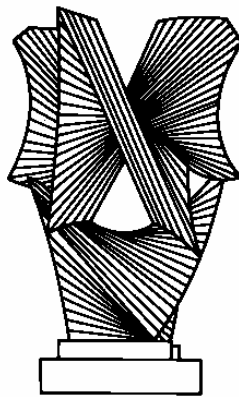


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CHEVRON STEP ZERO

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## Chevron Step Zero

Cass R. Sunstein\*

### Abstract

*The most famous case in administrative law, Chevron U.S.A. v. Natural Resources Defense Council, Inc., has come to be seen as a counter-Marbury, or even a McCulloch v. Maryland, for the administrative state. But in the last period, new debates have broken out over Chevron Step Zero—the initial inquiry into whether Chevron applies at all. These debates are the contemporary location of a longstanding dispute between Justice Scalia and Justice Breyer over whether Chevron is a revolutionary decision, establishing an across-the-board rule, or instead a mere synthesis of preexisting law, inviting a case-by-case inquiry into congressional instructions on the deference question. In the last decade, Justice Breyer’s case-by-case view has enjoyed significant victories. Two trilogies of cases—one explicitly directed to the Step Zero question, another implicitly so directed—suggest that the Chevron framework may not apply (a) to agency decisions not preceded by formal procedures and (b) to agency decisions that involve large-scale questions about agency authority. Both of these trilogies threaten to unsettle the Chevron framework, and to do so in a way that produces unnecessary complexity for judicial review and damaging results for regulatory law. These problems can be reduced through two steps. First, courts should adopt a broader understanding of Chevron’s scope. Second, courts should acknowledge that the argument for Chevron deference is strengthened, not weakened, when major questions of statutory structure are involved.*

Over twenty years after its birth, the Supreme Court’s decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*<sup>1</sup> shows no sign of losing its influence. On the contrary, the 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. Ironically, Justice Stevens, the author of *Chevron*, had no broad ambitions for the decision; the Court did not mean to do anything dramatic.<sup>2</sup> But shortly after it appeared, *Chevron* was quickly taken to establish a new

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<sup>1</sup> 467 U.S. 837 (1984). As a sign of *Chevron*’s influence, consider the fact that the decision was cited 2,414 times in its first decade (between 1984 and January 1, 1994), 2,584 times in its next six years (between January 1, 1994 and January 1, 2000), and 2,235 times in its next five years (between January 1, 2000 and January 28, 2005). LEXIS search, March, 2005.

<sup>2</sup> See Robert Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10613 (1993). In fact it is possible, and fascinating, to trace a series of opinions in which Justice Stevens expressed reservations about the broad reading of *Chevron*, and attempted to domesticate the decision. See, e.g., *Young v. Community Nutrition Institute*, 476 U.S. 974, 985 (1986) (Stevens, J., dissenting); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Babbitt v. Sweet Home Chapter of*

approach to judicial review of agency interpretations of law,<sup>3</sup> going so far as to establish a kind of counter-*Marbury* for the administrative state. It seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the *administrative* department to say what the law is.<sup>4</sup>

*Chevron* also appeared to have imperialistic aspirations, cutting across countless areas of substantive law and the full range of procedures by which agencies might interpret statutory law. Some of those ambitions have been realized, for *Chevron* has had a fundamental impact on areas as disparate as taxation,<sup>5</sup> labor law,<sup>6</sup> environmental protection,<sup>7</sup> immigration,<sup>8</sup> foods and drugs,<sup>9</sup> and highway safety.<sup>10</sup> In all of these areas, and many more, *Chevron* has signaled a substantial increase in agency discretion to make policy through statutory interpretation. For this reason, *Chevron* might well be seen not only as a kind of counter-*Marbury*, but even more fundamentally as the administrative state's very own *McCulloch v. Maryland*,<sup>11</sup> permitting agencies to do as they wish so long as there is a reasonable connection between agency choices and congressional instructions. This grant of permission seemed to depend on a distinctive account of legal interpretation, one that sees resolution of statutory ambiguity as involving judgments of principle and policy, and insists that the executive, not the courts, should be making those judgments.<sup>12</sup>

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Communities for a Great Oregon, 515 U.S. 687 (1995). See also *Christensen v. Harris County*, 529 U.S. 576, 595 n.2 (2000) (Stevens, J., dissenting) (endorsing "fully" Justice Breyer's narrow reading of *Chevron*).

<sup>3</sup> See, e.g., Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. REG. 283 (1986); Richard Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988). On the real-world consequences of *Chevron*, see Peter Schuck and E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 42 DUKE L.J. 984 (1989). Schuck and Elliott find a significant effect from *Chevron*, an increase in affirmance rates from 71% in the pre-*Chevron* year of 1984 to 81% in the post-*Chevron* year of 1985. Over more extended periods, studies are hard to conduct, because prospective litigants will adjust their mix of cases to the rules governing judicial review of agency action; when challenges are hard to sustain under doctrines of deference, fewer challenges will be brought. On the other hand, agencies and their lawyers may adjust their own practices to deference doctrines as well, and hence take legal risks that they would not assume if courts were less likely to defer. Relevant findings, exploring the importance of whether a panel is composed of Republican or Democratic appointees to the application of *Chevron*, can be found in Frank Cross and Emerson Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998) (finding that all-Republican panels are particularly willing to strike down agency action at the behest of an industry challenge, notwithstanding *Chevron*).

<sup>4</sup> See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the laws is.").

<sup>5</sup> *Atlantic Mutual Ins. Co. v. Commissioner*, 523 U.S. 382 (1998); *Tate & Lyle v. Commissioner*, 87 F.3d 99 (3d Cir. 1996).

<sup>6</sup> See *NLRB v. United Food Workers Union*, 484 U.S. 112 (1987); *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598 (3d Cir 1996).

<sup>7</sup> See *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116 (1985).

<sup>8</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

<sup>9</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

<sup>10</sup> *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

<sup>11</sup> 17 U.S. 316 (1819).

<sup>12</sup> See *infra* notes 40-44.

In the last fifteen years, however, the simplest interpretations of *Chevron* have unraveled. Like a novel or even a poem, the decision has inspired fresh and occasionally even shocking readings. In some cases, the Court appears to have moved strongly in the direction of pre-*Chevron* law, in an evident attempt to reassert the primacy of the judiciary in statutory interpretation. At times, the effort to re-establish judicial supremacy has been quite explicit.<sup>13</sup> But the result has not been a restoration of pre-*Chevron* principles; it has instead been the addition of several epicycles to the *Chevron* framework, producing not only a decrease in agency authority, but also a significant increase in uncertainty about the appropriate approach. More than at any time in recent years, a threshold question—the scope of judicial review—has become one of the most vexing in regulatory cases.<sup>14</sup>

*Chevron* famously creates a two-step inquiry for courts to follow in reviewing agency interpretations of law.<sup>15</sup> The first step asks whether Congress has “directly spoken to the precise question at issue,” an inquiry that requires an assessment of whether Congress’s intent “is clear” and “unambiguously expressed.”<sup>16</sup> The second step asks whether the agency’s interpretation is “permissible,” which is to say reasonable in light of the underlying law.<sup>17</sup> It is an understatement to say that a great deal of judicial and academic attention has been paid to the foundations and meaning of *Chevron*’s two-step inquiry.<sup>18</sup> But in the last period, the most important and confusing questions have involved neither step. Instead they involve *Chevron* Step Zero—the initial inquiry into whether the *Chevron* framework applies at all.<sup>19</sup> The Supreme Court has issued several important Step Zero decisions,<sup>20</sup> which clarify a number of questions but also offer complex and conflicting guidance. As we shall see, the area is pervaded by legal fictions about congressional understandings, and the proliferation of fictions has vindicated the

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<sup>13</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *FDA v. Brown & Williamson*, 529 U.S. 120 (2000).

<sup>14</sup> A detailed discussion can be found in Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, *VALD. L. REV.* (forthcoming 2005).

<sup>15</sup> 467 U.S. at 842-44.

<sup>16</sup> *Id.* at 842-43.

<sup>17</sup> *Id.* at 843.

<sup>18</sup> See, e.g., Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969 (1992); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two*, 2 *ADMIN. L.J.* 255 (1988); Thomas Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 *WASH. U. L.Q.* 351 (1994); Richard Pierce, *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 *VAND. L. REV.* 301 (1988); Note, “How Clear is Clear” in *Chevron’s Step One?*, 118 *HARV. L. REV.* 1687 (2005); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 *YALE J. REG.* 283 (1986).

<sup>19</sup> I borrow the term from Thomas W. Merrill and Kristin E. Hickman, *Chevron’s Domain*, 89 *GEO. L.J.* 833, 836 (2001).

<sup>20</sup> *Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

fears of those who have insisted on the importance of a simple answer to the Step Zero question.<sup>21</sup>

My principal purpose here is to provide an understanding of the foundations and nature of the Step Zero dilemma, and to suggest how that dilemma should be resolved. Step Zero has become the central location of an intense and longstanding disagreement between the Court's two administrative law specialists, Justice Breyer and Justice Scalia.<sup>22</sup> In fact it is impossible to understand the current debates without reference to this disagreement. In the 1980s, the two converged, apparently independently, on a distinctive understanding of *Chevron*, one that roots the decision in a theory of implicit congressional delegation of law-interpreting power to administrative agencies.<sup>23</sup> Both justices explicitly recognized that any understanding of legislative instructions is a "legal fiction"<sup>24</sup>; both approved of resort to that fiction. But the two sharply disagreed about its meaning and content. Here, as elsewhere, Justice Scalia seeks clear and simple rules, intended to reduce the burdens of decision-making for lower courts and litigants.<sup>25</sup> And here, as elsewhere, Justice Breyer prefers a case-by-case approach, one that eschews simplicity in the interest of (what he sees as) accuracy.<sup>26</sup> This kind of disagreement, involving a classic rules-standards debate,<sup>27</sup> echoes throughout the law, but as we shall see, it has distinctive resonance in the context of judicial review of agency interpretations of law.

On an important matter, Justice Scalia's approach has largely triumphed, at least thus far: When agency decisions have the force of law, or follow a formal procedure, *Chevron* supplies a simple rule, notwithstanding early efforts to cabin its reach.<sup>28</sup> In recent years, however, Justice Breyer's approach has enjoyed a partial but significant victory, on the theory that *Chevron* should not be taken to cede law-interpreting power to

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<sup>21</sup> See *Mead*, 533 U.S. at 239, 245-47 (Scalia, J., dissenting); Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 847 (2003).

<sup>22</sup> Justice Breyer taught administrative law for many years at Harvard Law School; Justice Scalia did the same at the University of Virginia Law School and the University of Chicago Law School.

<sup>23</sup> Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 DUKE L.J. 511.

<sup>24</sup> This point is emphasized and explored in David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

<sup>25</sup> See Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>26</sup> See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

<sup>27</sup> See Louis Kaplow, *Rules v.s Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kathleen Sullivan, Foreword: The Justices of Rules and the Justices of Standards, 106 HARV L. REV. 22 (1992).

<sup>28</sup> *INS v. Cardoza Fonseca*, 480 U.S. 421 (1987). As we shall see, this claim must be qualified by reference to recent developments involving major questions. See *infra* 198-231.

agencies in circumstances in which it is implausible to infer a congressional delegation. A trilogy of cases, unambiguously directed to Step Zero, has suggested that when agencies have not exercised delegated power to act with the force of law, *Chevron* may not provide the governing framework.<sup>29</sup> In a separate trilogy of cases,<sup>30</sup> the Court has also raised Step Zero questions simply because it has suggested the possibility that deference will be reduced, or even nonexistent, if a “major question” is involved, one that goes to the heart of the regulatory scheme at issue. The apparent theory is that Congress should not be taken to have asked agencies to resolve those questions.

I suggest that both trilogies point in unfortunate directions. As for the first: The “force of law” test is a crude way of determining whether *Chevron* deference is appropriate, and it introduces far too much complexity into the deference issue. The Court is apparently seeking to allow *Chevron* deference only or mostly when agency decisions have followed procedures that guarantee a kind of deliberation and reflectiveness. But that goal, however appealing, cannot justify the high level of complexity that the first trilogy has introduced. As for the second: Major questions are not easily distinguished from less major ones, and the considerations that underlie *Chevron* apply with more, not less, force when major questions are involved. To be sure, it is possible to defend a background principle that limits agency discretion when constitutionally sensitive interests are at stake.<sup>31</sup> But that principle should not be converted into a general presumption in favor of limiting agency authority—a presumption that would encode a kind of status quo bias, or possibly even a strong antiregulatory “tilt,” into the *Chevron* framework.

My argument, in short, is that where fairly possible, the Step Zero question should be resolved in favor of applying the standard *Chevron* framework—a framework that has the dual virtues of simplifying the operation of regulatory law and giving policymaking authority to institutions that are likely to have the virtues of specialized competence and political accountability. The Court’s emerging steps in favor of a more complex framework, calling for independent judicial judgment in certain circumstances, are a

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<sup>29</sup> *Christensen v. Harris County*, 529 U.S. 576 (2000); *United States v. Mead*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

<sup>30</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson*, 529 U.S. 120 (2000).

<sup>31</sup> See Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005).

product of an evident desire to constrain agency discretion when such discretion seems particularly unlikely to be fairly exercised.<sup>32</sup> But the Court’s goals can be accomplished in much simpler and better ways, above all by insisting on the rule of law constraints embodied in Steps One and Two, and on continued judicial review for arbitrariness.

