

Chevron's Inevitability

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ABSTRACT

For over thirty years, Chevron deference has been the target of criticism. Now, some judges and legislators are calling for an end to Chevron, and legal scholars are heralding the doctrine's retreat. Chevron may be evolving, as common law often does. But claims that Chevron is in decline are overblown, and efforts to overturn Chevron in any meaningful sense are misdirected. Chevron-style deference is inevitable in the modern administrative state. The real "problem"—to the extent one sees it as such—is not Chevron but rather unhappiness with the natural consequences of congressional reliance on agencies to resolve major policy issues.

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“Faithless is he that says farewell when the road darkens,”

“Maybe, . . . but let him not vow to walk in the dark, who has not seen the nightfall.”

—J.R.R. Tolkien¹

INTRODUCTION

Is the mighty *Chevron* deference on the wane? Maybe. Several legal scholars seem to think so.² But what does that mean, what would that look like, and what really would that accomplish?

The *Chevron* standard of judicial review—with its two-part test mandating judicial deference to reasonable agency interpretations of ambiguous statutes, derived from the Supreme Court’s 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*³—has dominated discussions of American administrative law for a generation and continues to do so.⁴ *Chevron* has been dissected, debated, and applied more than any other canonical administrative law case⁵: more than *State Farm*⁶

¹ J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* 274 (1954).

² See, e.g., Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937–38 (2017) (suggesting the *Chevron* standard has been “oust[ed]” by “a new trio of canons of statutory interpretation”); Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868 (2015) (describing *Chevron*’s “condition” as “if not terminal, at least serious”); Catherine M. Sharkey, *In the Wake of Chevron’s Retreat* 1–3 (June 2, 2016) (unpublished manuscript), https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2016/06/Sharkey_In-the-Wake-of-Chevron_5_20_16.pdf (exploring *Chevron*’s “retreat”) (cited with permission).

³ 467 U.S. 837, 842–43 (1984). Speaking loosely, the *Chevron* standard requires a reviewing court to consider whether the meaning of the statute at issue is clear, and if it is not, then to defer to the administering agency’s permissible or reasonable interpretation thereof. *Id.* For a substantially lengthier examination of the *Chevron* Court’s description of this two-step mode, see *infra* Section II.A.

⁴ 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 158 (5th ed. 2010) (describing *Chevron* as “one of the most important decisions in the history of administrative law”).

⁵ According to Westlaw, *Chevron* has been cited more than 81,000 times, including roughly 15,100 cases and 11,000 law review articles as of June 2017.

⁶ *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that agencies must contemporaneously justify their policy choices).

or *Vermont Yankee*;⁷ more than *Goldberg v. Kelly*⁸ or *Mathews v. Eldridge*;⁹ more even than all of *Overton Park*,¹⁰ *Abbott Labs*,¹¹ *Chenery I*,¹² and *Chenery II*¹³ taken together.¹⁴ Only *Lujan v. Defenders of Wildlife*¹⁵ even comes close.¹⁶

But, although scholarly analysis of *Chevron* continues apace¹⁷ and

According to Westlaw, *State Farm* has been cited more than 27,000 times, including roughly 5,400 cases and 2,400 law review articles as of June 2017.

⁷ *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978) (holding that courts may not impose procedural requirements beyond those required by statute, by agency rule, or by the Constitution). According to Westlaw, *Vermont Yankee* has been cited more than 12,000 times, including roughly 1,700 cases and 1,600 law review articles as of June 2017.

⁸ 397 U.S. 254 (1970) (holding that welfare benefits are a protected interest under the Due Process Clause and laying the foundation for modern due process analysis). According to Westlaw, *Goldberg v. Kelly* has been cited approximately 19,700 times, including roughly 4,800 cases and 3,300 law review articles as of June 2017.

⁹ 424 U.S. 319 (1976) (establishing the modern three-part standard for evaluating whether the Due Process Clause requires agencies to follow additional procedures before depriving parties of protected interests). According to Westlaw, *Mathews v. Eldridge* has been cited roughly 45,500 times, including approximately 13,000 cases and 4,800 law review articles as of June 2017.

¹⁰ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (holding that an agency must provide an administrative record in support of its actions to facilitate judicial review).

¹¹ *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (recognizing that the Administrative Procedure Act creates a presumption favoring reviewability of agency action and creating the contemporary two-part standard for evaluating whether agency action is ripe for judicial review).

¹² *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943) (holding that reviewing courts must evaluate agency actions based on contemporaneously established justifications rather than post hoc rationalizations).

¹³ *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947) (holding that where Congress authorizes an agency to act through both rulemaking and adjudication, the choice between those formats is a matter of agency discretion).

¹⁴ According to Westlaw, these four canonical administrative law cases collectively have been cited approximately 52,600 times, including roughly 16,100 cases and 4,200 law review articles as of June 2017.

¹⁵ 504 U.S. 555 (1992) (establishing the modern three-part test for constitutional standing).

¹⁶ Indeed, according to Westlaw, although *Defenders of Wildlife* has far fewer citations in law review articles (roughly 3,700), it has been cited slightly more often overall and in judicial opinions (roughly 65,200 and 17,600, respectively) as of June 2017.

¹⁷ For just a few of the scholarly articles written about *Chevron* in the past year, see, for example, John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657, 1660 (2016), discussing *Chevron* deference for U.S. Patent and Trademark Office interpretations; Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1188–89 (2016), contending that “the key constitutional questions” raised by *Chevron* “have

judicial reliance on *Chevron* remains more or less constant,¹⁸ *Chevron* is under attack and thus, arguably, on the decline. In *Perez v. Mortgage Bankers Ass'n*,¹⁹ Justice Scalia—long one of *Chevron*'s greatest proponents—acknowledged that *Chevron* “did not comport with” the Administrative Procedure Act (“APA”)²⁰ and that the Court was “[h]eedless of the original design of the APA” in developing its deference jurisprudence.²¹ Shortly thereafter, in *Michigan v. EPA*,²² Justice Thomas contended that “*Chevron* deference raises serious separation-of-powers questions” and urged the Court to “stop to consider [the Constitution] before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.”²³ Justice Neil Gorsuch, as a circuit court judge, advocated abandoning *Chevron*, characterizing it as “permit[ting] all too easy intrusions on the liberty of the people,”²⁴ though he grudgingly conceded that *Chevron* alone is not quite “the very definition of tyranny.”²⁵ The House of Representatives has passed two separate versions of the Separation of Powers Restoration Act (“SOPRA”),²⁶ which purports to overturn *Chevron* by amending the APA to require de novo review of agency interpretations of law.²⁷ Several prominent Senators have expressed

been neglected” and proceeding to discuss same; Matthew A. Melone, *King v. Burwell and the Chevron Doctrine: Did the Court Invite Judicial Activism?*, 64 U. KAN. L. REV. 663, 664–65 (2016), arguing that the Court’s approach to *Chevron* review in *King v. Burwell* “appears to provide the judicial branch with the opportunity to impose its own policy preferences with respect to issues best left to Congress”; and Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 150 (2016), asking “whether courts should apply *Chevron* deference to interpretations of substantive patent law advanced by the U.S. Patent and Trademark Office.”

¹⁸ For example, according to Westlaw, in 2015, *Chevron* was cited in 591 federal court opinions, including 8 issued by the Supreme Court. These statistics exceed those from most prior years. Although judicial citations of *Chevron* declined in 2016—with only 514 federal court opinions, including 4 issued by the Supreme Court citing *Chevron*—the decline is roughly in line with year-to-year fluctuations over the past decade.

¹⁹ 135 S. Ct. 1199 (2015).

²⁰ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

²¹ *Mortg. Bankers*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment).

²² 135 S. Ct. 2699 (2015).

²³ *Id.* at 2712, 2714 (Thomas, J., concurring).

²⁴ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

²⁵ *Id.* at 1155 (quoting THE FEDERALIST NO. 47 (James Madison)).

²⁶ Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016).

²⁷ *See id.* § 2. *See also* Vikram David Amar, *Chevron Deference and the Proposed “Separation of Powers Restoration Act of 2016”: A Sign of the Times*, JUSTIA: VERDICT (July 26, 2016), <https://verdict.justia.com/2016/07/26/chevron-deference-proposed->

support for SOPRA as well,²⁸ although regulatory reform legislation under consideration in the Senate does not include either version of SOPRA or otherwise repudiate or even curtail *Chevron*.²⁹

Digging a little deeper, one can identify several ways in which the Supreme Court has arguably weakened *Chevron* deference already in both scope and substance. Certainly, with its 2001 decision in *United States v. Mead Corp.*,³⁰ the Court restricted *Chevron*'s application to agency actions carrying the "force of law" pursuant to congressionally delegated authority, relegating other agency actions like opinion letters, enforcement guidelines, and most informal adjudications to the less deferential *Skidmore* review.³¹ Much more recently, in *King v. Burwell*,³² the Court demonstrated its inclination to avoid using *Chevron* in resolving so-called "major questions."³³ The Court arguably has exhibited a willingness to apply *Chevron*'s two steps more aggressively as well; for example, the Court gave *Chevron*'s second step greater heft by incorporating *State Farm*'s reasoned decisionmaking requirement.³⁴

separation-powers-restoration-act-2016-sign-times (discussing the legislation's goal of overturning *Chevron*). *But see* Kristin E. Hickman, *The Proposed Separation of Powers Restoration Act: Why?*, ADMIN. & REG. L. NEWS, Summer 2016, at 6, 6–7 (questioning whether the 2016 version of SOPRA would really accomplish that goal). The House passed an expanded version of SOPRA as part of the Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017). *See infra* Section III.D. (analyzing both versions of SOPRA).

²⁸ *See, e.g.*, Orrin Hatch & John Ratcliffe, *Sen. Hatch, Rep. Ratcliffe: It's Time to Restore Accountability to Our Runaway Bureaucracy*, FOX NEWS (June 7, 2016), <http://www.foxnews.com/opinion/2016/06/07/sen-hatch-rep-ratcliffe-its-time-to-restore-accountability-to-our-runaway-bureaucracy.html>; Press Release, Senator Mike Lee, Senate, House Leaders Introduce Bill to Restore Regulatory Accountability Through Judicial Review (Mar. 17, 2016), <http://www.lee.senate.gov/public/index.cfm/2016/3/senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review> (listing Senators Hatch (R-UT), Grassley (R-IA), Lee (R-UT), Lankford (R-OK), Flake (R-AZ), Inhofe (R-OK), Tillis (R-NC), Cruz (R-TX), Cornyn (R-TX), Sasse (R-NE), and Sullivan (R-AK) as introducing the bill in the Senate).

²⁹ Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

³⁰ 533 U.S. 218 (2001).

³¹ *See id.* at 229–34, 238 (announcing standard and denying *Chevron* review to Customs Service tariff ruling letter); *see also* Christensen v. Harris Cty., 529 U.S. 576, 586–88 (2000) (counseling *Skidmore* rather than *Chevron* review for agency "interpretations contained in policy statements, agency manuals, and enforcement guidelines").

³² 135 S. Ct. 2480 (2015).

³³ *See id.* at 2488–89; *see also* Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 62–64 (describing *King* as an effort to limit *Chevron*'s scope); *cf.* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000) (suggesting *Chevron* review should be unavailable in "extraordinary cases").

³⁴ *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (blending

Still, *Chevron* has always been controversial, even before its purported decline. Critics have offered all kinds of reasons why *Chevron* is flawed or misguided.³⁵ And, perhaps joining or at least influenced by *Chevron*'s critics, commentators have long predicted that *Chevron* deference would not last. *Chevron* coincided approximately with the rise of textualism, and at *Chevron*'s ten-year mark, Thomas Merrill linked the Supreme Court's increasing reliance on textualist reasoning to a "waning" of *Chevron*.³⁶ Shortly after *Chevron*'s twentieth birthday, Linda Jellum similarly described *Chevron*'s "relevance" as "waning," this time due largely to the Court's limiting of *Chevron*'s scope in *Mead*.³⁷ And now, again, having passed its thirtieth year, *Chevron* is supposedly on the wane again.

We take a different view. Leave aside, for the sake of argument, *stare decisis* and whether *Chevron* even meets traditional criteria the Supreme Court has applied when overturning precedents.³⁸ Although the Court's rhetoric regarding the *Chevron*'s scope and operation continues to evolve, we believe that reports of the doctrine's pending demise are overblown. Moreover, we suggest, those who actively seek to eliminate *Chevron*

Chevron and *State Farm* analysis); *Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015) (invoking *State Farm* in connection with *Chevron* review); *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011) (describing *Chevron* step two and *State Farm* analysis as "the same").

³⁵ For just a few of the many articles criticizing *Chevron*, see Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782–84 (2010), listing ten "overlapping sets of reasons" for why "*Chevron* should be overruled"; Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 587–88, describing *Chevron* as "the Supreme Court's conceptually flawed effort to control the inclinations of some lower court judges to impose their politically unaccountable, unreconstructed New Deal prejudices to push the bureaucracy toward an aggressive regulatory stance"; and Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 678–80 (2007), suggesting that *Chevron* is predicated on a misunderstanding of agencies' "operational, policy-implementing role."

³⁶ See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 363–73 (1994).

³⁷ See Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 772–81 (2007); see also Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 188 (2012) ("With two important changes to *Chevron*'s application—restricting the types of agency interpretations entitled to deference and curbing the implied-delegation rationale—the Court has begun to reclaim the interpretive power it ceded and the lawmaking power it shifted with the rise and fall of *Chevron*.").

³⁸ See, e.g., Jerold H. Israel, *Gideon v. Wainwright: The Art of Overruling*, 163 SUP. CT. REV. 211, 220–26 (1963) (identifying "changed conditions," "lessons of experience," and inconsistent "later precedent" as reasons generally offered by the Court).

deference are aiming at the wrong target.

For one thing, the common narrative of *Chevron*'s revolutionary rise and dominance of judicial review of administrative action is exaggerated. The sheer volume of cases in which courts must consider agency interpretations of statutes means courts inevitably apply *Chevron* a lot. But for all of the hype and attention, *Chevron* is, first and foremost, just a standard of review—one among several that courts apply in evaluating agency action.³⁹ Rhetoric notwithstanding, *Chevron* alone does not truly drive the outcome in most of the cases in which courts apply it.⁴⁰

Admittedly, because the Justices have never been able to agree on precisely how *Chevron* review works, the Supreme Court has done a poor job of applying *Chevron* consistently. Consequently, *Chevron* is susceptible to competing theories regarding how it does and should operate, all employed here and there by one court or another, often seemingly interchangeably, without the courts acknowledging or perhaps even recognizing the distinctions.⁴¹ This jurisprudential inconsistency has produced a ridiculous degree of doctrinal complexity that provides endless fodder for discussion (and discontent) about *Chevron*. Yet standards of judicial review are never precise instruments, and many other legal doctrines are highly malleable in their application without occasioning the vitriol presently being hurled at *Chevron*.

Finally, predictions of (or hopes for) *Chevron*'s pending demise fail to take into account that *Chevron* deference, or something much like it, is a necessary consequence of and corollary to Congress's longstanding habit of relying on agencies to exercise substantial policymaking discretion to resolve statutory details.⁴² As administrative law's best known doctrine, *Chevron* has become a convenient scapegoat or bogeyman for those who are unhappy with the administrative state or judicial review of agency action. But unless Congress chooses to assume substantially more responsibility for making policy choices itself or the courts decide to seriously reinvigorate the nondelegation doctrine—neither of which seems remotely likely—at least some variant of *Chevron* deference will be essential to guide and assist courts from intruding too deeply into a policy sphere for which they are ill-suited.

In support of our argument, this Article proceeds in three parts.

³⁹ See *infra* Section III.A.

⁴⁰ See *infra* Section III.A.

⁴¹ See *infra* Part II.

⁴² See *infra* Section III.C.

Drawing from thirty years of *Chevron* jurisprudence and commentary, Part I recognizes and examines two competing narratives of *Chevron*'s trajectory—one a quite dramatic tale of a singular legal doctrine, and the other a more nuanced (and more boring), but more realistic, story of an important and routinely applied but not omnipresent standard of review. Part II offers a taxonomy of sorts, documenting several operating variations of *Chevron* that together help explain why the doctrine has been simultaneously confusing and durable. Lastly, Part III defends *Chevron*'s basic premise as well as the doctrine's inevitability given Congress's habit of delegating the power to make significant policy decisions to agencies in the first place.

I. CHEVRON'S COMPETING NARRATIVES

The great irony in *Chevron*'s tale is that Justice Stevens, who authored the Supreme Court's opinion in that case, did not intend and never really thought of *Chevron* as a departure from precedent.⁴³ Even before *Chevron*, if the meaning of the statute was clear or plain, then the administering agency could not successfully claim deference for a contrary interpretation.⁴⁴ And for decades prior, the Court had counseled the sort of strong, mandatory deference described by *Chevron* for at least some agency interpretations of statutes.⁴⁵ Peter Schuck and E. Donald Elliott have noted

⁴³ See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398, 412–20 (Peter L. Strauss ed., 2006) (summarizing evidence that the Court did not see *Chevron* as making a significant statement about administrative law doctrine); Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10613 (1993) (documenting little deliberation in the *Chevron* case).

⁴⁴ See *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) (“True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction.”); see also, e.g., *SEC v. Sloan*, 436 U.S. 103, 117–19 (1978) (declining to defer to an agency interpretation deemed “inconsistent with the statutory mandate”); *Zuber v. Allen*, 396 U.S. 168, 181, 183–85 (1969) (rejecting agency interpretation found inconsistent with clear congressional intent); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616–19 (1944) (embracing deference for agency gap-filling but rejecting agency regulation as “not authorized” by Congress).

⁴⁵ See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981) (“Although we do not abdicate review in these circumstances, our task is the limited one of ensuring that the Secretary did not ‘exceed[ed] his statutory authority’ and that the regulation is not arbitrary or capricious.” (alteration in original) (quoting *Batterton v. Francis*, 432 U.S. 416, 426 (1977))); *Batterton*, 432 U.S. at 425 (“In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. . . . A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.”); *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett*, 300 U.S. 471, 474 (1937) (“The regulation having been made by the commission

that *Chevron* “failed to instruct the circuits with the unmistakable clarity and moral authority that seem minimally necessary . . . for the Court to succeed in altering the shape of court-agency relationships.”⁴⁶ Without subsequent cases parsing and elevating the significance of its language, *Chevron* might have been a rather unremarkable case.

Nevertheless, *Chevron* is often described as sparking a revolution.⁴⁷ Certainly, with its famous two-step test, *Chevron* altered the *rhetoric* of judicial deference.⁴⁸ In case after case, judges now ask first whether the meaning of the statute at issue is clear and then, if it is not, whether the administering agency’s interpretation of that statute is “permissible.”⁴⁹ Scholars also have argued that *Chevron* meaningfully shifted interpretive power from the judicial branch to administrative agencies by calling for strong, mandatory deference to implicit as well as explicit delegations of authority to fill statutory gaps.⁵⁰ And one can easily fashion a dramatic narrative arc for *Chevron* from the thirty years of jurisprudence and commentary that followed it. First, *Chevron* gains the Court’s allegiance,

in pursuance of constitutional statutory authority, it has the same force as though prescribed in terms by the statute.”); *AT&T Co. v. United States*, 299 U.S. 232, 236–37 (1936); see also KENNETH CULP DAVIS, *ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE* § 29:16 (1989) (suggesting that *Chevron* reflected longstanding doctrine).

⁴⁶ Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1028.

⁴⁷ See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) (“Justice Stevens’ opinion contained several features that can only be described as ‘revolutionary,’ even if no revolution was intended at the time.” (footnote omitted)); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2595–96 (2006) (observing that “the Court itself may have had limited ambitions for its decision in *Chevron*[.] [b]ut the decision was soon viewed as a kind of revolution”).

⁴⁸ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (observing that the Court “often appl[ies] the two-step framework announced in *Chevron*”); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (describing *Chevron* as “establish[ing] a familiar two-step procedure for evaluating whether an agency’s interpretation of a statute is lawful”); *Harkonen v. U.S. Dep’t of Justice*, 800 F.3d 1143, 1149 (9th Cir. 2015) (analyzing agency statutory interpretation “using the familiar two-step framework established by *Chevron*”).

⁴⁹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (outlining the two steps); see also *infra* Section II.A (breaking down the *Chevron* opinion’s exposition of the two-step test).

