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CHEVRON STEP ZERO

*Cass R. Sunstein**

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INTRODUCTION

OVER twenty years after its birth, the U.S. Supreme Court’s decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*¹ 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.² But shortly after it appeared, *Chevron* was

¹ 467 U.S. 837. As a sign of *Chevron*’s influence, consider the fact that the decision was cited 2414 times in its first decade (between 1984 and January 1, 1994), 2584 times in its next six years (between January 1, 1994 and January 1, 2000), and 2235 times in its next five years (between January 1, 2000 and January 28, 2005). LEXIS search, Mar. 2005.

² See Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Marshall Papers*, 23 *Env’tl. 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., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703–08 (1995); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445–48 (1987); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 985 (1986) (Stevens, J., dissenting); see also Chris-

quickly taken to establish a new approach to judicial review of agency interpretations of law,³ going so far as to create a kind of counter-*Marbury* for the administrative state. *Chevron* 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.⁴

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,⁵ labor law,⁶ environmental protection,⁷ immigration,⁸ food and drug regulation,⁹

tensen v. Harris County, 529 U.S. 576, 595 n.2 (2000) (Stevens, J., dissenting) (endorsing “fully” Justice Breyer’s narrow reading of *Chevron*).

³ See, e.g., Richard J. Pierce, Jr., *Chevron* and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301, 301–03 (1988); Kenneth W. Starr, Judicial Review in the Post-*Chevron* Era, 3 Yale J. on Reg. 283, 283–84 (1986). On the real-world consequences of *Chevron*, see Peter H. Schuck & E. Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1020–61. Schuck and Elliott find a significant effect from *Chevron*: an increase in affirmance rates from seventy-one percent in the pre-*Chevron* year of 1984 to eighty-one percent in the post-*Chevron* year of 1985. *Id.* at 1030. Over more extended periods, studies are hard to conduct, because prospective litigants 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. At the same time, agencies and their lawyers are likely to adjust their own practices to deference doctrines as well, and 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 Thomas Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. (forthcoming 2006) (manuscript on file with Virginia Law Review) (finding significant effects of party affiliation on judicial voting in *Chevron* cases); see also Frank B. Cross & Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals, 107 Yale L.J. 2155, 2168–76 (1998) (finding that unified Republican panels were less likely to follow *Chevron* where the agency decision aligned with judicial political policy preferences).

⁴ *Contra* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

⁵ E.g., *Atl. Mut. Ins. Co. v. Comm’r*, 523 U.S. 382, 383–87 (1998); *Tate & Lyle, Inc. v. Comm’r*, 87 F.3d 99 (3d Cir. 1996).

⁶ E.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987); *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 603 (3d Cir. 1996).

⁷ E.g., *Chem. Mfrs. Ass’n v. Natural Res. Def. Council*, 470 U.S. 116 (1985).

⁸ E.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁹ E.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

and highway safety.¹⁰ 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*,¹¹ permitting agencies to do as they wish so long as there is a reasonable connection between their 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 make those judgments.¹²

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.¹³ 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.¹⁴

Chevron famously creates a two-step inquiry for courts to follow in reviewing agency interpretations of law.¹⁵ The first step asks whether Congress has “directly spoken to the precise question at issue,” an inquiry that requires an assessment of whether Con-

¹⁰ E.g., *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309 (D.C. Cir. 1992).

¹¹ 17 U.S. (4 Wheat.) 316 (1819).

¹² See *infra* notes 42–46 and accompanying text.

¹³ E.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26, 161 (2000); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995); *Cardoza-Fonseca*, 480 U.S. at 446–49.

¹⁴ A detailed discussion can be found in Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 *Vand. L. Rev.* 1443 (2005).