This Article comes in five parts. Part II explores the early debates over *Chevron*, with particular emphasis on the striking contrast between then-Judge Breyer’s effort to domesticate the decision by reading it to permit case-by-case inquiries and Justice Scalia’s insistence that *Chevron* is a dramatic development that establishes an across-the-board presumption. Part III investigates Step Zero trilogy in which the Court has held that *Chevron* applies to agency decisions having the force of law or backed by relatively formal procedures, while requiring a case-by-case inquiry into whether *Chevron* applies to less formal agency action. Part IV explores cases in which the Court has also failed to apply *Chevron* in the ordinary way, apparently on the theory that major questions, involving the basic reach of regulatory statutes, are for courts rather than agencies. Part V briefly concludes.

## **II. *Chevron* in the 1980s: Foundations and Reach**

### **A. *Chevron*’s Framing: Two Steps in Search of a Rationale**

In *Chevron*, the Court announced its two-step approach without giving a clear sense of the theory that justified it. The case itself involved the decision of the Environmental Protection Agency (EPA) to define “stationary source”<sup>33</sup> under the Clean Air Act as an entire factory, rather than each pollution-emitting unit within the plant. The Supreme Court insisted that because the statute was ambiguous, the EPA could supply whatever (reasonable) definition it chose. But why, exactly, should agencies be permitted to interpret statutory ambiguities as they see fit, subject only to the limitations of reasonableness? The Court emphasized that Congress sometimes explicitly delegates law-interpreting power to agencies<sup>34</sup>; if the Clean Air Act had said “stationary source (as defined by the Administrator),” judges would have to accept administrative judgments.

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<sup>32</sup> See Bressman, *supra* note 14.

<sup>33</sup> 42 U.S.C. § 7502 (c).

<sup>34</sup> 467 U.S. at 844.

Of course the Clean Air Act contained no explicit delegation. But the Court added that “sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”<sup>35</sup> If so, the court must accept any reasonable interpretation.

But why should a court find an implicit delegation in the Administrative Procedure Act (APA) or the Clean Air Act, the governing statutory provisions in *Chevron* itself? The APA does not appear to delegate law-interpreting power to agencies; on the contrary, it specifies that the “reviewing court shall decide all relevant questions of law, [and] interpret statutory provisions.”<sup>36</sup> This phrase seems to suggest that ambiguities must be resolved by courts and hence that the *Chevron* framework is wrong. But by empowering the EPA to issue regulations, perhaps the Clean Air Act is best taken to say that the agency is implicitly entrusted with the interpretation of statutory terms. If so, the reviewing court must continue to follow the APA and decide “all relevant questions of law”; but the *answer* to the relevant questions will depend on what the EPA has said, because under the Clean Air Act, the law is what the EPA says it is.<sup>37</sup> In *Chevron*, the Court referred to this possibility, noting that Congress might have wanted the agency to strike the relevant balance with the belief “that those with great expertise and charged with responsibility for administering the provision would be in a better position [than courts or Congress itself] to do so.”<sup>38</sup> But the Court did not insist that Congress in fact so thought. On the contrary, it said that Congress’s particular intention “matters not.”<sup>39</sup>

Instead the Court briefly emphasized judges’ lack of expertise and, in more detail, their lack of electoral legitimacy. In interpreting law, the agency may “properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is.”<sup>40</sup> Hence it would be appropriate for agencies, rather than judges, to resolve “competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved in light of everyday realities.”<sup>41</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> 5 U.S.C. § 706.

<sup>37</sup> See Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

<sup>38</sup> 467 U.S. at 865.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



The *Chevron* Court's approach was much clearer than the rationale that accounted for it. The Court's reference to expertise suggested one possible rationale: Perhaps the Court was saying that the resolution of statutory ambiguities sometimes calls for technical expertise, and that in such cases deference would be appropriate. On this view, having roots in the New Deal's enthusiasm for technical competence,<sup>42</sup> specialized administrators, rather than judges, should make the judgments of policy that are realistically at stake in disputes over ambiguous terms. But the Court's emphasis on accountability suggested a second possibility: Perhaps the two-step inquiry is based on a healthy recognition that in the face of ambiguity, agency decisions must rest on judgments of value, and those judgments should be made politically rather than judicially. On this view, having roots in legal realism,<sup>43</sup> value choices are a significant part of statutory construction, and those choices should be made by democratically accountable officials. This reading suggests a third and more ambitious possibility: Perhaps *Chevron* is rooted in separation of powers, requiring courts to accept executive interpretations of statutory ambiguities in order to guard against judicial displacement of political judgments.<sup>44</sup>

In the 1980s, then-Judge Breyer<sup>45</sup> and Justice Scalia, both administrative law specialists, rejected these readings of *Chevron*. They agreed that *Chevron* must rest on a simple idea: *Courts defer to agency interpretations of law when and because Congress has told them to do so*. As we shall see, this reading of *Chevron* has prevailed. If Congress wanted to do so, it could entrench *Chevron*, by providing that statutory ambiguities must be resolved by agencies; and if Congress sought to overrule *Chevron*, by calling for independent judicial judgments about legal questions, it could do precisely that. Judge Breyer and Justice Scalia agreed that the national legislature retains control of the deference question, and in this sense *Chevron* must rest on an understanding of what Congress has instructed courts to do. But their shared emphasis on implicit delegation led Judge Breyer and Justice Scalia to quite different understandings of *Chevron*'s scope and limitations. Where Judge Breyer sought to domesticate *Chevron*, treating it as a kind of

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<sup>42</sup> See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1935).

<sup>43</sup> See Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931).

<sup>44</sup> See Douglas Kmiec, *Judicial Deference to Executive Agencies*, 2 ADMIN. L.J. 269, 277-28 (1988).

<sup>45</sup> For ease of exposition, I shall henceforth refer to "Judge Breyer" when speaking of his 1986 essay, Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

“problem” to be solved by reference to established principles, Justice Scalia saw *Chevron* as a genuinely revolutionary decision, one that would fundamentally alter the relationship between agencies and reviewing courts, and renovate what had long been the law.

### **B. Against “Any Simple General Formula”: Breyer’s Plea for Complexity**

*Chevron* was decided in 1984. In that same year, Judge Breyer, writing for the United States Court of Appeals for the First Circuit, tried to make sense of the Court’s decision.<sup>46</sup> His explanation of *Chevron* pointed to a delegation of law-interpreting authority to agencies. When Congress has not made an express delegation, Judge Breyer wrote, “courts may still infer from the particular statutory circumstances an implicit congressional instruction about the degree of respect or deference they owe the agency on a question of law.”<sup>47</sup> The inference would be intensely particularistic; it would rest on an inquiry into “what a sensible legislator would have expected given the statutory circumstances.”<sup>48</sup> The expectations of the sensible legislator would depend on an inquiry into institutional competence:

“The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency’s (rather than the court’s) administrative or substantive expertise, the less likely it is that Congress (would have) ‘wished’ or ‘expected’ the courts to remain indifferent to the agency’s views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.”<sup>49</sup>

Thus Judge Breyer’s approach squarely endorsed the implicit delegation theory, but in a way that required a case-by-case inquiry into what “a sensible legislator would have expected given the statutory circumstances.” With an interstitial question closely connected to “the everyday administration of law,” or calling for agency expertise, deference would be warranted. But with a “larger” question, one whose answer would “stabilize a broad area of law,” an independent judicial assessment would be required.

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<sup>46</sup> *Mayburg v. HHS*, 740 F.2d 100, 106 (1st Cir. 1984).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

In 1986, Judge Breyer explored these issues far more systematically, in an essay that has proved to be extremely, and indeed increasingly, influential.<sup>50</sup> Judge Breyer's basic claim was straightforward. In the immediate aftermath of *Chevron*, existing doctrine seemed to argue for deferential judicial review of agency interpretations of law but stringent judicial review of agency judgments about policy.<sup>51</sup> In this sense, the governing standards were "anomalous," because a rational system would call for "stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert."<sup>52</sup> In Judge Breyer's view, judicial review should be specifically tailored to the "institutional capacities and strengths" of the judiciary.<sup>53</sup> For that tailoring, the simple approach set out in *Chevron* was hopelessly inadequate.

Judge Breyer began by emphasizing that before *Chevron*, courts had been inconsistent on the question of judicial review of agency interpretations of law, with competing strands of deference and independence.<sup>54</sup> In order to reconcile the conflict, Judge Breyer noted that courts might defer to agencies either because agencies have a "better understanding of congressional will"<sup>55</sup> or because Congress explicitly or implicitly delegated interpretive power to agencies.<sup>56</sup> Judge Breyer added, crucially, that the idea of a "legislative intent to delegate the law-interpreting function" is "a kind of legal fiction."<sup>57</sup> When courts find such an intent, they are really imagining "what a hypothetically 'reasonable' legislator would have wanted (given the statute's objectives)," and "looking to practical facts surrounding the administration of a statutory scheme."<sup>58</sup>

In Judge Breyer's view, this imagining should lead to a case-by-case inquiry into Congress's hypothesized intentions. If the question calls for special expertise, the agency is more likely to be able to answer it correctly; hence an ordinary question of agency administration would call for deference.<sup>59</sup> But if the question is "an important one," an

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<sup>50</sup> See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

<sup>51</sup> *Id.* at 364-65.

<sup>52</sup> *Id.* at 397.

<sup>53</sup> *Id.* at 398.

<sup>54</sup> *Id.* at 365-67.

<sup>55</sup> *Id.* at 368.

<sup>56</sup> *Id.* at 369.

<sup>57</sup> *Id.* at 370.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

independent judicial approach is preferable. “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.”<sup>60</sup> (That sentence has proved to be especially important, as we shall soon see.) Judge Breyer added that a court should “consider the extent to which the answer to the legal question will clarify, illuminate or stabilize a broad area of the law,” and whether “the agency can be trusted to give a properly balanced answer.”<sup>61</sup> Judge Breyer insisted that the reconciliation of the apparently conflicting lines of cases depends on inquiries of this sort.

At this stage Judge Breyer was confronted with an obvious question about the relationship between his views and the Court’s approach in *Chevron*. To answer that question, he embarked on a new discussion with a revealing title: “The Problem of the *Chevron* Case.”<sup>62</sup> He noted that *Chevron* could be read as embodying “the complex approach” that he endorsed; but it could also be seen “as embodying a considerably simpler approach,” one that accepts any reasonable agency interpretation in the face of ambiguity.<sup>63</sup> Not surprisingly, Judge Breyer argued strenuously against that latter approach. Notwithstanding “its attractive simplicity,” he urged, the broad reading could not survive “in the long run.”<sup>64</sup>

Judge Breyer offered three reasons for this conclusion. The first involves the sheer diversity of situations in which courts might be asked to defer to agency interpretations. No simple formula can fit so “many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures.”<sup>65</sup> Second, and ironically, a simple rule will increase delay and complexity. Under *Chevron*, courts will sometimes have to remand a case to an agency to establish a reasonable interpretation; because judges are at least as likely to produce the correct interpretation, such *Chevron* remands will be “a waste of time.”<sup>66</sup> Third, the simple view “asks judges to develop a cast of mind

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 371.

<sup>62</sup> *Id.* at 372.

<sup>63</sup> *Id.* at 373.

<sup>64</sup> *Id.* at 373.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 378.

that often is psychologically difficult to maintain.”<sup>67</sup> The reason is that after a detailed examination of a legal question, it is difficult “to believe both that the agency’s interpretation is legally wrong, *and* that its interpretation is reasonable.”<sup>68</sup>

In the end, Judge Breyer concluded, these “factors will tend to force a less univocal, less far-reaching interpretation of *Chevron*.” Inevitably, “we will find the courts actually following more varied approaches,” without adhering to any “single simple judicial formula.”<sup>69</sup> Judge Breyer urged, in short, that *Chevron* should be read in accordance with the most sensible understanding of what had preceded it, which entailed a case-specific inquiry into Congress’s fictional instructions on the question of deference.<sup>70</sup> Far from being a revolution, or even a radical departure, *Chevron* should be taken to codify the best understanding of existing law.

### C. An “Across-the-Board Presumption”: Justice Scalia’s Plea

Writing just three years later, Justice Scalia defended *Chevron* in exactly the same terms as Judge Breyer (though without referring to his essay).<sup>71</sup> He began by insisting that the decision ultimately rested on a reading of congressional instructions—and hence that prominent justifications for the decision, pointing to agency expertise and separation of powers, were irrelevant.<sup>72</sup> Quoting a lower court, Justice Scalia said that the deference judgment must be “a function of Congress’ intent on the subject as revealed in the particular statutory scheme at issue.”<sup>73</sup> For Justice Scalia, as for Judge Breyer, the central issue is what Congress has told courts to do, for the national legislature maintains ultimate authority over the deference question.

Justice Scalia also agreed with Judge Breyer’s reading of pre-*Chevron* law. The lower courts had tried to decide the deference question on a case-by-case basis, producing a statute-by-statute evaluation that was a recipe for confusion. “*Chevron*, however, if it is

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<sup>67</sup> *Id.* at 379.

<sup>68</sup> *Id.* at 379.

<sup>69</sup> *Id.* at 381.

<sup>70</sup> Candor compels an acknowledgement that an extremely young man, writing in the same period, analyzed the *Chevron* issue in terms akin to those used by Judge Breyer. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465-70 (1987). A somewhat older man believes that the conclusion in *id.*, favoring case-by-case inquiries into the deference question, was mistaken.

<sup>71</sup> Antonin Scalia, *Judicial Deference to Agency Interpretations of Law*, 1989 Duke L.J. 511.