⁵⁰ See, e.g., DAVIS, *supra* note 45, § 29:16-1; Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1548 (2006); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 833–34 (2001); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2075 (1990).

comes to dominate judicial review of agency actions, and shifts interpretive power significantly from courts to agencies. Then, the Court gradually begins to reclaim its authority.⁵¹ The Court curtails *Chevron's* scope and applies its two steps more critically. Individual justices begin to question *Chevron's* validity.⁵² Now, Congress considers legislation to abolish deferential review of agency legal interpretations.⁵³

Of course, the actual story of *Chevron* is more nuanced. While *Chevron* has been and remains unquestionably prominent, the Court's actual fidelity to *Chevron* deference has never been consistent—reflecting more ebb and flow than rise and fall.

A. *Chevron Emerges*

The D.C. Circuit was the first to pull the two-step *Chevron* framework from Justice Stevens's opinion.⁵⁴ Other circuits cited *Chevron* in its first year, but did not explicitly apply its two steps.⁵⁵ A few years after his elevation from the D.C. Circuit, Justice Scalia praised *Chevron's* two-step analytical approach as “unquestionably better than what preceded it.”⁵⁶

To its supporters, *Chevron* cemented deference as the appropriate judicial attitude for agency interpretations of statutes. In particular, *Chevron* counseled that courts should only overturn an agency's resolution of statutory ambiguity when “arbitrary, capricious, or manifestly contrary to the statute.”⁵⁷ In other words, judicial deference was not merely advisable but *mandatory* when the meaning of a statute was unclear and the

⁵¹ See *infra* Sections I.A, I.B.

⁵² See *infra* Section I.C.

⁵³ See *infra* Section I.D.

⁵⁴ See *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 140–41 (D.C. Cir. 1984) (“As we understand the Supreme Court's most recent pronouncements in *Chevron*, our inquiry consists of two steps.”); see also *Ry. Labor Execs.' Ass'n v. U.S. R.R. Ret. Bd.*, 749 F.2d 856, 860–62 (D.C. Cir. 1984); *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 833 (D.C. Cir. 1984); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1566–67 (D.C. Cir. 1984).

⁵⁵ See, e.g., *Phila. Gear Corp. v. FDIC*, 751 F.2d 1131, 1135 (10th Cir. 1984) (citing *Chevron* and applying *Skidmore's* factors); *South Dakota v. Civil Aeronautics Bd.*, 740 F.2d 619, 621–23 (8th Cir. 1984) (analyzing whether the agency had a “substantial basis” for the policy decisions embodied by its interpretation); *New Eng. Tel. & Tel. Co. v. Pub. Utils. Comm'n of Me.*, 742 F.2d 1, 11 (1st Cir. 1984) (rejecting a Federal Communications Commission interpretation because the interpretation does not reflect its position “after debate among staff or commissioners” and an agency interpretation “cannot bind a court as to the meaning of a jurisdictional statute”). *But see Lynch v. Rank*, 747 F.2d 528, 534 (9th Cir. 1984) (rejecting an agency interpretation as contrary to the statutory text).

⁵⁶ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

⁵⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–53 (1984).

agency's interpretation was permissible. Justice Scalia maintained that *Chevron's* "across-the-board presumption" in favor of agency discretion often better approximated congressional intent than the "wild-goose chase" of traditional, court-conducted statutory interpretation.⁵⁸ The D.C. Circuit was also a leader in quickly and wholeheartedly embracing this strong interpretation of *Chevron*.⁵⁹

Many judges and scholars lauded *Chevron* as a blueprint for balancing the roles of agencies and the courts in the modern administrative state.⁶⁰ Yet, as with any new doctrine, even proponents of *Chevron* recognized that the standard presented some difficulties. Judge Kenneth Starr observed that *Chevron* "raise[d] some rather difficult questions" regarding which doctrines previously relied upon by judges in interpreting statutes were appropriate at step one.⁶¹ Indeed, Justice Scalia prophesized that "the future battles over acceptance of agency interpretations of law will be fought" over step one's requisite clarity.⁶²

Also, the strong version of *Chevron* deference faced resistance. Cynthia Farina worried that *Chevron* would aggrandize the executive branch to such an extent that it would neuter the constitutional checks on lawmaking endorsed by bicameralism and presentment.⁶³ Cass Sunstein complained that *Chevron* undermined the principle of *Marbury v. Madison*⁶⁴ that "[c]ourts . . . are supposed to say what the law is," and

⁵⁸ Scalia, *supra* note 56, at 516–17.

⁵⁹ See Merrill, *supra* note 43, at 422 (attributing "*Chevron's* rise from obscurity" generally to the D.C. Circuit and particularly to Justice Scalia, who was serving on that court when *Chevron* was decided and first applied).

⁶⁰ See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 507 (1985) ("The Court's unanimous decision in *Chevron* leads logically to the constitutionally correct solution to the problem of agencies with vast policy-making power."); Kenneth W. Starr, Cass R. Sunstein, Richard K. Willard, Alan B. Morrison & Ronald M. Levin, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 360 (1987) [hereinafter *Judicial Review of Administrative Action in a Conservative Era*] (statement of Kenneth W. Starr) (describing *Chevron's* two-step framework as "straightforward" and "clear"); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118–26 (1987) (suggesting *Chevron's* increased utility in an era of both indeterminacy of statutory meaning and limited Supreme Court capacity to resolve disagreements among the circuits).

⁶¹ *Judicial Review of Administrative Action in a Conservative Era*, *supra* note 60, at 365 (statement of Kenneth W. Starr).

⁶² Scalia, *supra* note 56, at 520–21.

⁶³ See generally Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).

⁶⁴ 5 U.S. (1 Cranch) 137 (1803).

violated the APA's vision of the judiciary as a check against administrative agencies.⁶⁵ Justice Stephen Breyer, then a judge on the First Circuit, acknowledged that courts should consider the agency's comparative expertise as well as statutory clarity and congressional intent to delegate decisionmaking authority when evaluating an agency's interpretation of a statute.⁶⁶ But like Sunstein, Justice Breyer clearly viewed courts rather than agencies as the rightful and primary arbiters of statutory meaning.⁶⁷ He described the D.C. Circuit's strict, two-step interpretation of *Chevron* as simplistic and contrary to "'proper' judicial attitudes," and a "blanket rule" of deference as "seriously overbroad, counterproductive and sometimes senseless" in an area of law replete with different statutes, policy considerations, and problems.⁶⁸ Rather, he contended that *Chevron* was more appropriately "limited to its factual and statutory context" on account of "the difficulties associated with environmental regulation."⁶⁹

Moreover, although lower courts deferred to agency interpretations more often after *Chevron*,⁷⁰ the Supreme Court's early post-*Chevron* jurisprudence reflects its collective ambivalence regarding the decision's significance.⁷¹ Justice Scalia enthusiastically promoted the strong version of *Chevron*,⁷² writing separately to apply *Chevron*'s two-step framework when other Justices would not.⁷³ Often, however, the Court failed to cite

⁶⁵ *Judicial Review of Administrative Action in a Conservative Era*, *supra* note 60, at 367–68 (statement of Cass R. Sunstein).

⁶⁶ See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–71 (1986).

⁶⁷ See *id.* at 373.

⁶⁸ *Id.*

⁶⁹ *Id.* at 381–82.

⁷⁰ Schuck & Elliott, *supra* note 46, at 1020–51 (analyzing the shift in lower court rulings post-*Chevron*).

⁷¹ See Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 688 (1988) (observing inconsistency in *Chevron*'s first four years).

⁷² See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring in part and concurring in the judgment) (arguing the contextual factor test is an "anachronism"); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–81 (1988) (Scalia, J., concurring in the judgment) (applying *Chevron* to jurisdictional issues); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987) (Scalia, J., concurring) ("I . . . write separately only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron* . . .").

⁷³ See, e.g., *Arabian Am. Oil Co.*, 499 U.S. at 259–60 (Scalia, J., concurring in part and concurring in the judgment) (arguing that *Chevron* reversed the contextual factor tests); *Miss. Power & Light Co.*, 487 U.S. at 380–81 (Scalia, J., concurring in the judgment); *INS*

Chevron at all in cases where the standard seemed obviously appropriate.⁷⁴ As Thomas Merrill has documented, in evaluating agency statutory interpretations from 1984 to 1990, the Court relied on contextual factors derived from *Skidmore v. Swift & Co.*⁷⁵ and other pre-*Chevron* precedents as often as it applied *Chevron*, and the Court affirmed fewer agency interpretations after *Chevron* than before.⁷⁶ Meanwhile, notwithstanding his authorship of the Court's *Chevron* opinion, Justice Stevens resisted *Chevron's* intrusion on traditional judicial authority, insisting that "[t]he judiciary is the final authority on issues of statutory construction."⁷⁷

B. *Chevron's Apparent Dominance*

Over time, Justice Scalia's persistence subdued much of his colleagues' ambivalence about using *Chevron's* two-step framework. The Court came to accept that statutory interpretation "is often more a question of policy than of law," and that *Chevron* "reflects a sensitivity to the proper roles of the political and judicial branches."⁷⁸ By 1990, all of the Justices had joined at least one opinion invoking a two-step *Chevron*.⁷⁹ By 2000, *Chevron* had become one of the most cited and applied Supreme Court decisions in history.⁸⁰ The Court showed no sign of abandoning the strong interpretation of *Chevron* as Justices Breyer and Stevens had hoped. Rather, *Chevron* had, at least in that sense, entered its prime.

In many ways, *Chevron* seemed both dominant and highly deferential. Government lawyers often pressured courts to apply *Chevron's* mandatory

v. *Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (arguing against legislative history at step one).

⁷⁴ See, e.g., Hirshman, *supra* note 71, at 690 (questioning the Court's failure to apply or even cite *Chevron* in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), even though the agency's "claim to deference could hardly have been stronger").

⁷⁵ 323 U.S. 134, 140 (1944) (calling for judges to give "weight" to an agency's interpretation of a statute based upon contextual factors such as thoroughness, validity, and consistency).

⁷⁶ Merrill, *supra* note 47, at 980–84.

⁷⁷ *Cardoza-Fonseca*, 480 U.S. at 447–48 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

⁷⁸ *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991).

⁷⁹ Merrill & Hickman, *supra* note 50, at 838.

⁸⁰ Richard Pierce at one point suggested that *Chevron* "has been cited and applied in more cases than any other Supreme Court decision in history." PIERCE, *supra* note 4, at 140. Other scholars contested Pierce's assertion as "overstatement" and claimed that mantle for other cases. See, e.g., Herz, *supra* note 2, at 1870 n.19 (comparing federal case citations to *Chevron* with those of other cases). At a minimum, *Chevron* is the most cited decision in contemporary administrative law. *Id.* See also *supra* notes 5–16 and accompanying text (documenting citation counts for canonical administrative law cases).

deference in new contexts.⁸¹ As a result, the Supreme Court and the federal circuit courts of appeals applied *Chevron* to an increasingly broad array of agency legal interpretations. *Chevron* itself was concerned with regulations interpreting the Clean Air Act⁸² promulgated by the Environmental Protection Agency (“EPA”) using notice-and-comment rulemaking procedures.⁸³ Subsequently, however, courts extended *Chevron* to agency adjudications,⁸⁴ to proposed or temporary regulations lacking notice and comment,⁸⁵ and to a variety of informal agency actions exempt from formalized procedures, for just a few examples.⁸⁶ Beyond interpretive format, *Chevron* quickly crept from environmental law into other regulatory areas,⁸⁷ assuming precisely the seminal status that Justice Stevens initially sought to eschew.

Courts applying *Chevron* often found statutes ambiguous and deferred to agency interpretations with little apparent effort to discern statutory meaning through examination of text, history, or purpose.⁸⁸ In *Pauley v. Bethenergy Mines, Inc.*,⁸⁹ for example, the Supreme Court found deference appropriate merely because the Black Lung Benefits Act⁹⁰ provisions at stake “produced a complex and highly technical regulatory program” that

⁸¹ Merrill & Hickman, *supra* note 50, at 835.

⁸² Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

⁸³ See *Chevron*, 467 U.S. at 845–46.

⁸⁴ See, e.g., Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647–48 (1990) (informal adjudication); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574 (1988) (NLRB adjudication); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 978–79 (1986) (FDA no-action decision).

⁸⁵ See, e.g., *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697–98 (1991) (deferring to interim agency regulations).

⁸⁶ See, e.g., *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 181–82 (3d Cir. 1995) (granting *Chevron* deference to an interpretation of the Hyde Amendment articulated in two letters from the Director of the Medicaid Bureau of the Health Care Financing Administration to all state Medicaid directors); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995) (applying *Chevron* to a letter from the Assistant Secretary of Education to all chief state school officers clarifying United States Department of Education policy regarding the Individuals with Disabilities Education Act).

⁸⁷ See, e.g., *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 744–745 (1996) (Comptroller of the Currency interpretation); *Elizabeth Blackwell Health Ctr.*, 61 F.3d at 181–82 (Secretary of Health and Human Services interpretation); *Capistrano Unified Sch. Dist.*, 59 F.3d at 894 (Department of Education interpretation).

⁸⁸ See *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 728–29 (1994) (Thomas, J., dissenting) (criticizing the majority for accepting an agency’s interpretation without any analysis of the statutory text or reasonableness).

⁸⁹ 501 U.S. 680 (1991).

⁹⁰ Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150.

“require[d] significant expertise” to administer.⁹¹ In *National Railroad Passenger Corp. v. Boston & Maine Corp.*,⁹² the Court declared the agency’s interpretation “permissible” simply because it was “not in conflict with the plain language of the statute.”⁹³ And in *Yellow Transportation, Inc. v. Michigan*,⁹⁴ the Court deferred to the agency’s regulations based on the cursory observation that the relevant statutory subprovision was facially “silent” and “d[id] not foreclose” the agency’s approach.⁹⁵ Additionally, for fifteen years after deciding *Chevron*, the Court did not reject a single agency interpretation at *Chevron* step two.⁹⁶

The federal circuit courts of appeals in particular applied *Chevron* very deferentially. In a study of cases from 1995 and 1996, Orin Kerr found that circuit courts accepted agency interpretations in 73% of cases applying the *Chevron* standard.⁹⁷ The circuit courts reached step two in 62% of *Chevron* cases and upheld the agency’s interpretation in 89% of those cases.⁹⁸ To textualists’ dismay, courts did not always “recognize[] the existence of a large area in which Congress has ‘directly addressed precise questions.’”⁹⁹

On the other hand, the Justices continued to disagree over the terms of *Chevron*’s operation.¹⁰⁰ For example, the Supreme Court did not always eschew extensive analysis at *Chevron* step one. In *MCI Telecommunications Corp. v. AT&T*,¹⁰¹ for example, Justice Scalia’s opinion for the Court analyzed dictionary definitions and explored the statutory scheme’s structure and purpose in deciding that the claimed power of the Federal Communications Commission (“FCC”) to make tariff filing optional for certain long-distance carriers was “beyond the meaning that the statute [could] bear.”¹⁰² Justice Stevens in dissent accused the Court of “a rigid literalism that deprives the FCC of the flexibility

⁹¹ Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 697 (1991).

⁹² 503 U.S. 407 (1992).

⁹³ *Id.* at 417–18.

⁹⁴ 537 U.S. 36 (2002).

⁹⁵ *Id.* at 45–46.

⁹⁶ The first such decision was *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

⁹⁷ Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998).

⁹⁸ *Id.* at 30–31.

⁹⁹ See *Judicial Review of Administrative Action in a Conservative Era*, *supra* note 60, at 367 (statement of Cass R. Sunstein).

¹⁰⁰ Merrill & Hickman, *supra* note 50, at 838–53.

¹⁰¹ 512 U.S. 218 (1994).

¹⁰² *Id.* at 229.

Congress meant it to have.”¹⁰³ In *FDA v. Brown & Williamson Tobacco Corp.*,¹⁰⁴ Justice O’Connor’s majority opinion surveyed decades of tobacco legislation in concluding that the Food and Drug Administration (“FDA”) “clearly” lacked jurisdiction to regulate tobacco products under the Food, Drug, and Cosmetic Act.¹⁰⁵ Justice Breyer in dissent accused the Court of ignoring the “literal language and general purpose” of the statute.¹⁰⁶ Orin Kerr’s study of *Chevron* in the mid-1990s showed that, although the federal circuit courts of appeals found ambiguity and proceeded to step two significantly more often than not, they rejected the agency’s interpretation in 58% of cases resolved at step one.¹⁰⁷

Some members of the Supreme Court continued to rely on the contextual factors outlined in the Court’s pre-*Chevron* jurisprudence, even as they applied *Chevron*’s two-step framework. For example, in *Brown & Williamson Tobacco*, Justice O’Connor cited the FDA’s inconsistency with respect to its interpretation as “important context” in reaching that conclusion,¹⁰⁸ against Justice Breyer’s objection that “the FDA’s change of positions does not make a significant legal difference” under *Chevron*.¹⁰⁹ In *INS v. Cardoza-Fonseca*,¹¹⁰ Justice Stevens cited the agency’s inconsistency in the course of denying *Chevron* deference.¹¹¹ Likewise, in applying *Chevron* to resolve *Good Samaritan Hospital v. Shalala*,¹¹² Justice White maintained that “the consistency of an agency’s position is a factor in assessing the weight that position is due.”¹¹³ By contrast, in *Smiley v. Citibank (South Dakota), N.A.*,¹¹⁴ Justice Scalia refused to deny *Chevron* deference to agency regulations simply because the agency’s new interpretation might conflict with previous agency interpretations, saying that “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the

¹⁰³ *Id.* at 235 (Stevens, J., dissenting).

¹⁰⁴ 529 U.S. 120 (2000).

¹⁰⁵ *Id.* at 126; Food, Drug, and Cosmetic Act, 75-717, 52 Stat. 1040 (codified as amended in scattered sections of 21 U.S.C.).

¹⁰⁶ 529 U.S. at 162 (Breyer, J., dissenting).

¹⁰⁷ Kerr, *supra* note 97, at 31–32, 47.

¹⁰⁸ *Brown & Williamson Tobacco*, 529 U.S. at 157.

¹⁰⁹ *Id.* at 186 (Breyer, J., dissenting).

¹¹⁰ 480 U.S. 421 (1987).

¹¹¹ *Id.* at 446 n.30.

¹¹² 508 U.S. 402 (1993).

¹¹³ *Id.* at 417.

¹¹⁴ 517 U.S. 735 (1996).

implementing agency.”¹¹⁵ As Thomas Merrill observed, cases such as these collectively reveal tensions regarding the continued viability of contextual factors within the *Chevron* framework.¹¹⁶

Collectively as well, the courts’ applications of *Chevron* reflected tremendous disagreement over the scope of *Chevron*’s applicability. The Supreme Court often repeated the maxim that *Chevron* applies when an agency is “charged with administering” a statute, but the Court offered little or no further explanation as to what that meant or why it turned to *Chevron* when it did.¹¹⁷ In many cases concerning agency legal interpretations, the Court continued not to apply the *Chevron* standard at all.¹¹⁸ In a comprehensive study of post-*Chevron* Supreme Court cases, William Eskridge and Lauren Baer documented that only 8.3% of the 1014 cases involving agency interpretations of statutes applied the *Chevron* standard, while 53.6% saw the Court relying purely on its own analysis.¹¹⁹ Confronted with such inconsistency from the Supreme Court and a substantially more varied array of agency actions, the lower courts splintered into a bevy of circuit splits and lesser disagreements over the circumstances in which *Chevron* should or should not apply.¹²⁰

C. *Chevron*’s Arguable Decline

Since 2000, several Supreme Court opinions have seemed to weaken *Chevron* in both substance and scope. The most obvious trend has been in narrowing the scope of *Chevron*’s applicability. Several cases, however, have also signaled the Court’s sanction of more robust and intrusive inquiries at both of *Chevron*’s two steps.

The Supreme Court’s decision in *Mead*, which provided a threshold question for determining *Chevron*’s applicability and thereby narrowed *Chevron*’s scope, is the most obvious contributor to *Chevron*’s purported

¹¹⁵ *Id.* at 742.

¹¹⁶ See Merrill, *supra* note 47, at 977–78.

¹¹⁷ See, e.g., *Smiley*, 517 U.S. at 739; *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–81 (1988) (Scalia, J., concurring in the judgment).

¹¹⁸ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 493–94 (1991) (Blackmun, J., dissenting) (analyzing *Chevron* when the majority had not); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring in part and concurring in the judgment) (identifying *Chevron* as the applicable standard).

