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Chevron Deference: A Primer

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Summary

When Congress delegates regulatory functions to an administrative agency, that agency's ability to act is governed by the statutes that authorize it to carry out these delegated tasks. Accordingly, in the course of its work, an agency must interpret these statutory authorizations to determine what it is required to do and to ascertain the limits of its authority. The scope of agencies' statutory authority is sometimes tested through litigation. When courts review challenges to agency actions, they give special consideration to agencies' interpretations of the statutes they administer. Judicial review of such interpretations is governed by the two-step framework set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council*.

The *Chevron* framework of review usually applies if Congress has given an agency the general authority to make rules with the force of law. If *Chevron* applies, a court asks at step one whether Congress directly addressed the precise issue before the court, using traditional tools of statutory construction. If the statute is clear on its face, the court must effectuate Congress's stated intent. However, if the court concludes instead that a statute is silent or ambiguous with respect to the specific issue, the court proceeds to *Chevron*'s second step. At step two, courts defer to an agency's reasonable interpretation of the statute.

Application of the *Chevron* doctrine in practice has become increasingly complex. Courts and scholars alike debate which types of agency interpretations are entitled to *Chevron* deference, what interpretive tools courts should use to determine whether a statute is clear or ambiguous, and how closely courts should scrutinize agency interpretations for reasonableness. A number of judges and legal commentators have even questioned whether *Chevron* should be overruled entirely. Moreover, *Chevron* is a judicially created doctrine that rests in large part upon a presumption about legislative intent, and Congress could modify the courts' use of the doctrine by displacing this underlying presumption.

This report discusses the *Chevron* decision, explains the circumstances in which the *Chevron* doctrine applies, explores how courts apply the two steps of *Chevron*, and highlights some criticisms of the doctrine, with an eye towards the potential future of *Chevron* deference.

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Background

Congress has created numerous administrative agencies to implement and enforce delegated regulatory authority. Federal statutes define the scope and reach of agencies' power,[1] granting them discretion to, for example, promulgate regulations,[2] conduct adjudications,[3] issue licenses,[4] and impose sanctions for violations of the law.[5] The Administrative Procedure Act (APA) confers upon the judiciary an important role in policing these statutory boundaries, directing federal courts to "set aside agency action" that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations."[6] Courts will thus invalidate an action that exceeds an agency's statutory authorization or otherwise violates the law. Of course, in exercising its statutory authorities, an agency necessarily must determine what the various statutes that govern its actions mean. This includes statutes the agency specifically is charged with administering as well as laws that apply broadly to all or most agencies.

As this report explains, when a court reviews an agency's interpretation of a statute it is charged with administering,[7] the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[8] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[9] If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[10] In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[11]

This report discusses the *Chevron* decision, explains the circumstances in which the *Chevron* doctrine applies, explores how courts apply the two steps of *Chevron*, and highlights some criticisms of the doctrine, with an eye towards the potential future of *Chevron* deference.

What Is *Chevron* Deference?

The *Chevron* case itself arose out of a dispute over the proper interpretation of the Clean Air Act (CAA). The contested statutory provision required certain states to create permitting programs for "new or modified major stationary sources" that emitted air pollutants.[12] In 1981, the

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[1] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it.").

[2] *See* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[3] *See* 5 U.S.C. §§ 556, 557 (mandating certain procedures when agencies conduct formal adjudications).

[4] *See* 5 U.S.C. § 558 (imposing certain requirements on agencies when reviewing applications for a license).

[5] *See, e.g.*, Wilson v. Commodity Futures Trading Comm'n, 322 F.3d 555, 560 (8th Cir. 2003) (noting that "[t]he Commission's choice of sanctions" under 7 U.S.C. § 9 for a violation of the Commodity Exchange Act "will be upheld in the absence of an abuse of discretion").

[6] 5 U.S.C. § 706(2)(A), (C).

[7] These agency interpretations may be explicitly announced in agency rules or adjudications, or they may be implicit in an agency's action and later announced in court as a defense of that action.

[8] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).

[9] *Id*. at 842.

[10] *Id*. at 842-43.

[11] *Id*. at 843.

[12] *Id*. at 840; 42 U.S.C. § 7502.

Environmental Protection Agency (EPA) promulgated a regulation that defined "stationary source," as used in that statute, to include all pollution-emitting activities within a single "industrial grouping,"[13] and thus let states "bubble," or group together, all emitting sources in a single plant for the purposes of assessing emissions.[14] This allowed a facility to construct new pollution-emitting structures so long as the facility as a whole—that is, the "stationary source"—did not increase its emissions.[15] The Natural Resources Defense Council (NRDC) filed a petition for judicial review, arguing that this definition of "stationary source" violated the CAA.[16] The NRDC claimed that the text of the CAA required the EPA "to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source."[17]

A unanimous Supreme Court disagreed and upheld the regulation, determining that the EPA's definition was "a permissible construction of the statute."[18] The Court explained that when a court reviews an agency's interpretation of a statute it administers, it faces two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[19]

Applying this two-step inquiry to review the challenged EPA regulation, the Court first considered the text and structure of the CAA, along with the legislative history regarding the definition of "stationary source."[20] The text of the statute did not "compel any given interpretation of the term 'source,'"[21] and did not reveal Congress's "actual intent."[22] The Justices concluded that the statutory text was broad, granting the EPA significant "power to regulate particular sources in order to effectuate the policies of the Act."[23] The legislative history of the CAA was similarly "unilluminating."[24] However, the ambiguous legislative history was "consistent with the view that the EPA should have broad discretion in implementing the policies of" the CAA.[25] Ultimately, the Court decided that the EPA had "advanced a reasonable explanation" for

[13] *Chevron*, 467 U.S. at 840-41, 857-58.

[14] *Id.* at 840.

[15] *See id.* at 856.

[16] *Id.* at 841, 859.

[17] *Id.* at 859.

[18] *Id.* at 866.

[19] *Id.* at 842-43.

[20] *Id.* at 848-53.

[21] *Id.* at 860.

[22] *Id.* at 861.

[23] *Id.* at 862.

[24] *Id.*

[25] *Id.*

determining that its definition of "source" advanced the policy concerns that had motivated the CAA's enactment,[26] and upheld this "permissible construction."[27]

The Court gave three related reasons for deferring to the EPA: congressional delegation of authority, agency expertise, and political accountability.[28] First, the Court invoked a judicial presumption about legislative intent, which has subsequently become one of the leading justifications for deferring to agencies under *Chevron*:[29]

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[30]

In the view of the Court, because the statutory term "source" was ambiguous and could be read either to prohibit or to allow "bubbling,"[31] Congress had implicitly delegated to the EPA the ability to choose any definition that was reasonably permitted by the statutory text.[32] The statutory ambiguity constituted a limited delegation of interpretive authority from Congress, and the agency had acted within that delegation.[33]

Second, the Court cited the greater institutional competence of agencies, as compared to courts, to resolve the "policy battle" being waged by the litigants.[34] The Court reasoned that, with its superior subject matter expertise, the EPA was better able to make policy choices that accommodated "manifestly competing interests" within a "technical and complex" regulatory scheme.[35] Finally, the opinion of the Court also rested implicitly on concerns about the constitutional separation of powers.[36] While *judges* should not be in the business of "reconcil[ing] competing political interests," the Court stated, it was "entirely appropriate for this *political*

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[26] *Id.* at 863.

[27] *Id.* at 866.

[28] *Id.* at 843-44, 865-66. Justice Scalia later noted another justification for *Chevron* deference, rooted in the history of federal court review of agency action before passage of the federal question jurisdiction statute in 1875. United States v. Mead Corp., 533 U.S. 218, 241-42 (2001) (Scalia, J., concurring) (asserting that the *Chevron* decision "was in accord with the origins of federal-court judicial review [as] [j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus").

[29] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 192 (2006) (describing how Justices Stephen Breyer and Antonin Scalia, with very different views of the *Chevron* analysis, "both approved of resort to that [legal] fiction").

[30] *Chevron*, 467 U.S. at 843-44 (citations omitted).

[31] *Id.* at 860-61.

[32] *Id.* at 866.

[33] *See id.*

[34] *Id.* at 864.

[35] *Id.* at 865.

[36] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."); Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 990 (2016) (explaining the "constitutional roots" of "the delegation foundation of *Chevron*"); *but cf.* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 222 (2001) ("We have argued ... that separation-of-powers law usually neither prohibits nor requires *Chevron* deference."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989) ("[T]he notion that administrators may interpret statutes that they administer is inconsistent with separation of powers principles that date back to the early days of the American republic and that retain considerable vitality today. The basic case for judicial review depends on the proposition that foxes should not guard henhouses.") (citations omitted).

branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[37]

Does *Chevron* Deference Apply?

An important threshold question for a court reviewing an agency's interpretation of a statute is whether *Chevron* deference should apply at all. As an initial matter, the *Chevron* framework of review is limited to agencies' interpretations of statutes they administer.[38] Even when an agency is interpreting a statute that it administers, however, the Supreme Court has prescribed important limits on the types of agency statutory interpretations that qualify for *Chevron* deference. One crucial inquiry, sometimes referred to as *Chevron* "step zero," is whether Congress has delegated authority to the agency to speak with the force of law.[39] This analysis often turns on the formality of the administrative procedures used in rendering a statutory interpretation. The Court has indicated that an agency's determination of the scope of its jurisdictional authority is entitled to *Chevron* deference in appropriate circumstances.[40] Another situation where the Court has occasionally declined to follow *Chevron* occurs when an agency's interpretation implicates a question of major "economic and political significance."[41] However, this "major questions" doctrine has been invoked in a somewhat ad hoc manner, leaving unclear exactly how this consideration fits into the *Chevron* framework.

Importantly, even if the *Chevron* framework of review does not apply, a court might still give *some weight* to an agency's interpretation of a statute.[42] In the 2000 case of *United States v. Mead Corp.*,[43] the Court explained that even when *Chevron* deference was inapplicable to an agency's interpretation, it might still merit some weight under the Court's pre-*Chevron* decision in *Skidmore v. Swift & Co*.[44] Under *Skidmore*, when an agency leverages its expertise to interpret a

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[37] *Chevron*, 467 U.S. at 865-66 (emphasis added). *See also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373-74 (2001) (arguing the "*Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President," and is best justified as ensuring that policymaking functions track political accountability).