<sup>72</sup> *Id.* at 512-13.

<sup>73</sup> *Id.* at 516.

to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is what is meant.”<sup>74</sup> Here again Justice Scalia is in complete accord with Judge Breyer; but where Judge Breyer challenges the presumption as unacceptably simplistic, Justice Scalia defends it on exactly that ground—and hence as a dramatic departure from what preceded it.

How might that presumption be defended? Returning to the touchstone of legislative instructions, Justice Scalia acknowledges that *Chevron* is “not a 100% accurate estimation of modern congressional intent”<sup>75</sup>; deference does not always capture what Congress wants. But “the prior case-by-case evaluation was not so either”<sup>76</sup>—a point that might be buttressed with the suggestion that such evaluations will increase the burdens of decision while also producing a degree of error from inevitably fallible judges. In the end, Justice Scalia agrees with Judge Breyer on yet another point: Any account of congressional instructions reflects “merely a fictional, presumed intent.”<sup>77</sup> A judgment about that fictional and presumed intent, Justice Scalia seems to say, should also be based on a judgment about what would amount to a sensible instruction by a sensible legislature.

But what makes sense should be informed by a central point: any fictional or presumed intent will operate “principally as a background rule of law against which Congress can legislate.”<sup>78</sup> And by emphasizing this point, Justice Scalia marks his crucial departure from Judge Breyer. “If we are speaking of fictional intent, *Chevron*, taken to provide a simple background rule, is unquestionably better than what preceded it,” simply because “Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.”<sup>79</sup> Thus Justice Scalia offers a dynamic rather than static understanding of *Chevron*. Where Judge Breyer asks whether a univocal deference rule accurately reflects (fictive) congressional understandings, Justice Scalia focuses on the effects of a deference rule on

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 517.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

subsequent congressional activity – a focus that, in his view, argues for clarity and simplicity.

To this Justice Scalia added two points about the scope of *Chevron*, thus defended. First, the emphasis on “real or presumed legislative intent to confer discretion” should obliterate the old idea that longstanding and consistent interpretations would receive more deference than recent and inconsistent ones.<sup>80</sup> Second, and more fundamentally, Justice Scalia suggested the distinct possibility that under *Chevron*, it would be necessary to revise a “distinction of yesteryear,” which involves “the distinction among the various manners in which the agency makes its legal views known.”<sup>81</sup> Even mere litigating positions might receive *Chevron* deference, for

“if the matter at issue is one for which the agency has responsibility, if all requisite procedures have been complied with, and if there is no doubt that the position urged has full and considered approval of the agency head, it is far from self-evident that the agency's views should be denied their accustomed force simply because they are first presented in the prosecution of a lawsuit.”<sup>82</sup>

At this point Justice Scalia offered a jurisprudential suggestion, one that has turned out to be quite prescient. In his view, “there is a fairly close correlation between” enthusiasm for *Chevron* and a commitment to textualist methods of interpretation.<sup>83</sup> “One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists.”<sup>84</sup> Those who reject plain meaning, and are

“willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of ‘reasonable’ interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require that judge to accept an interpretation he thinks wrong is infinitely greater.”<sup>85</sup>

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<sup>80</sup> *Id.* at 519.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 521.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Justice Scalia noticed that *Chevron* had not yet marked a revolution in the law.

“The opinions we federal judges read, and the cases we cite, are full of references to the old criteria of ‘agency expertise,’ ‘the technical and complex nature of the question presented,’ ‘the consistent and long-standing agency position’—and it will take some time to understand that those concepts are no longer relevant, or no longer relevant in the same way.”<sup>86</sup>

But he added his belief that

“in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.”<sup>87</sup>

Where Judge Breyer predicted a disintegration of *Chevron*’s “univocal” approach, on the ground that it was ill-suited to reality, Justice Scalia contended that *Chevron* would be given its full scope, and amount to a major and novel development, precisely because of its univocal quality. As we shall see, Breyer’s prediction appears to have proved to be more accurate; but in important respects the jury is still out.

It should be clear that the disagreement between Judge Breyer and Justice Scalia involves the pervasive choice between standards and rules. Judge Breyer urged that no rule could solve the deference problem, simply because it would produce so much inaccuracy. Justice Scalia can be taken to have responded that a rule is likely to be as accurate as any standard and that it has the further advantage of reducing decisional burdens on courts. Seeing a deference rule as relevant to Congress’ subsequent performance, Justice Scalia emphasizes, as Judge Breyer does not, that a simple rule will provide better guidance to subsequent legislators. If the choice between rules and standards turns in part on the costs of error and the costs of decisions,<sup>88</sup> then Judge Breyer and Justice Scalia might be seen as disagreeing about exactly how to assess those costs.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Kaplow, *supra* note.



#### D. Reading Deference Doctrines Jurisprudentially: *Chevron* As *Erie*

If *Chevron* is read in light of the shared concerns of Judge Breyer and Justice Scalia, it can be understood as a natural outgrowth of the twentieth-century shift from judicial to agency lawmaking.<sup>89</sup> In numerous contexts, judge-made law has been replaced by administrative regulation, often pursuant to vague or open-ended guidance. The replacement has been spurred by dual commitments to specialized competence and democratic accountability—and also by an understanding of the need for frequent shifts in policy over time, with new understandings of fact and with new values as well. For banking, telecommunications, and environmental protection – among many other areas – changing circumstances often require agencies to adept old provisions to unanticipated problems. Despite the Court’s lack of ambition for its decision, the *Chevron* opinion, approving a bold and novel initiative by the Reagan Administration, did speak explicitly of the role of expertise and accountability in statutory interpretation. And if interpretation of unclear terms cannot operate without some judgments of the interpreter’s own,<sup>90</sup> then the argument for *Chevron*, as the appropriate legal fiction, seems overwhelming. Indeed, *Chevron* can be seen in this light as a close analogue to *Erie Railroad v. Tompkins*<sup>91</sup>—as a suggestion that law and interpretation often involve no “brooding omnipresence in the sky” but instead discretionary judgments to be made by appropriate institutions. For resolution of statutory ambiguities, no less than for identification of common law, federal courts may not qualify as appropriate.

I am suggesting, then, that Justice Scalia’s argument about the need for a clear background rule can be strengthened with a strong emphasis on Judge Breyer’s claims about expertise, an appreciation of the pressing need for agency flexibility over time, and a recognition that when agencies interpret ambiguities, a judgment of value, operating under the President, is often involved. As we shall see, many of the post-*Chevron* cases,

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<sup>89</sup> An illuminating study is Price Fishback and Shawn Kantor, *A Prelude to the Welfare State: The Origins of Workers’ Compensation* (1999). See also Jerry Mashaw, *Due Process in the Administrative State* (1983), for a valuable discussion in the context of social security disability determinations.

<sup>90</sup> There is a connection here between *Chevron* and Ronald Dworkin’s view on interpretation, as set out in *Law’s Empire* (1985). Dworkin contends that interpretation requires a judicial judgment about “fit” with existing materials and also about “justification” of those materials; his conception of law as integrity asks judges to put existing materials in their “best constructive light.” In modern government, courts are often less capable of accomplishing this task than are agencies, precisely because of their comparatively lesser expertise and accountability. Hence acceptance of Dworkin’s account of interpretation, or any account in the same general family, is easily enlisted on behalf of *Chevron*.

<sup>91</sup> 304 U.S. 64 (1938).

read in their context, testify to the importance of these points. But if *Chevron* is read both broadly and ambitiously, it runs immediately into Judge Breyer’s objection that it is too crude and univocal.

### III. Step Zero

#### A. Possibilities

The disagreements between Justices Scalia and Breyer could manifest themselves at multiple points. Suppose that the question involves *Chevron* Step One. We should expect a degree of simplicity from Justice Scalia, in the form of deference to the agency’s interpretation unless the text unambiguously forbids it; and the expectation is met in many cases.<sup>92</sup> We might expect Justice Breyer to be less willing to find statutory language to be plain and hence to be willing to defer to agencies even when Justice Scalia is not; and there is evidence to this effect as well.<sup>93</sup>

In these respects, the tempting idea that Justice Scalia’s enthusiastically pro-*Chevron* approach will be more deferential to agencies is only partly right. If Justice Scalia is correct to say that *Chevron* enthusiasts are also likely to insist on plain meaning, then those who favor the “simple” reading of *Chevron* will be more likely to find Step One violations. There is some evidence that this is true.<sup>94</sup> And in an important case that actually upholds an agency’s interpretation, the Court went out of its way to reject the strong and simple version of *Chevron* in favor of the weaker and more complex version—with explicit citation to the 1986 essay by then-Judge Breyer.<sup>95</sup>

In fact, the 1980s disagreement might have been expected to involve something far larger than Step Zero. While Justice Scalia would adopt a general rule of deference to agency interpretations, Justice Breyer would call for a case-by-case inquiry into (fictional, hypothesized) legislative expectations. The major locus of the disagreement, however, has become much narrower. It involves the threshold question whether *Chevron* is applicable at all—a question ignored by Judge Breyer in 1986 and prominently

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<sup>92</sup> See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (Scalia, J., dissenting); *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581 (2004); *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005).

<sup>93</sup> See *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).

<sup>94</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *MCI Telecommunications Corp.*, 512 U.S. .

<sup>95</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995).

presaged by Justice Scalia in 1989. In *Chevron*'s first decade, this question was largely invisible, at least in the Court itself; and a number of decisions applied the *Chevron* framework without serious consideration of any Step Zero.

Consider, for example, *Young v. Community Nutrition Institute*.<sup>96</sup> That case involved a provision saying that "the Secretary [of Health and Human Services] shall promulgate regulations limiting the quantity [of any poisonous or deleterious substance added to any food] to such extent as he finds necessary for the protection of public health."<sup>97</sup> The interpretive question, one of considerable practical importance, was whether "to such extent as he finds necessary" modified "shall promulgate," so as to allow the Secretary not to act at all, or instead modified "limiting the quantity," so as to require him to issue regulations, but with such severity as he chose. The agency had settled on the former interpretation, but not through any formal procedure; instead the agency's informal understanding was involved. Without even pausing to consider the applicability of the *Chevron* framework, the Court gave deference to the agency and upheld its interpretation.<sup>98</sup>

Does *Young* suggest that *all* agency interpretations of law should receive *Chevron* deference? If the underlying theory involves implicit (and fictional) delegation, the real question is when Congress should be understood to have delegated law-interpreting power to a regulatory agency. The broadest imaginable answer would be simple: *Whenever an agency makes an interpretation of law, that interpretation falls under the Chevron framework.* This answer would eliminate Step Zero altogether. But everyone should be willing to agree that the answer is too broad. Suppose, for example, that an agency is interpreting the Administrative Procedure Act. Is the FDA permitted to interpret the APA's provisions governing reviewability, and hence to decide, within the bounds of reasonableness, whether its own decisions are reviewable? Is the NLRB's understanding of the APA's substantial evidence test controlling, or does the Court interpret that test on its own? The clear answer to such questions is that *Chevron* is

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<sup>96</sup> 476 U.S. 974 (1986).

<sup>97</sup> 21 U.S.C. § 346.

<sup>98</sup> *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-439 (1986); *Mead Corp. v. Tilley*, 490 U.S. 714 (1989); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255 (1995); *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 642-643, 647-648 (1990).

inapplicable.<sup>99</sup> The reason is that neither the FDA nor the NLRB “administers” the APA; it is more accurate to say that the agencies are governed, or administered, by the APA. Hence, there is no reason to defer. By itself, this conclusion resolves a number of questions about *Chevron* Step Zero. Agencies are not given *Chevron* deference when they are interpreting the Freedom of Information Act, the National Environmental Policy Act, and other statutes that cut across a wide range of agencies.<sup>100</sup>

If this analysis is right, then the broadest plausible reading of *Chevron* would be this: *Whenever an agency makes an interpretation of a statute that it administers, that interpretation falls under the Chevron framework.* But a moment’s reflection should reveal that this interpretation remains implausibly broad. Suppose that a particular statute contains provisions governing the reviewability of agency action, as the Clean Air Act in fact does. Is the EPA permitted to interpret those provisions, because the EPA administers the Clean Air Act? It would make little sense to suppose that Congress has delegated to the EPA the power to say whether its own decisions are reviewable, even if the EPA is in charge of the Clean Air Act.<sup>101</sup> To be sure, judgments about reviewability might well call for both expertise and accountability; if an agency resists judicial review, it may do so for good reasons. But when an agency’s self-interest is so conspicuously at stake, Congress should not be taken to have delegated law-interpreting power to the agency.<sup>102</sup>

An unfortunate feature of this view is that it complicates the *Chevron* framework. But it is not all that complicated to offer an amended understanding of *Chevron*’s reach: *Whenever an agency makes an interpretation of a statute that it administers, that interpretation falls under the Chevron framework, unless the agency’s self-interest is so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power.* The evident problem with this attractive reading is that it does not say what it means for an “agency” to be making an interpretation of a statute. Does a lower-level official count as the “agency”? Does the General Counsel’s office? Such questions

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<sup>99</sup> See Merrill & Hickman, *supra* note 19.

<sup>100</sup> *Id.*

<sup>101</sup> See *Friends of the Earth v. Laidlaw Env. Services*, 528 U.S. 167 (2000) (resolving standing issue without deferring to agency’s view); *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1994) (same). *But see* *Chemical Waste Manufacturers v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (deferring to EPA regulations defining “public hearing”); *Penobscot Air Services Ltd. v. FAA*, 164 F.3d 713 (1st Cir. 1999) (deferring to FAA regulations involving procedures).