¹¹⁹ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–100 (2008).

¹²⁰ Merrill & Hickman, *supra* note 50, at 848–52.

decline.¹²¹ According to the *Mead* Court, *Chevron* deference is available only for agency interpretations issued in the exercise of congressionally delegated authority to act with legal force.¹²² Under *Mead*, a court should ascertain whether “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.”¹²³ If a court determines that Congress has delegated such authority, the court then asks whether the agency “promulgated [its interpretation] in the exercise of that authority.”¹²⁴ The *Mead* Court specified that, although *Chevron* typically applies to interpretations adopted in notice-and-comment rulemaking or formal adjudications, “the want of that procedure here does not decide the case.”¹²⁵ Drawing from a *Mead* precursor, *Christensen v. Harris County*,¹²⁶ however, the Court also specified that “policy statements, agency manuals, and enforcement guidelines” are “beyond the *Chevron* pale.”¹²⁷ If an agency interpretation does not satisfy *Mead*'s inquiry, then the agency's interpretation remains “entitled to respect” to the extent it has the “power to persuade” under the arguably less deferential *Skidmore* standard.¹²⁸ Unlike *Chevron*, the *Skidmore* standard regards the courts as the primary interpreters of statutory meaning, even as it counsels courts to respect an agency's interpretation based on “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.”¹²⁹

The direct consequence of *Mead* has been the carving away of a subcategory of agency statutory interpretations that courts decline to review under *Chevron*. Since deciding *Mead*, the Supreme Court has not extended *Chevron* deference to an agency statutory interpretation expressed in a format other than a notice-and-comment regulation or formal (or formal-ish) adjudication.¹³⁰ But *Mead* has created its own sort of doctrinal

¹²¹ *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹²² *Id.* at 226–27.

¹²³ *Id.*

¹²⁴ *Id.* at 227.

¹²⁵ *Id.* at 231.

¹²⁶ 529 U.S. 576 (2000) (holding that an agency opinion letter should be reviewed under *Skidmore*).

¹²⁷ *Mead*, 533 U.S. at 234 (quoting *Christensen*, 529 U.S. at 587).

¹²⁸ *Christensen*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹²⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹³⁰ See generally Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527 (2014) (surveying Supreme Court applications of *Mead*).

confusion, and *Mead*'s counterrevolution has been blunted by the Justices' competing attitudes about and doctrinal approaches to *Chevron* as well as *Mead* and *Skidmore*.¹³¹

The Supreme Court's 2015 decision in *King v. Burwell* reflects another effort to curtail *Chevron*'s reach.¹³² In that case, the Court declined to apply the *Chevron* standard in reviewing an Internal Revenue Service ("IRS") regulation implementing an important aspect of the Affordable Care Act.¹³³ Writing for the majority, Chief Justice Roberts reasoned that the interpretation at issue "involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people," was of "deep 'economic and political significance,'" and was "central to [the] statutory scheme."¹³⁴ He also observed that the IRS "has no expertise in crafting health insurance policy."¹³⁵ In relying on such grounds to deny *Chevron* review to the IRS's regulation, Chief Justice Roberts drew from the Court's earlier decision in *FDA v. Brown & Williamson Tobacco Corp.*,¹³⁶ rejecting the FDA's newfound claim of statutory authority to regulate the marketing of tobacco products.¹³⁷ A brief passage at the end of Justice O'Connor's majority opinion in *Brown & Williamson Tobacco* suggested that *Chevron* might be inapplicable altogether in so-called "extraordinary cases" of political and economic significance when "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."¹³⁸ Some commentators have suggested that *King v. Burwell* may herald a new categorical limitation on *Chevron*'s scope,¹³⁹ and the federal circuit courts of appeals could heed that call and invalidate agency action when the agency lacks expressly delegated authority over a particular provision.¹⁴⁰

¹³¹ See *id.* at 548–49; see also *infra* Part II.

¹³² See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

¹³³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); see *King*, 135 S. Ct. at 2488–89.

¹³⁴ *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

¹³⁵ *Id.*

¹³⁶ See *supra* text accompanying notes 104–106.

¹³⁷ See *King*, 135 S. Ct. at 2488–89 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹³⁸ *Brown & Williamson Tobacco*, 529 U.S. at 159–61.

¹³⁹ See, e.g., Hickman, *supra* note 33, at 58; Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 474–76 (2016); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191–92 (2016).

¹⁴⁰ See, e.g., *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1302 (Fed. Cir. 2015) (O'Malley, J., concurring) (arguing that the Court should not examine

Beyond questions of *Chevron*'s scope, other jurisprudence from the Supreme Court has signaled more subtly the Court's readiness to employ *Chevron*'s two steps to reject agency interpretations on the basis of either statutory clarity or agency unreasonableness. In *Scialabba v. Cuellar de Osorio*,¹⁴¹ for example, six Justices across three opinions disagreed sharply with Justice Kagan's assertion in her plurality opinion that the statute at issue was ambiguous merely because the text of a single subsection seemed internally contradictory on its face.¹⁴² Chief Justice Roberts in concurrence rejected as "wrong" the suggestion "that deference is warranted because of a direct conflict between [two] clauses," and called instead for considering the statutory scheme as a whole.¹⁴³ Justice Sotomayor in dissent likewise turned to traditional tools of statutory construction to resolve the conflict, criticizing the plurality for "neglect[ing] a fundamental tenet of statutory interpretation: We do not lightly presume that Congress has legislated in self-contradicting terms."¹⁴⁴

The Supreme Court has shown substantially greater willingness to invalidate agency interpretations at *Chevron* step two. Again, for fifteen years after deciding *Chevron*, the Court did not invalidate a single agency interpretation after applying *Chevron* and declaring the relevant statute ambiguous.¹⁴⁵ The first such instance was *AT&T Corp. v. Iowa Utilities Board*,¹⁴⁶ involving clear congressional intent for the FCC to give content to the obviously ambiguous statutory use of the words "necessary" and "impair" in giving competitors access to existing telephone networks.¹⁴⁷ Justice Scalia acknowledged the agency's discretion to elaborate on the statutory requirements but nevertheless declared its interpretation to be outside the boundaries of permissibility.¹⁴⁸ Since then, the Supreme Court has invalidated agency interpretations of statutes at *Chevron* step two at

the case under *Chevron* because the agency's interpretation presented a politically and economically significant issue); see also *infra* Section II.H.

¹⁴¹ 134 S. Ct. 2191 (2014).

¹⁴² See *id.* at 2203 (calling the statutory provision "Janus-faced[;] [i]ts first half looks in one direction, . . . [b]ut . . . the section's second half looks another way").

¹⁴³ *Id.* at 2214 (Roberts, C.J., concurring in the judgment); see also *id.* at 2216 (Alito, J., dissenting) (agreeing with Chief Justice Roberts's criticism of Justice Kagan's depiction of *Chevron* step one).

¹⁴⁴ *Id.* at 2220 (Sotomayor, J., dissenting).

¹⁴⁵ See *supra* note 96 and accompanying text (making this observation).

¹⁴⁶ 525 U.S. 366 (1999).

¹⁴⁷ *Id.* at 375–80.

¹⁴⁸ *Id.* at 386–92.

least three more times—in 2006,¹⁴⁹ in 2014,¹⁵⁰ and in 2015.¹⁵¹

Moreover, the Supreme Court has gradually embraced incorporating into *Chevron* step two the arbitrary and capricious analysis of *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*,¹⁵² which requires agencies to offer contemporaneous justifications of their policy choices that demonstrate reasoned decisionmaking.¹⁵³ The first case to do so, in 2011, was *Judulang v. Holder*,¹⁵⁴ in which the Court evaluated a Board of Immigration Appeals interpretation of the Immigration and Nationality Act¹⁵⁵ concerning the criteria for granting discretionary relief to deportable and excludable aliens.¹⁵⁶ The Court claimed that it was applying *State Farm* rather than *Chevron* as the standard in rejecting the agency's interpretation of the statute on the ground that the agency relied on analysis that was not "tied, even if loosely," to statutory purposes or operation.¹⁵⁷ But responding in a footnote to the government's argument that *Chevron* step two ought to apply rather than *State Farm*, the Court equated the two: "[O]ur analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance."¹⁵⁸

Justice Kagan, the author of the Court's *Judulang* opinion, subsequently disavowed any intent to make a significant statement regarding administrative law doctrine.¹⁵⁹ Nevertheless, subsequent opinions

¹⁴⁹ See *Rapanos v. United States*, 547 U.S. 715 (2006).

¹⁵⁰ See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

¹⁵¹ See *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

¹⁵² 463 U.S. 29 (1983).

¹⁵³ *Id.* at 43 ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

¹⁵⁴ 565 U.S. 42 (2011).

¹⁵⁵ Immigration & Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

¹⁵⁶ *Id.* at 45.

¹⁵⁷ *Id.* at 55.

¹⁵⁸ *Id.* at 52 n.7 (internal quotation marks omitted).

¹⁵⁹ See KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6 (5th ed. Supp. 2017) (documenting a public conversation between Pierce and Justice

of the Court again seem to embrace a relationship between *Chevron* and *State Farm*. In *Michigan v. EPA*, the Court applied the *Chevron* standard in considering a challenge to new EPA regulations concerning mercury and other emissions from coal- and oil-fired power plants.¹⁶⁰ As framed by the Court, the issue was whether the EPA can reasonably refuse to consider cost in deciding that regulating emissions of hazardous air pollutants from power plants is “appropriate and necessary” under the Clean Air Act.¹⁶¹ The EPA had concluded that “costs should not be considered” when making that threshold determination.¹⁶² In a seemingly straight-forward application of *Chevron*’s two steps, Justice Scalia acknowledged that the statutory terms at issue could support more than one reasonable interpretation but concluded that the EPA’s construction simply was not among the available alternatives.¹⁶³ Yet, Justice Scalia’s *Chevron* step two analysis cited *State Farm* and included among his reasons for rejecting the EPA’s interpretation the *State Farm*-like observation that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”¹⁶⁴

Most recently, in *Encino Motorcars, LLC v. Navarro*,¹⁶⁵ the Supreme Court blended references to procedural failings and *State Farm* in applying *Chevron* to reject a Department of Labor (“DOL”) regulation interpreting the Fair Labor Standards Act.¹⁶⁶ The regulation reversed a longstanding policy of the DOL that treated service advisors as exempt from overtime under the statute.¹⁶⁷ Justice Kennedy for the Court introduced his analysis with a clear statement that he was applying *Chevron*’s two-step standard because Congress gave the DOL the power to act with the force of law and the DOL did so by using notice-and-comment rulemaking to adopt its interpretation.¹⁶⁸ He immediately followed, however, by stating that “*Chevron* deference is not warranted where the regulation is ‘procedurally defective’—that is, where the agency errs by failing to follow the correct

Kagan).

¹⁶⁰ *Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015).

¹⁶¹ *Id.* at 2704; *see also* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2531.

¹⁶² 135 S. Ct. at 2705–06.

¹⁶³ *See id.* at 2707 (“There are undoubtedly settings in which the phrase ‘appropriate and necessary’ does not encompass cost. But this is not one of them.”).

¹⁶⁴ *Id.*

¹⁶⁵ 136 S. Ct. 2117 (2016).

¹⁶⁶ *See id.* at 2125–26; *see also* Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 836.

¹⁶⁷ *See* 136 S. Ct. at 2123.

¹⁶⁸ *Id.* at 2124–25.

procedures in issuing the regulation.”¹⁶⁹ He then proceeded to explain that the DOL in this case failed procedurally under *State Farm* when it “offered barely any explanation” for its policy change.¹⁷⁰

On the other hand, even as some of the Supreme Court’s cases have constrained or weakened *Chevron* deference, others have seemed to expand *Chevron*’s reach. Two examples are particularly notable. First, the Court has allowed *Chevron* deference to trump stare decisis in some cases. In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*¹⁷¹ in 2005, the Court held that a court’s prior interpretation of a statute does not override the agency’s newer interpretation unless the court held that the statute “unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill.”¹⁷² Justice Scalia scolded the Court for the “breathtaking novelty” of rendering “judicial decisions subject to reversal by executive officers.”¹⁷³ According to Justice Scalia, the majority’s “bizarre” holding permits agencies to take “action that the Supreme Court found unlawful.”¹⁷⁴ Subsequently, in *United States v. Home Concrete & Supply, LLC*,¹⁷⁵ the Court considered an IRS regulation that conflicted with a Supreme Court decision that predated both *Chevron* and *Brand X*.¹⁷⁶ A plurality of the Court concluded that its earlier decision found the meaning of the statute clear, thus denying the agency the opportunity to adopt an alternative interpretation.¹⁷⁷ *Home Concrete* led some commentators to suggest that the Court is unlikely to apply *Brand X*’s holding to its own precedents,¹⁷⁸ but that still leaves plenty of circuit court precedents to be overturned by agency action.

¹⁶⁹ *Id.* at 2125 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

¹⁷⁰ *Id.* at 2126. Justice Ginsburg concurred with Justice Kennedy’s opinion but “stress[ed] that nothing in today’s opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no ‘heightened standard’ of arbitrary-and-capricious review.” *Id.* at 2128 (Ginsburg, J., concurring).

¹⁷¹ 545 U.S. 967 (2005).

¹⁷² *Id.* at 982–83.

¹⁷³ *Id.* at 1016 (Scalia, J., dissenting).

¹⁷⁴ *Id.* at 1017. Justice Scalia’s dissent also questioned what this meant for step one: “Is the standard for ‘unambiguous’ under the Court’s new agency-reversal rule the same as the standard for ‘unambiguous’ under step one of *Chevron*? (If so, of course, every case that reaches step two of *Chevron* will be agency-reversible.)” *Id.* at 1018–19.

¹⁷⁵ 566 U.S. 478 (2012).

¹⁷⁶ *See id.* at 481.

¹⁷⁷ *See id.* at 487.

¹⁷⁸ *See, e.g.*, David J. Shakow, *A Concrete Shoe for Brand X?*, 135 TAX NOTES 651, 651 (2012); Walker, *supra* note 17, at 161 n.63 (suggesting the Patent and Trademark Office should “exercise caution” in relying on *Brand X*).

Separately, in *City of Arlington v. FCC*,¹⁷⁹ the Court settled a longstanding disagreement among the federal circuit courts of appeals by holding that an agency's interpretation of its jurisdiction is entitled to deference.¹⁸⁰ Writing for the Court, Justice Scalia explained that there is no difference "between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has."¹⁸¹ Justice Scalia disposed of the jurisdiction-nonjurisdictional line as a false dichotomy created to depose *Chevron* in favor of judicial policymaking.¹⁸² In the alternative, Justice Scalia proposed that the problem of excessive deference is solved by defending statutory limits at step one.¹⁸³ Writing separately to express his own distinct views regarding how precisely *Chevron* operates, Justice Breyer nevertheless reached the same conclusion as the majority.¹⁸⁴

Unsurprisingly, the Supreme Court's mixed messages regarding *Chevron*'s functionality and scope are echoed in the jurisprudence of the federal circuit courts of appeals. According to a comprehensive study by Kent Barnett and Christopher Walker of 1558 cases evaluating agency statutory interpretations from 2003 through 2013, circuit courts applying *Chevron* have continued to defer to agencies at a high rate of 77.4% overall and a whopping 93.8% when the analysis has reached *Chevron* step two.¹⁸⁵ But agencies actually lost 61% of the cases resolved by the circuit courts at *Chevron* step one, which in turn represented 22.4% of all cases.¹⁸⁶ The agency win rate was also lower when the circuit courts specified no standard of review or opted for *Skidmore* or de novo review, which combined represented another 25.2% of cases evaluated.¹⁸⁷ The First Circuit deferred to agencies substantially more often (82.8% of cases) than

¹⁷⁹ 133 S. Ct. 1863 (2013).

¹⁸⁰ *See id.* at 1866.

¹⁸¹ *Id.* at 1870.

¹⁸² *See id.* at 1872–73 ("Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the 'jurisdictional' card in every case. Some judges would be deceived by the specious, but scary-sounding, 'jurisdictional'-nonjurisdictional' line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands." (citation omitted)).

¹⁸³ *See id.* at 1874.

¹⁸⁴ *See id.* at 1875–77 (Breyer, J., concurring in part and concurring in the judgment).

¹⁸⁵ Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 34), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808848.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

the Ninth Circuit (65.8% of cases).¹⁸⁸ The D.C. Circuit applied the *Chevron* standard substantially more often (88.6% of cases) than the Sixth Circuit (60.7% of cases).¹⁸⁹ Deference rates in circuit court cases also varied tremendously depending on the agency and subject matter at issue.¹⁹⁰

In sum, at least in the courts, *Chevron*'s story remains a nuanced one. The *Chevron* doctrine may be evolving. Applications of *Chevron* may be highly variable depending upon which Justice or circuit court is writing the opinion. But reports that *Chevron*'s influence is waning—rather than merely evolving—overstate the case.

D. *Calls to Overturn Chevron*

At least partly as a result of their own internal disagreements regarding *Chevron*'s details, individual Justices have, in recent terms, expressed disillusionment with the *Chevron* standard. Perhaps the first case to include an expression of discontent, *Perez v. Mortgage Bankers Ass'n* did not involve a question of statutory interpretation and, therefore, did not implicate *Chevron*.¹⁹¹ The issue in that case was whether a court could require an agency to use notice-and-comment rulemaking if the agency sought to amend an otherwise exempt interpretative rule.¹⁹² Writing in concurrence, Justice Scalia wandered into a discussion of deference doctrine and acknowledged that *Chevron* “did not comport with the APA” and that the Court was “[h]eardless of the original design of the APA” in developing its deference jurisprudence.¹⁹³ This observation echoed a similar statement made by Justice Scalia in his dissent in *Mead*.¹⁹⁴

Justice Scalia's opinion in *Mortgage Bankers* stopped short of suggesting reconsidering *Chevron*'s validity. Concurring in *Michigan v. EPA*, by contrast, Justice Thomas argued that *Chevron* raises concerns under Articles I and III of the Constitution.¹⁹⁵ Article III “vests the judicial

¹⁸⁸ *Id.* at 43.

¹⁸⁹ *Id.* at 44.

¹⁹⁰ *Id.* at 49–51.

¹⁹¹ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

¹⁹² *Id.* at 1203.

¹⁹³ *Id.* at 1211–12 (Scalia, J., concurring in the judgment).

¹⁹⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 241 n.2 (2001) (Scalia, J., dissenting) (observing that the Court's *Chevron* jurisprudence has largely ignored the APA's instruction that courts “decide all relevant questions of law”).

¹⁹⁵ *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); see also *Mortg. Bankers*, 135 S. Ct. at 1215–25 (Thomas, J., concurring in the judgment) (raising similar constitutional concerns regarding *Auer* deference).

power exclusively in Article III courts, not administrative agencies.”¹⁹⁶ By contrast, according to Justice Thomas, *Chevron* deference “wrests from Courts the ultimate interpretative authority to ‘say what the law is’”¹⁹⁷ because it “precludes judges from exercising [independent] judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction.”¹⁹⁸ Justice Thomas argued further that agencies claiming *Chevron* deference often have not engaged in “interpretation” but rather have used statutory ambiguity “to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress.”¹⁹⁹ Thus, he suggests, *Chevron* unconstitutionally “permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power” by allowing agencies “the power to decide—without any particular fidelity to the text—which policy goals [they] wish[] to pursue.”²⁰⁰

Some scholars have argued that, if *Chevron* is to be abolished, Congress rather than the Supreme Court ought to strike the final blow.²⁰¹ Toward that end, in 2016, several members of Congress introduced, and the House of Representatives passed, the Separation of Powers Restoration Act (“SOPRA”), which would have amended the APA with the intent of overturning *Chevron*.²⁰² A somewhat different variation of the same proposal was incorporated into the Regulatory Accountability Act (“RAA”), which the House passed in January 2017.²⁰³

Statements by SOPRA’s sponsors indicate that their primary goal is to eliminate the deferential *Chevron* standard of review for agency interpretations of statutes.²⁰⁴ For example, in a March 17, 2016 speech in

¹⁹⁶ *Michigan v. EPA*, 135 S. Ct. at 2712 (Thomas, J., concurring).

¹⁹⁷ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁹⁸ *Id.* (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)).

¹⁹⁹ *Id.* at 2712–13.