[38] Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that "when it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency's particular interpretation").

[39] Sunstein, *supra* note 29, at 191; Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[40] *See infra* "Agency Interpretations of the Scope of Its Authority ("Jurisdiction")."

[41] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) [hereinafter *Brown & Williamson*].

[42] For more information, *see* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[43] 533 U.S. 218, 235 (2001).

[44] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); 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."); Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989) ("It

"highly detailed" "regulatory scheme," a court may accord the agency's interpretation "a respect proportional to its 'power to persuade.'"[45] In other words, a court applying *Skidmore* deference accords an agency's interpretation of a statute an amount of respect or weight that correlates with the strength of the agency's reasoning.[46]

Finally, when an agency interprets legal requirements that apply broadly across agencies, it is not operating pursuant to delegated interpretive authority to resolve ambiguities or relying on its particular expertise in implementing a statute, and the agency's interpretation is not afforded deference by a reviewing court.[47] For instance, courts will review de novo, or without any deference at all,[48] procedural provisions of the APA,[49] the Freedom of Information Act,[50] and the Constitution.[51]

How Did the Agency Arrive at Its Interpretation?

Determining whether *Chevron* deference applies to an agency's interpretation typically requires a court to examine whether Congress delegated authority to the agency to speak with the force of law in resolving statutory ambiguities or to fill statutory gaps. One important indicator of such a delegation is an agency's use of formal procedures in formulating the interpretation. As background, the APA requires agencies to follow various procedures when taking certain actions. For instance, agencies issuing legislative rules that carry the force of law generally must follow notice and comment procedures; and adjudications conducted "on the record" must apply formal court-like procedures.[52] In contrast, non-binding agency actions, such as agency guidance documents, are exempt from such requirements. In *Christensen v. Harris County*, the Court ruled that nonbinding interpretations issued informally in agency opinion letters, "like [those] contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," do not receive deference under *Chevron*.[53] In contrast, the Court indicated, *Chevron* deference is appropriate for legally binding interpretations reached through more formal procedures, such as formal adjudications and notice-and-comment rulemaking.[54]

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should not be thought that the *Chevron* doctrine ... is entirely new law. To the contrary, courts have been content to accept 'reasonable' executive interpretations of law for some time.").

[45] *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

[46] *Skidmore*, 323 U.S. at 140.

[47] *See Chevron*, 467 U.S. at 843-44, 865.

[48] Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006) (explaining that *de novo* review requires the court to "review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered").

[49] Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[A]n agency has no interpretive authority over the APA.").

[50] Fed. Labor Relations Auth. v. U.S. Dep't of the Treasury, Fin. Mgmt. Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989); Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice, 164 F. Supp. 3d 145, 155-56 (D.D.C. 2016) ("FOIA, of course, affords complainants who bring suit under Section 552(a)(4)(B) a de novo review of the agency's withholding of information.").

[51] *See, e.g.*, Emp'r Solutions Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer, 833 F.3d 480, 484 (5th Cir. 2016); *see also* Miller v. Johnson, 515 U.S. 900, 923 (1995) (declining to extend deference to an agency interpretation that "raises a serious constitutional question").

[52] 5 U.S.C. § 553 (rulemaking); §§ 556, 557 (adjudications).

[53] 529 U.S. 576, 587 (2000).

[54] *Id*.

Likewise, in *United States v. Mead Corp.*, the Court ruled that tariff classification rulings by the U.S. Customs Service were not entitled to *Chevron* deference because there was no indication that Congress intended those rulings "to carry the force of law."[55] The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[56] Such a delegation could be shown by an agency's authority to conduct formal adjudications or notice-and-comment rulemaking, "or by some other indication of a comparable congressional intent."[57] The Court found no such indication here—the tariff classifications were not issued pursuant to formal procedures and the rulings did not bind third parties.[58] Further, their diffuse nature and high volume—over 10,000 classifications issued every year at 46 different agency field offices—indicated that such classifications did not carry the force of law.[59]

Mead and *Christensen* thus indicate that a key indicator of a congressional delegation of power to interpret ambiguity or fill in the gaps of a statute is authority to utilize formal procedures such as notice-and-comment rulemaking or formal adjudications to implement a statute.[60] An agency's interpretation of a statute reached through these means is thus more likely to qualify for *Chevron* deference than is an informal interpretation,[61] such as one issued in an opinion letter or internal agency manual.[62]

Nonetheless, the Supreme Court has indicated that an agency's use of formal procedures in interpreting a statute is not a *necessary* condition for the application of *Chevron* deference.[63] *Mead* indicated that a delegation of interpretive authority could be shown by an agency's power to conduct notice-and-comment rulemaking or formal adjudications, "or by some other indication of a comparable congressional intent."[64] In *Barnhart v. Walton*, the Court deferred under *Chevron* to the Social Security Administration's interpretation of the Social Security Act's provisions regarding disability benefits.[65] The majority opinion, written by Justice Breyer, examined a variety of factors in finding that *Chevron* deference was applicable to the agency's

[55] *Mead*, 533 U.S. at 221.

[56] *Id*. at 226-27.

[57] *Id.* at 227.

[58] *Id.* at 233.

[59] *Id*. at 230-34.

[60] *Mead*, 533 U.S at 226-27; Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[61] *See* Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (declining to accord *Chevron* deference because the Controlled Substances Act "does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law"); Sunstein, *supra* note 29, at 218; *see, e.g.*, N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 328-29 (2d Cir. 2003); Shotz v. City of Plantation, 344 F.3d 1161, 1179 (11th Cir. 2003).

[62] *Christensen*, 529 U.S. at 587.

[63] Nat'l Cable & Telecommunications Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that Justice Scalia mentions. It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.") (citations omitted).

[64] *Id.* at 227.

[65] 535 U.S. 212, 222 (2002).

interpretation.[66] The Court noted that, under *Mead*, the application of *Chevron* deference depended on "the interpretive method used and the nature of the question at issue."[67] In this case, while the agency interpretation was reached informally, it was nonetheless "one of long standing," having apparently been in place for over 40 years.[68] Rejecting a bright-line rule that would require formal procedures to merit *Chevron* deference, the Court noted that a number of factors could be relevant in determining whether the *Chevron* framework is appropriate, such as "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."[69]

Following *Barnhart*'s case-by-case approach to when the *Chevron* framework governs judicial review of agency statutory interpretations, some lower courts have applied *Chevron* deference to certain agency statutory interpretations reached through informal means (e.g., a letter ruling issued to parties), particularly when an agency has expertise in implementing a complex statutory scheme.[70]

Agency Interpretations of the Scope of Its Authority ("Jurisdiction")

The Supreme Court has also ruled that an agency's statutory interpretation concerning the scope of its jurisdiction is eligible for deference.[71] In *City of Arlington v. FCC*, the Court rejected the contention that *Chevron* deference should not apply to an agency's "interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority,"[72] reasoning that "there is no difference, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has."[73] In that case, the Court examined the Telecommunications Act, which requires state and local governments to act on an application for siting a wireless telecommunications facility within a "reasonable period of time."[74] The Federal Communications Commission (FCC) issued a declaratory ruling specifying the number of days that it considered reasonable to reach a decision on those applications,[75] but this decision was challenged on the

[66] *See* Kristin Hickman & Nicholas Bednar, Chevron*'s Inevitability*, 85 GEO. W. L. REV. (forthcoming 2017) (manuscript at 146); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003–04 (2005) (Breyer, J., concurring) (noting that United States v. Mead Corp., 533 U.S. 218, 237 (2001) taught that delegation meriting *Chevron* deference can be shown "in a variety of ways").

[67] *Id.*

[68] *Id*. at 221.

[69] *Id*. at 222.

[70] *See, e.g.*, Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs., 766 F.3d 560, 572 (6th Cir. 2014) (extending *Chevron* deference to the Center for Medicare and Medicaid Service's interpretation of the Medicare Act contained in an agency manual); Mylan Labs., Inc. v. Thompson, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004) (extending *Chevron* deference to an interpretation contained in an agency's letter ruling); Davis v. EPA, 336 F.3d 965, 972-75, 972 n.5 (9th Cir. 2003) (extending *Chevron* deference to informal agency adjudication of request to waive emissions requirement).

[71] City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

[72] *Id*. at 1867-68, 1870-71.

[73] *Id*. at 1870.

[74] 47 U.S.C. § 332(c)(7)(B).

[75] The agency determined that 90 days was appropriate for some applications and 150 days was proper for others. *See In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14001.

ground that the agency did not have delegated authority to adopt a binding interpretation of that portion of the statute.[76]

The Supreme Court granted certiorari on the question of whether a court should apply *Chevron* to an agency's determination of its own jurisdiction.[77] In other words, the Court asked: did *Chevron* apply to the FCC's decision that it possessed authority to adopt a binding interpretation of this part of the statute? Or should courts refuse to defer to the FCC's "jurisdictional" decision that it enjoyed such authority? The Court ruled that the *Chevron* doctrine did apply, questioning whether an agency's jurisdictional authority could sensibly be distinguished from its nonjurisdictional power.[78] According to the majority opinion, every new application of an agency's statutory authority could potentially be reframed as a questionable extension of the agency's "jurisdiction"; but ultimately, the question for a court in any case is simply "whether the agency has stayed within the bounds of its statutory authority."[79]

The Court majority rejected the dissent's view that even when an agency has general rulemaking authority, courts should first conduct a de novo review to determine if Congress has delegated interpretive authority to speak with the force of law on a particular issue.[80] Instead, the majority held, the *Chevron* doctrine applied because Congress had vested the FCC with the authority to administer generally the Telecommunications Act through adjudication and rulemaking, and the agency had promulgated the disputed interpretation through the exercise of that authority.[81]

One way to understand *City of Arlington* is that the Court majority rejected the inclusion of a "jurisdictional" test at *Chevron* "step zero."[82] The dissent urged that, before applying the *Chevron* framework, courts should conduct a threshold examination of whether an agency has received a delegation of interpretive authority over particular issues,[83] essentially a "step zero" inquiry. The majority opinion, however, rejected examining that issue as a threshold matter. Instead, once the "preconditions to deference under *Chevron* are [otherwise] satisfied," the Court should proceed to the *Chevron* two-step framework and determine if the agency has reasonably interpreted the parameters of its statutory authority.[84] In this case, Congress delegated to the agency the power to speak with the force of law in administering a statute, and the agency reached an interpretation through the exercise of that authority. Accordingly, the court held that *Chevron*'s two-step framework was applicable to the agency's determination that it had authority to decide what constituted a "reasonable period of time."[85]

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[76] *See City of Arlington*, 133 S. Ct. at 1867; 47 U.S.C. § 332(c)(7)(A).