<sup>102</sup> Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB POLICY 203 (2004).

lead to an amended reading that is both plausible and broad, one favored by Justice Scalia: *Whenever an agency makes an authoritative interpretation of a statute that it administers, that interpretation falls under the Chevron framework, unless the agency's self-interest is so conspicuously at stake that it is implausible to infer a congressional delegation of law-interpreting power.* On this approach, it is necessary only to know whether the purported interpreters truly speak for the agency itself. If they do, the *Chevron* framework applies.

This approach retains a separate Step Zero inquiry, but it has the virtue of relative simplicity. Is its breadth justified by the theory of implicit delegation? If so, it is because the very creation of administrative agencies, and the grant of authority to them, implicitly carries with it a degree of interpretive power. But on its face, that statement requires an immediate qualification. Some agencies enforce the law; more particularly, they enforce the criminal law. The Department of Justice is of course the most obvious example. Is it plausible to say that when criminal statutes are ambiguous, the Department of Justice is permitted to construe them as it sees fit? That would be a preposterous conclusion. Such deference would ensure the combination of prosecutorial power and adjudicatory power, in a way that would violate established traditions and threaten liberty itself.<sup>103</sup> Congress should not be understood to have violated these traditions merely by authorizing enforcement of the criminal law; the grant of prosecutorial power, under federal criminal law, should not be seen as including interpretive power as well.

But this qualification, important as it is, is a limited one; it does not greatly undermine the reading of *Chevron* offered above. Note, however, that the resulting reading downplays two features of *Chevron* itself: That case involved notice-and-comment rulemaking, a procedure that is designed to ensure a degree of public transparency, responsiveness, and reason-giving; and it involved agency judgments that had the force of law, in the sense that EPA rules are binding on private parties. *Chevron* did not say whether these features of the case were relevant to the question of deference. In an important but old case, *Skidmore v. Swift & Co.*,<sup>104</sup> involving an agency

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<sup>103</sup> *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment). Note as well that the rule of lenity ensures that ambiguities in criminal statutes are construed favorably to defendants; *Chevron* deference to criminal prosecutors would override that long-established principle. For a contrary view, supporting deference to Department of Justice interpretations of statutes, see Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

<sup>104</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

interpretation lacking the force of law, the Court had made it clear that such an interpretation would have only persuasive authority, and hence that the statutory question would be resolved judicially rather than administratively. Thus the *Skidmore* decision suggested that courts would merely consult such interpretations, considering whether they were longstanding, consistent, and well-reasoned.<sup>105</sup> The status of the *Skidmore* holding was put in doubt by *Chevron*.

In three cases—a Step Zero trilogy—the Court has attempted to sort out the scope of *Chevron*.

### **B. A Step Zero Trilogy**

1. *Christensen*. The initial decision is *Christensen v. Harris County*.<sup>106</sup> At issue there was the validity of an opinion letter from the Acting Administration of the Wage and Hour Division of the Department of Labor. The letter involved the complex rules governing “compensatory time,” that is, overtime work paid at a rate of 1 1/2 hours for each hour worked. In an opinion by Justice Thomas, the Court concluded that *Chevron* deference was inapplicable to the Acting Administrator’s opinion letter. Speaking in broad terms, it said that interpretations “such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”<sup>107</sup> The Court distinguished opinion letters and their analogues from interpretations “arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.”<sup>108</sup> Opinion letters would be treated in the same way the Administrator’s opinion in *Skidmore*—as having merely persuasive authority. In this way, the Court made it clear that *Skidmore* had survived *Chevron*.

But the Court’s analysis left several ambiguities. By pointing first to the “force of law,” and second to the processes that give rise to agency interpretations, the Court did not specify which of these two factors was critical to its ruling, nor did it explain the relationship between them. And the Court did not say whether interpretations that lack

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<sup>105</sup> *Id.*

<sup>106</sup> *Christensen v. Harris County*, 529 U.S. 576 (2000).

<sup>107</sup> *Id.* at 587.

<sup>108</sup> *Id.*

the force of law, or that do not emerge from relatively formal procedures, are always to be assessed under *Skidmore*, or to be so assessed only some of the time. Nonetheless, the Court made it clear that Step Zero involves an independent inquiry, one that will often be resolved against the application of the *Chevron* framework. Henceforth there would be two sets of deference doctrines, one based on *Chevron*, the other on *Skidmore*.

Justice Scalia wrote separately, building directly on his 1989 article to argue that *Skidmore* “is an anachronism.”<sup>109</sup> All that mattered, in his view, was whether the position at issue “represents the authoritative view of the Department of Labor.”<sup>110</sup> It no longer was relevant whether the agency’s interpretation stemmed from formal procedures or otherwise. Indeed, Justice Scalia contended that *Chevron* deference should follow from the mere fact that the Solicitor General filed a brief in the case, cosigned by the Solicitor of Labor, stating that the opinion letter reflected the position of the Secretary of Labor.<sup>111</sup>

Evidently aware of the broader implications, Justice Breyer wrote separately as well, building directly on his 1986 article to emphasize that in crucial respects, “*Chevron* made no relevant change” in longstanding law.<sup>112</sup> For Justice Breyer, *Chevron*’s only contribution—in his view a modest one—was to identify a particular reason for “deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations.”<sup>113</sup> In some circumstances, he said, “*Chevron*-type deference is inapplicable” on this theory, for example because “one has doubt that Congress actually intended to delegate interpretive authority to the agency.”<sup>114</sup> In such circumstances, the appropriate “lens,” as he put it, comes from *Skidmore*, not *Chevron*. This suggestion is best taken as an effort to use his 1986 analysis to domesticate *Chevron*—to treat it as a synthesis rather than a revolution.

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<sup>109</sup> *Id.* at 589 (Scalia, J., concurring in the judgment).

<sup>110</sup> *Id.* For a valuable suggestion that the applicability of *Chevron* should turn on whether a high-level agency official has endorsed the interpretation in question, see David J. Barron and Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 596 (Breyer, J., dissenting).

<sup>113</sup> *Id.* at 596-97.

<sup>114</sup> *Id.* at 597.

2. *Mead*. The second case in the trilogy, and the most elaborately reasoned, is *United States v. Mead Corporation*.<sup>115</sup> At issue there was a tariff clarification ruling by the United States Customs Service. The Court concluded that the ruling was not entitled to *Chevron* deference and that *Skidmore* supplied the appropriate framework. The key to the holding is the suggestion that *Chevron* applies “when it appears that Congress has 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.”<sup>116</sup> It follows that the “core” cases for *Chevron* involve an exercise of delegated rulemaking authority. In the Court’s understanding, a delegation “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.”<sup>117</sup> Hence the linchpin for deference is the power to act with the force of law; that power would be found with the authority to use formal procedures, but it could also be based on some other evidence of what Congress intended.

Closely following Justice Breyer’s position in 1986, the Court described longstanding law in this way: the “fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have often looked to the degree of the agency’s care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency’s position.”<sup>118</sup> In the Court’s view, *Chevron* merely offered “an additional reason for judicial deference,”<sup>119</sup> one that stems from an implicit delegation of authority. When there has been such a delegation, the Court must accept any reasonable interpretation of ambiguous terms. An implicit delegation would be apparent if Congress “would expect the agency to be able to speak with the force of law.”<sup>120</sup>

But when is that? A “very good indicator of delegation,” in the Court’s view, is authorization “to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”<sup>121</sup> The reason is that when

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<sup>115</sup> 533 U.S. 218 (2001).

<sup>116</sup> *Id.* at 226-27.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 228.

<sup>119</sup> *Id.* at 229.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*



Congress provides “for a relatively formal administrative procedure,” one that fosters “fairness and deliberation,” it is fair to assume that “Congress contemplates administrative action with the force of law.”<sup>122</sup> If agencies have been given power to use relatively formal procedures, and if they have exercised that power, they are entitled to *Chevron* deference. Nonetheless, *Chevron* deference can be found, and has sometimes been found, “even when no such administrative formality was required and none was afforded.”<sup>123</sup> Thus the Court squarely rejected a possible reading of *Christensen*, to the effect that agency interpretations lacking the force of law, or not preceded by formal procedures, would always be evaluated under *Skidmore*.

Why, then, was the tariff ruling in *Mead* not entitled to deference? A relevant factor was that formal procedures were not involved. Another was that nearly fifty customs offices issue tariff classifications, producing 10,000 to 15,000 annually. “Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”<sup>124</sup> Hence such rulings should be treated like the policy statements, agency manuals, and enforcement guidelines mentioned in *Christensen*. *Skidmore*, not *Chevron*, provided the applicable principles.

Justice Scalia’s dissenting opinion emphasized a position that should now be familiar: “*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable.”<sup>125</sup> Responding to the Court’s emphasis on the absence of formal procedures, he contended that the appropriateness of deference should depend on authoritativeness rather than formality. In his view, the principal consequences of *Mead* would be to produce “protracted confusion” for litigants and courts and also to create an artificial incentive to resort to formal procedures. In this way, *Mead* would significantly decrease agency flexibility over time—and thus eliminate a primary advantage of *Chevron* itself.

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<sup>122</sup> *Id.* at 230.

<sup>123</sup> *Id.* at 231.

<sup>124</sup> *Id.* at 233.

<sup>125</sup> *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

The Court offered a rebuttal to Justice Scalia, one that sounded almost identical to Judge Breyer’s attack on Chevron in 1986.<sup>126</sup> The Court’s major emphasis was on the “great range” of administrative action and the variety of procedures under which agency action occurs.<sup>127</sup> In these circumstances, simplicity would be obtuse. “If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized.”<sup>128</sup> But if “it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either Chevron deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. . . . The Court’s choice has been to tailor deference to variety.”<sup>129</sup>

3. *Barnhart: Justice Breyer’s triumph.* Whereas *Christensen* suggested a clean line between *Chevron* cases and *Skidmore* cases, turning on the “force of law” test, *Mead* says that Congress might, under unidentified circumstances, be best read to call for deference even when (a) an agency is not using formal procedures and (b) an agency’s actions lack the force of law. This qualification turned out to be central in the third case in the Step Zero trilogy, *Barnhart v. Walton*.<sup>130</sup>

At issue there was a regulation of the Social Security Administration, specifying that a claimant for disability benefits did not have an “impairment” unless facing a problem that would be expected to last for at least twelve months. The twelve-month rule had been adopted after notice and comment procedures, and the Court might have simply emphasized that fact. Instead the Court acknowledged that the agency had previously reached its interpretation through less formal means—but said that that use of those means did not eliminate *Chevron* deference. On the contrary, the Court read *Mead* to say that *Chevron* deference would depend on “the interpretive method used and the nature of the question at issue.”<sup>131</sup> In the key sentence, the Court added,

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<sup>126</sup> See Barron and Kagan, *supra* note 110, at 226, for the suggestion that “*Mead* naturally lends itself to interpretation as a classic ad hoc balancing decision, and so a partial reversion to the doctrine of judicial review that prevailed before *Chevron*.”

<sup>127</sup> *Mead*, 533 U.S. at 236.

<sup>128</sup> *Id.* at 237.

<sup>129</sup> *Id.*

<sup>130</sup> 535 U.S. 212 (2002).

<sup>131</sup> *Id.* at 222.

“the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the 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 all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.”<sup>132</sup>

This sentence represents an extraordinary personal triumph for Justice Breyer. Sixteen years before, he had argued against a strong reading of *Chevron* and contended that a case-by-case inquiry would be far better than a simple deference rule. *Barnhart* embeds such a case-by-case inquiry. Just as he urged in 1986, whether an agency’s decision is “interstitial” has now become highly relevant. Even more important, *Barnhart* says that careful consideration over a long period of time—a factor that might have become an anachronism after *Chevron*, as Justice Scalia urged in 1989—also bears on whether *Chevron* provides “the appropriate legal lens.” And indeed, a number of lower courts have given *Chevron* deference to agency interpretations that are not a product of any kind of formal process.<sup>133</sup> Under *Christensen*, *Mead*, and *Barnhart*, the real question is Congress’s (implied) instructions *in the particular statutory scheme*, and the grant of authority to act with the force of law is a sufficient but not necessary condition for finding a grant of power to interpret ambiguous terms.

Justice Breyer’s triumph is not unqualified.<sup>134</sup> Recall that in 1986, he urged that *Chevron* should be taken not to establish a presumption or a rule, but instead to invite a case-by-case inquiry into whether the relevant legal question should be resolved administratively or judicially. In the Step Zero trilogy, the Court has not accepted this position. When an agency’s decision has the force of law, or results from some kind of formal process, *Chevron* applies with full force; these are safe harbors for application of *Chevron*.<sup>135</sup> And when *Chevron* applies, the Step Zero trilogy does not argue in favor of any kind of case-by-case inquiry. Of course it would be possible to use the trilogy as the foundation for a far more frontal assault on the *Chevron* framework—to suggest that whether an

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<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., *Mylan Laboratories v. Thompson*, 389 F.2d 1272, 1279-80 (D.C. Cir. 2004); *Davis v. EPA*, 336 F.3d 965, 972 n.5 (9th Cir. 2003); *Alfaro v. Commissioner*, 349 F.3d 225 (5th Cir. 2003).

<sup>134</sup> See *Barron & Kagan*, supra note 110, at 227 (emphasizing the degree of structure imposed by the *Mead* opinion).