²⁰⁰ *Id.* at 2713.

²⁰¹ See, e.g., Andrew Hessick, *Legislative Efforts to Overturn Chevron*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 19, 2016), <http://www.yalejreg.com/blog/legislative-efforts-to-overturn-chevron-by-andy-hessick>.

²⁰² Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016).

²⁰³ Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017).

²⁰⁴ See Amar, *supra* note 27; Hatch & Ratcliffe, *supra* note 28 (“In practice, courts read these terms so broadly as to give federal bureaucrats essentially unbridled power to say what the laws is—oftentimes even if the agency’s interpretation contradicts the plain language of the statute.”); Lee, *supra* note 28 (“[J]udicial deference to the agencies undercuts the courts’ ability to hold the government accountable to the law. Our bill restores accountability to the regulatory process by ensuring that the courts say what the law is, not

support of SOPRA, Senator Mike Lee stated that *Chevron* “has helped to midwife this shadowy fourth branch, by requiring Courts, under certain circumstances, to surrender their Article III constitutional power of judicial review to executive agencies.”²⁰⁵ Regulated industries have announced support of SOPRA to prevent agencies from “expand[ing] the scope of their own regulatory authority.”²⁰⁶ By contrast, the version of the RAA under consideration in the Senate does not repudiate or even curtail *Chevron*.²⁰⁷ Whether SOPRA, in one version or another, will be enacted into law remains to be seen.

II. *CHEVRON*’S MANY VERSIONS

The above survey of *Chevron*’s history demonstrates less that the doctrine has risen and fallen, but more that it ebbs and flows from case to case, sometimes but not always to great effect. *Chevron* has not dominated administrative law jurisprudence quite as much as lore would have it. But it definitely has endured and has featured prominently in numerous cases, including relatively recent ones.

A key reason *Chevron* seems to ebb and flow as it does is that the jurisprudence and academic literature do not advance a single, unified understanding of what *Chevron* deference entails. Rather, they reflect several competing versions of *Chevron*, none of which are demonstrably incorrect, and all of which are theoretically defensible. In other words, *Chevron* has become a generic label for several variations on a theme.²⁰⁸ All share the general premise of strong, mandatory judicial deference to some subset of agency statutory interpretations and some number of analytical steps—generally two, but not always—for getting to that point. But disagreements over the details abound. And, depending on which

what the agencies wish the law would be.”).

²⁰⁵ Senator Mike Lee, Remarks on Separation of Powers Restoration Act: Ending *Chevron* Deference (Mar. 17, 2016), <http://www.lee.senate.gov/public/index.cfm/2016/3/remarks-on-separation-of-powers-restoration-act-ending-chevron-deference>.

²⁰⁶ Letter from R. Bruce Josten, Exec. Vice President of Gov’t Affairs, U.S. Chamber of Commerce, to Members of the U.S. Cong. (Mar. 18, 2016), <https://www.uschamber.com/sites/default/files/documents/files/3.18.16->

[_hill_letter_to_congress_supporting_h.r._4768_and_s._2724_the_separation_of_powers_restoration_act.pdf](https://www.uschamber.com/sites/default/files/documents/files/3.18.16-hill_letter_to_congress_supporting_h.r._4768_and_s._2724_the_separation_of_powers_restoration_act.pdf); see also *CEI Leads Coalition to Support the Separation of Powers Restoration Act*, COMPETITIVE ENTERPRISE INST. (June 8, 2016), <https://cei.org/content/cei-leads-coalition-support-separation-powers-restoration-act> [<https://perma.cc/2Z9F-33X3>].

²⁰⁷ Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

²⁰⁸ Cf. Allan Erbsen, *Erie’s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 581–82 (2013) (arguing that the *Erie* doctrine’s imprecision and ambiguity have rendered *Erie* an improper label for choice of law).

Chevron application one chooses to embrace and follow, *Chevron* becomes more or less formalistic, more or less textualist, and more or less deferential.

Part of the difficulty stems from the *Chevron* opinion itself, which describes the relevant standard of review in highly variable terms, and thus supports a multiplicity of interpretations.²⁰⁹ Identifying all of *Chevron*'s many variations is probably impossible. Regardless, appreciating at least some of the many options is essential to understanding both the Supreme Court's *Chevron* jurisprudence and also efforts to reshape, restrain, and invalidate *Chevron* deference.

A. *The Original Exposition Raises Questions*

The origin of *Chevron*'s two steps derives easily from the Supreme Court's assertion in *Chevron* that "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions."²¹⁰ From there, the Court's rhetoric becomes murky.

"First," according to the Court, "is the question whether Congress has *directly spoken* to the *precise* question at issue."²¹¹ A few sentences later, the Court says that, "[i]f . . . the court determines Congress has not *directly* addressed the *precise* question at issue, the court does not simply impose its own construction on the statute."²¹² Based on these two sentences alone, the step one inquiry would seem both highly textualist and narrowly tailored toward facial specificity. Few questions of statutory interpretation that rise to the Supreme Court or even to the federal circuit courts of appeals, however, are likely to find direct and explicit resolution in the statutory text without additional inquiry. Consequently, with this framing of the step one inquiry, one would expect the vast majority of cases to proceed readily to *Chevron*'s second step.

In between these two sentences, however, the Court says that, "[i]f the *intent of Congress* is clear, that is the end of the matter; for the court, as well as the agency, must give effect to *the unambiguously expressed intent of Congress*."²¹³ A requirement that a court be able to identify clear congressional intent arguably contemplates a more robust, and potentially more purposivist, step one inquiry than a requirement that a statute resolve

²⁰⁹ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²¹⁰ *Id.* at 842.

²¹¹ *Id.* (emphasis added).

²¹² *Id.* at 843 (emphasis added).

²¹³ *Id.* at 842–43 (emphasis added).

the interpretive difficulty directly and precisely. Courts rely on a variety of canons and resources, including legislative history and statutory purpose, to glean congressional intent from facially ambiguous statutory text. Moreover, in a footnote to this sentence, the Court specifies the judiciary as “the final authority on issues of statutory construction” and declares, “[i]f a court, *employing traditional tools* of statutory construction, ascertains that *Congress had an intention* on the precise question at issue, that *intention* is the law and must be given effect.”²¹⁴ This footnote, too, obviously contemplates a more robust inquiry than a mere facial check of statutory text. But the footnote fails to specify which traditional tools of statutory construction a court ought to consider in attempting to ascertain clear congressional intent: all of them or merely certain subsets? After all, in theory as well as practice, the statutory interpretation toolbox includes not only a host of textual canons, legislative history, and statutory purpose, but also substantive canons, like the constitutional avoidance canon or the rule of lenity, that themselves serve as ambiguity tiebreakers.²¹⁵

Finally, at the end of that same paragraph in the *Chevron* opinion, the Court rephrases step one as whether “the statute is *silent or ambiguous* with respect to the specific issue.”²¹⁶ This language seems to equate statutory silence regarding a particular question with statutory ambiguity. Certainly, in some cases textual silence is indicative of ambiguity.²¹⁷ Such was the case in *Chevron* itself, as the Court found ambiguity in the fact that neither the Clean Air Act’s text nor its history offered even the merest hint of congressional intent regarding the “bubble concept” addressed by the regulations at issue in that case.²¹⁸ But although legislatures will sometimes incorporate exceptions from statutory requirements explicitly in statutory text, legislatures do not commonly construct statutes by expressly excluding everything under the sun that is not included. Hence, the post-*Chevron* jurisprudence has seen the emergence of the “elephants in mouseholes” canon: “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not,

²¹⁴ *Id.* at 843 n.9 (emphasis added).

²¹⁵ *See infra* Section II.B.

²¹⁶ *Chevron*, 467 U.S. at 843 (emphasis added).

²¹⁷ *See, e.g.,* *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45–48 (2002) (finding ambiguity where a statute “does not foreclose” the agency’s interpretation); *see also* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1506–07 (identifying cases in which agencies claimed that statutory silence gave them the power to regulate).

²¹⁸ *Chevron*, 467 U.S. at 851.

one might say, hide elephants in mouseholes.”²¹⁹ Yet, precisely when statutory silence shifts from ambiguity to clarity, or vice versa, remains ill-defined at best.²²⁰

The Court's *Chevron* opinion was hardly clearer in describing step two. First, the Court said that, at that step, “the question for the court is whether the agency's answer is based on a *permissible* construction of the statute.”²²¹ In a footnote to that sentence, the Court elaborated that a reviewing court “need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the [agency's] construction.”²²² In the next paragraph, however, the Court used different rhetoric to describe the deference owed to “express delegation[s] of authority” and “implicit” ones.²²³ The former were to be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute,” while the latter warranted deference if “reasonable.”²²⁴ Commentators at times have disagreed over whether the permissibility, controlling weight, and reasonableness formulations are interchangeable²²⁵ or establish different deference standards for different types of interpretations.²²⁶ And because the Court's use of the phrase “arbitrary, capricious, or manifestly contrary to the statute” strongly resembles that of

²¹⁹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see, e.g.*, *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 468–69 (D.C. Cir. 2005) (employing the canon in concluding that statutory silence should not be construed as authorization to regulate); *see also* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 24–45 (2010) (connecting the canon's emergence with *Chevron*).

²²⁰ *See, e.g.*, Loshin & Nielson, *supra* note 219; Sales & Adler, *supra* note 217.

²²¹ *Chevron*, 467 U.S. at 843 (emphasis added).

²²² *Id.* at 843 n.11.

²²³ *Id.* at 843–44.

²²⁴ *Id.*

²²⁵ *See, e.g.*, Frederick Liu, *Chevron as a Doctrine of Hard Cases*, 66 ADMIN. L. REV. 285, 315–17 (2014) (arguing for a positivist formulation of step two and rejecting the reasonableness formulation); Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 31–32 (2006) (equating “permissible” and “reasonable”).

²²⁶ *See, e.g.*, John P.C. Duncan, *The Course of Federal Pre-emption of State Banking Law*, 18 ANN. REV. BANKING L. 221, 251–52 (1999) (reading *Chevron* as advocating different standards for different types of delegation); Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 859–60 (1992) (contending that the *Chevron* opinion contemplates a more deferential permissibility inquiry for legislative rules and a less deferential reasonableness inquiry for interpretative rules); J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 45–47 (2010) (suggesting that *Chevron* requires less deference for implicit delegations than for explicit ones).

APA § 706(2)(A), commentators also have disagreed over whether judicial review under *Chevron* step two is limited to statutory interpretation²²⁷ or extends to considering the agency's reasons for choosing one interpretation over another.²²⁸

Finally, the *Chevron* opinion alludes to the continued viability of the contextual factors without affirmatively deciding as much. Citing *Skidmore*, the Court noted that the EPA's interpretation represented "a reasonable accommodation of manifestly competing interests and is entitled to deference" because "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."²²⁹ The *Chevron* Court contended further that "[j]udges are not experts in the field," and when the interpretation of a statute "really centers on the wisdom of the agency's policy," deference is appropriate.²³⁰ These statements harken back to the expertise-based multifactor *Skidmore* approach, comporting with Justice Stevens's belief that *Chevron* itself did not change the Court's deference jurisprudence. But if *Chevron* incorporated *Skidmore*'s contextual factors, it left open where in the two-step analysis they fall. And *Chevron*'s evasion of the issue—intentional or not—has prompted disagreements among the Justices about whether these factors remain relevant to the *Chevron* analysis.²³¹

In summary, *Chevron*'s own rhetoric supports different expositions of its two steps depending on which snippets of language one chooses to emphasize. Whenever the Supreme Court announces (or is perceived as

²²⁷ See, e.g., Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 325–26 (1996) (distinguishing *Chevron*'s statutory inquiry from "process" review under the APA).

²²⁸ See, e.g., Galler, *supra* note 226, at 859–60 (recognizing both interpretations of *Chevron* step two); Ronald M. Levin, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 37–38 (2002) (acknowledging that courts engage in both types of analysis at *Chevron* step two); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1268–69 (1997) [hereinafter Levin, *Anatomy of Chevron*]; Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62 ADMIN. L. REV. 433, 434 n.5 (2010) (contending that "most scholars" take this view).

²²⁹ *Chevron*, 467 U.S. at 865 (footnotes omitted) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

²³⁰ *Id.* at 865–66.

²³¹ Compare *Christensen v. Harris Cty.*, 529 U.S. 576, 589–90 (2000) (Scalia, J., concurring in part and concurring in the judgment) ("*Skidmore* deference to authoritative agency views is an anachronism That era came to an end with our watershed decision in *Chevron*"), with *id.* at 596 (Breyer, J., dissenting) ("*Chevron* made no relevant change [to the Court's deference jurisprudence].").

announcing) a new standard or test, some initial confusion is probably inevitable as courts apply that new standard or test in subsequent cases.²³² But many of *Chevron's* nuances remain almost as unclear today as they did thirty years ago, as the Court, for the most part, has done little to resolve the specifics of *Chevron's* two steps directly.²³³ As a result, courts and commentators have embraced and advocated different variations on *Chevron's* theme.

B. Which Tools of Statutory Interpretation, and When?

No matter the variation, *Chevron* entails at least some independent evaluation of statutory meaning. Depending on which language from *Chevron* one wants to highlight, however, that assessment may range anywhere from exceedingly shallow to incredibly robust.

At times, both textualists and purposivists have argued in favor of aggressively seeking statutory clarity under *Chevron* using the methods and tools that courts have always used when evaluating statutory meaning. Consistent with his more general adherence to textualism, Justice Scalia repeatedly called for a rigorous judicial defense of statutory limits through textualist reasoning.²³⁴ Likewise, consistent with his own, more purposivist leanings, Justice Breyer has proposed a more thorough appraisal of statutory text, purpose, and legislative history, along with contextual factors like consistency, in discerning under *Chevron* whether Congress intended to give agencies discretionary space.²³⁵ No matter the methodology, a robust *Chevron* step one analysis that utilizes a wider array of interpretive tools affords judges more room to find statutory clarity.²³⁶ If courts readily find statutory meaning to be clear, then they turn less often to deference.

Nevertheless, courts and scholars have clashed over which interpretive

²³² See, e.g., *supra* notes 43–77 and accompanying text.

²³³ See *supra* notes 78–184 and accompanying text.

²³⁴ See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874–75 (2013); Scalia, *supra* note 56, at 521 (observing that a “ ‘strict constructionist’ ” like himself, “who finds *more* often . . . that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists” (emphasis in original)).

²³⁵ *City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and concurring in the judgment).

²³⁶ Cf. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”).

tools ought to be applied at *Chevron* step one versus step two. For example, the Supreme Court has been inconsistent in its use of legislative history in *Chevron* analysis. The Court in the *Chevron* opinion itself discussed legislative history at some length, despite finding it inconclusive.²³⁷ In several subsequent cases, the Court relied heavily on legislative history to find statutory clarity at *Chevron* step one.²³⁸ In other instances, however, the Court has framed *Chevron*'s first step rhetorically in purely textualist terms and ignored legislative history in its analysis.²³⁹ For example, in *Mayo Foundation for Medical Education & Research v. United States*,²⁴⁰ Chief Justice Roberts, writing for all participating Justices, completely ignored the parties' observations regarding legislative history in concluding that the statute's meaning was ambiguous,²⁴¹ leading some courts and commentators to wonder whether the Court regarded legislative history as relevant to *Chevron* step one analysis.²⁴²

The Court's inconsistent use of legislative history in *Chevron* analysis may derive from the Justices' varying attitudes toward legislative history in general.²⁴³ Regardless, the circuits are now divided over when in the *Chevron* framework to consider legislative history. Most circuits will

²³⁷ *Id.* at 851–53, 862.

²³⁸ *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133–59 (2000); *see also* Eskridge & Baer, *supra* note 119, at 1136 (demonstrating that the Court applies legislative history in 62.3% of cases).

²³⁹ *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665 (2007) (describing *Chevron* deference as "appropriate only where 'Congress has not directly addressed the precise question at issue' through the statutory text" (quoting *Chevron*, 467 U.S. at 843)).

²⁴⁰ 562 U.S. 44 (2011).

²⁴¹ *Compare id.* (resolving the case without mentioning legislative history), with Brief for Petitioners at 38–39, *Mayo Found.*, 562 U.S. 44 (No. 09-837) (discussing legislative history in support of position), and Brief for the United States at 24–25, *Mayo Found.*, 562 U.S. 44 (No. 09-837) (same). Justice Kagan abstained from the *Mayo Foundation* case.

²⁴² *See, e.g.*, *Carpenter Family Invs., LLC v. Comm'r*, 136 T.C. 373, 389 (2011) (writing after *Mayo Foundation* that the Court "appears to frown upon the use of legislative history at step one of a *Chevron* analysis"); Joana Que, Note, *The State of Treasury Regulatory Authority After Mayo Foundation: Arguing for an Intentionalist Approach at Chevron Step One*, 85 S. CAL. L. REV. 1413, 1423 (2012); *see also* Irving Salem, *Mayo Dissected: Some Dragons Slain, Some Still Breathing Fire*, 130 TAX NOTES 1327, 1328–29 (2011).

²⁴³ *See* Jellum, *supra* note 37, at 771 (making this observation); *see also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31 (Amy Gutmann ed., 1997) ("I object to the use of legislative history on principle . . .").

readily consider legislative history at *Chevron* step one.²⁴⁴ But the Third Circuit does not examine legislative history at step one.²⁴⁵ Rather, the Third Circuit restricts its analysis at that stage to textual tools such as semantic canons, statutory structure, and dictionaries.²⁴⁶ The Seventh Circuit similarly defers consideration of legislative history to *Chevron* step two.²⁴⁷ The difference in approach may not matter much to an ardent textualist who eschews legislative history in any event. But for a judge who relies more often on legislative history as an interpretive tool, and who also takes seriously the comparatively deferential posture of *Chevron*'s second step, waiting to consider legislative history might change the outcome in a hard case.

The courts have also expressed uncertainty regarding the relationship between substantive canons and *Chevron*'s two-step framework.²⁴⁸ Supreme Court precedent is quite clear that the constitutional avoidance canon trumps *Chevron* deference. In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,²⁴⁹ the Supreme Court

²⁴⁴ See, e.g., *Sierra Club v. EPA*, 781 F.3d 299, 308 (6th Cir. 2015); *BNSF Ry. Co. v. United States*, 775 F.3d 743, 755 n.87 (5th Cir. 2015); *Kingdomware Techs., Inc. v. United States*, 754 F.3d 923, 931 (Fed. Cir. 2014); *Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1297 (11th Cir. 2014); *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1157 n.10 (10th Cir. 2014); *Santana v. Holder*, 731 F.3d 50, 55 (1st Cir. 2013); *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012); *Schafer v. Astrue*, 641 F.3d 49, 57 (4th Cir. 2011); *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009); *North Dakota ex rel. Olson v. Ctr. for Medicare & Medicaid Servs.*, 403 F.3d 537, 539 (8th Cir. 2005).

²⁴⁵ See *United States v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008) (“[L]egislative history should not be considered at *Chevron* step one.”). The Third Circuit, however, does permit judges to consider legislative history at step two to determine “whether the agency made ‘a reasonable policy choice’ in its interpretation.” See *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 307 (3d Cir. 2015) (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005)).

²⁴⁶ *Geiser*, 527 F.3d at 294–98. The Third Circuit claimed that the Supreme Court had “returned to its original mode of analysis, which does not include a consideration of legislative history at *Chevron* step one.” *Id.* at 293 (citing *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S. Ct. 1535, 1543 (2007)).

²⁴⁷ See, e.g., *Coyomani-Cielo v. Holder*, 758 F.3d 908, 914 (7th Cir. 2014) (acknowledging that “some of our sister circuits consider legislative history at [*Chevron* step one], but we prefer to save that inquiry for *Chevron*'s second step”); *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012) (“In this Circuit, ‘we seem to lean toward reserving consideration of legislative history and other appropriate factors until the second *Chevron* step.’” (quoting *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998))).

²⁴⁸ See Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 70–84 (2008) (outlining the competing arguments).