[77] *City of Arlington*, 133 S. Ct. at 1867-68.

[78] *See id.* at 1868 ("The argument against deference rests on the premise that there exist two distinct classes of agency interpretations.... That premise is false, because the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage.").

[79] *Id.*

[80] *Compare City of Arlington*, 133 S. Ct. at 1874 (majority opinion), *with* id. at 1880 (Roberts, J., dissenting) ("But before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.").

[81] *City of Arlington*, 133 S. Ct. at 1874 (majority opinion).

[82] *See supra* "How Did the Agency Arrive at Its Interpretation?" at 6-7.

[83] *City of Arlington*, 133 S. Ct. at 1880 (Roberts, J., dissenting).

[84] *City of Arlington*, 133 S. Ct. at 1874 (majority opinion).

[85] *Id.* at 1866, 1874.

Major Questions Doctrine

The Court has sometimes declined to defer to an agency interpretation under *Chevron* when a particular case presents an interpretive question of such significance that "there may be reason to hesitate before concluding that Congress ... intended" to delegate resolution of that question to the agency.[86] Although the Court has not fully articulated when the so-called "major questions doctrine" applies, and indeed, has never used this phrase itself,[87] previous applications of this principle seem to rest on a determination by the Court that one of the core assumptions underlying *Chevron* deference—that Congress intended the agency to resolve the statutory ambiguity—is no longer tenable.[88] The fact that an agency interpretation implicates a major question is sometimes deemed to render the *Chevron* framework of review inapplicable.[89] However, the Court has also invoked this concern while applying *Chevron*,[90] to justify concluding that under the two-part test, the Court should not defer to the agency's construction of the statute.[91]

The Court first held that a question of great "economic and political significance" might displace *Chevron* deference in *FDA v. Brown & Williamson Tobacco Corp*.[92] The impetus for that dispute was the decision of the Food and Drug Administration (FDA) to regulate tobacco products.[93] The Supreme Court decided that Congress had not given the FDA the authority to regulate tobacco products and invalidated the regulations.[94] The Court acknowledged that its analysis was governed by *Chevron*, because the FDA regulation was based upon the agency's interpretation of the Food, Drug, and Cosmetic Act (FDCA), a statute that it administered.[95] However, the Court

[86] *Brown & Williamson*, 529 U.S. 120, 159 (2000).

[87] The phrase "major questions doctrine" emerged from academic work. *E.g.*, *id.* at 159, citing Hon. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration"). *See also* Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 n.3 (2016) (listing other scholarly labels for the doctrine and noting that "the Court itself does not use a particular name").

[88] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015). Some commentators have argued that both the *Chevron* step zero doctrine and major questions doctrine serve to align *Chevron* deference more closely with those situations in which Congress has actually delegated to an agency the authority to interpret a particular statutory provision. *See, e.g.*, Adler, *supra* note 36, at 993, 994.

[89] *See King*, 135 S. Ct. at 2489 (invoking major questions doctrine at outset of opinion); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (invoking major questions doctrine during step zero inquiry).

[90] *See City of Arlington*, 133 S. Ct.at 1872 (describing major-questions cases as applications of *Chevron*).

[91] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (invoking major questions doctrine during *Chevron* step one); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (invoking major questions doctrine during *Chevron* step two).

[92] *Brown & Williamson*, 529 U.S. 120, 159-60 (2000). *Cf.* Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 453-57 (2016) (discussing intellectual precursors to *Brown & Williamson*); Asher Steinberg, *Another Addition to the* Chevron *Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine*, THE NARROWEST GROUNDS (May 7, 2017, 8:44 PM), http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html ("[T]he best view of the major-questions exception is that it didn't truly exist until *King v. Burwell* was decided ... Major-questions cases before *Burwell* had,.... far from applying an exception to *Chevron*, applied *Chevron* itself, albeit in ways that felt less deferential than traditional *Chevron* review.").

[93] *Brown & Williamson*, 529 U.S. at 125.

[94] *Id.* at 161.

[95] *Id.* at 132.

resolved the matter at *Chevron* step one, concluding that Congress had "directly spoken to the issue" and "precluded the FDA's jurisdiction to regulate tobacco products."[96]

A significant factor in the Court's decision in *Brown & Williamson* was the fact that Congress had for decades enacted "tobacco-specific legislation" outside the FDCA, acting "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco."[97] The Court concluded that the apparent clarity of this legislative and regulatory history, considered against "the breadth of the authority that the FDA ha[d] asserted" when it promulgated the new regulations, undercut the justifications for *Chevron* deference.[98] The Court then articulated what was later characterized by some observers as the major questions doctrine,[99] holding that "[i]n extraordinary cases, ... there may be reason to hesitate before concluding that Congress has intended ... an implicit delegation" of authority "to fill in the statutory gaps."[100] In the Court's view, this was such an extraordinary case, and the Justices were "obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power."[101] The Court believed "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[102] Thus, in *Brown & Williamson*, the Court invoked this major questions consideration under *Chevron*'s first step, as a factor supporting its conclusion that the FDCA unambiguously precluded the FDA's interpretation.[103]

The Supreme Court has cited the importance of a disputed question to avoid deferring to an agency under *Chevron* in a number of cases since *Brown & Williamson*, although the Court has applied the "major questions doctrine" in a somewhat ad hoc manner.[104] In these subsequent cases, the Court has not clearly explained when an agency interpretation will raise a question so significant that a court should not defer, nor has it explained why this consideration is relevant in some cases but not others. In *Whitman v. American Trucking Ass'ns*, decided one year after *Brown & Williamson*, the Court invoked the major questions consideration as part of its *Chevron* step one analysis.[105] The Court held that there was not a sufficient "textual commitment of authority" in the Clean Air Act to support the EPA's assertion that Congress had given the EPA

[96] *Id.* at 133. The majority opinion in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013), invoked this passage from *Brown & Williamson* to support the following proposition: "The U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction."

[97] *Brown & Williamson*, 529 U.S. at 144.

[98] *Id.* at 159-60.

[99] *E.g.*, Monast, *supra* note 92, at 457.

[100] *Brown & Williamson*, 529 U.S. at 159.

[101] *Id.* at 160.

[102] *Id.*

[103] *Id.* at 133.

[104] *See* Monast, *supra* note 92, at 462 ("[T]he Court has neglected to articulate the bounds of the major questions doctrine.... "); *See* Note, *Major Questions Objections*, 129 HARV. L. REV. 2191, 2192 (2016) [hereinafter *Note*] ("[T]his Note.... proposes to abandon the fruitless quest to rationalize the disorderly major question cases in terms of conventional doctrine, and suggests it might be better to regard them as episodes of vaguely equitable intervention ... "). *But see* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (2017) (Kavanaugh, J., dissenting) (describing scheme of judicial review of agency actions in which "ordinary agency rules" are reviewed under *Chevron* framework but "major agency rules" are scrutinized for clear congressional authorization).

[105] 531 U.S. 457, 468 (2001). The major questions doctrine arguably arose in *Whitman* in the context of a *Chevron* step-one inquiry: whether the statute unambiguously conferred upon the EPA the authority to consider implementation costs. *See id.* However, the Court did not explicitly invoke the *Chevron* framework until later in the opinion. *Id.* at 481.

the authority to consider costs when regulating air pollutants.[106] In reaching this conclusion, the Court read the statutory text as being primarily concerned with promoting the "public health," rather than cost concerns.[107] Because these provisions were highly important to this statutory scheme, the Court required a "clear" "textual commitment of authority to the EPA to consider costs."[108] The Court observed that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[109]

In 2006, the Court invoked the major questions principle as one factor in its analysis at step zero in *Gonzales v. Oregon*.[110] The Court held that Congress had not given the U.S. Attorney General the authority to issue an interpretive rule regarding the use of controlled substances in assisted suicides "as a statement with the force of law."[111] Citing *Brown & Williamson*, the Justices refused to conclude that "Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act's] registration provision."[112]

By contrast, the Court declined to apply the major question exception in *Massachusetts v. EPA*, decided in 2007.[113] The Court was reviewing the EPA's decision to deny a rulemaking petition that had asked the EPA "to regulate greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act."[114] The EPA claimed that the CAA did not give it the authority to regulate "substances that contribute to climate change."[115] As summarized by the Court, the EPA argued that "climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it."[116] The Court rejected this claim, distinguishing *Brown & Williamson* by deciding that in this case, the statutory scheme and congressional and regulatory "backdrop" supported a conclusion that the EPA had authority to regulate greenhouse gases.[117]

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[106] *See id.* at 468.

[107] *Id.* at 465, 469.

[108] *Id.* at 468.

[109] *Id.*

[110] 546 U.S. 243, 267 (2006).

[111] *Id.* at 255-56, 267-68.

[112] *Id.* at 267.

[113] 549 U.S. 497, 531 (2007).

[114] *Id.* at 510 (internal quotation marks omitted).

[115] *Id.* at 528.

[116] *Id.* at 512.