<sup>135</sup> See, e.g., *Shotz v. City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003).

issue is interstitial, or calls for agency expertise, *always* bears on the deference question, and not merely on the threshold inquiry whether *Chevron* is applicable at all. Indeed, some of the Court’s decisions can be taken to suggest a tacit judgment to exactly that effect.<sup>136</sup> And in an important opinion, Judge Posner writes that *Barnhart* “suggests a merger between *Chevron* deference and Skidmore’s . . . approach of varying the deference that agency decisions receive in accordance with the circumstances.”<sup>137</sup> If there has indeed been a “merger,” Justice Breyer’s triumph is complete. But notwithstanding Judge Posner’s suggestion, the formal doctrine does not qualify the *Chevron* framework in this way<sup>138</sup>—with one exception to which I will turn in due course.

4. *The trilogy in the lower courts.* A consequence of the three cases has been to produce a great deal of confusion<sup>139</sup>—and, perhaps more notably still, a series of decisions according *Chevron* deference to agency interpretations that did not follow formal procedures.

As a leading example, consider *Davis v. EPA*.<sup>140</sup> At issue was the EPA’s denial of a request by California for a waiver of the oxygen level requirement under the federal reformulated gas program.<sup>141</sup> The relevant provision allowed a waiver “upon a determination by the Administrator that compliance” with the oxygen requirement “would prevent or interfere with the attainment by the area” of the air quality required by national ambient air quality standards.<sup>142</sup> The EPA interpreted this provision to require that a state “clearly demonstrate” the impact of a waiver on attainment with national standards. The D.C. Circuit panel treated this as a *Chevron* question.<sup>143</sup> The court acknowledged that the agency’s interpretation was not a product of any formal procedure, and it did not investigate the question whether that interpretation had the force of law.<sup>144</sup> Quoting *Barnhart*, it said that “the interpretive method used and the nature of the

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<sup>136</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson*, 529 U.S. 120 (2000).

<sup>137</sup> *Krzalic v., Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002). Notably, Judge Easterbrook wrote separately on this point, supporting the standard view that there was no such merger. *Id.* at 883-84 (Easterbrook, J., concurring in the judgment).

<sup>138</sup> See *id.* (Easterbrook, J., concurring in the judgment).

<sup>139</sup> See Bressman, *supra* note 14, for a valuable treatment.

<sup>140</sup> 348 F.3d 772 (D.C. Cir. 2003).

<sup>141</sup> 42 U.S.C. § 7545(k)(2)(B).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 779-80.

<sup>144</sup> *Id.* at 780 n.5.

question at issue” called for application of *Chevron* even though the denial of the waiver was merely “informal” action.<sup>145</sup>

The same approach was followed in *Mylan Laboratories v. HHS*.<sup>146</sup> The legal question involved the time that Mylan would be permitted to market a generic version of a chronic pain treatment for which other companies had been given a temporary period of exclusive marketing. In a letter to the interested parties, the FDA interpreted the governing statute to forbid Mylan from marketing its generic version at the stage Mylan preferred.<sup>147</sup> Under *Mead*, it would certainly have been reasonable to say that interpretive letters of this kind must be analyzed under *Skidmore* rather than *Chevron*; and so Mylan urged. But a D.C. Circuit panel disagreed. Emphasizing *Barnhart* and *Mead*, the court stressed that this was a complex statutory regime and that the FDA’s expertise was relevant to its interpretation.<sup>148</sup> The court added that “the FDA’s decision made no great legal leap but relied in large part on its previous determination of the same or similar issues and on its own regulations.”<sup>149</sup> Hence *Chevron*, not *Skidmore*, provided the appropriate basis for analysis.

Other cases are in the same vein.<sup>150</sup> For example, the majority view is that Statements of Policy issued by the Department of Housing and Urban Development are entitled to *Chevron* deference, even though such statements do not come from any kind of formal procedure.<sup>151</sup> But other decisions, reading *Mead* broadly, seem to adopt a kind of presumption to the effect that a lack of formality implies a lack of *Chevron* deference.<sup>152</sup> In the important context of Revenue Rulings for the IRS, for example, deference is denied by analogy to the tariff classification rulings involved in *Mead*.<sup>153</sup> Many lower courts seem to choose between *Mead* and *Barnhart*, and the result is a kind of Step Zero chaos.<sup>154</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> 389 F.3d 1272 (D.C. Cir. 2004).

<sup>147</sup> *Id.* at 1277.

<sup>148</sup> *Id.* at 1280.

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g.*, *Nation v. HHS*, 285 F.3d 864 (9th Cir. 2002); *but see* *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002).

<sup>151</sup> *See* *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004).

<sup>152</sup> *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002); *Wilderness Society v. United States Fish and Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (en banc).

<sup>153</sup> *See* *Omohundro v. U.S.*, 300 F.3d 1065, 1067-68 (9th Cir. 2002); *Aeroquip-Vickers, Inc. v. CIR*, 347 F.3d 173 (6th Cir. 2003).

<sup>154</sup> *See* *Bressman*, *supra* note 14.

## C. Bad Fictions

1. Problems. The initial innovation in the Step Zero trilogy is to emphasize that agency decisions receive *Chevron* deference if they are a product of delegated authority to act with the force of law. It is presumed that an agency has such authority if it has been granted the power to act through notice-and-comment rulemaking or formal adjudication. For four reasons, this analysis is quite confusing.

a. *Defining the force of law*. The Court has not explained what it means by the “force of law.” There seem to be two possible interpretations. An agency decision may have the “force of law” when and because it receives *Chevron* deference. On this view, the “force of law” test is no test at all; it is a circle, not an analytical tool. All of the relevant work is being done by an inquiry into congressional intentions, which are typically elicited by an examination of whether the agency has been given the authority to use certain procedures. Alternatively, an agency decision may be taken to have the “force of law” *when it is binding on private parties in the sense that those who act in violation of the decision face immediate sanctions*.<sup>155</sup> On this view, *Chevron* deference is inferred from the grant of power to make decisions that people violate at their peril. Perhaps we could supplement this approach to say that a decision has the “force of law” if the agency is legally bound by it as well.<sup>156</sup> This interpretation has the advantage of avoiding any circularity, and it is therefore the most plausible reading of the Court’s approach in *Mead*.<sup>157</sup>

b. *Force of law vs. formal procedures*. Some rules having the force of law in the latter sense do not, and need not, go through formal procedures at all; as a statutory matter, formal procedures are emphatically not a necessary condition for the force of law. The APA itself makes a series of exemptions from notice-and-comment requirements. For example, an agency may make rules that are binding, in the sense that they have the

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<sup>155</sup> See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 809 (2002) (“The traditional understanding is that agency action has” the force of law “when it is not open to further challenge and subjects a person who disobeys to some sanction, disability, or other adverse legal consequence....”); Thomas W. Merrill and Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). An analogous debate can be found in the complex body of law raising the question whether certain rules must go through notice and comment procedures; in the relevant cases, some courts refer to a “legal effect” test. See *American Mining Congress v. Dept. Of Labor*, 995 F.2d 1106 (D.C. Cir. 1993); *but see Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (requiring a rule to go through notice and comment procedures even though it appears to lack legal effect).

<sup>156</sup> *FEC v. NRA*, 254 F.3d 173 (2d Cir. 2001).

<sup>157</sup> See Merrill and Watts, *supra* note 155.

force of law, without notice and comment when the rules involve agency procedure or when there is “good cause” for dispensing with notice-and-comment processes.<sup>158</sup> Properly exempted rules have the force of law, but they need not go through any kind of procedure. The Court cannot have meant to say that such rules are not entitled to *Chevron* deference; but the emphasis on procedures seems to leave this possibility open.

c. *Adjudications without the force of law.* Many adjudications lack the force of law.<sup>159</sup> The NLRB and the Federal Trade Commission, for example, issue orders that cannot be enforced without a judicial proceeding; in fact the FTC’s rules do not have the force of law.<sup>160</sup> What does the Step Zero trilogy mean to suggest for agency decisions that follow formal procedures but that do not lead to sanctions in the event that people violate them? It would be exceedingly strange to say that the decisions of the NLRB and the FTC lack *Chevron* deference, and the Court has held that NLRB decisions do,<sup>161</sup> notwithstanding the fact that those decisions do not have the force of law. The most likely conclusion is that *Chevron* deference applies in such circumstances, but the Court did not appear to see the problem.

d. *Fictions and heuristics.* Most importantly, the relationship among “force of law,” formal procedure, and *Chevron* deference is confusing. What does any one of these have to do with the other two? *Mead* seems to insist on close links among these three moving parts. The Court appears to be using the “force of law” idea as a heuristic for an implicit delegation—on the theory that when Congress has given an agency the authority to act with legal force, it has also given the agency the authority to interpret statutory ambiguities. But what is the basis for this heuristic? It is possible to imagine a delegation of interpretive authority to an agency that does not have, or is not exercising, the power to act with the force of law. It is also possible to imagine a congressional decision to withhold interpretive authority from an agency that has that power. Congress retains ultimate control of the deference issue, and hence Congress could uncouple, if it chose, the force of law question from the deference question.

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<sup>158</sup> 5 U.S.C § 553.

<sup>159</sup> See Merrill and Watts, *supra* note 155.

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., *NLRB v. United Food & Commercial Workers*, 484 U.S. 112 (1987); *Hoffman Plastics Compounds v. NLRB*, 535 U.S. 137 (2002).

Perhaps the Court’s reasoning is as follows. We do not know whether Congress wants courts to defer to agency interpretations of law; any answer to that question remains a legal fiction. But if Congress has authorized agencies to act with the force of law, the best inference is that deference is the national legislature’s instruction. At the very least, a grant of authority to act with such force is a sufficient condition for deference—a basis for a presumption of the sort that Justice Scalia originally championed. Since we are speaking of fictions, this particular inference is not implausible, at least if the power to act with the force of law is taken as a sufficient even if not necessary condition for Chevron deference.

But what is the relevance of relatively formal procedures? There are two possibilities. Perhaps a heuristic is at work here as well: An agency will be assumed to have the power to act with the force of law if it is authorized to engage in formal procedures. On this view, the Court does not ordinarily know whether an agency can act with the force of law, and an agency is presumed to be entitled to do so if Congress has granted the power to engage in rulemaking or adjudication. This idea does not fit with longstanding understandings of when an agency acts with the force of law, and as a matter of legislative instructions it is probably wrong.<sup>162</sup> But it is not the worst reconstruction of judicial understandings in the last two decades.<sup>163</sup>

Alternatively, the Court may not be using a heuristic for the force of law. It might mean something more straightforward and appealing, to wit: *An agency will be assumed to be entitled to Chevron deference if it is exercising delegated power to make legislative rules or to issue orders after an adjudication.* The general goal is to ensure that at one or another stage, the legal system contains adequate safeguards against arbitrary, ill-considered, or biased agency decisions. In fact, this does seem to be a crucial part of *Mead*, which might therefore be read in the following way. Any reading of congressional instructions on the deference question is inevitably fictive; it is not a matter of finding something. The best reconstruction of congressional will is that agencies receive *Chevron* deference if and only if they have availed themselves of procedures that promote what, in the crucial passage, the *Mead* Court called “fairness and deliberation”<sup>164</sup>—by, for

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<sup>162</sup> See Merrill and Hickman, *supra* note 19.

<sup>163</sup> *Id.*

<sup>164</sup> 533 U.S. 218, 230 (2001).



example, giving people an opportunity to be heard and offering reasoned responses to what people have to say. Of course trial-type procedures, including both adjudication and formal rulemaking, satisfy that requirement. The same is true of notice-and-comment rulemaking, which create an opportunity to participate in agency processes<sup>165</sup> and which operate, in practice, to require agencies to produce detailed explanation for their decisions.<sup>166</sup> If we emphasize the phrase “fairness and deliberation,” we can see *Mead* as attempting to carry forward a central theme in administrative law, which is to develop surrogate safeguards for the protections in the Constitution itself.<sup>167</sup>

By contrast, informal processes—certainly of the sort that result in 10,000 classifications per year—are unlikely to promote values of participation and deliberation. On this view, *Mead* puts agencies to a salutary choice; it essentially says, *Pay me now or pay me later*. Under *Mead*, agencies may proceed expeditiously and informally, in which case they can invoke *Skidmore* but not *Chevron*; or they may act more formally, in which case *Chevron* applies. In either case, the legal system, considered as a whole, will provide an ample check on agency discretion and the risk that it will be exercised arbitrarily—in one case, through relatively formal procedures; in another, through a relatively careful judicial check on agency interpretations of law.

In my view, these points are the best and most appealing reconstruction of *Mead*, and they help to account for much of what the Court has done in the Step Zero trilogy. But it is not at all clear that they adequately justify the trilogy. The initial problem involves the burdens of judicial decisions reviewing agency action. Suppose, as is clear, that the values promoted by *Mead* come at the expense of a significantly more complex system of law.<sup>168</sup> Under *Mead*, the system is complex along two dimensions. First, Step Zero is exceedingly hard for both litigants and courts to handle. Second, courts that use *Skidmore* deference are deprived of the simplicity and ease introduced by *Chevron*.<sup>169</sup> If so, *Mead* may not be worth the candle. This point is buttressed by the very fact that the choice between *Chevron* and *Skidmore* will often be irrelevant to the resolution of cases.

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<sup>165</sup> 5 U.S.C. § 553.

<sup>166</sup> See *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983).

<sup>167</sup> See Cass R. Sunstein, *Constitutionalism After the New Deal*, *supra* note 70, for an overview; for important cases implicitly reflecting this theme, see *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983); *Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359 (1998); *Zhen Li Iao v. Gonzales*, 400 F.3d 530 (7th Cir. 2005).

