 218, 247-50 (2001) (Scalia, J., dissenting) (arguing that such an approach would "be a landmark abdication of judicial power" and "worlds apart from *Chevron*").

202. Bamberger, *supra* note 99.

203. Murphy, *supra* note 99.

Alaska Department provides a new format for courts to follow in applying *Skidmore*: courts need not adopt an agency interpretation to apply it. By finding the agency interpretation worthy of "respect," they can employ that interpretation without necessarily embracing it themselves. *Brand X* adds the gloss that even if the court explicitly adopts the agency interpretation, that judicial decision will not bind the agency thereafter unless the court decides that its interpretation is the only possible one.

Let's now review how the several recent *Chevron* cases relate to each other and to the *Chevron* doctrine as a whole. *Mead* tells us that there are indeed limits to the judicial obligation to defer. In *Mead*, the Court ruled that the thousands of customs classifications rulings did not command mandatory deference. This result seems fore-ordained. Because of their volume, no customs classification ruling can be assumed to embody the considered policy of the Bureau of Customs. There are too many rulings to involve the Commissioner or his close assistants in each ruling. And the speed with which the rulings are issued appears inconsistent with high-level consideration of their content. Accordingly, the Court appears to have taken the right approach when it denied mandatory deference, but suggested that it would be appropriate for a court to follow a ruling if it found its rationale persuasive. When *Mead* indicated that the mandatory deference of *Chevron* would apply to agency interpretations announced in adjudications or rulemaking proceedings, it may be suggesting that interpretations arising in those contexts would receive substantial consideration. Indeed, in both contexts, the interpretive issue would be addressed by interested parties outside the agency, who would then press the agency to consider the ramifications of its decision.

Barnhart added the gloss to *Mead* that interpretive issues entwined with administration were prima facie more entitled to deference than issues involving the principal parameters of the statute. For reasons already discussed, this gloss helps to complete *Mead*'s directions in cases involving agency interpretations issued outside the context of rulemaking or adjudication. *Barnhart*'s gloss can also be extended beyond this narrow application, as a further limitation on *Chevron*'s mandatory deference. Understood in this latter way, major issues of statutory interpretation would remain a judicial responsibility, even if the agency had formulated its own interpretation in rulemaking or in an adjudication. This broad application of *Barnhart* seems consistent with an allocation of decision-making based upon institutional competence as well as upon what most members of Congress would likely intend, were the issue called to their attention.

Under the approach just described, the persuasive deference of *Skidmore* and the mandatory deference of *Chevron* blur together. The rulings of *Mead* did not warrant mandatory deference because it was not clear that

they embodied careful consideration at the highest agency levels. Each ruling, however, would be a candidate for persuasive deference, based upon its own intrinsic merits. Adjudication and rulemaking raise presumptions of careful consideration at the highest agency levels. On interpretations affecting the major contours of a regulatory program, the courts, whose broad perspectives provide them with superior institutional competence, should bear the ultimate interpretational responsibility. In performing this task, however, they should assess agency interpretations for their persuasiveness.

The blurring of *Skidmore* and *Chevron* would have generated serious administrative problems during the era when agency interpretations could be revised under *Chevron*, but could be frozen when a court, deferring under *Skidmore*, adopted the agency interpretation as its own. *Alaska Department of Environmental Conservation*, however, has shown that a court can defer under *Skidmore* without adopting the agency's interpretation as its own. Moreover, *Brand X* has shown that even when a court does interpret a statute, it need not foreclose the agency from subsequently adopting a different one. These two cases have removed the primary obstacle to a blurring of *Skidmore* and *Chevron* into a larger deference format, in which each of these decisions, rather than competing for application, now reinforce one another.

CONCLUSION

A new model for judicial review of agency interpretations seems to be emerging. That model is one in which the mandatory obligation to defer, set forth in *Chevron*, is limited. Analogous to the cases that have required judicial deference to agency applications of broad statutory terms, the deference obligation is most clear when the agency interpretation is entwined with routine matters of administration. The obligation becomes less mandatory as the interpretation at issue plays a critical role in determining the outlines of the statutory scheme. The new model eschews bright line boundaries for the application of mandatory deference. Rather, the new model provides workable criteria for assessing the obligation to defer. The obligation (or lack of it) is clear enough at the ends of that spectrum, while in its middle ranges, contextual judgment is required to assess the presence of an obligation to defer.

The new model retains and extends the agency flexibility over policy that had been a hallmark of the *Chevron* doctrine. Although this new model restricts the scope of *Chevron*'s application, it allows greater freedom to agencies to formulate their own statutory interpretations and to revise them than did the earlier law. Even in the heyday of *Chevron*, it had been thought that a prior judicial interpretation foreclosed a later

inconsistent agency interpretation. Moreover, *Skidmore* had seemed to imply that when a court deferred to an agency interpretation that it found persuasive, that interpretation was no longer subject to agency revision. Now, agencies need not fear a loss of flexibility when a court is persuaded by the agency's interpretation. Indeed, *Alaska Department* suggests that a proper judicial stance in a *Skidmore* situation is not to adopt a persuasive agency interpretation but merely to accord it respect. Step one from *Chevron* appears to have been extended to *Skidmore* review. And issues of timing no longer pose a threat to agency flexibility. That a court formulates its own interpretation of a statutory term (that is ambiguous in the *Chevron* step one sense) does not detract from the agency's ability later to issue its own interpretation.

The complaint, voiced by some, that Justice Breyer is blending *Skidmore* and *Chevron*, is losing its force. Indeed, Justice Kennedy made a similar complaint about Justice Ginsburg. It would have been important to maintain the boundaries between *Skidmore* and *Chevron* when *Chevron* deference was mandatory; *Skidmore* deference depended on the persuasiveness of the agency's reasoning, and *Chevron* was the primary source for agency flexibility to revise its interpretation. *Alaska Department of Environmental Conservation* and *Brand X* have recast the law governing agencies' abilities to revise their interpretations. As a result, *Skidmore* and *Chevron* are emerging as component parts in a larger deference framework, one in which the respective roles of these precedents overlap, in which both *Skidmore* and *Chevron* partially reinforce each other, and in which ultimate interpretive authority is based upon institutional competence.