[117] *Id.* at 531. Arguably, the Court resolved this case under *Chevron* step one, when it held that the statutory text clearly authorized EPA regulation. *See id.* (declining "to read ambiguity into a clear statute"); *id.* at 529 n.26 ("EPA's distinction ... finds no support in the text of the statute.... "). *But see id.* at 529 n.26 (invoking *Chevron* step two by suggesting EPA's "is a plainly unreasonable reading of a sweeping statutory provision"); *id.* at 553, 558 (Scalia, J., dissenting) (arguing majority opinion improperly failed to apply *Chevron* or to explain why *Chevron* deference was inapplicable).

The doctrine was arguably revived[118] in recent years, first in *Utility Air Regulatory Group v. EPA*,[119] and then in *King v. Burwell*.[120] In *Utility Air*, the Court reviewed EPA rules regulating greenhouse gas (GHG) emissions from stationary sources.[121] The EPA had concluded that regulation of GHG emissions from motor vehicles triggered GHG permitting requirements for stationary sources.[122] The Court held at step two of the *Chevron* analysis that the EPA's interpretation was "not permissible."[123] The regulations represented an unreasonable reading of the statute in part because they would have constituted "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[124] In the Court's view, the "extravagant" and "expansive" power claimed by the EPA fell "comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[125]

In *King v. Burwell*,[126] the Court considered whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act.[127] The Court declined to apply the *Chevron* framework to analyze the statutory interpretation of the Internal Revenue Service (IRS), holding that this was an "'extraordinary case'" in which the Court had "'reason to hesitate before concluding that Congress'" implicitly delegated to the IRS the authority to "'fill in the statutory gaps.'"[128] The Court concluded:

> Whether [the tax] credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.[129]

The *King v. Burwell* decision arguably represented a break from prior major question cases: in past cases, the Court had considered the economic or political significance of the regulation as one factor during its *application* of the *Chevron* framework of review.[130] In *King*, the Court concluded that the significance of the issue rendered *Chevron* entirely *inapplicable*.[131]

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[118] A number of commentators had previously declared the major questions doctrine to be dead. *See* David Baake, *Obituary:* Chevron*'s "Major Questions Exception"*, HARV. ENVTL. L. REV.: HELR BLOG (Aug. 27, 2013, 5:43 PM), http://harvardelr.com/2013/08/27/obituary-chevrons-major-questions-exception/ (concluding Court "'unceremoniously killed'" major questions doctrine in *Massachusetts v. EPA*, 549 U.S. at 531 (majority opinion), and *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013)) (quoting Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Non-Interference (Or Why* Massachusetts v. EPA *Got it Wrong)*, 60 ADMIN. L. REV. 593, 598 (2008)).

[119] 134 S. Ct. 2427, 2444 (2014).

[120] 135 S. Ct. 2480, 2489 (2015).

[121] 134 S. Ct. at 2437-38.

[122] *Id.* at 2437.

[123] *Id.* at 2442.

[124] *Id.* at 2444.

[125] *Id.*

[126] 135 S. Ct. 2480, 2487 (2015).

[127] 42 U.S.C. § 18031; 26 U.S.C. §§ 36B(b)-(c).

[128] *King*, 135 S. Ct. at 2488-89 (quoting *Brown & Williamson*, 529 U.S. 120, 159 (2000)).

[129] *Id.* at 2489 (quoting *Utility Air*, 134 S. Ct. at 2444).

[130] *See* Note, *supra* note 104, at 2201.

[131] *See King*, 135 S. Ct. at 2489. Although the doctrine was also invoked in *Gonzales* to render *Chevron* inapplicable, it was cited in the course of a step zero analysis and not on its own. Gonzales v. Oregon, 546 U.S. 243, 267 (2006). In

Therefore, when reviewing an agency's interpretation of a statute, depending on the nature and significance of the question purportedly delegated to the agency,[132] a court could decline to afford deference to the agency's interpretation either by utilizing the major questions doctrine as a factor in the course of its *Chevron* analysis[133] or by concluding that the *Chevron* framework is altogether inapplicable.[134] Consequently, some commentators have argued that the major questions doctrine has the potential to alter the doctrine of *Chevron* deference, shifting the power to interpret ambiguous statutes from agencies to courts.[135] However, given the uncertainty about what constitutes a "major question," or how the major questions inquiry should be factored into the *Chevron* analysis, it seems equally plausible that courts will continue to be reluctant to invoke the doctrine.[136]

Chevron Step One

After a court has determined that *Chevron* applies to a particular agency's interpretation of a statute,[137] the first inquiry in the two-step *Chevron* framework presents a question of statutory construction for the court.[138] Step one requires a court to determine whether Congress "directly addressed the precise question at issue."[139] A court proceeds to step two only if a statute is "silent or ambiguous with respect to the specific issue."[140] If the statute is unambiguous, a court must "give effect" to that congressional intent without deferring to the agency.[141] The Supreme Court

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King, the Court cited only the major questions doctrine, absent any other *Chevron*-related inquiry. *See King*, 135 S. Ct. at 2489. *See also* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 795 (2017), ("[T]he Court in *King* saw majorness as a hard, 'on/off' trigger for, rather than a 'soft' and nonexclusive guiding factor of, the *Chevron* inquiry. Indeed, *King* for the first time applied the [major questions exception] as a pre-*Chevron* device, citing to majorness and majorness alone as a sufficient basis for withholding judicial deference altogether.").

[132] *Brown & Williamson*, 529 U.S. at 159.

[133] *E.g.*, *id.* at 132.

[134] *E.g.*, *King*, 135 S. Ct. at 2489.

[135] *See* Coenen & Davis, *supra* note 131, at 796-99; Leske, *supra* note 87, at 499; Note, *supra* note 104, at 2202.

[136] *See, e.g.*, Coenen & Davis, *supra* note 131, at 780 (arguing that because Supreme Court has not defined "what makes a question 'major,'" lower courts should not apply doctrine); *but see, e.g.*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422 n.4 (2017) (Kavanaugh, J., dissenting) (concluding lower courts are constrained to apply major questions doctrine).

[137] Courts may be reviewing either an explicit agency interpretation of a statute, announced in a rule or adjudication, or may be reviewing an agency action that implicitly rests on the agency's view of the authorizing statute.

[138] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

[139] *Id.* at 843.

[140] *Id.* Notably, however, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has introduced a distinct analytical question into the *Chevron* analysis. Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 761 (2017). Before it will afford *Chevron* deference to an agency interpretation, the D.C. Circuit asks whether the agency has interpreted the statute by bringing "its experience and expertise to bear in light of competing interests at stake." PDK Labs. Inc. v. U.S. DEA, 362 F.3d 786, 797-98 (D.C. Cir. 2004). The D.C. Circuit will require an agency to reconsider its decision if the agency has conducted an erroneous step one analysis—that is, if the agency incorrectly believed that its decision was mandated by the statute, and therefore failed to recognize a statutory ambiguity and interpret that ambiguity by exercising its discretion. *See* Prill v. NLRB, 755 F.2d 941, 950 (D.C. Cir. 1985); Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006) ("[W]e cannot say that either proffered construction reflects the Congress's unambiguously expressed intent. We therefore cannot uphold the [agency's] interpretation under step 1 of *Chevron*. Nor may we review it under step 2.") (citation omitted).

[141] *Chevron*, 467 U.S. at 842-43.

stated in *Chevron* that a court should conduct the step one analysis by "employing traditional tools of statutory construction."[142]

This "traditional tools" instruction, however, left open for debate the tools that should be employed during *Chevron*'s first step.[143] There are different theories of statutory interpretation, and each interpretive school has a different view of which tools courts should appropriately deploy when they seek to discern statutory meaning.[144] Generally, however, most courts begin by considering the text of the statute.[145] To give meaning to this text, judges typically seek to determine the "natural reading"[146] or "ordinary understanding"[147] of disputed words. They often refer to dictionaries to find this ordinary meaning.[148] A contested statutory term can be further clarified by reference to the statutory context, looking to that specific provision as a whole,[149] or by examining how the term is employed in related statutes.[150] Courts may also turn to a set of presumptions, or interpretive canons, about how people usually read meaning into text.[151]

Other tools of statutory construction, focused on determining legislative intent, are somewhat more controversial but are still frequently deployed in step one analyses.[152] Accordingly, courts often refer to statutory purpose.[153] They also regularly cite legislative history at *Chevron* step

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[142] *Id.* at 843 n.9.

[143] *See id.*; Peter L. Strauss, *Overseers or "The Deciders" – The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 820 (2008).

[144] *E.g.*, Lisa Shultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551 (2009) ("In applying *Chevron*, courts rely heavily on the dominant theories of statutory interpretation: intentionalism, purposivism, or textualism."). *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) ("[W]hereas intentionalists believe that legislatures have coherent and identifiable but unexpressed policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the public meaning of the final statutory text.").

[145] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007). *Cf.* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 93 (2007) ("[N]ormally neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation."); *id.* at 109 (Scalia, J., dissenting) ("We must begin, as we always do, with the text.").

[146] Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 611 (1991).

[147] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995). *See also* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2130 (2012) (considering ordinary usage of statutory term "child").

[148] *E.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 227-29 (1994). *Cf.* Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 419 (1992) ("The existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation.").

[149] *E.g.*, *Nat'l R.R. Passenger Corp.*, 503 U.S. at 410-11, 418-19 (defining statutory term by reference to "statutory presumption" created in subsequent statutory text).

[150] *E.g.*, Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 223 (2009) (comparing "parallel provisions" of act); *Brown & Williamson*, 529 U.S. at 134-37 (looking to act "as a whole" to determine its "core objectives," and examining operation of statute); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1991) (reviewing judicial construction of "similar provisions in other regulatory statutes").

[151] *E.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697-98 (1995) (applying canon against surplusage). *Cf.* Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) (declining to apply presumption of consistent usage where statutory context suggested otherwise). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); *cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) ("[T]here are two opposing canons on almost every point.").

[152] *Compare, e.g.*, *Sweet Home*, 515 U.S. at 698 ("[T]he broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."); *with id.* at 726 (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or, in this case, the quite simple one) of reading the whole text.").