²⁴⁹ 485 U.S. 568 (1988).

expressly rejected the agency's interpretation in favor of one that avoided "serious constitutional questions," notwithstanding that the agency's interpretation "would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress" under *Chevron*.²⁵⁰ Likewise, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,²⁵¹ the Court refused to defer to the agency's regulation specifically because it raised "significant constitutional questions."²⁵² By comparison, in *Rancheria v. Jewell*,²⁵³ the Ninth Circuit refused to apply the Indian canon in lieu of *Chevron* because "the *Blackfeet* presumption is merely a 'guideline,' whereas '*Chevron* is a substantive rule of law.'"²⁵⁴

Meanwhile, conflicting Supreme Court precedents have left an ongoing debate over whether "*Chevron* still leaves some place for the rule of lenity," particularly, although not exclusively, when a regulatory statute provides for both civil and criminal enforcement.²⁵⁵ In 1995, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²⁵⁶ the Court suggested that *Chevron* deference trumps the rule of lenity, at least when considering notice-and-comment regulations.²⁵⁷ "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement," said the Court.²⁵⁸ Some courts have expressed concern that lenity and *Chevron* are simply incompatible—that allowing for lenity in reviewing a particular statute would obviate *Chevron* for that context.²⁵⁹

But the Supreme Court has occasionally applied the rule of lenity in noncriminal contexts where the statute had both criminal and noncriminal applications, albeit with no mention of *Chevron*.²⁶⁰ Judge Jeffrey Sutton of

²⁵⁰ *Id.* at 574, 588.

²⁵¹ 531 U.S. 159 (2001).

²⁵² *Id.* at 174.

²⁵³ 776 F.3d 706 (9th Cir. 2015).

²⁵⁴ *Id.* at 713 (quoting *Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997)).

²⁵⁵ *Espinal-Andrades v. Holder*, 777 F.3d 163, 170 (4th Cir. 2015).

²⁵⁶ 515 U.S. 687 (1995).

²⁵⁷ *See id.* at 704 n.18.

²⁵⁸ *Id.*

²⁵⁹ *See, e.g., Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198 (2d Cir. 2007) ("It cannot be the case . . . that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context.").

²⁶⁰ *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (applying lenity in the

the Sixth Circuit has articulated at some length the case for applying the rule of lenity rather than *Chevron* when an agency interpretation might later support criminal prosecution.²⁶¹ In 2014, in a statement accompanying the Court's denial of certiorari in *Whitman v. United States*,²⁶² Justice Scalia called for the Court to consider whether courts "owe deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement," and suggested further that "[u]ndoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation."²⁶³

Supposing substantive canons are part of *Chevron* analysis, do they apply at step one or step two?²⁶⁴ Substantive canons often operate as ambiguity tie breakers. Thus, if a reviewing court applies a substantive canon at *Chevron* step one, then presumably the court will be more likely to find the meaning of the statute to be clear as it assumes Congress intended the statute to be interpreted in accordance with the policy concern of the canon. If applied at step one, therefore, substantive canons may, indeed, render *Chevron* de facto inapplicable in certain regulatory contexts, such as immigration²⁶⁵ or Indian affairs.²⁶⁶

immigration context); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517–18 (1992) (declining to defer to the agency's interpretation in a tax case).

²⁶¹ See *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1023–24 (6th Cir. 2016) (arguing that lenity must apply to statutes supporting both criminal and civil enforcement); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730–32 (6th Cir. 2013) (Sutton, J., concurring) ("[T]he rule of lenity forbids deference to the executive branch's interpretation of a crime-creating law.").

²⁶² 135 S. Ct. 352 (2014).

²⁶³ *Id.* at 353 (Scalia, J., respecting the denial of certiorari) (citation omitted).

²⁶⁴ See *Olmos v. Holder*, 780 F.3d 1313, 1320–24 (10th Cir. 2015) (addressing lenity and constitutional avoidance at step two); *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1271 (9th Cir. 2015) (applying the presumption that the Fair Labor Standards Act should be construed in favor of employees at step one), *vacated*, 136 S. Ct. 2117 (2016); *Florez v. Holder*, 779 F.3d 207, 213 (2d Cir. 2015) (examining lenity outside of the two-step framework); *Espinal-Andrades v. Holder*, 777 F.3d 163, 169–70 (4th Cir. 2015) (examining lenity outside of the two-step framework, but noting that it only applies where a statute is ambiguous); *Rancheria v. Jewell*, 776 F.3d 706, 712–13 (9th Cir. 2015) (examining the *Blackfeet* canon outside of the two-step framework, but noting that it only applies "where a statute is not clear").

²⁶⁵ See, e.g., *Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 198 (2d Cir. 2007); *Florez*, 779 F.3d at 213.

²⁶⁶ See, e.g., *Cobell v. Norton*, 240 F.3d 1081, 1100–02 (D.C. Cir. 2001) (explaining its decision to apply the Indian affairs canon rather than *Chevron* to resolve statutory ambiguity); *Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997) (noting that what the

If substantive canons apply at step two, however, *Chevron* presumably would trump the canon because the court could feel compelled to defer to an agency interpretation deemed reasonable but for its clash with the canon's policy presumption.²⁶⁷ In *Morales-Izquierdo v. Gonzales*,²⁶⁸ Judge Alex Kozinski of the Ninth Circuit refused to apply the avoidance canon and instead analyzed deference and constitutional implications separately.²⁶⁹ Dissenting, Judge Sidney Thomas argued that the avoidance canon applies at *Chevron* step one.²⁷⁰ According to Judge Thomas, the avoidance canon is "unquestionably a 'traditional tool of statutory interpretation' that may and should be used to determine whether Congress intended to preclude the agency's chosen interpretation."²⁷¹ In summary, the placement of substantive canons within *Chevron* analysis may in some cases serve as a barometer for how rigorously a court will assess statutory meaning for itself or how readily a court will defer.

C. *Deliberative Democracy and a Syncopated Chevron*

The courts' case-by-case engagement with *Chevron* typically makes their doctrinal analysis more than a little fragmented. Given the multiplicity of *Chevron* cases, it is unsurprising that legal scholars have attempted to bring coherence to that jurisprudence, both by finding commonalities among existing cases but also in advocating for particular views of how *Chevron* ought to function.

In 1994, Mark Seidenfeld articulated an argument for what he dubbed "a syncopated *Chevron*," based on the proposition that *Chevron* should view "agencies as a means of fostering public deliberation about government policy choices."²⁷² Drawing from the *Chevron* opinion's

court calls the *Blackfeet* canon must give way to *Chevron*).

²⁶⁷ At least one scholar has suggested that substantive canons should apply as a post-*Chevron* inquiry, after a finding of ambiguity and unreasonableness, as a justification for the court's own interpretation. See David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron*, 59 ADMIN. L. REV. 479, 517–19 (2007).

²⁶⁸ 486 F.3d 484 (9th Cir. 2007) (en banc).

²⁶⁹ *Id.* at 492–98 ("When Congress has explicitly or implicitly left a gap for an agency to fill, and the agency has filled it, we have no authority to re-construe the statute, even to avoid potential constitutional problems; we can only decide whether the agency's interpretation reflects a plausible reading of the statutory text. . . . [C]onstitutional avoidance . . . plays no role in the second *Chevron* inquiry.").

²⁷⁰ *Id.* at 503–05 (Thomas, J., dissenting).

²⁷¹ *Id.* at 504.

²⁷² Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87 (1994).

emphasis on agencies as policymakers, Seidenfeld premised his claim on a theory of “deliberative democracy,” which “views politics as a process by which members of society seek both to define the public interest and to determine the best way to further that interest.”²⁷³ According to Seidenfeld, to promote legitimacy, government must represent the perspectives and values of all members of society and seek to persuade dissenters to adopt the view most beneficial to the whole of society.²⁷⁴ Agencies provide this discourse by allowing “public participation, political influence, and reasoned decisionmaking.”²⁷⁵

Seidenfeld argued that *Chevron* could best effectuate the goals of deliberative democracy by emphasizing step two over step one.²⁷⁶ Consequently, he favored a minimalist, textualist, and highly deferential *Chevron* step one.²⁷⁷ As judges should not make policy choices, he argued, they should find statutory silence or ambiguity under step one “unless the statute clearly manifests congressional intent to constrain agency discretion, as opposed to merely providing guidance on the substantive regulatory issues the statute addresses.”²⁷⁸ At *Chevron* step two, Seidenfeld suggested that courts apply a variation of hard look review. Under traditional hard look review, derived from the Supreme Court’s decision in *State Farm*, courts must reject agency action as “arbitrary and capricious” when the agency in question “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²⁷⁹ By comparison, Seidenfeld’s *Chevron* step two would “require the agency to identify the concerns that the statute addresses and explain how the agency’s interpretation took those concerns into account.”²⁸⁰ Thus, *Chevron* would require an agency to explain how its interpretation effectuates statutory goals. Courts would then rely on traditional tools, including legislative history and canons of construction, not to discern statutory meaning, but to evaluate the agency’s assessment of

²⁷³ *Id.* at 125.

²⁷⁴ *Id.* at 126.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 127.

²⁷⁷ *See id.* at 127–28.

²⁷⁸ *Id.* at 128.

²⁷⁹ *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁸⁰ Seidenfeld, *supra* note 272, at 129.

statutory purposes and, with that focus, the reasonableness of its interpretive choice.²⁸¹

Seidenfeld's syncopated *Chevron* thus would leave more interpretive questions to agencies, even if "the agency has only an indirect role in administering the statute, so long as the agency procedures encourage discourse about the implications of potential interpretations."²⁸² Correspondingly, the syncopated model essentially discards the traditional understanding of courts as the primary interpreters of statutory meaning.²⁸³ Rather, as judges have often said regarding their own efforts at statutory interpretation, if Congress disagrees with an agency's interpretation of a statute, then Congress can either pass overriding legislation to reverse agency decisionmaking or threaten to constrain the agency's budget.²⁸⁴

Many cases arguably apply *Chevron* in a manner consistent with Seidenfeld's syncopated model. For example, almost any opinion that makes short work of finding ambiguity at *Chevron* step one, but then finds the agency's interpretation unreasonable at *Chevron* step two, arguably reflects Seidenfeld's approach—although he might contend that the court asked the wrong questions at step two if its analysis was textual rather than policy oriented.²⁸⁵

By limiting *Chevron*'s first step to a purely textual inquiry and deferring consideration of legislative history to *Chevron* step two, the Third and Seventh Circuits arguably dance more in step with Seidenfeld's syncopated rhythm. Describing *Chevron* analysis in one recent case, for example, the Third Circuit framed step one as "whether the statute unambiguously forbids the Agency's interpretation," and step two as "whether [the agency] made 'a reasonable policy choice' in reaching its interpretation."²⁸⁶ It then said it would consider legislative history at step one solely for the purpose of "clarify[ing] the policies framing the statute."²⁸⁷ Although the court's step one analysis was extensive, reviewing arguments concerning the statute's text and purpose along with substantive

²⁸¹ *Id.* at 129–30.

²⁸² *Id.* at 133–34.

²⁸³ *Id.* at 137.

²⁸⁴ *Id.* at 136.

²⁸⁵ *Id.* at 132 (suggesting as much of the court's reasoning in *Northern Natural Gas Co. v. FERC*, 827 F.2d 779 (D.C. Cir. 1987) (en banc)).

²⁸⁶ *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 294–95 (3d Cir. 2015) (first quoting *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); then quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005)).

²⁸⁷ *Id.* at 307.

canons, its way of thinking about the task at hand resembles Seidenfeld's vision.²⁸⁸ Similarly, a key Seventh Circuit discussion of the *Chevron* framework clearly anticipated more extensive step two than step one analysis:

While this circuit has examined legislative history during the first step of *Chevron*, we now seem to lean toward reserving consideration of legislative history and other appropriate factors until the second *Chevron* step. In the second step, the court determines whether the regulation harmonizes with the language, origins, and purpose of the statute. While not dispositive, a court may find various considerations informative—these considerations might include the consistency of the agency's interpretation, the contemporaneousness of the interpretation, and the robustness of the regulation following congressional re-enactment of the underlying statute.²⁸⁹

In *Oil, Chemical & Atomic Workers International Union v. NLRB*,²⁹⁰ the D.C. Circuit cited Seidenfeld's work and seemed to adhere rather closely to his theory of *Chevron*.²⁹¹ The case concerned a National Labor Relations Board ("NLRB") interpretation of the National Labor Relations Act²⁹² as prohibiting an employer from permanently replacing workers engaged in a work stoppage based on a good-faith belief that their working conditions are abnormally dangerous.²⁹³ Although the court rejected the agency's interpretation of the statute under *Chevron*,²⁹⁴ its analysis avoided any discussion of the statute's text or legislative history. Rather, expressing "no doubt that Congress delegated authority" to the NLRB to interpret the statute, the court declared, "The only question here is whether the [NLRB] has articulated a defensible policy."²⁹⁵ To facilitate its *Chevron* step two analysis, the court required the agency to articulate "the rationale

²⁸⁸ See *id.* at 295–306.

²⁸⁹ *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998) (citations omitted); see also *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 465–66 (7th Cir. 2012) ("[T]he only questions we must answer in the first step of *Chevron* are whether the statutory language to be interpreted, on its face, is ambiguous, and whether Congress was silent regarding that ambiguity.").

²⁹⁰ 46 F.3d 82 (D.C. Cir. 1995).

²⁹¹ *Id.* at 89 (citing Seidenfeld, *supra* note 272).

²⁹² National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended in scattered sections of 29 U.S.C.).

²⁹³ 46 F.3d at 84.

²⁹⁴ *Id.* at 88–89.

²⁹⁵ *Id.* at 90.

underlying an agency's construction of the statute."²⁹⁶ The problem for the court, and the reason it rejected the agency's interpretation, was that the NLRB's members had not been able to agree on a single rationale for its interpretation.²⁹⁷

D. Step Two and Traditional Hard Look Review

Several years after *Chevron*, Ronald Levin professed at a panel discussion that he preferred a robust step one in which the court extracts "all the guidance that it can possibly get out of the statute," fearing that *Chevron* would dismember the judicial role in agency interpretation.²⁹⁸ A decade later, Levin rejoiced as courts continued to apply "critical judicial scrutiny" to agency interpretations.²⁹⁹ Rather than displacing traditional statutory interpretation and deference, he said, *Chevron* provided a "manageable framework."³⁰⁰

Levin recognized, however, that a court's inquiry at *Chevron* step two would be influenced by how the court chose to approach step one. If one contemplates a robust *Chevron* step one analysis utilizing the full array of traditional tools of statutory construction, one could argue that the only analysis remaining to be performed at step two is whether the agency's interpretation is absurd³⁰¹—and even then, some courts will apply the absurdity canon at step one to discount patently absurd interpretations.³⁰²

As a proponent of a robust *Chevron* step one seeking content for *Chevron* step two beyond a mere absurdity inquiry, Levin advocated merging *Chevron* step two with traditional hard look review.³⁰³ According to Levin, employing hard look review at *Chevron* step two would ensure that agencies rationalize their decisions from a policymaking

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 91.

²⁹⁸ *Judicial Review of Administrative Action in a Conservative Era*, *supra* note 60, at 376 (statement of Ronald M. Levin).

²⁹⁹ *See* Levin, *Anatomy of Chevron*, *supra* note 228, at 1259.

³⁰⁰ *Id.*

³⁰¹ *See id.* at 1290–91.

³⁰² *See, e.g.,* *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 552 (D.C. Cir. 2009); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("The rule that statutes are to be read to avoid absurd results allows an agency to establish that seemingly clear statutory language does not reflect the 'unambiguously expressed intent of Congress,' and thus to overcome the first step of the *Chevron* analysis." (citation omitted)); *Bower v. Fed. Express Corp.*, 96 F.3d 200, 207–08 (6th Cir. 1996).

³⁰³ *See* Levin, *Anatomy of Chevron*, *supra* note 228, at 1266–79; *see also supra* notes 279–281 and accompanying text (describing traditional hard look review as distinguished from Mark Seidenfeld's syncopated *Chevron* version).

perspective.³⁰⁴ Moreover, he contended, attempts to differentiate *Chevron* step two and hard look review create “excess baggage,” resulting in judicial inefficiency.³⁰⁵

Numerous circuit court opinions, most notably though not exclusively from the D.C. Circuit, correspond with Levin’s model.³⁰⁶ One of the first D.C. Circuit cases to apply *Chevron*’s two steps, *Rettig v. Pension Benefit Guaranty Corp.*,³⁰⁷ is consistent with Levin’s approach. Writing for the court, Judge Patricia Wald conducted an extensive step one analysis that considered statutory text, legislative conference reports, subsequent statutory amendments, and Supreme Court precedent, concluding that the court was “unable to characterize” the evidence before it “as entirely clear and unambiguous” evidence of congressional intent.³⁰⁸ Judge Wald then contemplated the potential overlap between *State Farm* and *Chevron* analysis, noting that step two might either ask whether the agency properly interpreted the statute or whether the agency’s interpretation was arbitrary and capricious under the APA.³⁰⁹ The court ultimately declined to extend *Chevron* deference because the agency failed to “provide some basis in the record for [the court] to conclude that the agency ‘considered the matter in a detailed and reasoned fashion,’ and made a reasonable decision.”³¹⁰ Numerous subsequent D.C. Circuit opinions equate *State Farm* and *Chevron* step two,³¹¹ although others expressly reject merging the two standards.³¹² Even more notably, as described earlier, the Supreme Court

³⁰⁴ Levin, *supra* note 228, at 1270.

³⁰⁵ *Id.* at 1296.

³⁰⁶ See, e.g., *Citizens Coal Council v. EPA*, 447 F.3d 879, 889 n.10 (6th Cir. 2006) (“We recognize that there is support for the proposition that in review of rulemaking the second step of *Chevron* indeed amounts to the same inquiry as arbitrary or capricious review under the APA.”).

³⁰⁷ 744 F.2d 133 (D.C. Cir. 1984).

³⁰⁸ *Id.* at 142–50.

³⁰⁹ *Id.* at 150–51, 151 n.46 (“We must admit to some doubts about such a distinction.”).

³¹⁰ *Id.* at 156 (citation omitted) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)).

³¹¹ See, e.g., *Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005) (citing several circuit precedents as conflating *Chevron* step two with arbitrary and capricious review under *State Farm*).

³¹² See, e.g., *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (“[T]his is a *State Farm* case, not a *Chevron* case.”); *Republican Nat’l Comm. v. FEC*, 76 F.3d 400, 407 (D.C. Cir. 1996) (conceding that the two standards “overlap[] somewhat” but contending that “a permissible statutory construction under *Chevron* is not always reasonable under *State Farm*”); *Arent v. Shalala*, 70 F.3d 610, 615–16 (D.C. Cir. 1995) (explaining the analytical distinction between *Chevron* and *State Farm*).

seems to be gravitating toward blending *Chevron* step two with *State Farm*'s traditional hard look review in some cases, though without quite acknowledging as much.³¹³

E. *One-Step Chevron*

Drawing partly from Levin's study of *Chevron* step two, Matthew Stephenson and Adrian Vermeule have proposed that *Chevron* redundantly and "artificially divides one inquiry into two steps."³¹⁴ If *Chevron* step two asks whether or not the agency's interpretation is a permissible construction of the statute, then step one is redundant with step two. Indeed, courts could decide many *Chevron* issues at either step and reach the same result.³¹⁵ If, however, step two evaluates the process of the agency's interpretive decisionmaking, then step two is redundant with *State Farm*. Stephenson and Vermeule label these clashes "the doctrinal equivalent of musical chairs."³¹⁶

Thus, Stephenson and Vermeule argue that *Chevron* has only one step: "[W]hether the agency's construction is permissible as a matter of statutory interpretation."³¹⁷ Under the one-step approach, the reviewing court employs traditional tools of interpretation to identify the "zone of ambiguity" in which all permissible interpretations of a statute may fall.³¹⁸ If the agency's interpretation falls within this zone, the court must defer to the interpretation under *Chevron*.³¹⁹ Otherwise, if the agency's interpretation falls outside the range of permissible interpretations, the court must strike down the interpretation.³²⁰ In the latter case, Stephenson and Vermeule claim the denial of deference can be framed as either a step one outcome—that the statute "unambiguously prohibits the agency's interpretation"—or as a step two outcome—that the interpretation is

³¹³ See *supra* Section I.C.

³¹⁴ Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009).

³¹⁵ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987) (recognizing statutory term as containing "some ambiguity" but holding that the agency's interpretation was "incorrect" with reasoning that could be characterized readily as either *Chevron* step one or step two); see also *id.* at 453–55 (Scalia, J. concurring in the judgment) (criticizing the majority's muddling of *Chevron*'s two steps).

³¹⁶ Stephenson & Vermeule, *supra* note 314, at 604.