<sup>168</sup> See Vermeule, *supra* note 21; Bressman, *supra* note 14.

<sup>169</sup> See Peter 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 (1987).

If the difference between the two is often immaterial, does it really make sense for courts and litigants to spend a great deal of time deciding whether *Skidmore* governs or instead *Chevron*?

If courts could easily apply the approach suggested by *Christensen*, *Mead*, and *Barnhart*, that method would have something to be said in its favor. Above all, it would ensure that agency interpretations would receive *Chevron* deference only if they were a product of procedures that increase the likelihood of reasoned decisionmaking. At the same time, the Court's approach would increase the incentive to use such procedures—a desirable step if those procedures are in fact helpful. But serious problems remain. Suppose that the question is whether to select a judicial or administrative interpretation of an ambiguous statute when formal procedures have not been used. It is not at all clear how to answer that question. If policymaking expertise and democratic accountability are relevant, then perhaps Congress should be understood to have delegated law-interpreting power whether or not formal procedures are involved.

My attempted explanation of *Mead* places a great deal of weight on the value of formal procedures; but this might be questioned. *Barnhart* takes *Mead* to allow *Chevron* deference in many contexts in which such procedures are absent; it does not say when, exactly, such deference will be appropriate, but it clearly permits deference even in the absence of formality. And as Justice Scalia has emphasized, it is not clear that agencies should generally be encouraged to use more formal procedures, because such procedures tend to ossify the administrative process and hence to make it more difficult for agencies to implement the law.<sup>170</sup> It is also necessary to know how much, exactly, is gained by resorting to more formal processes. If the notice and comment process produces far more sensible and well-reasoned rules, then an asymmetry, in terms of the intensity of judicial review, might well be defensible. But it is not at all clear that notice and comment so significantly increases the quality of rules as to justify this difference.<sup>171</sup>

*Mead* is evidently motivated by a concern that *Chevron* deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures.

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<sup>170</sup> See STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY (5th ed. 2002).

<sup>171</sup> See E. Donald Elliott, *Reinventing Rulemaking*, 41 DUKE L.J. 1490, 1492-93 (1992) (“No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions — a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”)

But *Chevron* is no blank check to agencies. Step One ensures that agencies will lose if Congress has clearly forbidden them from acting as they have chosen. Even if no congressional ban is found, Step Two operates as a safeguard against insufficiently justified interpretations.<sup>172</sup> In any case, judicial review always remains available for lack of substantial evidence or arbitrariness, and unreasonable agency decisions will be struck down even if there is no problem under either step of *Chevron*.<sup>173</sup>

I hope that I have said enough to show that an identifiable and appealing rationale lies behind *Mead*; it is possible to identify the Court's concerns. But it is also possible to doubt whether those concerns justify the high degree of uncertainty that now accompanies the Step Zero question. Perhaps the Court should follow the path originally suggested by *Christensen* and hold, very simply, that agency interpretations receive *Chevron* deference only if they have the force of law or (alternatively) follow formal procedures. This approach would have the virtue of simplifying the line between *Chevron* cases and *Skidmore* cases; it would produce a rule, rather than a standard, for identifying that line.<sup>174</sup> It might lead to an excessively large set of *Skidmore* cases, but perhaps that is a price worth paying in return for greater simplicity on the threshold question whether *Chevron* or *Skidmore* applies. But this approach seems to be foreclosed by *Mead* and *Barnhart*.

#### D. Out of the Box

In short, the Court seems to have placed itself and lower courts into a box from which extrication is extremely difficult. Indeed, it would be possible to conclude that the Court has opted for a complex standard over a simple rule in precisely the circumstances in which a complex standard makes least sense: numerous decisions in which little is to be gained by particularized judgments. Those are the settings in which a standard imposes high decisional burdens while also offering little or no gain in terms of increased accuracy. Because the scope of judicial review of agency interpretations comes up so often – indeed, because that issue is an opening question in a vast array of administrative

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<sup>172</sup> See *Ohio v. Dept. of Interior*, 880 F.2d 432 (D.C. Cir. 1989).

<sup>173</sup> See *Motor Vehicle Manufacturers' Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29 (1983); *Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359 (1998); *Zhen Li Iao v. Gonzales*, 400 F.3d 530 (2005).

<sup>174</sup> See the argument in this direction in Merrill, *supra* note 155.

law cases – the Step Zero trilogy forces courts to undertake complex inquiries when it is far from clear anything at all is gained by the ultimate conclusion that *Skidmore*, rather than *Chevron*, provides the governing standard. What might be done to improve the situation?

I suggest two possible solutions.

1. It often won't matter. The first and simplest solution stems from a recognition that *Chevron* and *Skidmore* are not radically different in practice; in the vast majority of cases, either approach will lead to the same result. If the agency's interpretation runs afoul of congressional instructions or is unreasonable, the agency will lose even under *Chevron*. If the agency's interpretation is not evidently in conflict with congressional instructions, and if it is reasonable, the agency's interpretation will be accepted even under *Skidmore*. These observations suggest the easiest path for questions on which *Mead* and *Barnhart* give inadequate guidance: Resolve the case without answering the question whether it is governed by *Chevron* or *Skidmore*. For most cases, the choice between *Chevron* and *Skidmore* is not material, and hence it is not worthwhile to worry over it.

A number of cases take this pragmatic approach.<sup>175</sup> In *General Dynamics Land Systems v. Cline*,<sup>176</sup> the Supreme Court was confronted with the question whether the Age Discrimination in Employment Act (ADEA) forbids “reverse discrimination,” that is, discrimination against younger workers for the benefit of older ones. The Court ruled that such discrimination was not forbidden by the ADEA. But to do so, it had to deal with an EEOC regulation concluding otherwise; the parties strenuously disputed the (open) question whether an EEOC regulation should be given *Chevron* deference or instead *Skidmore* deference. The Court found it unnecessary to resolve that dispute, announcing, “We neither defer nor settle on any degree of deference because the Commission is so clearly wrong.”<sup>177</sup> In so saying, the Court followed an earlier decision in which it had refused to resolve the deference question, finding that it was not necessary “to choose

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<sup>175</sup> See, e.g., *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir 2002); *Ranbaxy Labs. v. FDA*, 96 Fed Appx 1, 1 (D.C. Cir. 2004); *Community Health Center v. Wilson-Coker*, 311 F.3d 132 (2d Cir. 2002). This strategy is helpfully described as “*Chevron* avoidance” in Bressman, *supra* note 14. Bressman plausibly objects that *Chevron* avoidance leaves the agency uncertain about whether it may make changes in the future, but in my view, that uncertainty is unlikely to create serious problems; if an agency is uncertain about whether it may make changes, it is nonetheless likely to do so if the argument for those changes is strong. In any case *Skidmore* permits agencies to make changes so long as they have good reasons for doing so.

<sup>176</sup> 540 U.S. 581 (2004).

<sup>177</sup> *Id.* at 600.

between *Skidmore* and *Chevron*, or even to defer, because the EEOC was clearly right.”<sup>178</sup> In *Mylan* itself, the court noted that “the result would likely be the same” under *Skidmore* or *Chevron*.<sup>179</sup>

The general lesson is plain. If the agency’s decision clearly runs afoul of congressional instructions, the Step Zero question is immaterial, and so too if the agency’s decision is clearly consistent with the statute.

2. Domesticating *Mead*. The second and more ambitious solution would attempt to domesticate *Mead*—and to suggest that read carefully, the Court’s analysis there is not as different from Justice Scalia’s approach as it appears.<sup>180</sup> Let us turn more specifically to the question why the Court refused to give *Chevron* deference to the tariff classification letter there at issue. The Court did not rest content with the observation that such letters were not a product of formal processes. Instead it said that “to claim that classifications have legal force is to ignore the reality that 46 different Customs offices issue 10,000 to 15,000 of them each year.”<sup>181</sup> Because of that reality, the suggestion that “rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency’s 46 scattered offices is simply self-refuting.”<sup>182</sup> If these sentences are emphasized, *Mead* can emerge as a highly pragmatic case about the problems with deferring to the numerous lower-level functionaries who produce mere letter rulings.<sup>183</sup>

*Barnhart*, granting *Chevron* deference to an agency decision not preceded by formal procedures, is an illuminating comparison on this count. No lower-level functionaries were involved in *Barnhart*, nor was there a question of thousands of rulings purporting to receive *Chevron* deference. Recall Justice Breyer’s discussion in *Barnhart* on the agency’s “interstitial” judgment on a complex issue, calling for specialized expertise. And if *Mead* and *Barnhart* are distinguished in this way, the line between Justice Scalia’s “authoritativeness” test and the Court’s apparently case-by-case inquiry is thinner than it appears. If an agency’s decision is authoritative, and if an interstitial matter is involved, *Barnhart* suggests that the agency is likely to receive *Chevron* deference

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<sup>178</sup> *Id.*, citing *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).

<sup>179</sup> 389 F.3d at 1280 n.6.

<sup>180</sup> In the same vein, see Barron and Kagan, *supra* note 110, at 257, emphasizing that “Both the majority and the dissent in *Mead* refer to the agency’s internal decision-making structure — and, specifically, to the level of the decision maker; these references count as the single point of commonality between the two warring opinions.”

<sup>181</sup> 533 U.S. 218, 233 (2001).

<sup>182</sup> *Id.* at 219.

<sup>183</sup> See Barron & Kagan, *supra* note 110.

after all. It emerges that the real difference between Justice Scalia and the Court will matter only when an agency makes a decision on a large question without resorting to formal proceedings.

But this point raises independent issues. It recalls the 1980s debate in another form, for one of Judge Breyer’s principal claims in 1986 was that courts, rather than agencies, should resolve “major” questions of law. That debate has returned in a separate Step Zero trilogy—one that is less self-evidently creating a new understanding of the domain of *Chevron*, but that is, I suggest, best understood in just those terms.

### **III. Winning by Losing: *Chevron* and Big Issues**

#### **A. Old Debates**

1. Interstitial questions, major questions. Recall that in his 1986 article, then-Judge Breyer distinguished between interstitial issues and larger ones. He suggested that for larger questions, courts ought not to defer to agency interpretations of law, because Congress is not best read to have instructed courts to do so. For questions that do not involve everyday administration, but central aspects of the statutory scheme, a degree of independent review is desirable. We have seen *Barnhart* endorses this claim; it suggests that “interstitial” judgments will be reviewed under *Chevron*, with the clear implication that noninterstitial judgments will be reviewed more independently.

The most plausible source of this idea is the implicit delegation principle, accompanied by an understanding of what reasonable legislators would prefer. Judge Breyer appears to think that Congress should be understood to want agencies to decide interstitial questions, but to prefer courts to resolve the larger ones, which are necessary to clarify and stabilize the law. But why is this? At first glance, there is no reason to think that in large cases, the considerations that animate *Chevron* do not apply. Suppose that an agency is deciding whether to adopt an emissions trading system, rather than command-and-control, in order to reduce air pollution; suppose too that this qualifies as a large question rather than an interstitial one. The agency’s expertise is certainly relevant to answering that question. And to the extent that issues of value are involved, it would

appear best to permit the resolution of ambiguities to come from a politically accountable actor.

Nor is this particular example hypothetical. It lies at the heart of the looming litigation over the validity of the EPA's recent decision to regulate mercury, a hazardous pollutant, under a trading system.<sup>184</sup> Indeed the example is a version of *Chevron* itself, which involved the EPA's decision to adopt a modest kind of (intrafirm) trading system through its definition of "source." *Chevron* hardly involved an interstitial question of the sort at issue in the everyday administration of the Clean Air Act; it involved a significant rethinking of the definition of the statutory term "source."<sup>185</sup> Of course we are speaking of legal fictions, but why should it be assumed that Congress (fictionally) intended the courts, rather than agencies, to define that term? Isn't that a bad and unhelpful fiction?

Judge Breyer's central response is that "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."<sup>186</sup> But this is unconvincing. If Congress has in fact focused upon, and answered, major questions, agencies must accept those answers under *Chevron* Step One. By hypothesis, we are dealing not with such cases but with those in which statutes are ambiguous, and the only question is whether to accept an agency's resolution or instead to rely on the interpretation chosen by a federal court. For "major questions," the agency's specialized fact-finding competence and democratic accountability might well be more relevant, not less.

A better justification for the distinction between interstitial and major questions would involve agency incentives. Perhaps there is less reason to trust agencies when they are making large-scale judgments about statutory meaning. Perhaps parochial pressures, such as those imposed by interest groups, will distort agency decisions in one or another direction; perhaps agency self-interest, such as the expansion of administrative authority, will increase the likelihood of bias. Judge Breyer might believe that on interstitial questions, involving everyday administration, agencies can be trusted, but that the same is not true when a major decision is involved. And if agencies were systematically less

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<sup>184</sup> See Lisa Heinzerling & Rene Stenzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENV. L. REPT. 10297 (2004).

<sup>185</sup> See ROBERT PERCIVAL ET AL., ENVIRONMENTAL LAW AND POLICY (2003).

<sup>186</sup> *Id.*

reliable on major questions, the argument for a reduced degree of deference would be quite plausible.

Nonetheless, that argument faces large problems. As I have noted, the line between interstitial and major questions is thin. If the line can be drawn, it is hardly clear that courts are in a substantially better position to resolve the “major” questions than agencies are. Perhaps agencies are responding to parochial pressures, but it is also possible that their judgments are a product of specialized competence and democratic will; no sustained evidence justifies the suggestion that when agencies make decisions on major questions, bias and self-interest are the motivating factors. In any case, *Chevron* deference does not give agencies a blank check. It remains the case that agency decisions must not violate clearly expressed legislative will, must represent reasonable interpretations of statutes, and must not be arbitrary in any way.<sup>187</sup> These constraints produce significant checks on agency self-interest and bias if they should be present.