[153] *E.g.*, Cuozzo Speech Techs., LLC v. Lee, 136 S. Ct. 2131, 2142-44 (2016) (considering purpose of statute). *Cf.* Zuni

one.[154] Similarly, to help determine congressional intent, courts have looked to past agency practice[155] as well as agency interpretations that were advanced prior to the dispute before the court.[156] Finally, judges may sometimes invoke normative or substantive canons of statutory interpretation, distinct from the textual canons mentioned above.[157]

Courts and scholars debate not only which methods of statutory construction constitute the "traditional tools" embraced in *Chevron*'s step one, but also when application of those tools may render a statute sufficiently clear to conclude that Congress has "directly addressed the precise question at issue."[158] It is an open question whether *Chevron*'s first step presents a normal question of statutory interpretation, in which the court should look for ambiguity or clarity as it would any other time it interprets a statute, or whether instead a determination that a statute is unambiguous for the purposes of *Chevron* step one requires some higher level of clarity.[159] Different judges may undertake a more or less searching inquiry,[160] deploying different tools of

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Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 93 (2007) (Kennedy, J., concurring) (arguing majority opinion erred in considering history and purpose of statute before plain language because, "[w]ere the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes"); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994) (rejecting arguments regarding legislative purpose in light of clear statutory meaning).

[154] *E.g.*, Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2131 (2012) (considering prior version of statute); INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37, 441-42 (1987) (reviewing congressional record and rejection of Senate version of bill). *But see Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring) (disapproving of majority's use of legislative history because courts "are not free to replace [clear statutory language] with an unenacted legislative intent"). Some courts believe legislative history should only be considered at step two of a *Chevron* inquiry. Hemel & Nielson, *supra* note 140, at 781.

[155] *E.g.*, *Cardoza-Fonseca*, 480 U.S. at 434-35 (reviewing agency practice under prior version of statute).

[156] *E.g.*, Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs [hereinafter *SWANCC*], 531 U.S. 159, 168 (2001) (looking to agency's original interpretation of a federal statute); *Brown & Williamson*, 529 U.S. at 145-46 (looking to prior agency interpretations of the governing statute, as announced in congressional hearings).

[157] *E.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007) (applying presumption against implied repeals); INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) (applying presumption against retroactive legislation); *SWANCC*, 531 U.S. at 172-73 (applying canon of constitutional avoidance); Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (applying absurdity doctrine). *See generally* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 76-84 (2008) (reviewing judicial approaches to reconciling normative canons with *Chevron* framework).

[158] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). *See* Scalia, *supra* note 44, at 520 ("*Chevron* ... suggests that the opposite of 'ambiguity' is not 'resolvability' but rather 'clarity.' Here, of course, is the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions.... How clear is clear?") (citation omitted). For one relatively recent example of disagreement that may arise when applying these traditional tools of statutory construction, see *Scialabba v. De Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) (concluding statute "does not speak unambiguously to the issue here"); *id.* at 2219 (Sotomayor, J., dissenting) (concluding statute "answers the precise question in this case").

[159] *Compare* Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1197 (2017) (concluding Court did not need to consider whether agency interpretation was due *Chevron* deference because that construction "best comport[ed] with [the statute's] text, context, and purpose"), *and* Dole v. United Steelworkers of Am., 494 U.S. 26, 43 (1990) (holding *Chevron* deference was inapplicable because "the statute, as a whole, clearly expresses Congress' intention"), *with* INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (emphasizing that courts may not simply "substitute their interpretation of a statute for that of an agency whenever they face a pure question of statutory construction for the courts to decide") (internal quotation marks and citation omitted). *See also* Note, *"How Clear is Clear" in* Chevron*'s Step One?*, 118 HARV. L. REV. 1687, 1697 (2005) (arguing "*Chevron* imposes a standard of proof higher than" ordinary statutory interpretation because it shifts the question from "'What does the statute mean?'" to "'Is the statute clear?'").

[160] *Compare* Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 659-60 (D.C. Cir. 2011) ("Because at Chevron step one we alone are tasked with determining Congress's unambiguous intent, we answer [step one] inquiries without showing the agency any special deference."), *and* Abbott Labs. v. Young, 920 F.2d 984, 994-95 (D.C. Cir. 1990)

statutory interpretation and, perhaps as a result, reaching different conclusions regarding whether to proceed to *Chevron* step two.[161] Some decisions have implied that if a court needs to resort to a greater number of tools in the search for a clear meaning, this in itself suggests that a statute is ambiguous.[162]

Confusion about the level of statutory ambiguity required to trigger *Chevron*'s step two is compounded by Supreme Court decisions that seemingly blur the line between the two steps. The Court has sometimes held only that an agency's interpretation is "reasonable"[163] or "permitted"[164] without expressing an opinion on whether the statute is sufficiently clear to indicate that Congress in fact unambiguously addressed the specific question before the court.[165]

Chevron Step Two

If a court determines at step one that the statute is ambiguous or silent on the particular issue in question, the *Chevron* framework next requires consideration of whether the agency's construction of the statute is "permissible."[166] Under *Chevron*'s step-two analysis, if Congress has

(Edwards, J., dissenting) ("Underlying the majority's analysis is the assumption that if one can perceive *any* ambiguity in a statute, however remote, slight or fanciful, the statute must be pushed into the second step of *Chevron* analysis.... This fundamentally misconceives the point of *Chevron* analysis.... Minor ambiguities or occasional imprecision in language may be brooked under *Chevron*'s first step, so long as traditional tools of statutory construction reveal Congress' intentions.") (internal quotation marks omitted), *with* Mexichem Fluor, Inc. v. EPA, No. 15-1328, 2017 U.S. App. LEXIS 14539, at *44 (D.C. Cir. Aug. 8, 2017) (Wilkins, J., concurring in part and dissenting in part) (stating it is a "high bar to show clear Congressional intent" at step one).

[161] *See, e.g.*, Merrill & Hickman, *supra* note 39, at 860 (arguing that because Justice Scalia had "adopted an extremely aggressive conception of the judicial role at step one," he "invokes *Chevron* more consistently than other Justices, but also ends up deferring to agency views *less* than other Justices").

[162] *See, e.g.*, Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1272 (D.C. Cir. 1994) ("Because we must examine the effective date provision in its statutory context in order to determine which meaning the Congress intended, we cannot say that either the NRDC's or the EPA's reading is the uniquely 'plain meaning' of the provision.").

[163] *E.g.*, Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2133 (2012) ("The [agency's] interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference under *Chevron*."); Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009) (stating agency's "view governs if it is a reasonable interpretation of the statute").

[164] *E.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 84 (2007) (phrasing the question before the Court as "whether the emphasized statutory language permits" the agency's reading).

[165] *See Entergy Corp.*, 556 U.S. at 219-20 (holding statute did not "unambiguously preclude" agency interpretation); Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 (1995) (holding that the agency "better comprehends the Act's terms").

Some scholars have invoked these decisions to argue that *Chevron* review consists of only one inquiry: "whether the agency's construction is permissible as a matter of statutory interpretation." Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009). *Cf.* Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 635 (2014) (arguing Supreme Court views step one as distinct but optional). Others have countered that *Chevron*'s first step poses an important question regarding whether there is a single, mandatory reading of the statute that the agency is required to follow. *E.g.*, Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 624-25 (2009). As discussed later in the report, a step-one decision has important implications for an agency's ability to later change its reading of the statute, under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). *See infra* at "Agency Discretion to Change Course."

The D.C. Circuit has articulated a view of step one that might make sense of Supreme Court opinions that generally ask only whether an agency's interpretation is reasonable. *See* Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 659 (D.C. Cir. 2011) (defining *Chevron* step one to include two inquiries: whether Congress "prescrib[ed] a precise course of conduct other than the one chosen by the agency, or ... grant[ed] the agency a range of interpretive discretion that the agency has clearly exceeded").

[166] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

delegated authority to an agency to fill in the gaps of a statute, courts will give "controlling weight" to reasonable agency interpretations of a statutory ambiguity.[167] Accordingly, at *Chevron*'s second step, courts may not substitute their own interpretation of a statutory provision for an agency construction that is reasonable.[168] *Chevron* deference thus sometimes requires a court to sanction an interpretation that departs from what the court considers the best reading of a statute,[169] so long as the agency's interpretation is "rationally related to the goals of the statute."[170] Commentators have noted that, at least in the federal courts of appeals, agency interpretations are more likely to prevail when a case is resolved at *Chevron*'s second step than when a court decides an issue at step one, or declines to apply the *Chevron* framework at all.[171]

Agency Discretion to Change Course

What qualifies as a permissible statutory construction is largely dependent on the particular context, although courts applying *Chevron*'s second step may inquire into the sufficiency of an agency's reasoning[172] and may consider the traditional tools of statutory construction.[173] The theory of delegation animating *Chevron* deference implicitly acknowledges that an ambiguous statute permits a range of plausible interpretations.[174] Within the parameters of its statutory delegation, an agency might have discretion to pursue a variety of different policy objectives.[175]

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[167] *Id*. at 844-45, 865-66; Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000) ("The reasonableness prong includes an inquiry into whether the agency reasonably filled a gap in the statute left by Congress.").

[168] *See* Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 58 (2011) ("[T]he second step of *Chevron* ... asks whether the Department's rule is a 'reasonable interpretation' of the statutory text.") (quoting *Chevron*, 467 U.S. at 844); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 981 (1986) (noting that at *Chevron*'s second step, a court is "preclude[d]" from "substituting its own judgement for that of the agency") (internal citations and quotations omitted).

[169] Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009) ("That view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts."); Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 71 (D.C. Cir. 2000) ("Under *Chevron*, we are bound to uphold agency interpretations as long as they are reasonable—'regardless whether there may be other reasonable, or even more reasonable, views.'") (quoting *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)).

[170] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388 (1999); Pharm. Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 208 (D.C. Cir. 2015) (quoting Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 667 (D.C. Cir. 2011)).

[171] *See* Kent Barnett & Christopher Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming) (manuscript at 5-6) (concluding that agencies prevailed at *Chevron*'s second step significantly more often than when cases were resolved at step one or when *Chevron* did not apply); *see, e.g.*, Petit v. Dept. of Educ., 675 F.3d 769, 785 (D.C. Cir. 2012) ("As noted above, in order for Appellants to prevail on their *Chevron* step-two claim, we must find that the Mapping Regulations are 'manifestly contrary to the statute.'"); NRA of Am., Inc. v. Reno, 216 F.3d 122, 137 (D.C. Cir. 2000) (deferring to the agency under "*Chevron* step two's highly deferential standard").