³¹⁷ *Id.* at 599.

³¹⁸ *Id.* at 598–602.

³¹⁹ *Id.*

³²⁰ *Id.*

unreasonable.³²¹

Some judges seem amenable to this condensed framework. Many cases do not delineate two steps in their application of *Chevron* to agency interpretations.³²² For that matter, cases that frame the *Chevron* inquiry as whether an agency's interpretation is foreclosed by the statute, and conclude without inquiring into policy alternatives that an interpretation not foreclosed by the statute is reasonable, arguably embrace the one-step model by failing to conceptualize two separate, meaningful inquiries.³²³

In a footnote in *United States v. Home Concrete & Supply, LLC*, citing Stephenson and Vermeule's article, Justice Scalia contended:

"Step 1" has never been an essential part of *Chevron* analysis. Whether a particular statute is ambiguous makes no difference if the interpretation adopted by the agency is clearly reasonable—and it would be a waste of time to conduct that inquiry. The same would be true if the agency interpretation is clearly beyond the scope of any conceivable ambiguity. It does not matter whether the word "yellow" is ambiguous when the agency has interpreted it to mean "purple."³²⁴

Subsequently, in *United States v. Garcia-Santana*,³²⁵ Judge Marsha Berzon of the Ninth Circuit cited Justice Scalia's footnote for the proposition that "the Supreme Court has authorized courts to omit evaluation of statutory ambiguity on the ground that, 'if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.'"³²⁶ Similarly, in *Friends of the Everglades v. South Florida Water Management District*,³²⁷ Chief Judge Ed Carnes of the Eleventh Circuit cited Stephenson and Vermeule to support that *Chevron*'s two steps are "obviously intertwined," although he still bifurcated his opinion between steps one and two.³²⁸ Overall, empirical analysis of

³²¹ *Id.*

³²² *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987).

³²³ *See, e.g.*, *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002); *see also supra* notes 94–95 and accompanying text (discussing *Yellow Transportation*).

³²⁴ *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment) (citation omitted) (citing Stephenson & Vermeule, *supra* note 314, at 599).

³²⁵ 774 F.3d 528 (9th Cir. 2014).

³²⁶ *Id.* at 542 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009)); *see also Home Concrete & Supply*, 566 U.S. at 493 n.1 (Scalia, J., concurring in part and concurring in the judgment).

³²⁷ 570 F.3d 1210 (11th Cir. 2009).

³²⁸ *Id.* at 1218–28 (citing Stephenson & Vermeule, *supra* note 314) ("Having

decisions from the federal circuit courts of appeals suggests that those courts may apply a one-step *Chevron* in roughly one quarter of cases.³²⁹

The one-step view of *Chevron* has its critics. Kenneth Bamberger and Peter Strauss argue, for example, that courts thinking of *Chevron* as having only one step will not distinguish between mandatory and permissible interpretations of the statute.³³⁰ Yet, this distinction is often meaningful. For example, under the Supreme Court's holding in *Brand X*, the agency has the authority to change its interpretation if a reviewing court has not previously found the meaning of a statute clear at *Chevron* step one.³³¹ “[A] judicial precedent holding that a particular interpretation is either required or precluded fixes statutory meaning to that extent, foreclosing future agency constructions to the contrary.”³³² Yet *Chevron* stands for the proposition that the agency decides how to interpret the statute and the court only intervenes to the extent that (1) a particular interpretation is mandatory or (2) the agency has adopted an unreasonable interpretation.³³³ Thus, Bamberger and Strauss maintain, the one-step model of *Chevron* would seem to undercut the reasoning of *Brand X* by curtailing the instances in which an agency would perceive itself as having the power to adopt an alternative interpretation.

F. Flipping *Chevron*'s Two Steps

As a response to Stephenson and Vermeule's one-step approach and its critics, Richard Re has developed yet another optional two-step model that, in essence, reverses the order of *Chevron*'s step one and step two.³³⁴ Under

concluded that the statutory language is ambiguous, our final issue is whether the EPA's regulation . . . is a permissible construction of that language.”)

³²⁹ See Richard M. Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 638 (2014) (finding that federal circuit courts used a one-step *Chevron* in 22% of cases decided in 2011); Kerr, *supra* note 97, at 30 (observing that 28% of federal circuit court decisions applying *Chevron* in 1995 and 1996 followed a one-step model)e).

³³⁰ See Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009).

³³¹ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

³³² Bamberger & Strauss, *supra* note 330, at 616.

³³³ See *id.* at 617 (“Thus, under *Brand X*, when a court holds that an agency construction is impermissible because it exceeds the scope of interpretive authority assigned to the agency by reason of statutory ambiguity, the court should not go on to offer its views of the best way to resolve statutory meaning. Its role as ‘decider’ has been exhausted.”).

³³⁴ Re, *supra* note 329, at 619. Re is not the only scholar to have proposed flipping *Chevron*'s two steps. See Richard Murphy, *The Last Should Be First—Flip the Order of the Chevron Two-Step*, 22 WM. & MARY BILL RTS. J. 431 (2013).

this approach, the court first asks whether or not the agency's interpretation is reasonable.³³⁵ If the court finds that the interpretation is reasonable, the court then has discretion to address whether or not the statute mandates that interpretation.³³⁶ Re defends the optional two-step approach because it removes the redundancy of some formalist approaches to *Chevron* but avoids the arguable conflict with *Brand X* generated by the one-step approach described by Stephenson and Vermeule.³³⁷

Qualitatively, Re draws examples from cases in which the Supreme Court has deferred to the agency's interpretation without deciding whether the statute mandates the agency's interpretation.³³⁸ In *Astrue v. Capato ex rel. B.N.C.*³³⁹ the Court deferred to the agency's interpretation under *Chevron* as a permissible interpretation of the statute but refused to address whether the statute mandated the agency's interpretation.³⁴⁰ Moreover, Re reinforces his prescriptive formulation with empirical data demonstrating that appellate courts already switch between a one- and two-step approach to *Chevron*, suggesting that one of the steps is optional.³⁴¹ While Re finds support for the optional two-step approach in the current practices of the Supreme Court and federal circuit courts of appeals, he acknowledges that no court has identified the approach as such.³⁴² The optional two-step approach is, perhaps, more of a normative ideal than an identifiable approach. In cases where the court does not exercise the optional second step, the optional two-step approach would be indistinguishable from the one-step approach. Similarly, cases applying the optional step may appear

³³⁵ Re, *supra* note 329, at 619.

³³⁶ *Id.*

³³⁷ *See id.* at 625.

³³⁸ *Id.* at 634–35; *see also* Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012) (“We think the BIA’s view on imputation meets [the *Chevron*] standard, and so need not decide if the statute permits any other construction.”); *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 545 (2012).

³³⁹ 566 U.S. 541 (2012).

³⁴⁰ *Id.* at 545 (“[E]ven if the SSA’s longstanding interpretation is not the only reasonable one, it is at least a permissible construction that garners the Court’s respect under *Chevron* . . .”).

³⁴¹ Re, *supra* note 329, at 634–35. We are not entirely convinced by the presentation of Re’s data as a descriptive tool. It appears to rely on the notion that there is a uniform application of *Chevron*. If an individual judge utilizes both one-step and two-step *Chevron* depending on the context, it would certainly support Re’s contentions of an optional-step *Chevron*. Re, however, does not identify any such judges. Alternatively, his data may reveal the panoply of *Chevron*’s variations, with some judges preferring a one-step approach and others a two-step approach. Nevertheless, Re’s optional two-step approach remains prescriptively viable.

³⁴² *Id.* at 642.

as a traditional *Chevron* analysis. Nevertheless, Re offers at minimum a prescriptive approach that some judges may already embrace, even if he lacks qualitative comparisons between the cases of individual judges to identify its preexisting usage.

G. *Justice Breyer's Blended Deference Doctrine*

Overall, *Chevron's* scholarly variations maintain the formalistic structure of *Chevron's* two steps. Justice Breyer, however, breaks the two-step mold. Instead, Justice Breyer is a strong advocate for a rather idiosyncratic approach to *Chevron* review. According to Justice Breyer, "*Chevron* made no relevant change" to the multifactor, contextual analysis of *Skidmore*.³⁴³ Rather, *Chevron* merely added an additional consideration to *Skidmore*—namely, whether Congress delegated interpretive authority to the agency.³⁴⁴ Justice Breyer's concurring opinion in *Brand X* similarly emphasizes not the "force of law" language from *Mead*, but focuses on the "variety of indicators that Congress would expect *Chevron* deference."³⁴⁵ He goes on to lambast the Court's reliance on agency procedure, noting that even in a case involving notice-and-comment rulemaking, "Congress may have intended *not* to leave the matter of a particular interpretation up to the agency."³⁴⁶ Justice Breyer's *Brand X* concurrence is consistent with his majority opinion in *Barnhart v. Walton*,³⁴⁷ where he examined "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" to conclude that *Chevron* applied.³⁴⁸

Essentially, Justice Breyer's blended approach to deference seeks to ascertain congressional intent through an examination of the totality of the circumstances. Thus, he asks simply "whether Congress would want a reviewing court to defer to the agency interpretation at issue."³⁴⁹ Particularly as compared to the more formalistic step-by-step model of

³⁴³ See *Christensen v. Harris Cty.*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting).

³⁴⁴ *Id.* at 596.

³⁴⁵ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003–04 (2005) (Breyer, J., concurring) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001)).

³⁴⁶ *Id.* at 1004.

³⁴⁷ 535 U.S. 212 (2002).

³⁴⁸ *Id.* at 222.

³⁴⁹ *Hickman*, *supra* note 130, at 541.

Mead and *Chevron* advocated by some courts and scholars, Justice Breyer's approach is more functionalistic. One of us has described this approach as generating a "word cloud," with one or more doctrinal factors and tools of statutory interpretation popping out in ad hoc fashion to point toward or away from a congressional desire for deference.³⁵⁰

Justice Breyer's concurrence in *City of Arlington* best illustrates the blended approach. Justice Breyer refused to reduce congressional intent to just "a deference-warranting gap" in the statute, and instead called upon the Court to also consider additional factors.³⁵¹ In addition to the factors he considered in *Barnhart*, Justice Breyer added that the "distance from the agency's ordinary statutory duties" and the subject matter, as well as traditional tools of statutory interpretation, can be used to ascertain whether "ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law."³⁵² If Congress has not spoken unambiguously, the court should ask "whether Congress would have intended the agency to resolve the resulting ambiguity" and award or deny deference accordingly.³⁵³

Some circuit court judges have used Justice Breyer's blended *Chevron*—especially his analysis in *Barnhart*—in deciding which agency materials outside of notice-and-comment rules and adjudications warrant *Chevron* deference. In *Atrium Medical Center v. United States Department of Health & Human Services*,³⁵⁴ the Sixth Circuit considered whether the interpretation by the Center for Medicare and Medicaid Services ("CMS") of the Medicare Act,³⁵⁵ articulated in the Provider Reimbursement Manual ("PRM"), warranted *Chevron* or *Skidmore* deference.³⁵⁶ Prior to *Atrium Medical Center*, a number of circuits reviewed the PRM under *Skidmore*,³⁵⁷ citing *Mead* for the proposition that agency manuals are "beyond the

³⁵⁰ *Id.* at 541–42.

³⁵¹ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring in part and concurring in the judgment).

³⁵² *Id.* at 1875–76.

³⁵³ *Id.* at 1876.

³⁵⁴ 766 F.3d 560 (6th Cir. 2014).

³⁵⁵ Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (establishing Medicare).

³⁵⁶ 766 F.3d at 566–67.

³⁵⁷ *See, e.g.*, *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 73 (1st Cir. 2006); *Pub. Citizen, Inc. v. U.S. Dep't of Health & Human Servs.*, 332 F.3d 654, 660 (D.C. Cir. 2003); *Cnty. Hosp. of the Monterey Peninsula v. Thompson*, 323 F.3d 782, 791 (9th Cir. 2003).

Chevron pale.”³⁵⁸ In holding that the PRM deserved consideration under *Chevron*, the Sixth Circuit found that the portion of the PRM at issue differed from other parts in that CMS solicited comments, plus CMS has substantial expertise and developed the PRM over a “long, long time.”³⁵⁹ The Sixth Circuit then concluded that “[b]ecause *Barnhart* directs us to apply *Chevron*, our analysis of the Secretary’s statutory interpretation is relatively simple: CMS’s treatment of non-insurance short-term disability programs is simply not ‘manifestly contrary’ to [the statute].”³⁶⁰ The Sixth Circuit’s analysis lacks the structure of a formalistic approach to *Chevron*, and instead blends *Mead*’s threshold question with the substantive analysis of *Chevron* into a single totality-of-the-circumstances question.

H. Chief Justice Roberts and a More Limited *Chevron*?

A growing body of opinions from Chief Justice Roberts seems to reject wholesale application of *Chevron* to every ambiguous statutory provision, suggesting that a “grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions.”³⁶¹ Dissenting in *City of Arlington*, Chief Justice Roberts argued that courts should ask “whether Congress had ‘delegat[ed] authority to the agency to elucidate a *specific provision* of the statute’” before applying *Chevron*.³⁶² He contended that the Constitution requires a limited *Chevron* to preserve the separation of powers and ensure that Congress truly wished to delegate interpretive authority to the agency to decide the issue.³⁶³ Of course, Chief Justice Roberts wrote for a minority of the Court in *City of Arlington*. But he tried again, and accomplished much the same result, writing for the Court in *King v. Burwell*.³⁶⁴ In that case, Chief Justice Roberts revived a fledgling major questions doctrine to require courts to predicate the availability of *Chevron* review on the

³⁵⁸ *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

³⁵⁹ *Atrium Med. Ctr.*, 766 F.3d at 571–74.

³⁶⁰ *Id.* at 573.

³⁶¹ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1883 (2013) (Roberts, C.J., dissenting); see also Hickman, *supra* note 33.

³⁶² *City of Arlington*, 133 S. Ct. at 1881 (Roberts, C.J., dissenting) (alteration in original) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)).

³⁶³ *Id.* at 1886.

³⁶⁴ 135 S. Ct. 2480 (2015); see *supra* notes 32–33 and accompanying text (describing *King v. Burwell*); see also Hickman, *supra* note 33, at 62–64 (linking Chief Justice Roberts’s approach to *King v. Burwell* with his earlier dissenting opinion in *City of Arlington*).

centrality of the issue to the statutory scheme, its economic and political significance, and the extent of the agency's expertise.³⁶⁵

Christopher Walker has both identified and defended this trend based upon his survey of agency officials regarding the technical drafting assistance they provide to Congress.³⁶⁶ Agency officials overwhelmingly expressed the view that congressional staffers do not understand preexisting regulatory regimes and draft poor-quality statutes.³⁶⁷ In light of these findings, Walker argues that *Chevron* deference encourages agencies to engage in self-delegation by drafting legislation deliberately, with an eye toward *Chevron*, to give themselves room to maneuver where they know greater statutory specificity might preclude their preferred policy outcomes.³⁶⁸ Walker argues that Congress cannot effectively police agency self-delegation through the bicameral debate process due to institutional incompetency. Referencing Chief Justice Roberts's approach, Walker contends a heightened "*Chevron* Step Zero" asking "whether the collective Congress intended to delegate [the] particular substantive question to the agency" would prevent collusion between individual members of Congress and encourage clearer delegation.³⁶⁹

Chief Justice Roberts's approach has resonated with some circuit court judges. For example, in a concurring opinion in *ClearCorrect Operating, LLC v. International Trade Commission*,³⁷⁰ for example, Judge O'Malley of the Federal Circuit cited *King v. Burwell* in finding that "there are times when courts should not search for an ambiguity in the statute because it is clear Congress could not have intended to grant the agency authority to act

³⁶⁵ *King*, 135 S. Ct. at 2488–89; see also Hickman, *supra* note 33, at 63–64 (describing the test for *Chevron*'s applicability one can draw from *King v. Burwell*, and connecting that test with the Court's earlier decision in *FDA v. Brown & Williamson Tobacco Corp.*).

³⁶⁶ Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

³⁶⁷ *Id.* at 1406–07.

³⁶⁸ *Id.* at 1407. Critics of *Auer* deference have raised similar arguments that deference regimes encourage self-delegation when the agency is substantially involved in drafting the later interpreted law. See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 654 (1996); Nicholas R. Bednar, *Defying Auer Deference: Skidmore as a Solution to Conservative Concerns in Perez v. Mortgage Bankers Association*, U. MINN. L. REV.: DE NOVO (June 24, 2015), <http://www.minnesotalawreview.org/2015/06/defying-auer-deference-skidmore-solution-conservative-concerns-perez-v-mortgage-bankers-association>.

³⁶⁹ Walker, *supra* note 366, at 1421–22.

³⁷⁰ 810 F.3d 1283 (Fed. Cir. 2015).

in the substantive space at issue.”³⁷¹ Judge O’Malley argued that the court should not reach *Chevron* because the agency’s interpretation would allow the International Trade Commission (“ITC”) to regulate the internet despite the ITC having no relevant expertise.³⁷² In conclusion, Judge O’Malley summarized, “[b]ecause Congress did not intend to delegate such authority to the Commission, . . . we never get past what some refer to as *Chevron* step zero.”³⁷³

One can cast Chief Justice Roberts’s approach to *Chevron* as either an expansion of or an addition to the Supreme Court’s 2001 decision in *Mead*, which limited the scope of *Chevron*’s applicability to agency actions carrying the force of law and reinstated the multifactor *Skidmore* standard as an alternative for those that do not.³⁷⁴ Alternatively, one can read Chief Justice Roberts’s analysis as yet another reframing of *Chevron* step one, reminiscent of some of Justice Breyer’s rhetoric. Either way, the result is less deference to agency interpretations of statutes.

III. DEFENDING *CHEVRON*

When contemplating the many claims of *Chevron*’s impending demise, one has to consider exactly which aspect or variation of *Chevron* the anti-*Chevron* crowd has in mind. Many critics of *Chevron* do not reject deference per se but rather advocate for certain variations thereof.

Justice Scalia was the strongest advocate of a formalistic two-step *Chevron*,³⁷⁵ although he later seemed sympathetic to the notion of *Chevron* having only one step.³⁷⁶ Yet, Justice Scalia derided *Mead* and the more flexible, blended approach to *Chevron* pursued by Justice Breyer.³⁷⁷ Justice

³⁷¹ *Id.* at 1302 (O’Malley, J., concurring).

³⁷² *Id.* at 1303.

³⁷³ *Id.*

³⁷⁴ *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (describing factors relevant for deference); *supra* notes 121–130 and accompanying text (describing the *Mead* decision).

³⁷⁵ *See* Scalia, *supra* note 56 (demonstrating Justice Scalia’s advocacy of a two-step *Chevron*).

³⁷⁶ *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).

³⁷⁷ *See Barnhart v. Walton*, 535 U.S. 212, 226–27 (2002) (Scalia, J., concurring in part and concurring in the judgment) (objecting to Justice Breyer’s reliance on contextual factors in conjunction with *Chevron* analysis); *cf. Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (describing *Skidmore*’s multifactor approach derisively as “th’ol’ ‘totality of the circumstances’ test”); *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment) (describing *Skidmore*’s factors as “anachronis[ti]c”).

Scalia questioned *Chevron*'s validity only after the Court repeatedly strayed too far from his original vision.³⁷⁸ Similarly, Justice Breyer purportedly dislikes *Chevron* and has steadfastly refused to accept Justice Scalia's formalistic *Chevron* in favor of his more flexible, blended approach.³⁷⁹ Yet, Justice Breyer tends to be at least as deferential, if not more so, to agency legal interpretations than Justice Scalia was.³⁸⁰

Regardless of their many disagreements regarding *Chevron*'s validity, operation, and scope, however, both Justices have repeatedly acknowledged the importance of judicial deference and its role in administrative law. Like Justices Scalia and Breyer, academic critics of *Chevron* frequently seem merely to want to replace one version of *Chevron* with another, or with *Skidmore*—not do away altogether with judicial deference to agency action. As Part II establishes, for better or worse, the *Chevron* umbrella has proved large enough to accommodate just about any vision of deferential review.

By contrast, other *Chevron* critics seem to want to do away with deferential review of agency statutory interpretations altogether. Certainly the sponsors of SOPRA fall into this category, with their calls for de novo review. Their efforts focus on the wrong target.