As we have seen, Judge Breyer’s challenge to the simple reading of *Chevron* refers more generally to the psychological difficulty, for judges, of believing that an agency interpretation is both reasonable and wrong; and that difficulty is likely to be heightened for major questions. Perhaps he is right. But it is hardly unfamiliar for judges to think “wrong but reasonable.” They might believe, for example, that a jury’s verdict is incorrect but not clearly erroneous, or that some statutes, even major ones, are hard to defend but not “irrational.”<sup>188</sup> In any case, doctrines of deference ought not to be based on the psychological difficulties of judges. Perhaps Judge Breyer’s point should be taken as purely predictive—as a claim that judges are unlikely to follow the simplified version of *Chevron* generally or for major questions. If so, the path of the law is certainly a point in his favor; indeed, the decisions of the past twenty years suggest that he was uncannily prescient. But he clearly means his point as a normative one—as a challenge to the simplified reading of *Chevron*—and to this extent, the psychological point is neither here nor there.<sup>189</sup>

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<sup>187</sup> See note supra.

<sup>188</sup> See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

<sup>189</sup> Perhaps Judge Breyer ought to be taken to be venturing a version of “ought implies can,” through the suggestion that the Supreme Court should not ask judges to maintain an attitude that is psychologically unrealistic. So stated, the argument is logical, but the use of lenient standards of review suggests that judges can indeed maintain that attitude.



2. Jurisdiction. In an early debate, the Court divided on the question whether *Chevron* applies to jurisdictional disputes,<sup>190</sup> and this particular Step Zero question remains unsettled in the lower courts.<sup>191</sup> It is easy to understand the opposing views. *Chevron* rests on a theory of implied delegation, and perhaps Congress should not be taken to have intended to delegate to agencies the power to decide on the scope of their own authority. That question, it might be thought, ought to be answered by an independent institution, not by the agency itself. Thus Justice Brennan urged that judgments about jurisdiction “have not been entrusted to the agency” and might well “conflict with the agency's institutional interests in expanding its own power.”<sup>192</sup> In his view, “agencies can claim no special expertise in interpreting a statute confining its jurisdiction,” and Congress cannot be presumed to ask “an agency to fill ‘gaps’ in a statute confining the agency's jurisdiction.”<sup>193</sup>

On the other hand, any exemption of jurisdictional questions is vulnerable on two grounds. First, the line between jurisdictional and nonjurisdictional questions is far from clear, and hence any exemption threatens to introduce more complexity into the world of *Chevron*. Thus Justice Scalia argued that “there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority.”<sup>194</sup> Second, the theory that underlies *Chevron* might well support, rather than undermine, its application to jurisdictional questions. If an agency is asserting or denying jurisdiction over some area, it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision. Thus Justice Scalia urged that “Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.”<sup>195</sup> Of course the claim about what “Congress would naturally expect” is a fiction; but perhaps it is the most useful one.

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<sup>190</sup> *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 357 (1988).

<sup>191</sup> *See, e.g., Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) (deferring on jurisdictional issue involving definition of “public lands”); *Cavert Acquisition Corp. v. NLRB*, 83 F.3d 598 (3d Cir. 1996) (deferring on jurisdictional issue involving definition of “employee”); *United Trans. Union v. Surface Transp. Bd.*, 183 F.3d 606 (7th Cir. 1999) (refusing to defer on jurisdictional issue). A recent discussion can be found in *NRDC v. Abraham*, 355 F.3d 179 (2d Cir. 2004), in which the court, after finding a Step One violation, adds that “it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power” — and then suggested that *Mead* (!) provided the appropriate framework. *See id.* at 199-200.

<sup>192</sup> 487 U.S. at 387 (Brennan, J., dissenting).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 345 (Scalia, J., concurring in the judgment).

<sup>195</sup> *Id.*

Consider a prominent example. During the Clinton Administration, the EPA contended that it could assert jurisdiction over greenhouse gases under ambiguous provisions of the Clean Air Act.<sup>196</sup> During the Bush Administration, the EPA contended that it could not do so.<sup>197</sup> The difference is undoubtedly attributable to some combination of political commitments and readings of relevant evidence. If this is so, there is every reason, one might well think, to give deference to the agency’s jurisdictional judgment under *Chevron*.

## B. Major Questions and Another Trilogy

While the Court has not recently spoken to the question of jurisdiction, it has issued three decisions that bear on the Step Zero question whether *Chevron* applies to major questions. The meaning of these decisions is far from clear, and it remains to be seen whether they will be taken to carve out a distinct exception to *Chevron*. But the Court has given strong indications that this is what it means to do, in a way that has an unmistakable link with Judge Breyer’s distinction between incremental and major questions. Ironically, Justice Breyer dissented from the most important and explicit of these decisions—which borrowed, with citation, his central argument.

(1) An “unlikely” delegation: *MCI*. The first case in the trilogy is *MCI Telecommunications Corp. v. American Telephone and Telegraph*.<sup>198</sup> The 1934 Communications Act permits the Federal Communications Commission (FCC) to “modify” the statutory requirement that carriers file tariffs and charge customers in accordance with the tariffs that have been filed.<sup>199</sup> As part of a program of partial deregulation, the FCC issued a regulation providing that only AT&T, as the dominant long-distance carrier, would have to file tariffs; other carriers need not do so.

At first glance, this was a straightforward Step One question, and by a 6 to 3 vote, the Court held that the agency’s decision was unlawful under Step One. Much of Justice Scalia’s opinion for the Court emphasized the dictionary definition of “modify”—a

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<sup>196</sup> See Note, *Trapped in the Greenhouse?*, 54 DUKE L.J. 147 (2004); Note, *Carbon Dioxide: A Pollutant in the Air, but Is the EPA Correct that It is Not an Air Pollutant?*, 104 Colum. L. Rev. 1996 (2004).

<sup>197</sup> *Id.*; see Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, Acting EPA Administrator, at <http://www.epa.gov/airlinks/co2petitiongcmemo8-28.pdf>.

<sup>198</sup> 512 U.S. 218 (1994).

<sup>199</sup> 49 U.S.C. § 203.

definition that, in the Court’s view, permitted only “moderate” or “modest” rather than fundamental change. But as Justice Stevens’s dissenting opinion pointed out, a long-established meaning of “modify”—“to limit or reduce in extent or degree”—was fully compatible with the FCC’s decision. Perhaps, then, *MCI* could be taken as an odd case in which the Court found a Step One violation because of an emphasis, characteristic in Justice Scalia’s opinions, on what most dictionaries say. And perhaps Justice Scalia’s opinion should be taken as a vindication of his promise, in 1989, that as an advocate of “plain meaning” approaches to interpretation, he would be entirely willing to invoke *Chevron* Step One to strike down agency action.

But the Court offered a strong clue that something else was involved. It noted that rate filings are “the essential characteristic of a rate-regulated industry.”<sup>200</sup> In this light, it “is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”<sup>201</sup> Thus the Court’s analysis of whether the agency’s decision was a “modification” was undertaken with reference to “the enormous importance to the statutory scheme of the tariff-filing provision.”<sup>202</sup> This discussion, and the suggestion about what “Congress would leave” to the agency, seems to suggest that a kind of Step Zero inquiry might be involved, one that raised a question whether Congress intended to delegate this “enormous” question to a regulatory agency. And indeed, the Court’s emphasis on the important, and hardly interstitial, nature of the question at issue might easily be taken as a partial endorsement of Justice Breyer’s approach to the *Chevron* question.

(2) Where’s *Chevron*?: “some degree of deference.” The Court provided a related clue in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>203</sup> At issue was a provision of the Endangered Species Act that makes it unlawful to “take” a member of an endangered species.<sup>204</sup> The word “take” is in turn defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>205</sup> By regulation, the Department of the Interior adopted a broad understanding of the word “take,” interpreting it to include “significant habitat

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<sup>200</sup> 512 U.S. at 231.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> 515 U.S. 687 (1995).

<sup>204</sup> 16 U.S.C. § 1538(a)(1).

<sup>205</sup> 16 U.S.C. § 1532(19).

modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>206</sup> Small landowners and logging companies challenged this definition as unlawfully broad.

Two different opinions would have been unsurprising from the Court. The Court might have upheld the regulation by treating the case as a simple rerun of *Chevron* itself, involving an ambiguous term (“harm”) and a reasonable agency interpretation of that term. Alternatively, the Court might have struck down the regulation under *Chevron* Step One on the ground that the term “harm” appears in the context of verbs suggesting intentionality (“harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect”). Perhaps the context forbids an interpretation that would include mere habitat modification and unintended injury to members of endangered species. And indeed, Justice Scalia, true to his account in 1989 and continuing his emphasis on dictionaries in *MCI*, was willing to find a “plain meaning” of the statute that prohibited the agency’s understanding.<sup>207</sup> But the Court did neither of these things. Instead it embarked on its own, entirely independent construction of the statute, suggesting the correctness of the broad construction. For most of the Court’s opinion, it would be reasonable to ask: Where is *Chevron*? Why does the Court fail to point to statutory ambiguity and the agency’s interpretation?

After parsing the statute independently, the Court turned to *Chevron* in a brief paragraph, noting (finally!) that Congress had “not unambiguously manifested its intent” to forbid the regulation.<sup>208</sup> And then the Court added a singularly odd sentence: “The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation.” At that point the Court did not cite *Chevron* or indeed any of its other decisions on the general question. Instead its citation reads, in full: “See Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 373 (1986).”<sup>209</sup> As it happens, p. 373 of this essay contains the heart of Judge Breyer’s attack on *Chevron*, on the ground that the proper judicial attitudes

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<sup>206</sup> 50 C.F.R. 17.2 (1994).

<sup>207</sup> 515 U.S. at 714 (Scalia, J., dissenting). The Court might have invalidated the regulation by reference to some canon of construction, perhaps involving the protection of property rights; and indeed, Justice Scalia’s opinion contains an opening gesture in that direction. *Id.*

<sup>208</sup> *Id.* at 703.

<sup>209</sup> *Id.* at 703-04.

toward review of questions of law cannot “be reduced to any single simple verbal formula.”

The key paragraph in *Sweet Home* is cryptic, to be sure, but the Court’s opinion might well be read in a way that fits with the general approach in *MCI*. The scope of the words “take” and “harm” is not an interstitial question; it goes to the heart of the Endangered Species Act. Narrow definitions would constrict the range of the statutory ban; broad definitions work, in a sense, to expand the agency’s jurisdiction. For this reason, *Sweet Home* did not present the sort of minor question, involved in everyday administration, which Judge Breyer treated as the core case for judicial deference to agency interpretation. On the other hand, both expertise and accountability are relevant to interpretation of this provision of the Act, and a judgment about the breadth of the term “harm” certainly requires knowledge of the underlying facts. Unlike in *MCI*, the agency was not fundamentally altering any central feature of the statute. Hence “some degree of deference” was due. But the Court’s refusal to produce a simple *Chevron* opinion, and its only citation, appear to endorse Breyer’s position on the proper approach.

(3) “Congress could not have intended to delegate”: *Brown & Williamson*. It might have been an overreaction to see *MCI* and *Sweet Home* as offering a serious qualification of *Chevron*, or as suggesting that major questions would be treated in any special way. But consider *FDA v. Brown & Williamson*.<sup>210</sup> At issue there was whether the FDA had authority to regulate tobacco and tobacco products. The agency pointed to the statutory language, which defines drug to include “articles (other than food) intended to affect the structure or any function of the body.”<sup>211</sup> It would certainly be plausible to argue that under this language and with the assistance of *Chevron*, the FDA could assert authority over tobacco. At the same time, it could have been concluded that this was a question of agency jurisdiction, for which *Chevron* deference was inapposite. But the Court took a far more complicated route. Much of its opinion emphasized the wide range of tobacco-specific legislation enacted by Congress in the last decades—legislation that, in the Court’s view, should “preclude an interpretation of the FDCA that grants the FDA

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<sup>210</sup> 529 U.S. 120 (2000).

<sup>211</sup> 21 U.S.C. § 321(g)(1)(c).

authority to regulate tobacco products.”<sup>212</sup> This argument had a degree of fragility, as the Court appeared to appreciate; repeals by implication are disfavored,<sup>213</sup> and the Court’s failure to allow the agency to interpret ambiguous terms, merely because of subsequent legislation, was the equivalent of a finding of an implied repeal.

Perhaps for this reason, the Court added a closing word. It said that its inquiry into the Step One question “is shaped, at least in some measure, by the nature of the question presented.”<sup>214</sup> *Chevron*, the Court noted, is based on “an implicit delegation,” but in “extraordinary cases,” courts should “hesitate before concluding that Congress has intended such an implicit delegation.”<sup>215</sup> Just as in *Sweet Home*, the Court cited no case for this key proposition, but instead resorted to only one source: Judge Breyer’s 1986 essay. On this occasion, however, it went beyond the citation to offer a quotation, encapsulating one of Judge Breyer’s central arguments, that there is a difference between “major questions,” on which “Congress is more likely to have focused,” and “interstitial matters.” At that point the Court drew a direct connection with *MCI*: “As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>216</sup>

Ironically, Justice Breyer dissented from the Court’s conclusion; even more ironically, he offered a powerful rebuttal to his own argument in 1986. He acknowledged the possibility that courts should accept a “background canon of construction” to the effect that decisions with enormous social consequences “should be made by democratically elected Members of Congress rather than by unelected agency administrators.”<sup>217</sup> In this way he suggested, even more clearly than the Court, that some decisions, rejecting agency interpretations of statutes, might be rooted in nondelegation principles that reflect a reluctance to take ambiguous provisions as grants of “enormous” discretion to agencies. But he found any such background principle inapplicable to the problem at issue. The reason was that the decision to regulate tobacco is one for which the incumbent administration “must (and will) take responsibility.”<sup>218</sup>

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<sup>212</sup> 529 U.S. at 157.