¹⁵ 467 U.S. at 842–44.

gress's intent is "clear" and "unambiguously expressed."¹⁶ The second step asks whether the agency's interpretation is "permissible," which is to say reasonable in light of the underlying law.¹⁷ 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.¹⁸ 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.¹⁹ The Supreme Court has issued several important Step Zero decisions,²⁰ which clarify a number of questions but also offer complex and conflicting guidance. As we shall see, the entire area is pervaded by legal fictions about congressional understandings, and the proliferation of fictions has vindicated the fears of those who have insisted on the importance of a simple answer to the Step Zero question.²¹

My principal purpose in this Article is to provide an understanding of the foundations and nature of the Step Zero dilemma and to suggest how that dilemma should be resolved. I shall argue that the Step Zero inquiry has become far too unruly and that the doctrine should be simplified in a way that will broaden the application of the *Chevron* framework. Many cases can be decided without resolving the Step Zero question; in such cases, it will not matter whether *Chevron* deference is applied. If Step Zero questions must

¹⁶ Id. at 842–43.

¹⁷ Id. at 843.

¹⁸ See, e.g., Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 Admin. L.J. 255 (1988); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351 (1994); Richard J. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988); Starr, *supra* note 3; Note, "How Clear is Clear" in *Chevron's Step One?*, 118 Harv. L. Rev. 1687 (2005).

¹⁹ I gratefully borrow the term, and hence my title, from Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 836 (2001). For a recent illustration of the importance of the Step Zero inquiry, see *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (holding that an interpretive ruling by the Attorney General is not entitled to *Chevron* deference because there is no general grant of rulemaking authority to the Attorney General).

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

²¹ See *Mead*, 533 U.S. at 239, 245–47 (Scalia, J., dissenting); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 Geo. Wash. L. Rev. 347, 347–49, 358–61 (2003).

be answered, courts should increase their willingness to use the *Chevron* framework whenever the agency has authoritatively answered a question about the meaning of a statute that it has been asked to implement.

As we shall see, Step Zero has become the central location of an intense and longstanding disagreement between the Court's two administrative law specialists, Justices Stephen Breyer and Antonin Scalia.²² 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.²³ Both Justices explicitly recognized that any understanding of legislative instructions is a "legal fiction";²⁴ both approved of resort to that fiction. But the two sharply disagreed about its meaning and application. Here, as elsewhere, Justice Scalia seeks clear and simple rules, intended to reduce the burdens of decisionmaking for lower courts and litigants.²⁵ 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.²⁶ This kind of disagreement, involving a classic rules-standards debate,²⁷ echoes throughout the law, but as we shall see, it has distinctive resonance in the context of judicial review of agency interpretations of law.

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

²³ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 370–82 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 516–17.

²⁴ Breyer, *supra* note 23, at 370; Scalia, *supra* note 23, at 517. This point is emphasized and explored in David J. Barron and Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 *Sup. Ct. Rev.* 201, 212–25 (2002).

²⁵ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175 (1989).

²⁶ See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. Cal. L. Rev.* 845, 848–61 (1992) (arguing for use of legislative history in statutory construction and against the simplicity of textualism).

²⁷ See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557 (1992); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22 (1992).

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* continues to supply a simple rule, notwithstanding early efforts to cabin its reach.²⁸ 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 agencies in circumstances in which it is implausible to infer a congressional delegation of such power. 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, a case-by-case analysis of several factors ought to be used to determine whether *Chevron* provides the governing framework.²⁹ In a separate trilogy of cases, which I will call the "Major Question" trilogy,³⁰ the Court has raised a separate Step Zero question by suggesting the possibility that deference will be reduced, or even nonexistent, if a fundamental issue 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 issues.

I suggest that both trilogies point in unfortunate directions because they increase uncertainty and judicial policymaking without promoting important countervailing values. 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. As we shall see, the Court is apparently seeking to allow *Chevron* deference only, or mostly, when agency decisions have followed procedures that guarantee deliberation and reflectiveness. But that goal, however appealing, cannot justify the high level of complexity and confusion that the first trilogy has

²⁸ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445–48 (1987). As we shall see, this claim must be qualified by reference to recent developments involving major questions. See *infra* notes 209–49 and accompanying text. Moreover, Justice Breyer has argued that the simple rule does not, in fact, reflect the law. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2713 (2005) (Breyer, J., concurring).