For all of the debate and disagreement over *Chevron*'s substance, scope, and trajectory, two things seem clear, and both concern delegation.³⁸¹ First, *Chevron* is a byproduct of congressional delegation (or conferral of discretionary authority). Indeed, the one aspect of *Chevron* upon which most of the Justices agree is the presence or absence of a congressional delegation of decisionmaking power as the touchstone for deciding whether to defer to agency interpretations of statutes. Only Justice Scalia has objected (rather vociferously) to *Mead*'s emphasis on "delegation" as relevant to deference.³⁸² Nevertheless, in describing his

³⁷⁸ See *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

³⁷⁹ See Breyer, *supra* note 66, 373–82; see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875–76 (2013) (Breyer, J., concurring in part and concurring in the judgment) (disregarding Justice Scalia's *Chevron* analysis in favor of his own).

³⁸⁰ Eskridge & Baer, *supra* note 119, at 1153–54 (documenting deference rates among individual Justices, including that Justice Breyer deferred more often than Justice Scalia, although Justice Scalia was more likely than Justice Breyer to defer to ideologically conservative interpretations).

³⁸¹ See *supra* Parts I, II.

³⁸² See *Mead*, 533 U.S. at 239, 241–45 (Scalia, J., dissenting); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1005, 1014–20 (2005) (Scalia, J., dissenting).

understanding of *Chevron*, Justice Scalia acknowledged that some statutory ambiguities reflect congressional intent to “leave [their] resolution to the agency,” and such ambiguities represent “the conferral of discretion upon the agency”³⁸³—i.e., delegation in all but name.³⁸⁴ Without Congress’s expansive reliance on agencies to make significant policy decisions, *Chevron* would be unnecessary.

Second, Congress shows little inclination to curtail its habit of giving agencies expansive statutory authority to exercise policymaking discretion, and the courts appear equally disinclined to declare such power grants unconstitutional. So long as agencies are allowed such authority, *Chevron* deference—or something much like it—is likely inevitable. The courts and Congress should not fool themselves into believing otherwise.

A. *Chevron Is Just a Standard of Review*

With all of the debates and complaints about *Chevron* deference, it is easy to lose sight of the fact that *Chevron* is, primarily, just a standard of review rather than a rule of decision. *Chevron* serves important doctrinal functions in facilitating the organization of legal arguments and helping judges to think about their role vis-à-vis agencies. In such ways, *Chevron* may influence judicial decisionmaking. At the end of the day, however, standards of review generally do not determine case outcomes. In the vast majority of cases, judicial evaluation of statutory text, history, and purpose—not *Chevron*—determines whether courts uphold an agency’s interpretation of a statute.³⁸⁵ Indeed, much of *Chevron*’s variability can be attributed to the fact that *Chevron* is a standard of review.

Standards of review always speak in terms of how skeptical or deferential a reviewing court should be in assessing the “correctness or propriety” of a lower-level adjudicator or interpreter, whether jury, court,

³⁸³ Scalia, *supra* note 56, at 516.

³⁸⁴ Justice Scalia’s resistance to characterizing the conferral of policymaking discretion as delegation is consistent with his pronouncements regarding executive power and the nondelegation doctrine. *See, e.g.*, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–73 (2001); *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (“The whole theory of *lawful* congressional ‘delegation’ is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.”).

³⁸⁵ *See* Liu, *supra* note 225, at 291 (arguing that *Chevron* really only matters in “hard cases . . . when the court has already done all it can to ‘say what the law is’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

or agency.³⁸⁶ Yet, standards of review are not bright-line rules, nor do they even represent fixed points on an attitudinal continuum. Rather, they are malleable. Justice Frankfurter described standards of review as reflecting moods: “[T]hat mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application.”³⁸⁷ How does one pinpoint with precision what a mood represents?

Standards of review can be distilled into two key elements: the boilerplate and the application. The boilerplate recites talismanic language—describing the mood—across courts and cases to maintain the appearance of uniformity.³⁸⁸ For any standard of review, however, the boilerplate only scratches the surface of actual, case-by-case application. Particular to the administrative law context, even before *Chevron* took hold, Professor Kenneth Culp Davis observed:

Probably more than 500 pages a year are devoted to detailed statements about scope of review of administrative action; most of that verbiage is harmless, for neither the judges nor the readers of opinions take it seriously. Whether the verbiage about scope of review is helpful is doubtful, for it is typically vague, abstract, uncertain, and conflicting.³⁸⁹

The relative uniformity of a standard’s boilerplate tricks commentators into searching for uniformity in the standard’s application.

These observations about a standard of review’s boilerplate hold especially true for the *Chevron* standard. With its two-step framework, *Chevron*’s boilerplate often seems more rule-like than most standards of review—certainly more so than the alternative, multifactor *Skidmore* standard.³⁹⁰ But that more rule-like framework is deceptive—not least because, as described in Part II, *Chevron*’s two-step boilerplate routinely takes different rhetorical forms that, in turn, support different analytical approaches that may be more or less formalistic, more or less textualist, and more or less deferential.

With regard to application, scholars have long criticized judges for

³⁸⁶ Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 15 (1994).

³⁸⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

³⁸⁸ See Kunsch, *supra* note 386, at 15; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381–82 (1985) (describing this as “trigger[s]” and “response[s]”).

³⁸⁹ 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:2 (2d ed. 1984).

³⁹⁰ See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809–10 (2002) (making this comparison).

applying standards of review inconsistently.³⁹¹ Martha Davis and Steven Childress observed that “standards of review become confused because reviewing judges, like the rest of us, respond differently to new situations.”³⁹² Certainly, *Chevron*’s history mirrors this critique. The Supreme Court unknowingly sprung upon the lower courts what appeared to be a new two-part standard without articulating with any degree of detail its scope or substance.³⁹³ As litigants invoked *Chevron* in new contexts, courts had to make decisions about whether and how *Chevron* applied to the cases before them.³⁹⁴ Multiple versions of *Chevron* emerged because even the Justices disagree about the standard’s nuances. Consequently, the Supreme Court’s pronouncements have been vague and inconsistent, and lower court judges with crowded dockets have been left to do the best they can with the cases before them. Multiply that lack of clarity across thousands of circuit court cases featuring different agencies, statutes, and subject matters, and *Chevron*’s variability is both understandable and predictable.

Furthermore, because *Chevron* arguably calls for separate inquiries into statutory clarity and agency reasonableness, *Chevron* developed not along a single deference continuum but on a multidimensional grid comprised of *X* (how clear), *Y* (how reasonable), and *Z* (how formalistic). Justice Scalia pursued a formalistic *Chevron* with a strong step one and a deferential but robust step two. Mark Seidenfeld’s syncopated *Chevron* assumes a still formalistic, but more deferential, standard with a narrow, textual step one inquiry and a broader but still highly deferential step two. The incorporation of *State Farm*’s hard look analysis by Ron Levin and some courts is also formalistic but, in addition to featuring a robust step one analysis, expands *Chevron* step two beyond a mere statutory inquiry. Justice Breyer’s approach and that of Matthew Stephenson and Adrian Vermeule blend *Chevron*’s two steps, and so are less formalistic, albeit in different ways that may or may not be more deferential than the others. And all of these variants of *Chevron* find support in the *Chevron* opinion

³⁹¹ See, e.g., Martha S. Davis & Stevan Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461 (1986); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 762–65 (1982) (noting a large range in the interpretation of “abuse of discretion” by appellate judges); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1053–62 (1995) (presenting a model for determining doctrinal indeterminacy).

³⁹² Davis & Childress, *supra* note 391, at 561.

³⁹³ See *supra* Section I.A.

³⁹⁴ See *supra* Section I.B.

and subsequent jurisprudence.

In summary, the use of a uniform label for a standard of review—or, indeed, any legal doctrine—does not create a uniformly applied legal doctrine.³⁹⁵ Allan Erbsen has observed a similar state of affairs with the choice-of-law doctrine announced by *Erie Railroad Co. v. Tompkins*.³⁹⁶ Courts and scholars have debated the contours of the *Erie* doctrine for over three-quarters of a century, and are just now accepting the viability of coexisting variations, leading Erbsen to suggest that there is no one, single *Erie* doctrine.³⁹⁷ *Chevron*'s status as a standard of review supports accepting its operation as similarly malleable. Perhaps it is time that courts and commentators recognize that *Chevron* can have multiple variations, all of which are reasonable interpretations of the doctrine's primary source.

B. *Statutory Ambiguity Is Unavoidable*

No matter what standard of review, or even which version of *Chevron*, the courts choose to employ in evaluating agency interpretations of statutes, courts will disagree over statutory meaning. Even when judges employ pure de novo review using traditional tools of statutory construction with no layer of deference intruding, they often disagree over what statutes mean.³⁹⁸

Moreover, even if one pursues a robust, de novo-like analysis of statutory text, history, and purpose, some statutory questions simply do not have answers that can be derived through traditional common law reasoning. As Justice Scalia once observed:

An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. . . . When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is

³⁹⁵ See *supra* Part II (comparing a number of variations of *Chevron*).

³⁹⁶ 304 U.S. 64 (1938).

³⁹⁷ See Erbsen, *supra* note 208, at 581–82 (“*Erie*’s imprecision and importance have combined to transform the opinion into a mirror that reflects the varying interests of its readers.”).

³⁹⁸ See, e.g., *Muscarello v. United States*, 524 U.S. 125, 127–28, 139–40 (1998) (featuring a court divided over statutory meaning under de novo review); *Smith v. United States*, 508 U.S. 223, 233–42 (1993) (same); *Moskal v. United States*, 498 U.S. 103, 108–14, 119–21 (1990) (same).

whether the agency has acted within the scope of its discretion—
i.e., whether its resolution of the ambiguity is reasonable.³⁹⁹

Hence, *Chevron* itself recognizes that many statutes are silent on particular issues, and that the resolution of these silences “really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress.”⁴⁰⁰

Some examples are obvious. Many statutes contain specific statutory delegations of authority to make rules or adjudicate cases to accomplish a particular, congressionally identified goal, and resolving such matters obviously is not a matter of interpretation but of pure, naked policymaking.⁴⁰¹ Long before it decided *Chevron*, the Supreme Court recognized the limitations of its role in reviewing agency exercises of specific authority grants. *AT&T Co. v. United States*,⁴⁰² decided in 1936, offers a key illustration. In that case, the Court considered regulations implementing a provision of the Communications Act of 1934⁴⁰³ giving the FCC specific authority to establish uniform standards of accounting for utilities required to report their receipts and expenditures to the agency for ratemaking purposes.⁴⁰⁴ Beyond the contextual need to support the ratemaking function itself, nothing in the statute’s text, history, or purpose offered more detailed guidance regarding the content of those uniform standards of accounting.⁴⁰⁵ Hence, no mere application of traditional tools of statutory construction could aid the Court in evaluating the FCC’s regulations. Beyond “gauging rationality,”⁴⁰⁶ what else was the Court to do? In the end, the only option for the Court was to evaluate the FCC’s regulations for reasonableness—whether they were “‘so entirely at odds with fundamental principles of correct accounting’ as to be the expression of a whim rather than an exercise of judgment.”⁴⁰⁷ In deferring to the agency, the Court said that it was “not at liberty to substitute its own

³⁹⁹ Scalia, *supra* note 56, at 516.

⁴⁰⁰ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

⁴⁰¹ See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696–97 (1991); see also Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 304–08 (1988) (discussing the distinction between statutory interpretation as a question of law and a question of policy).

⁴⁰² 299 U.S. 232 (1936).

⁴⁰³ Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064.

⁴⁰⁴ *AT&T Co.*, 299 U.S. at 235.

⁴⁰⁵ See *id.* at 235–36.

⁴⁰⁶ *Id.* at 237.

⁴⁰⁷ *Id.* at 236–37 (citation omitted) (quoting *Kan. City S. Ry. Co. v. United States*, 231 U.S. 423, 444 (1913)).

discretion for that of administrative officers who have kept within the bounds of their administrative powers.”⁴⁰⁸

When drafting a regulatory statute, Congress often cannot (or does not want to) articulate clear legislative rules for things like “what constitute[s] a ‘safe’ drug, a ‘reasonable hazard,’ . . . [or] a ‘crashworthy automobile.’”⁴⁰⁹ Congress assigns responsibility for giving content to these terms to agency experts, whether through rulemaking, through adjudication, or both.⁴¹⁰ Broad statutory terms may cabin agency discretion, and a court might be able to invoke traditional interpretive tools to arrive at a workable understanding of such words and phrases. In *AT&T Corp. v. Iowa Utilities Board*, for example, the Supreme Court concluded that the word “necessary” as used in the Telecommunications Act of 1996⁴¹¹ with respect to network elements conferred broad discretion on the Federal Communications Commission (FCC), but also served a limiting function, and that the FCC’s interpretation of the statute exceeded the limitations imposed by even that broad term.⁴¹² But resolving terms as vague as “necessary”—or “safe,” “reasonable,” or “crashworthy”—inherently involves making policy judgments as to what activities are desired or acceptable, promoted or prohibited.⁴¹³

Additionally, as the *Chevron* Court recognized, particularly given the complexity of modern statutes, sometimes congressional reliance on agency policymaking is not so explicit, meaning that Congress did not see the problem to be resolved but nevertheless clearly signaled somehow in the statute its intent that agencies have discretion in filling the gap.⁴¹⁴ To such ends, Congress routinely by statute authorizes agencies to adopt rules and regulations as needed to effectuate statutory goals.⁴¹⁵ And the Supreme

⁴⁰⁸ *Id.* at 236.

⁴⁰⁹ JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 246 (1989).

⁴¹⁰ *See id.* at 246–47; *see also SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 202–03 (1947) (concluding that, where Congress gives an agency the power to exercise delegated power through both rulemaking and adjudication, the choice between those two formats lies with the agency).

⁴¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 251(d)(2).

⁴¹² *See, e.g., AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388–90 (1999) (recognizing statutory terms “necessary” and “impair” as giving the agency broad but not unlimited discretion).

⁴¹³ *See WILSON, supra* note 409, at 241.

⁴¹⁴ *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Scalia, supra* note 56, at 516–18.

⁴¹⁵ *See Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of*

Court has long recognized instances in which Congress has delegated general rulemaking authority and, in turn, statutory interpretation of ambiguous provisions involves policymaking.⁴¹⁶ Such was the case in *Chevron* itself, where the EPA exercised general rulemaking authority to elaborate how an underdefined statutory term applied to a common set of facts and circumstances, and the Court did not feel that traditional tools of statutory construction offered a clear answer.

Even if *Chevron* is not part of the analysis, reasonable judges will prefer different tools of statutory construction and reach different conclusions regarding statutory meaning, whether or not they are influenced at least partly by policy implications.⁴¹⁷ In *Yates v. United States*,⁴¹⁸ for example, the Supreme Court considered whether a commercial fisherman who tossed harvested undersized fish into the sea could be charged under the Sarbanes-Oxley Act⁴¹⁹ for knowingly concealing a “tangible object with the intent to impede, obstruct, or influence the investigation” of a United States agency.⁴²⁰ Writing for the plurality, Justice Ginsburg, joined by Chief Justice Roberts and Justices Breyer and Sotomayor,⁴²¹ utilized the statutory text, textual canons, dictionaries, other provisions within the Sarbanes-Oxley Act, other statutes, legislative history, and the rule of lenity to conclude that “tangible object” applied only to objects intended to “record or preserve information.”⁴²² Justice Kagan filed a dissenting opinion, which Justices Scalia, Kennedy,

Law: The Original Convention, 116 HARV. L. REV. 467, 483–87 (2002) (noting general rulemaking grants in various statutes). For examples of grants of general authority, see, for example, 15 U.S.C. § 77s(a) (2012), granting authority to the Securities and Exchange Commission over the Securities Act of 1933; 26 U.S.C. § 7805(a) (2012), granting authority to the Secretary of the Treasury Department over the Internal Revenue Code; and 29 U.S.C. § 156 (2012), granting authority to the National Labor Relations Board over the National Labor Relations Act.

⁴¹⁶ See, e.g., *United States v. Shimer*, 367 U.S. 374, 383 (1961) (“If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”).

⁴¹⁷ See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

⁴¹⁸ 135 S. Ct. 1074 (2015).

⁴¹⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.).

⁴²⁰ *Yates*, 135 S. Ct. at 1078 (quoting 18 U.S.C. § 1519 (2012)).

⁴²¹ Justice Alito concurred in the judgment, but did not join the majority opinion. See *id.* at 1089–90 (Alito, J., concurring in the judgment).

⁴²² *Id.* at 1074–89 (plurality opinion).

and Thomas joined, using nearly all of the same tools to reach the opposite conclusion.⁴²³

Chevron's threshold inquiry—whether the statute at issue is ambiguous—merely adds another layer of complexity while reflecting the same disagreements regarding statutory meaning. In other words, just as judges will inevitably disagree sometimes in attempting to discern statutory meaning using traditional tools, they will likewise inevitably disagree in applying those same tools to assess whether a statute is clear or ambiguous. As Justice Scalia observed early in *Chevron's* life, how one answers “how clear is clear [] may have much to do with where one stands on the earlier points of what *Chevron* means and whether *Chevron* is desirable.”⁴²⁴ He then ruminated regarding differences in interpretive methodology:

One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a “plain meaning” rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of “reasonable” interpretation that the agency may adopt and to which the courts must pay deference.⁴²⁵

In short, that question—how clear is clear—focuses only partly on *Chevron* itself. The interpretive methodology of the judge applying it as the standard of review necessarily comes into play as well.

A recent exchange of ideas between Chief Judge Robert Katzmann of the Second Circuit and Judge Brett Kavanaugh of the D.C. Circuit highlights the difficulty of reaching consensus in statutory interpretation cases, with or without the *Chevron* standard. Writing generally about statutory interpretation, Chief Judge Katzmann advocated using legislative history to understand what the law means and ensure faithful execution of congressional intent.⁴²⁶ Although he warned against using legislative

⁴²³ *Id.* at 1090–101 (Kagan, J., dissenting).

⁴²⁴ Scalia, *supra* note 56, at 521.

⁴²⁵ *Id.*

⁴²⁶ See ROBERT A. KATZMANN, JUDGING STATUTES 38–39 (2014).

history to inject ambiguity into otherwise clear statutes,⁴²⁷ he maintained that failing to consider legislative history could actually expand a judge's discretion by leaving her "only with words that could be interpreted in a variety of ways without contextual guidance as to what legislators may have thought."⁴²⁸ By comparison, Judge Kavanaugh expressed concern that judicial reliance on legislative history to resolve interpretive questions would merely allow judges to find whatever evidence supports their favored interpretation.⁴²⁹ He instead advocated a two-step process for resolving statutory meaning: courts should first use textualist tools to find the "best reading" of the statute; courts then could apply substantive canons to depart from the text.⁴³⁰ In response to Judge Kavanaugh, Chief Judge Katzmann raised the possibility that there will always "be legitimate differences about what is the 'best reading' under the proposed framework whenever there is ambiguity" in statutory meaning.⁴³¹

Perhaps not surprisingly, the exchange between Chief Judge Katzmann and Judge Kavanaugh reflected disagreement over *Chevron's* approach to statutory ambiguity as well. Consistent with *Chevron's* general premise, Chief Judge Katzmann described statutory ambiguity as "often the product of the simple fact that the issues are difficult and Congress, having identified the general problem, leaves it to an agency or court to determine how best to address the problem in its specifics."⁴³² By comparison, Judge Kavanaugh was more prepared to find statutory clarity. In cases where an agency interprets "broad and open-ended terms," such as "reasonable" or "feasible," "a judge can engage in appropriately rigorous scrutiny of an agency's statutory interpretation and simultaneously be very deferential to an agency's policy choices within the discretion granted to it by the statute."⁴³³ "But in cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text."⁴³⁴ Nevertheless, Judge Kavanaugh also worried that "judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded

⁴²⁷ See Robert A. Katzmann, *Response to Judge Kavanaugh's Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 392–93 (2016).

⁴²⁸ KATZMANN, *supra* note 426, at 48.

⁴²⁹ See Kavanaugh, *supra* note 417, at 2149–50.

⁴³⁰ *Id.* at 2144.

⁴³¹ See Katzmann, *supra* note 427, at 398.

⁴³² KATZMANN, *supra* note 426, at 47.

⁴³³ Kavanaugh, *supra* note 417, at 2153–54.