[172] *See, e.g.*, Zero Zone, Inc. v. Dep't of Energy, 832 F.3d 654, 668 (7th Cir. 2016).

[173] *See, e.g.*, Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

[174] *See Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis."); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."); Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000) ("As long as the agency stays within [Congress's] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.") (quotations omitted) (quoting Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995)).

[175] Judges and commentators have noted that the *Chevron* framework, at least at step two, merges judicial review of traditional legal interpretations of a statute's meaning with policy choices within (or without) the parameters of a statute's terms. *See* Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (noting that when agencies choose between competing interpretations of an ambiguous statute, "[t]hat sort

One important consequence of this principle is that agencies are permitted to change their interpretations of ambiguous statutes over time.[176] Assuming agencies acknowledge the change and stay within the bounds of a reasonable interpretation,[177] they may reconsider the wisdom of their policy choices and shift their construction of statutory ambiguities accordingly to reflect altered circumstances or a change in policy preferences.[178]

In addition to an agency's discretion to alter its interpretations at step two, another implication of *Chevron*'s delegation theory is that an agency's construction of a statutory ambiguity can supersede a court's contrary prior decision on the meaning of a statute. Because the *Chevron* framework rests on the assumption that "it is for agencies, not courts, to fill statutory gaps"[179] at *Chevron*'s second step, agencies possess delegated interpretive authority to determine the legal meaning of ambiguities in statutes they administer. Accordingly, in *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*) the Supreme Court held that "[o]nly a judicial precedent holding that [a] statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[180] Put another way, when a court concludes that its determination of a statute's meaning "follows from the unambiguous terms of [a] statute and thus leaves no room for agency discretion," an agency is foreclosed from adopting a contrary interpretation.[181] But absent such a judicial finding, *Brand X* teaches that an agency is free to adopt a countervailing reasonable construction of a statutory ambiguity in the future.[182]

Differing Judicial Approaches to Step Two Analysis

Given the variety of statutory schemes implemented by federal agencies, as well as the potential for multiple reasonable interpretations of the same statute, precisely what constitutes a reasonable agency construction of a statute is difficult to define in the abstract. As an initial matter, some courts affirm the agency's interpretation under *Chevron*'s step two without any sustained analysis beyond consideration of the statute at step one.[183] In these situations, courts often appear to anchor their decision on their prior consideration at step one of the statute's meaning—meaning, for example, that if an agency's position is one of multiple interpretations that the court found

of choice implicates and sometimes squarely involves policy making"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) ("*Chevron* is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle."); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1083 (2016) (considering the implications of eliminating *Chevron* deference and separating judicial review of an agency's legal interpretation from policymaking).

[176] *See* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); *see generally* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) (ruling that when reviewing agency actions under the APA's "arbitrary" and "capricious" standard courts should not apply "more searching review" simply because an agency changed course).

[177] *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016); *see generally* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[178] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

[179] *Id*. at 982.

[180] *Id.*

[181] *Id.* at 981 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

[182] *Id*.

[183] *See* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2133-34 (2012).

could be reasonable at *Chevron*'s first step, then the court will defer to the agency's interpretation at *Chevron*'s second step.[184]

In other cases, however, courts at step two engage in a more thorough examination of the reasonableness of an agency's interpretation.[185] In some instances, a court's analysis at step two focuses on the sufficiency of an agency's reasoning,[186] an examination which can overlap with "hard look" review under the "arbitrary and capricious" standard of the APA.[187] Some courts may also employ the traditional tools of statutory construction at *Chevron*'s second step. One common inquiry courts consider is whether the agency's position comports with the overall purpose of the statute in question.[188] For example, in *Chevron* itself, the Supreme Court held that the agency's interpretation "of the term 'source' [was] a permissible construction of the statute" in light of the statute's goals "to accommodate progress in reducing air pollution with economic growth."[189] Lower courts have followed suit, examining at *Chevron*'s second step whether an agency's interpretation of a statutory ambiguity accords with a statute's policy objectives.[190] A variety of other indicia can also potentially be relevant in assessing the reasonableness of an agency

[184] *See, e.g.*, Friends of Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227-28 (11th Cir. 2009). Cases such as this arguably support the notion that *Chevron* ultimately consists of one step. *See* Stephenson & Vermeule, *supra* note 165, at 598 (arguing that *Chevron*'s two steps ultimately merge into a single reasonableness inquiry).

[185] *See, e.g.*, Nat'l Mining Ass'n v. Kempthorne, 512 F.3d 702, 710 (D.C. Cir. 2008); Kennecott Utah Copper Corp. v. U.S. Dep't of Interior, 88 F.3d 1191, 1206 (D.C. Cir. 1996).

[186] *See, e.g.*, Consumer Fed'n of Am. v. Dep't of Health & Human Servs., 83 F.3d 1497, 1504-05 (D.C. Cir. 1996); Envtl. Def. Fund v. EPA, 82 F.3d 451, 467 (D.C. Cir. 1996); Republican Nat'l Comm. v. FEC, 76 F.3d 400, 406-07 (D.C. Cir. 1995); Madison Gas & Elec. Co. v. EPA, 25 F.3d 526, 529 (7th Cir. 1994); *see* M. Elizabeth Magill, Judicial Review of Statutory Issues Under the Chevron Doctrine, in A Guide to Judicial and Political Review of Federal Agencies 93-95 (2005).

[187] The Court has indicated that the analysis at *Chevron* step two can overlap with an arbitrary and capricious review under the APA. Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011); Zero Zone, Inc. v. Dep't of Energy, 832 F.3d 654, 668 (7th Cir. 2016) ("As the Supreme Court has noted, this second step of *Chevron* is functionally equivalent to traditional arbitrary and capricious review under the APA."); *see also* Arent v. Shalala, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) ("The *Chevron* analysis and the 'arbitrary, capricious' inquiry set forth in *State Farm* overlap in some circumstances, because whether an agency action is 'manifestly contrary to the statute' is important both under *Chevron* and under *State Farm*."). *But see* Humane Soc'y of the United States v. Zinke, Nos. 15-5041, 15-5043, 15-5060, 15-5061, 2017 U.S. App. LEXIS 13912, at *42-43 (D.C. Cir. Aug. 1, 2017) ("While analysis of the reasonableness of agency action under *Chevron* Step Two and arbitrary and capricious review is often the same, the Venn diagram of the two inquiries is not a circle. The question thus remains whether the agency arbitrarily and capriciously failed to consider an important aspect of the problem it faces.") (internal quotation marks and citations omitted). For more on the arbitrary and capricious standard of review, *see* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[188] Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 58 (2011) (upholding the agency's decisions at step two of *Chevron* because they furthered the purposes of the Social Security Act); Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 698 (1995) ("[T]he broad purpose of the [Endangered Species Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."); Troy Corp. v. Browner, 120 F.3d 277, 285 (D.C. Cir. 1997) ("Therefore, under *Chevron*, as the wording of the statute is at most ambiguous, the most that can be required of the administering agency is that its interpretation be reasonable and consistent with the statutory purpose."); Mueller v. Reich, 54 F.3d 438, 442 (7th Cir. 1995) (suggesting that because the statute is necessarily ambiguous when a court reaches step two of the *Chevron* test, "about all the court can do is determine whether the agency's action is rationally related to the objectives of the statute containing the delegation").

[189] *Chevron*, 467 U.S. at 866.

[190] *See, e.g.*, Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 111 (D.C. Cir. 1987) (deferring to the EPA's interpretation because, given the overarching goals of the Clean Water Act, the EPA's regulation "reasonably balances and resolves the competing Congressional goals reflected in the provision"); Kennecott Utah Copper Corp. v. U. S. Dep't of the Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (concluding that the agency's construction was "not a reasonable interpretation of the statute, viewed with an eye to its structure and purposes").

interpretation, including whether the agency's construction serves the public interest,[191] and whether the agency has consistently interpreted the statute in the same manner over time.[192]

Courts may also apply other traditional tools of statutory interpretation at step two, although this practice can sometimes mirror a court's step one analysis.[193] For example, courts will examine whether an agency's interpretation makes sense within the statutory scheme, looking for consistency with other relevant provisions in the statute at issue,[194] the interaction between various statutory provisions,[195] or prior judicial precedents interpreting similar provisions.[196] In addition, courts may inquire into the commonly used meaning of a statutory term.[197] Importantly, some courts apply a broader range of tools of construction at *Chevron*'s second step than at step one. For instance, some courts will examine a statute's legislative history at step two to determine if the agency has reasonably complied with Congress's goals, even if those courts believe that doing so at step one would be inappropriate.[198]

As noted above, some observers have concluded that agencies are more likely to prevail at *Chevron*'s second step than when a court completes its analysis at step one or conducts review de novo of the agency's position.[199] Potentially, judicial deference to an agency's interpretation may lead to relatively greater national uniformity in the implementation of regulatory statutes,[200] a feature arguably endorsed by the Supreme Court.[201] Because *Chevron* instructs courts of appeals

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[191] Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131, 2144-45 (2016).

[192] *Id*; Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1221 (9th Cir. 2015) (deferring at *Chevron*'s second step because, among other things, the agency's position was "consistent" with its "longstanding policy").

[193] *See* Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1049 (D.C. Cir. 1997) ("Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation; under step two we consider text, history, and purpose to determine whether these *permit* the interpretation chosen by the agency."); *see supra* "*Chevron* Step One."

[194] *See, e.g.*, Your Home Visiting Nurse Servs., Inc., v. Shalala, 525 U.S. 449, 454 (1999); UC Health v. NLRB, 803 F.3d 669, 676 (D.C. Cir. 2015) (deferring at *Chevron*'s second step because "[t]he Board's interpretation of the statute reads every clause of the statutory provision harmoniously").

[195] *See, e.g.*, NationsBank of North Carolina, N.A., v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258-59 (1995).