²⁹ *Barnhart v. Walton*, 535 U.S. 212, 217–22 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 221, 226–34 (2001); *Christensen v. Harris County*, 529 U.S. 576, 586–88 (2000).

³⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 159–61 (2000); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703–08 (1995); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228–34 (1994).

introduced into the threshold question whether *Chevron* applies at all.

As for the second: There should not be an exception to the *Chevron* framework for those agency decisions that have “large” or fundamental policy implications. 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.³¹ 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 possible, the Step Zero question should be resolved in favor of applying the standard *Chevron* framework—a framework that has the dual advantages 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.³² The Court’s emerging steps in favor of a more complex framework, calling for independent judicial judgment in certain circumstances, are a product of an evident desire to constrain agency discretion when such discretion seems particularly unlikely to be fairly exercised.³³ But the Court’s goals can be accomplished in much simpler and better ways—above all, by insisting both on the rule of law constraints embodied in Steps One and Two and on continued judicial review for arbitrariness.

³¹ See Cass R. Sunstein, *Administrative Law Goes to War*, 118 Harv. L. Rev. 2663, 2664 (2005).

³² Unfortunately, empirical analysis shows that even under *Chevron*, judicial policy preferences are continuing to play a significant role in judicial review of agency interpretations of law. See Miles & Sunstein, *supra* note 3. For example, Republican appointees are more sympathetic to interpretations by Republican presidents than to those by Democratic presidents, and Democratic appointees show the opposite preference. See *id.* In addition, former Chief Justice Rehnquist, and Justices Scalia and Thomas, have shown significantly greater deference to agency interpretations of law after President Bush succeeded President Clinton—while Justices Stevens, Souter, Ginsburg, and Breyer have shown significantly decreased deference after that succession. *Id.* These findings might well be taken to support a strong reading of *Chevron*, one that disciplines judicial policymaking. See *id.*

³³ See Bressman, *supra* note 14.

This Article will proceed in three parts. Part I will explore 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 II will investigate the first 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. I will contend here that the Court has opted for an excessively complex approach; greater simplicity would be far preferable. Part III will explore the Major Question trilogy, in which the Court has also failed to apply *Chevron* in the ordinary way, apparently on the theory that certain questions, involving the basic reach of regulatory statutes, are for courts rather than agencies. In this Part, I will argue that such questions should be analyzed under the standard framework of Steps One and Two.

I. CHEVRON IN THE 1980S: FOUNDATIONS AND REACH

A. Chevron's Framing: Two Steps in Search of a Rationale

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,³⁴ 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" under the nonattainment provisions of the Clean Air Act ("CAA") as an entire plant, rather than as each pollution-emitting unit within the plant.³⁵ 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;³⁶ if the CAA had said "stationary source (as defined by the Adminis-

³⁴ 467 U.S. 837.

³⁵ Id. at 840 (discussing 42 U.S.C. § 7502(b)(6) (1982)).

³⁶ 467 U.S. at 843–44.

trator),” judges would have to accept the agency’s judgment. The CAA, of course, contained no explicit delegation, but the Court added that “[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”³⁷ If so, a court must still accept any reasonable agency interpretation.

But this conclusion raises a further question: Why should a court find an implicit delegation in the Administrative Procedure Act (“APA”) or the CAA, which supplied 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.”³⁸ 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 CAA 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 the EPA’s interpretation, because under the CAA, the law is what the EPA says it is.³⁹ In *Chevron*, the Court referred to this possibility, noting that Congress might have wanted the agency to answer the underlying questions with the belief “that those with great expertise and charged with responsibility for administering the provision would be in a better position [than Congress itself] to do so.”⁴⁰ But the Court did not insist that Congress in fact had such an intention. On the contrary, it said that Congress’s particular intention “matters not.”⁴¹

Instead, the Court briefly emphasized judges’ lack of expertise and, in more detail, their lack of electoral legitimacy. In interpreting laws, an 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 Ex-

³⁷ *Id.* at 844.