<sup>213</sup> *TVA v. Hill*, 437 U.S. 153 (1978).

<sup>214</sup> 529 U.S. at 159.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 160.

<sup>217</sup> *Id.* at 190 (Breyer, J., dissenting).

<sup>218</sup> *Id.*

Because of its high visibility, that decision will inevitably be known to the public, and officials will be held accountable for it. “Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects.”<sup>219</sup> An agency’s “decision of this magnitude—one that is important, conspicuous, and controversial” will inevitably face “the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.”<sup>220</sup>

There is a close link between Justice Breyer’s arguments on this count and the Court’s emphasis on procedural safeguards in *Mead*. Those safeguards might be seen as a check on administrative arbitrariness, a check that reduces the need for independent judicial scrutiny of agency interpretations of law. So too, a high degree of public visibility, ensuring the operation of political safeguards, might be seen as a surrogate for independent judicial scrutiny. I believe that Justice Breyer is correct on this point and that his argument casts serious doubt on his own argument to the contrary in 1986. It is that issue to which I now turn.

### C. Major Issues, Expertise, and Political Safeguards

Suppose that *Brown & Williamson* is taken to suggest that *Chevron* deference is not due for agency decisions involving questions of great “economic and political significance.” This position would have exceedingly large implications. Return, for example, to an important and disputed question: Does the EPA have the authority to regulate greenhouse gases under the Clean Air Act?<sup>221</sup> Let us simply stipulate that the relevant provisions of the Act are ambiguous. Under *Chevron*, the EPA would appear to have the power to regulate greenhouse gases if it chooses to do so. But under *Mead* and *Brown & Williamson*, it would be easy to argue that Congress, and not the EPA, should decide whether the EPA ought to be regulating greenhouse gases, a fundamental question

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<sup>219</sup> *Id*

<sup>220</sup> *Id.* at 191.

<sup>221</sup> See sources cited *supra* note 196.

about the reach of federal environmental law. And so, in fact, the EPA's General Counsel has argued under President Bush.<sup>222</sup>

1. *Step Zero again*. Is this argument convincing? The answer depends on whether *MCI* and *Brown & Williamson* should be read to establish an independent Step Zero constraint on the application of *Chevron*, suggesting that certain fundamental questions must be resolved judicially rather than administratively. I believe that despite some of their language, *MCI* and *Brown & Williamson* should not be so understood; for the future, they are best regarded as Step One cases, not as Step Zero cases. The reason is that there is no justification for the conclusion that major questions should be resolved judicially rather than administratively. In fact, there are two problems with that conclusion. The first is that as with the distinction between jurisdictional and nonjurisdictional questions, the difference between interstitial and major questions is extremely difficult to administer; and if sensibly administered, it raises doubts about an array of decisions, including *Chevron* itself. The second is that expertise and accountability, the linchpins of *Chevron*'s legal fiction, are highly relevant to the resolution of major questions.

Assume, for example, that the statutes in *MCI* and *Brown & Williamson* were genuinely ambiguous—that the relevant sources of interpretation could plausibly be read to support or to forbid the agency action at issue. If so, the argument for judicial deference would be exceptionally strong. In *MCI*, the FCC was deciding fundamental questions about the structure of the telecommunications market—hardly an issue for judicial resolution, and one for which expertise and accountability are relevant. In *Brown & Williamson*, the FDA was taking action against one of the nation's most serious public health problems, in a judgment that had a high degree of public visibility and required immersion in the subject at hand. Perhaps Congress could not easily be taken to delegate the resolution of these questions to administrative agencies. But would it really be better to understand Congress to have delegated the resolution of those questions to federal courts? I have referred to the concern that on major questions, interest-group power and agency self-dealing might produce a real risk, one that is sufficient to call for a reduced degree of judicial deference. But that concern is not well-grounded in any empirical

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<sup>222</sup> See Memorandum from Robert E. Fabricant, *supra* note 197.



literature, and in any case the standard *Chevron* framework provides ample constraints on bias and self-dealing.

2. *Chevron v. nondelegation*. The best response would suggest that *MCI* and *Brown & Williamson* should not be understood to say that major questions will be resolved by courts rather than agencies. They should be taken to impose a more powerful limit on administrative discretion, in the form of a background principle to the effect that in the face of ambiguity, agencies will be denied the power to interpret ambiguous provisions in a way that would massively alter the preexisting statutory scheme.<sup>223</sup>

On this view, *Mead* and *Brown & Williamson* are not Step Zero decisions; they are discretion-denying decisions. They do not say that courts, rather than agencies, will interpret ambiguities. They announce, far more ambitiously, that ambiguities will be construed so as to reduce the authority of regulatory agencies. But it would not much matter if this principle is described in terms of *Chevron* Step Zero or *Chevron* Step One. The key idea is that agencies would not receive deference when they attempt to exercise their authority in ways that produce large-scale changes in the structure of the statutory programs that they are administering.

The best justification for this conclusion would rely on an analogy. In some cases, well-established background principles operate to “trump” *Chevron*. Agencies are not permitted to interpret statutes so as to apply beyond the territorial boundaries of the United States.<sup>224</sup> Nor are they allowed to interpret ambiguous statutes to apply retroactively.<sup>225</sup> An agency cannot construe an ambiguous statute so as to raise serious constitutional doubts.<sup>226</sup> In these and other contexts, courts have insisted on a series of *nondelegation canons*, which require legislative rather than merely executive deliberation on the issue in question.<sup>227</sup> Congress will not lightly be taken to have delegated to agencies the choice of how to resolve certain sensitive questions. Perhaps *MCI* and *Brown & Williamson* can be understood to build on these nondelegation canons to

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<sup>223</sup> For a valuable discussion, see John Manning, *The Nondelegation Doctrine as A Canon of Avoidance*, 2000 S. CT. REV. 223.

<sup>224</sup> *EEOC v Arabian American Oil Co*, 499 U.S. 244, 248 (1991).

<sup>225</sup> *Bowen v Georgetown University Hospital*, 488 U.S. 204, 208 (1988).

<sup>226</sup> See *id.* at 208–09 (1988).

<sup>227</sup> For general discussion, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

suggest a more general principle: Fundamental alterations in statutory programs, in the form of contractions or expansions, will not be taken to be within agency authority.<sup>228</sup>

For those who are enthusiastic about the nondelegation doctrine, this background principle will have considerable appeal, above all because the principle requires Congress, rather than agencies, to decide critical questions of policy (including, plausibly, the question whether significant deregulation of communications should occur, or whether the FDA should be authorized to regulate tobacco produces). But the principle faces three problems. The first is the uncertain foundations of the argument for the nondelegation doctrine itself.<sup>229</sup> As a matter of text and history, the doctrine does not have a clear constitutional pedigree, and to say the least, it is controversial to base a principle of statutory construction on a doctrine that cannot easily be rooted in the Constitution. The second is the difficulty of administering the line that the principle would require courts to maintain. As I have emphasized, the distinction between major questions and non-major ones lacks a metric. On its facts, *Chevron* itself might seem to be wrong, and perhaps *Sweet Home* as well.

The third and most fundamental problem is that expertise and accountability are entirely relevant to questions about contraction or expansion of statutory provisions.<sup>230</sup> If a nondelegation principle is meant to prevent agencies from making significant alterations in statutory programs on their own, in a way that goes beyond the ordinary operation of Step One, it would embed an unhealthy status quo bias into administrative law. *MCI* could well be understood as embodying such a bias. But because regulatory programs last for decades, and across significantly changed circumstances, agencies should be taken to have the discretion to construe ambiguities reasonably, even if their constructions lead to large changes in the statute that they are administering. Indeed, this flexibility is a primary benefit of *Chevron* itself, allowing adaptation to new understandings of both facts and values.

But suppose that the nondelegation principle is understood not to include a general status quo bias, but simply to ban agencies from expanding their authority, again in a way that goes beyond the ordinary operation of Step One. If so, then it is a modern

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<sup>228</sup> Cf. Manning, *supra* note 223 (discussing and challenging the use of nondelegation principles as a tool of statutory construction).

<sup>229</sup> See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

<sup>230</sup> See Manning, *supra* note 223.

version of the old (and discredited) idea that statutes in derogation of the common law should be narrowly construed.<sup>231</sup> *Brown & Williamson* could be understood to reflect that idea. If so, it should be repudiated. In the modern state, agencies should not have the authority to expand their authority in violation of statutory limitations. But so long as agencies are reasonably interpreting statutory ambiguities, they ought to receive deference under *Chevron*, at least if their interpretation does not violate a particular interpretive principle, such as the principles against extraterritoriality, retroactivity, and serious constitutional doubts.

I conclude that *MCI* and *Brown & Williamson* are best read as Step One decisions. Despite the more general language that I have explored here, they should not be taken to suggest an additional reason to deny deference under Step Zero.

### Conclusion

In 1984, it was not entirely clear whether *Chevron* was a synthesis of existing law, as the Court appeared to believe at the time,<sup>232</sup> or instead a genuine revolution, signaling a new era in the relationship between courts and regulatory agencies. Justice Scalia saw its revolutionary potential and sought to justify a broad reading of the decision as well-suited to the realities of modern government, above all by virtue of its clarity and simplicity. Judge Breyer, also a long-time specialist in administrative law, sought to domesticate the decision and to treat it as a codification of the best of existing practice, which called for case-by-case inquiries into the fictional instructions of rational legislators. The most ambitious readings of *Chevron* see it as a recognition that resolution of statutory ambiguities often calls for judgments of both policy and principle, and as a firm suggestion that such judgments should be made by administrators rather than judges. So understood, *Chevron* is a natural outgrowth of the twentieth-century shift from judicial to administrative lawmaking.

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<sup>231</sup> See *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924); *FTC v. Eastman Kodak*, 264 U.S. 619, 623-25 (1920); Jefferson Fordham & J. Russell Leach, *Interpretation of Statutes In Derogation of the Common Law*, 3 *VAN. L. REV.* 438 (1950).

<sup>232</sup> See Percival, *supra* note 2.

For the most part, current disagreements have taken the form of a dispute over *Chevron* Step Zero—the inquiry into whether the *Chevron* framework applies at all. Justice Breyer has succeeded in ensuring case-by-case assessments of whether Congress intended to delegate law-interpreting power to agencies. To be sure, those assessments are less case-by-case than he suggested that they should be in 1986; if the agency action has the force of law, *Chevron* applies, and agency decisions that result from formal procedures are taken to have the force of law.<sup>233</sup> But even if agency action lacks the force of law and is not a product of formal procedures, *Chevron* might apply on the basis of an inquiry into the particular nature of the decision at stake. After *Mead* and *Barnhart*, then, *Chevron* seems to supply a clear rule, but only in the domain of agency decisions having the force of law. The *Christensen-Mead-Barnhart* trilogy thus represents a significant triumph for Justice Breyer’s efforts to domesticate *Chevron*.

At the same time, *Sweet Home*, *MCI*, and *Brown & Williamson* seem to be Step Zero decisions in Step One guise.<sup>234</sup> They are informed, and explicitly so, by a doubt about whether Congress should generally be taken to have given agencies the authority to restructure administrative schemes, either by significantly reducing or significantly expanding their nature and coverage.

These restrictions on the reach of *Chevron* create a great deal of complexity, and in a way that disregards the best justifications for the deference rule. The Court seems to have opted for standards for rules in precisely the context in which rules make most sense: numerous and highly repetitive decisions in which little is to be gained, in terms of accuracy, by a more particularized approach. Because the scope of review is a threshold issue in nearly every administrative law case, the rise of sustained controversy over the meaning of Step Zero introduces needless uncertainty. I have suggested that courts can handle the initial Step Zero trilogy either by noticing that the choice between *Chevron* and *Skidmore* usually will not matter, or by treating most cases as *Barnhart* cases rather than as *Christensen* or *Mead* cases. Just as *Mead* threatens to domesticate *Chevron*, future courts can use *Barnhart* to domesticate *Mead*. I have also suggested that *MCI* and *Brown & Williamson*, if rightly decided, are best read as Step One cases; it follows that future

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<sup>233</sup> As I have noted, some agency action does not have the force of law even if based on formal procedures; the decisions of the NLRB are examples.

<sup>234</sup> Cf. Manning, *supra* note 223 (exploring *Brown & Williamson* in nondelegation terms).

courts should downplay the Court's unnecessary emphasis on what Congress could not have meant to delegate. That emphasis threatens to give courts a kind of interpretive primacy with respect to the very questions for which the *Chevron* framework is best suited.

Constraints on administrative discretion, rooted in the rule of law, remain a central part of administrative law, and indeed serve to give that subject its basic point. But those constraints can and should be supplied through other means, above all through an emphasis on the limitations recognized in *Chevron* itself. Sometimes legal epicycles are necessary to ensure against the arbitrariness introduced by inflexible rules. But in this context, the extraordinary complexity introduced by the emerging law of Step Zero serves no useful purpose.

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