[196] *See, e.g.*, Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1294 (D.C. Cir. 2000).

[197] *See, e.g.*, Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744-45 (1996); *Sweet Home*, 515 U.S. at 697.

[198] Village of Barrington, Ill. v. Surface Transp. Bd., 636 F.3d 650, 666 (D.C. Cir. 2011) ("Although we would be uncomfortable relying on such legislative history at *Chevron* step one, we think it may appropriately guide an agency in interpreting an ambiguous statute—just how the Board used it here."); Am. Farm Bureau Fed'n v. EPA, 792 F.3d 281, 307 (3d Cir. 2015) ("[A]t Step Two we may consider legislative history to the extent that it may clarify the policies framing the statute.").

[199] *See* Barnett & Walker, *supra* note 171 (manuscript at 6) (finding that between 2003 and 2013, in cases where circuit courts applied *Chevron* deference to agency statutory interpretations, the agency prevailed approximately 25% more often than when *Chevron* did not apply); 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 (1998) (determining that in 1995 and 1996 courts that reached step two of the *Chevron* test "upheld the agency view in 89% of the applications"); *but see* Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (reviewing various studies examining agency win-rates and concluding that "doctrinally-based differences in outcome are barely detectable").

[200] 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, 1121 (1986) ("By removing the responsibility for precision from the courts of appeals, the *Chevron* rule subdues this diversity, and thus enhances the probability of uniform national administration of the laws.").

[201] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) (noting that adoption of the dissent's rule regarding *Chevron*'s application would permit "[t]hirteen Courts of Appeals [to] apply[] a totality-of-the-circumstances test ... and destroy the whole stabilizing purpose of *Chevron*").

to defer to reasonable agency interpretations of statutory ambiguities, circuit splits on the meaning of ambiguous statutory provisions may be less likely than would arise without *Chevron* deference.[202] In turn, it is arguably more likely that agencies entrusted with administering statutes will do so uniformly regardless of forum, compared to courts across different circuits, which might reach conflicting interpretations of a statute's meaning.[203]

The potential for *Chevron* deference to harmonize the administration of a statute might shed light on the observation that the Supreme Court is arguably less deferential than federal courts of appeals when it applies *Chevron*'s second step.[204] That is, while the Court applies the same basic framework as do lower courts,[205] certain recent decisions at least appear to apply *Chevron*'s second step more stringently.[206] In the 2015 case of *Michigan v. EPA*, for example, the Court rejected as unreasonable the EPA's interpretation of a CAA provision that authorized the agency to regulate certain emissions only where "appropriate and necessary."[207] In making the initial determination whether to regulate at all, the EPA did not consider the cost to industry in doing so.[208] The majority opinion applied the *Chevron* framework,[209] but held at *Chevron*'s second step that it was unreasonable for the EPA not to consider costs when *initially* deciding that it was appropriate and necessary to regulate.[210] In contrast, the dissent would have upheld the EPA's interpretation.[211] While the agency did not consider costs in deciding whether to regulate, it did consider costs in setting the specific emissions limits.[212] Importantly, however, both the majority and the dissenting Justices agreed that not considering costs at all would be unreasonable.[213] Consequently, all the Justices applied *Chevron* in a manner cabining the agency's discretion in interpreting the statute – an approach that contrasts with the deference traditionally typically given agency interpretations at step two.

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[202] *See generally* Pojanowski, *supra* note 175 (noting that "[w]ith deference, the EPA can decide what the Clean Air Act means in all fifty states. Without it, critical provisions can mean different things in states covered by, say, the Ninth and Fifth Circuits," but cautioning that the concern over potential diverging statutory provisions may be "overblown"). Obviously, this consistency will hinge on the agency asserting consistent interpretations and a court finding that *Chevron* deference applies and the statutory provision is ambiguous.

[203] *See* Strauss, *supra* note footnote 200, at 1121; *see* Barnett & Walker, *supra* note 171 (manuscript at 68).

[204] *See* Barnett & Walker, *supra* note 171 (manuscript at 9) ("This may suggest that, in *Chevron*, the Supreme Court has an effective tool to supervise and rein in the lower courts in their review of agency statutory interpretations.").

[205] *See id*. (manuscript at 4) ("In other words, the Court's choice to apply *Chevron* deference, as opposed to a less-deferential doctrine or no deference at all, does not seem to affect the outcome of the case. *Chevron* deference—at least at the Supreme Court—does not seem to matter."); *see generally* Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011); William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1124–25 (2008).

[206] *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2442 (2014).

[207] 135 S. Ct. 2699 (2015).

[208] *Id*. at 2705-06.

[209] *Id*. at 2706-07.

[210] *Id*. The Court noted that, in contrast to the strict criteria for regulating other sources, the CAA directed the EPA to regulate power plants only if "appropriate and necessary." In addition, the Court noted that agencies have historically considered cost as a "centrally relevant factor when deciding whether to regulate.... [I]t is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost." *Id*. at 2706-07. Finally, the Court pointed to the statutory context as indicative of "the relevance of cost" to the agency's decision. *Id*. at 2707.

[211] *Id*. at 2714 (Kagan, J., dissenting).

[212] *Id*.

[213] *Compare id*. at 2714 (Kagan, J., dissenting), *with id*. at 2710 (majority opinion).

Issues to Consider

Criticisms and Future Application of *Chevron*

The Court's decision in *Chevron* is a foundational case for understanding the modern administrative state.[214] It is one of the most cited cases by federal courts in administrative law disputes,[215] and supplies a background principle of deference to statutory ambiguity against which Congress may legislate.[216] Indeed, some scholars have noted that a certain amount of ambiguity in a statute is likely inevitable.[217] Consequently, *Chevron* is sometimes characterized as placing resolution of statutory ambiguities in politically accountable agencies, rather than unelected Article III courts.[218] A number of commentators have nonetheless criticized the doctrine of *Chevron* deference in the years since the Court's opinion,[219] although recent skepticism from various Justices has arguably brought increased attention to their concerns.[220] Justice Thomas, for instance, has questioned the doctrine on separation of powers grounds.[221] At bottom, Justice Thomas objects to "*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law."[222] He argues that judicial deference to ambiguous agency statutory interpretations contradicts the Constitution's vestment of judicial power in Article III courts, which requires the judiciary, rather than the Executive, to "say what the law is."[223] In addition, for Justice Thomas, to the extent that agencies are not truly *interpreting* statutory ambiguities, but rather *formulating policy* under the *Chevron* deference framework, "[s]tatutory ambiguity thus becomes an implicit delegation of rule-making authority, [allowing the agency] to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress."[224] But, for Justice Thomas, granting agencies power to speak with the force of law with respect to matters on which "Congress did not actually have an intent" violates Article I by permitting the executive branch to exercise legislative power.[225]

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[214] Sunstein, *supra* note 29, at 191 (asserting that the *Chevron* decision "has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies").

[215] *See* Hickman & Bednar, *supra* note 66, manuscript at 101.

[216] Scalia, *supra* note 44, at 517.

[217] *See* Hickman & Bednar, *supra* note 66, manuscript at 155-61.

[218] *Chevron*, 467 U.S. at 865-66; City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.").

[219] *See* Pojanowski, *supra* note 175, at 1077-78 (noting various critics of *Chevron* deference).

[220] *See, e.g.*, Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring in the judgment) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations.").

[221] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring).

[222] Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2148 (2016) (Thomas, J., concurring).

[223] *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[224] *Id*. at 2713.

[225] *Id*. at 2712 (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

Likewise, recently appointed Justice Neil Gorsuch criticized the doctrine while he was a judge on the Court of Appeals for the Tenth Circuit.[226] For example, then-Judge Gorsuch argued in a concurring opinion that deferring to agency interpretations under *Chevron* was an "abdication of the judicial duty" to say what the law is.[227] This shift of responsibility, for Judge Gorsuch, raises due process and equal protection concerns.[228] In particular, he argued that under the *Chevron* framework, regulated parties do not receive fair notice of what the law requires.[229] Additionally, rather than effectuating "the fairest reading of the law that a detached magistrate can muster," politicized agency decisionmakers enjoy discretion to determine legal requirements "based merely on the shift of political winds."[230] Further, Judge Gorsuch questioned whether silence or ambiguity in a statute truly reflects congressional intent to delegate interpretive authority to federal agencies, and argued that this theory contradicts the APA's mandate to courts to interpret the law.[231] Finally, Judge Gorsuch noted that, at least in some instances, the application of *Chevron* deference might constitute an unconstitutional delegation of legislative authority to the executive branch.[232]

Other judges sitting on the federal courts of appeals have raised similar objections to *Chevron* deference.[233] At least one has echoed the separation of powers concerns voiced by Justices Gorsuch and Thomas;[234] another has lamented that *Chevron*'s broad scope encourages agencies to aggressively pursue policy goals "unless ... *clearly forbidden*," rather than fairly determining the best interpretation of a statute's meaning.[235] And numerous scholars have also questioned the doctrine,[236] critiquing, among other things, its purported historical foundations,[237] theoretical basis,[238] and inconsistent application by the Court.[239] Further, scholars have criticized the

[226] *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015).

[227] *See Gutierrez-Brizuela*, 834 F.3d at 1149-48 (Gorsuch, J., concurring). Judge Gorsuch also criticized the Court's opinion in *Brand X*, which instructs a court to defer to reasonable agency interpretations at *Chevron* step two, even if the court previously reached a different interpretation. He argued that the doctrine "risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law's meaning ... without the inconvenience of having to engage the legislative processes the Constitution prescribes." *Id*. at 1151.

[228] *Id*. at 1152.

[229] *Id.*

[230] *Id*.

[231] *Id*. at 1153.

[232] *Id*. at 1154-55. For Judge Gorsuch, permitting an agency to issue and reverse regulations affecting large aspects of the economy, including its own jurisdiction to regulate at all, may not satisfy the "intelligible principle" test set forth by the Supreme Court in delegation cases. *Id*.

[233] *See* Waterkeeper All. v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name.").