⁴³⁴ *Id.* at 2154.

way.”⁴³⁵ Judge Kavanaugh’s concern is not redundancy, but fear that nontextualists will too quickly end the step one inquiry. Indeed, he worried that *Chevron* encourages the executive branch to abuse the doctrine by aggressively pursuing ambiguity in litigation.⁴³⁶ According to Judge Kavanaugh, “In certain major *Chevron* cases, different judges will reach different results even though they may actually *agree* on what is the best reading of the statutory text.”⁴³⁷ Consequently, Judge Kavanaugh concluded that step one is so fraught with disagreement that “we need to consider eliminating that inquiry as the threshold trigger.”⁴³⁸ In this sense, Judge Kavanaugh’s approach to *Chevron* appears similar to Stephenson and Vermeule’s one-step *Chevron*.⁴³⁹

In short, ambiguity is inevitable so long as jurists continue to disagree about what tools and interpretive theories ought to apply when interpreting statutes. Those disagreements inevitably spill over and infuse the disagreements over *Chevron* and its two steps. But eliminating *Chevron* will not magically resolve the problem of statutory ambiguity.

C. *Delegation, Not Deference, Is the “Problem”*

In the end, when courts apply *Chevron*, agencies will win some cases and lose others. Whenever judges reject controversial agency statutory interpretations, critics will contend the judges were inadequately

⁴³⁵ *Id.* at 2118.

⁴³⁶ *See id.* at 2151. Judge Kavanaugh claims “some academics fail to fully grasp the reality of how this works.” *Id.* Kavanaugh is undoubtedly correct at least anecdotally, but the extent to which *Chevron* has such an effect systemically is difficult to discern with any reliable degree of certainty. *See generally* Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703 (2014) (offering the first empirical analysis of *Chevron*’s influence on agency rulemaking, with nuanced results). James Q. Wilson, after acknowledging that agencies actively pursue autonomy, stated, “The supposedly imperialistic character of government agencies is a vast oversimplification.” WILSON, *supra* note 409, at 195. Although he was an academic, Wilson served in three Republican administrations (as well as the Johnson administration) and was a leading expert on bureaucracy. *See, e.g.*, Tevi Troy, *The Mind in the Oval Office*, AM. ENTERPRISE INST. (Mar. 2, 2012, 2:30 PM), <http://www.aei.org/publication/the-mind-in-the-oval-office/print/>; James Q. Wilson, *Ph.D. (In Memoriam)*, PEPPERDINE SCH. OF PUB. POL’Y, http://publicpolicy.pepperdine.edu/academics/faculty/?faculty=james_wilson (last visited Aug. 31, 2017). Wilson published his seminal commentary on bureaucracy in 1989, and it is fair to theorize that the post-*Chevron* years have altered agency behavior. Regardless, as this Article describes, at least some understandings of *Chevron* analysis leave room within that doctrine to police agency aggressiveness.

⁴³⁷ Kavanaugh, *supra* note 417, at 2153.

⁴³⁸ *Id.* at 2154.

⁴³⁹ *See supra* Section II.E.

deferential. Whenever judges uphold controversial agency statutory interpretations, critics will contend the judges were overly deferential. Sometimes, judges strain our credulity by employing traditional tools of statutory construction in arguably tortured ways to find statutory clarity. Some judges will find ambiguity in a stop sign.⁴⁴⁰ Blaming *Chevron* for case outcomes that one dislikes is misdirected. The real “fault” (to the extent it exists) is a system of government that routinely relies on unelected agency officials to resolve hard policy questions.

Yet, Congress seems unlikely to stop delegating policymaking authority to agencies. In *Mistretta v. United States*,⁴⁴¹ the Supreme Court contended that, “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”⁴⁴² In the same case, even as he dissented from allowing the Sentencing Commission to adopt uniform sentencing guidelines, Justice Scalia conceded that courts cannot readily preclude Congress from relying on agencies to make policy because “no statute can be entirely precise” and “some judgments involving policy considerations[] must be left to the officers executing the law and to the judges applying it.”⁴⁴³

Regardless of whether Congress *could* stop delegating policymaking discretion, it seems unlikely to do so. Arguments abound justifying congressional delegations of discretionary power to agencies. Congress routinely delegates authority to agencies because it wants to utilize their policy and scientific expertise to resolve programmatic details and fill statutory gaps.⁴⁴⁴ Additionally, Christopher Walker’s study of agency involvement in statutory drafting reflects interaction between agency officials and congressional staffers that may, in turn, lead Congress to delegate even more discretionary authority to the former. Notwithstanding their own subject matter expertise, congressional staffers routinely seek assistance—much of it technical, but some of it substantive—from

⁴⁴⁰ Credit for this particular observation goes to a judge who said it to one of the authors and whose identity we will not disclose, though he attributed authorship to another as well.

⁴⁴¹ 488 U.S. 361 (1989).

⁴⁴² *Id.* at 372.

⁴⁴³ *Id.* at 415 (Scalia, J., dissenting).

⁴⁴⁴ See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 184 (1999) (suggesting more positively that delegation allows Congress “to write simpler statutes, allows the details of policy to adjust to new knowledge and changed circumstances, and creates an expert body that can provide useful information about the needs for changes in either legislation or appropriations”).

agencies when drafting legislation.⁴⁴⁵ Congressional staffers may be insufficiently familiar with agencies' governing statutes and implementing regulations, leading congressional staffers to seek drafting assistance from agency experts to avoid duplicative or conflicting language in legislative proposals.⁴⁴⁶ In other words, Congress utilizes agency expertise in the legislative drafting process to improve statutory quality and avoid creating enforcement headaches for the agency once the legislation passes. And because agencies play a substantial role in the legislative process, they may be perceived as possessing comparative expertise over courts in understanding Congress's original intent, which in turn may prompt Congress to delegate more power to agency officials.⁴⁴⁷

Broad delegations may at times indicate that Congress cannot decide what it wants or does not know what a particular regulatory scheme needs to function most effectively.⁴⁴⁸ Particularly in the face of changing social, economic, or technological conditions, good governance in some instances may dictate that Congress should delegate general rulemaking power coupled with open-ended statutory language to give agencies flexibility in utilizing their expertise to accomplish congressional goals. If Congress, despite its investigative powers, cannot ascertain the best means of achieving complex regulatory goals, courts are unlikely to produce satisfactory solutions to such quandaries when they arise in cases of narrow scope.

More cynically, Congress may at least sometimes draft regulatory statutes ambiguously to serve the interests of the legislators themselves. Scholars have theorized, for example, that Congress uses ambiguous language to reduce legislative delays caused by continued debate over statutory terms and shift the political costs of undesirable decisions from legislators, whose jobs depend on public opinion, to bureaucrats.⁴⁴⁹ If the details of regulatory schemes are controversial, these scholars suggest, Congress may seek to claim credit for the politically favorable aspects of legislation on one hand, but shift blame for politically undesirable decisions

⁴⁴⁵ See Walker, *supra* note 366, at 1388–89.

⁴⁴⁶ See *id.* at 1391–94.

⁴⁴⁷ See *id.* at 1402–03; see also Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 347–49 (1990).

⁴⁴⁸ WILSON, *supra* note 409, at 246–47.

⁴⁴⁹ See Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 45–47 (1982); Mathew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, in CONGRESS: STRUCTURE AND POLICY 409 (Mathew D. McCubbins & Terry Sullivan eds., 1987).

on the other.⁴⁵⁰

Regardless of Congress's reasons for delegating policymaking discretion in the first instance, most jurists prefer not to be in the policymaking business, at least not on the same scale as agencies. As Justice Blackmun put it, "A judge is first and foremost one who resolves disputes, and not one charged with the duty to fashion broad policies establishing the rights and duties of citizens. That task is reserved primarily for legislators."⁴⁵¹ Of course, in any common law system, judicial resolution of individual cases often carries policy implications. Nevertheless, the traditional sort of judicial policymaking is different at least in degree, if not in kind, from the major policymaking role that agencies play in the modern regulatory state.

Particularly as compared to agencies, generalist judges lack the expertise to engage in that latter kind of policymaking. Indeed, the Supreme Court in *Chevron* justified deferring to agency interpretations by recognizing that agencies are better policymakers than courts.⁴⁵² And, as Justice Scalia further recognized in *Mistretta*, Congress better understands the "necessities" of government and the Court "almost never fe[els] qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."⁴⁵³ Even if courts possessed more institutional capacity to engage in expansive policymaking, most judges likely do not want that sort of responsibility—hence most judges' insistence that their function is to interpret rather than make the law.

In sum, Congress has relied and likely will continue to rely on agencies to exercise policymaking discretion in filling statutory gaps. As *Chevron* counsels, when Congress clearly envisions an agency role in resolving such questions, the only role that remains for the courts is to police such agency interpretations for reasonableness. Hence, the Court has grounded *Chevron* in the assumption that, where Congress statutorily grants agencies the power to act with the force of law, Congress thus wants courts to defer to agency interpretations of those statutes.⁴⁵⁴ Some have described this assumption as fictional, contending that Congress gives little consideration to judicial deference doctrine or standards of review when it

⁴⁵⁰ See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52–54 (1974).

⁴⁵¹ *Gregory v. Ashcroft*, 501 U.S. 452, 487 n.1 (1991) (Blackmun, J., dissenting).

⁴⁵² See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

⁴⁵³ *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

⁴⁵⁴ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

drafts legislation. A study by Abbe Gluck and Lisa Bressman suggests otherwise, demonstrating at least that, nearly thirty years after the Court's *Chevron* decision, the practices and intentions of congressional staffers charged with drafting legislation strongly support the intuitions driving *Chevron*—that Congress often but does not always intend to delegate primary interpretive responsibility to administering agencies rather than courts.⁴⁵⁵ Exemplifying the latter, Kent Barnett has documented Congress's deliberate and express rejection of *Chevron* in the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁴⁵⁶

D. Amending the APA Will Not Eliminate Chevron

Could Congress amend the APA to contradict the Supreme Court's assumption that Congress generally wants it to defer as *Chevron* contemplates? Perhaps. The Separation of Powers Restoration Act ("SOPRA"), passed by the House of Representatives, is an example of legislators attempting to do just that.⁴⁵⁷ Whether SOPRA would effectively accomplish its goal of eliminating *Chevron* deference is uncertain.

Section 706 of the APA presently calls upon reviewing courts to "decide all relevant questions of law [and] interpret constitutional and statutory provisions."⁴⁵⁸ That same provision goes on to instruct reviewing courts to "set aside agency action" they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁵⁹ Although the Court's opinion in *Chevron* used language echoing APA § 706(2)(A)'s arbitrary and capricious standard,⁴⁶⁰ and more recent opinions have linked *Chevron* step two to *State Farm*'s interpretation of the same text,⁴⁶¹ Justice Scalia is correct in saying that the Court has never tied the *Chevron* standard of review very tightly to the APA's text.⁴⁶²

⁴⁵⁵ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013).

⁴⁵⁶ See Kent Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 FORDHAM L. REV. 587, 600 n.114 (2014) (citing 12 U.S.C. § 25b(b)(5)(A) (2012) as directing courts to review decisions to preempt state law made by the Office of the Comptroller of the Currency using the *Skidmore* standard).

⁴⁵⁷ Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016); see also *supra* notes 26–29 and 201–207 and accompanying text (discussing SOPRA).

⁴⁵⁸ 5 U.S.C. § 706 (2012).

⁴⁵⁹ *Id.* § 706(2)(A).

⁴⁶⁰ See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁴⁶¹ See *supra* notes 152–170 and accompanying text.

⁴⁶² *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211–1212 (2015) (Scalia, J., concurring); see also *supra* notes 191–193 and accompanying text (discussing Justice

SOPRA proposes to amend APA § 706 to require courts to “decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules.”⁴⁶³ Although SOPRA’s text does not mention *Chevron* explicitly, statements by the Act’s sponsors and supporters indicate that their primary goal with SOPRA is to eliminate the deferential *Chevron* standard of review for agency interpretations of statutes.⁴⁶⁴

Given the general understanding that SOPRA’s proponents aim to overturn *Chevron*,⁴⁶⁵ presumably many or even most judges would honor that intent and stop applying *Chevron*, at least by name. At a minimum, SOPRA’s reference to *de novo* review may encourage more robust consideration of statutory text, history, and purpose from judges otherwise inclined toward the least intrusive, and thus most deferential, variants of *Chevron* analysis.

On the other hand, SOPRA’s text is not explicit in repudiating *Chevron* altogether, leaving the amendment open to interpretation. As should be apparent from Part II, at least in theory, the *Chevron* standard itself contemplates a *de novo*-like step one analysis employing traditional tools of statutory construction to evaluate congressional intent and provides for deference under step two only when those tools fail to yield a clear answer. Also, as noted above, many statutes contemplate that agencies will exercise discretion to fill statutory gaps—sometimes explicitly, for example by expressly calling upon agencies to develop regulations to resolve a particular issue; other times implicitly, for example by using vague or undefined terms and separately authorizing agencies to adopt regulations as needed.⁴⁶⁶ Specific statutes trump the more general APA.⁴⁶⁷ Consequently, a reviewing court might reasonably interpret a specific statutory grant of discretionary authority—for example to adopt regulations or pursue formal adjudication to elaborate and implement undefined or underdefined statutory terms—as taking precedence over a general call for *de novo*

Scalia’s observations).

⁴⁶³ *Id.* § 2(3) (emphasis added).

⁴⁶⁴ *See, e.g.*, Press Release, Representative Bob Goodlatte, Goodlatte Introduces Major Regulatory Reform Package to Promote Economic Growth & Job Creation (Jan. 3, 2017), <https://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=739>; *see also supra* notes 26, 204–205 and accompanying text (documenting other statements).

⁴⁶⁵ *See, e.g.*, 163 CONG. REC. H328 (daily ed. Jan. 11, 2017) (statement of Rep. McCarthy).

⁴⁶⁶ *See supra* notes 401–416417 and accompanying text.

⁴⁶⁷ *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general . . .”).

review contained in the APA. Thus, a reviewing court might reasonably conclude that SOPRA's reference to de novo review does not preclude judicial deference in all cases, but rather merely limits the scope of when the court ought to honor the agency's choices. If such is the case, then it is difficult to see what exactly SOPRA's call for de novo review accomplishes that cannot be reconciled with *Chevron* and *Mead*.

Perhaps recognizing these limitations, a lengthier SOPRA incorporated into the House version of the RAA goes even further by specifying:

If the reviewing court determines that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law.⁴⁶⁸

Presumably, this language is intended to undermine *Chevron*'s instruction that courts should defer when faced with ambiguous statutes. By instructing courts not to read statutory ambiguities as delegations of legislative rulemaking power, this language also raises the spectre of some very old notions regarding different types of statutory grants of rulemaking power. In doing so, the revised SOPRA may generate more questions and create more uncertainty than it resolves.

In the middle of the twentieth century, the consensus among courts, agencies, and legal scholars held that agencies could only promulgate legally binding regulations when Congress specified statutorily what the content of those regulations should be.⁴⁶⁹ By contrast, more general statutory grants of authority to adopt rules and regulations as needed were thought not to support legally binding regulations at all.⁴⁷⁰ In light of this distinction, prior to *Chevron*, courts evaluated agency regulations adopted pursuant to specific grants of rulemaking power merely for reasonableness but less authoritative, general authority regulations using *Skidmore*'s arguably less deferential, multi-factor analysis.⁴⁷¹ One of *Chevron*'s innovations was to eliminate the old specific versus general authority

⁴⁶⁸ Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 202(1)(B) (2017).

⁴⁶⁹ See Hickman, *supra* note 50, at 1564–67 (documenting pre-*Chevron* historical understandings regarding different types of statutory rulemaking authority).

⁴⁷⁰ *Id.*

⁴⁷¹ See *id.* at 1568–73 (relating deference doctrine to scholarly and judicial understandings of specific versus general delegations of rulemaking power in the decades prior to the *Chevron* decision).

distinction in the judicial deference context.⁴⁷² By implicitly distinguishing between specific and general authority delegations of rulemaking power, does the revised SOPRA contemplate a return to different standards of review for specific versus general authority regulations? If so, which ones—*Chevron*, *Skidmore*, neither, or both?

Moreover, the added language addresses only the standard of review that courts should apply when evaluating agency legal interpretations. Meanwhile, other provisions of the RAA preserve a distinction between legislative rules subject to notice-and-comment rulemaking requirements and interpretative rules and policy statements exempt from those procedures, without defining those categories.⁴⁷³ Since at least the 1960s, courts have routinely treated regulations adopted pursuant to general grants of rulemaking authority as legislative rules carrying the force of law and, thus, as subject to notice-and-comment rulemaking requirements.⁴⁷⁴ By implicitly distinguishing between specific and general authority delegations of rulemaking power, does the revised SOPRA repeal the legal effect of fifty years of general authority regulations treated as legislative rules by agencies, courts, and regulated parties alike? Do all of those regulations suddenly become interpretative rules, subject to change without further notice and opportunity for comment? And if so, then what happens if Congress downgrades thousands of regulations governing primary behavior and extending government benefits from binding law to mere nonbinding agency advice?

In short, although intended to overturn *Chevron*, neither version of SOPRA is altogether clear as to its meaning or its scope. Additionally, the revised SOPRA contained in the House version of the RAA is arguably inconsistent with other provisions of that legislation and, if adopted, could be enormously destabilizing for those who depend upon consistency in the laws that govern their legal rights, obligations, and interests. Perhaps for these reasons, the version of the RAA presently making its way through the Senate contains none of SOPRA's language and does not seek otherwise to repudiate *Chevron* or limit its scope.⁴⁷⁵

Regardless, whatever amendment to the APA Congress might fashion

⁴⁷² See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56–57 (2011) (acknowledging that *Chevron* eliminated that distinction).

⁴⁷³ H.R. 5 § 103(b) (amending APA § 553 rulemaking procedures but retaining the exceptions from most procedural requirements for interpretative rules and policy statements).

⁴⁷⁴ Hickman, *supra* note 50, at 1574–75.

⁴⁷⁵ Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017).

and adopt, merely telling courts to decide cases for themselves and not read too much into statutory gaps is unlikely to eliminate judicial deference to agency interpretations of law. When faced with two competing, seemingly reasonable interpretations of a statute, and when traditional tools of statutory construction fail to provide a clear answer, many judges will be inclined simply to side with the agency charged by Congress with administering the statute. With *Chevron* deference as an option, courts finding themselves in such a scenario are free to say so as the basis for their decision. Without that alternative, courts in such circumstances may very well still side with the agency but with less transparency, justifying their decisions using whatever interpretive tools the agency suggested in its Brief, even if that reasoning did not persuade the court that the agency's interpretation really was superior. Such disingenuousness in judicial decisionmaking hardly seems like an improvement over the status quo.

In the end, the only way for Congress to really "repeal" *Chevron* sensibly and effectively is statute by statute, and perhaps even provision by provision, disclaiming the use of *Chevron* where Congress intends the agency to have no major policymaking role, and clarifying statutory language where Congress disagrees with the administering agency's interpretation thereof. That outcome seems almost as unlikely on a grand scale as Congress ceasing its reliance on delegating policymaking discretion in the first instance.

CONCLUSION

Reports of *Chevron*'s demise are greatly exaggerated, and efforts to overturn *Chevron* aim at the wrong target. Certainly, *Chevron* is a highly imperfect doctrine. The opinion itself is confusing. Courts are inconsistent when they apply it, adding to the confusion. Legitimate questions abound regarding *Chevron*'s proper scope and operation. Undoubtedly, there remains room for improvement and clarification.

Yet, casting *Chevron* as administrative law's bogeyman has always been a bit overwrought. *Chevron* undoubtedly is not what the Framers had in mind, but then again, neither is the modern regulatory state. So long as agency officials possess the authority to make major policy decisions, however, *Chevron*—or something much like it—will survive. Congress will continue delegating, so courts will continue deferring in some number of cases. To the extent that courts and commentators want to curtail the administrative state, they should focus their efforts on rolling back congressional delegations of policymaking discretion to agency officials rather than overturning *Chevron*.

In short, *Chevron*'s basic premises represent a reasonable judicial

response to the government that we actually have and the world in which we actually live. To paraphrase Winston Churchill, *Chevron* is the worst standard of review, except for all the others.⁴⁷⁶

⁴⁷⁶ CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 573 (Richard M. Langworth ed., 2008) (quoting speech to the House of Commons on November 11, 1947: “[D]emocracy is the worst form of Government except for all those other forms that have been tried from time to time....”).