[234] *See* Egan v. Del. River Port Auth., 851 F.3d 263, 278-79 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

[235] *See* Hon. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2152 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[236] For a survey of the literature criticizing *Chevron* deference, see Christopher J. Walker, *Attacking* Auer *and* Chevron*: A Literature Review*, 15 GEO. J. L. & PUB. POL. (forthcoming 2018).

[237] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 930-62 (2017).

[238] *See* Jack M. Beerman, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795 (2010).

[239] *See* Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 484 (2015); John F. Manning, Chevron *and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1551–52 (2014).

apparent tools provided in *Chevron* to determine the meaning of a statute,[240] the Court's test for when *Chevron* applies,[241] as well as confusion regarding the mechanics and purpose of the doctrine's framework stemming from *Chevron*'s "unsystematic origin."[242] Finally, scholars have debated the merits of each of *Chevron*'s initial justifications, including the presence of an implied delegation of interpretive authority from Congress to an agency, the role of agency expertise, and the importance of political accountability.[243]

These concerns aside, the doctrine as a whole nevertheless is firmly established at the Supreme Court.[244] Most importantly, the majority of Supreme Court Justices appear comfortable applying the doctrine.[245] Nonetheless, appellate judges and commentators have noted that the Supreme Court has recently limited the doctrine's reach and applied *Chevron*'s second step fairly stringently.[246] Given the doubts about the constitutionality of *Chevron* deference of at least two Justices,[247] the competing tests for determining when *Chevron* applies to judicial review of agency action,[248] and the uncertainty about whether an agency interpretation concerns a "major question" that does not merit agency deference,[249] future disagreements about the scope of the doctrine are quite possible.[250] Achieving consensus on the doctrine's applicability may prove difficult in certain cases, at least with respect to those areas where the appropriateness of *Chevron* has not been conclusively decided by the Supreme Court.[251] Further, just as the Court has limited

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[240] *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 551 (2009); Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us about the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 619 (2014).

[241] *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1443-48 (2005); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO WASH. L. REV. 347, 347 (2003).

[242] *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 4 (2013).

[243] *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B. U. L. REV. 1271, 1283–91 (2008) (surveying these arguments).

[244] Pojanowski, *supra* note 175, at 1081; Michael Herz, Chevron *Is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1870 (2015).

[245] *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2144-45 (2016).

[246] Kavanaugh, *supra* note 235, at 2151 ("Perhaps in response to all of these criticisms, the Supreme Court itself has been reining in *Chevron* in the last few years."); Herz, *supra* note 244, at 1869 (noting that "[t]here is nothing remotely deferential about the majority opinion" applying *Chevron*'s second step in *Michigan v. EPA*). *See, e.g.*, King v. Burwell, 134 S. Ct. 2427, 2444 (2014); Michigan v. EPA, 135 S. Ct. 2699, 2606-08 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

[247] *See* Michigan v. EPA, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[248] *See supra* "How Did the Agency Arrive at Its Interpretation?."

[249] *See supra* "Major Questions Doctrine."

[250] *Compare* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2213 (2014) (Kagan, J., joined by Kennedy & Ginsburg, JJ.) ("This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law."), *with id*. at 2214 (Roberts, J., joined by Scalia, J., concurring in the judgment) ("To the extent the plurality's opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong."), *and id*. at 2216 (Alito, J., dissenting) (agreeing with Chief Justice Roberts' critique of the plurality's reasoning).

[251] *See, e.g.*, Whitman v. United States, 135 S. Ct. 352, 353 (2014) (statement of Scalia, J., joined by Thomas, J. respecting the denial of certiorari) (questioning whether "court[s] owe deference to an executive agency's interpretation of a law that contemplates both criminal and administrative enforcement"); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1028 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (arguing that the rule of lenity should take precedence over *Chevron* deference when a statute imposes criminal penalties), *cert. granted*, 137 S. Ct. 368 (2016), and *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017); Carter v. Welles–Bowen Realty, Inc., 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring); Scenic Am., Inc. v. Dep't of Transp., 836 F.3d 42, 57

the reach of the doctrine in the past, such as by requiring certain procedures to apply the *Chevron* framework or declining to apply *Chevron* to certain issues, the scope of these "doctrinal safety valves" may be expanded in future cases.[252]

Could Congress Eliminate *Chevron*?

Chevron is a judicially created doctrine that rests, in part, upon an assumption made by courts about congressional intent: that where a statute is silent or ambiguous, Congress would have wanted an agency, rather than a court, to fill in the gap.[253] Accordingly, Congress can determine whether a court will apply *Chevron* review to an agency interpretation. When it drafts a statute delegating authority to an agency, it may "speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[254] Thus, Congress can legislate with *Chevron* as a background presumption, using ambiguity to delegate interpretive authority to agencies or writing clearly to withhold that authority.

Alternatively, if it deemed such action appropriate, Congress could also act more directly to control how courts will review agency action. Congress has the authority to shape the standards used by courts to review agency actions. Perhaps most notably, Congress has outlined the standards that should generally govern judicial review of agency decisions in the APA.[255] Although *Chevron*'s place within the APA framework is a matter of dispute,[256] it is within Congress's power to modify or displace entirely the *Chevron* framework by amending the APA to impose a different standard of review.[257]

(D.C. Cir. 2016), *petition for cert. filed*, (U.S. Dec. 5, 2016) (No.16-739); Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016), *petition for cert. filed* (U.S. Aug. 11, 2016) (No. 17-241).

[252] Pojanowski, *supra note* 175, at 1081. *Compare* City of Arlington v. FCC, 133 S. Ct. 1863, 1880-83 (2013) (Roberts, J., dissenting, joined by Kennedy & Alito, JJ.) (arguing that *Chevron* does not apply to an agency's determination of its own jurisdiction) *with* Michigan v. EPA, 135 S. Ct. 2699, 2712-14 (2015) (Thomas, J., concurring) (arguing that *Chevron* violates the separation of powers); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (same), *and City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring) (repeating his view of a functional test for determining whether *Chevron* deference applies).

[253] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

[254] *City of Arlington*, 133 S. Ct. at 1868 (majority opinion). *See also* Barron & Kagan, *supra* note 36, at 212 ("Congress ... has the power to turn on or off *Chevron* deference.").

[255] 5 U.S.C. § 706.

[256] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the 'reviewing court ... interpret ... statutory provisions,' we have held that agencies may authoritatively resolve ambiguities in statutes."). *See also* Barron & Kagan, *supra* note 36, at 218 n.63 (noting that "some scholars have suggested" that 5 U.S.C. § 706 "*requires* independent judicial review of interpretive judgments, thus precluding *Chevron* deference," but concluding that instead, the APA "may well leave the level of deference to the courts, presumably to be decided according to common law methods, in the event that an organic statute says nothing about the matter").

[257] In fact, the U.S. House of Representatives, in 2016 and 2017, has twice passed the "Separation of Powers Restoration Act," intended to eliminate *Chevron* deference by amending 5 U.S.C. § 706 to require courts to "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." H.R. 5; H.R. 4768. H.R. 5 adds, "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." *Cf.* Hickman & Bednar, Chevron*'s Inevitability*, *supra* note 66, manuscript at 166 (evaluating

As a more limited approach to working outside of *Chevron*, Congress also has the power to prescribe different judicial review standards in the specific statutes that grant agencies the authority to act.[258] Congress took such a step when it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. A provision of the act instructs courts that, when they review "any determinations made by the Comptroller [of the Currency] regarding preemption of a State law," they should "assess the validity of such determinations" by reference to a series of factors outlined in the Supreme Court's opinion in *Skidmore v. Swift & Co*.[259] This *Skidmore* standard is considered less deferential to agencies than the *Chevron* framework of review,[260] and courts so far have recognized this legislative choice as significant.[261]

However, given the extent to which the *Chevron* doctrine is unsettled, it is unclear exactly how much of the *Chevron* framework of review rests on presumptions about congressional intent.[262] Therefore, it remains difficult to determine exactly how or to what extent Congress, if it deemed such action warranted, could intervene to displace that presumption.

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whether amending APA would eliminate *Chevron*).

[258] *Cf.* Barron & Kagan, *supra* note 36, at 212 ("Although Congress can control applications of *Chevron*, it almost never does so, expressly or otherwise; most notably, in enacting a standard delegation to an agency to make substantive law, Congress says nothing about the standard of judicial review.").

[259] 323 U.S. 134, 140 (1944). Congress also stipulated in a few other provisions of the act that courts should recognize that only one agency is authorized to "apply, enforce, interpret, or administer the provisions" of a specified area of law. *See* Kent Barnett, *Codifying* Chevmore, 90 N.Y.U. L. REV. 1, 33 (2015). This might influence a court's decision on which agency is entitled to *Chevron* deference in that area of law. *See id.*

[260] *See* Barnett, *supra* note footnote 259, at 28 ("The legislative history [of Dodd-Frank] reveals that Congress understood that codifying *Skidmore* would lead to less deference than under *Chevron*."). *See also supra* notes 44- 46 and accompanying text.

[261] *See* Lusnak v. Bank of Am., N.A., No. CV 14-1855-GHK (AJWx), 2014 U.S. Dist. LEXIS 154225, at *12 (C.D. Cal. Oct. 29, 2014) ("Congress made clear that courts need not use *Chevron* deference for OCC decisions regarding NBA preemption."); Bate v. Wells Fargo Bank, N.A., 454 B.R. 869, 877 n.46 (Bankr. M.D. Fla. 2011) ("While not controlling in this case, it is noteworthy that *Skidmore* level deference has been incorporated in [Dodd-Frank]."). *But cf.* Powell v. Huntington Bank, 226 F. Supp. 3d 625, 637 (S.D. W. Va. 2016) (interpreting 12 U.S.C. § 25b(b)(5) as consistent with prior cases outlining non-*Chevron* standard for determining "when a relevant federal regulation, specifically an OCC regulation, conflicts with state law"); *Lusnak*, 2014 U.S. Dist. LEXIS 154225, at *12-13 ("But, ... this directive does not seem entirely new, as courts do not typically wholly rely on agency preemption determinations when deciding whether a state law is preempted.").

[262] *See, e.g., supra* note 243 and accompanying text.

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