³⁸ 5 U.S.C. § 706 (2000).

³⁹ See Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 25–28 (1983) (arguing that courts can defer to agency interpretations of law when, under statute, the law is what the agency says it is).

⁴⁰ 467 U.S. at 865.

⁴¹ *Id.*

ecutive is”⁴² 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.”⁴³

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 in such cases deference would be appropriate. On this view, which has roots in the New Deal’s enthusiasm for technical competence,⁴⁴ 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 by political rather than judicial institutions. On this view, which has roots in legal realism,⁴⁵ 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 the separation of powers, requiring courts to accept executive interpretations of statutory ambiguities in order to guard against judicial displacement of political judgments.⁴⁶

In the 1980s, then-Judge Breyer⁴⁷ and Justice Scalia, both administrative law specialists, rejected all of these readings of *Chevron*.

⁴² Id.

⁴³ Id. at 865–66.

⁴⁴ See James M. Landis, *The Administrative Process* 23–26 (1938). The point is connected to *Chevron* in Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Interpret the Law*, 115 *Yale L.J.* (forthcoming 2006).

⁴⁵ See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222 (1931) (emphasizing the role of value judgments in legal reasoning). On realism and *Chevron*, see Sunstein, *supra* note 44. For empirical evidence, showing that judicial review of agency interpretations of law is affected by the political inclinations of federal judges, see Miles & Sunstein, *supra* note 3.

⁴⁶ See Douglas W. Kiniec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 *Admin. L.J.* 269, 277–78 (1988).

⁴⁷ For ease of exposition, I shall henceforth refer to “Judge Breyer” when discussing his 1986 essay. Breyer, *supra* note 23.

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. It follows that if Congress sought to entrench *Chevron*, it could do so 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. Whereas Judge Breyer sought to domesticate *Chevron*, treating it as a kind of "problem" to be solved by reference to previously 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":
Judge Breyer's Plea for Complexity*

In 1984, the same year *Chevron* was decided, Judge Breyer, writing for the United States Court of Appeals for the First Circuit, tried to make sense of the Court's decision.⁴⁸ 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."⁴⁹ The inference would be intensely particularistic; it would rest on an inquiry into "what a sensible legislator would have expected given the statutory circumstances."⁵⁰ The expectations of the sensible legislator would depend on a judgment about institutional competence:

⁴⁸ *Mayburg v. Sec'y of Health & Human Serv.*, 740 F.2d 100, 106 (1st Cir. 1984).

⁴⁹ *Id.*

⁵⁰ *Id.*

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.⁵¹

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.

Judge Breyer explored these issues far more systematically in a 1986 essay that has proven extremely, and indeed increasingly, influential.⁵² 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.⁵³ In this sense, the then-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."⁵⁴ In Judge Breyer's view, judicial review should be specifically tailored to the "institutional capacities and strengths" of the judiciary.⁵⁵ For that endeavor, the simple approach set out in *Chevron* was hopelessly inadequate.

⁵¹ Id. (internal citations omitted).

⁵² Breyer, *supra* note 23. A similar analysis is briefly offered in Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 102–08 (2005) [hereinafter Breyer, *Active Liberty*].

⁵³ Breyer, *supra* note 23, at 364–65.

⁵⁴ Id. at 364–65, 397.

⁵⁵ Id. at 398.

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.⁵⁶ 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”⁵⁷ or because Congress delegated (explicitly or implicitly) interpretive power to agencies.⁵⁸ Judge Breyer added, crucially, that the idea of a “legislative intent to delegate the law-interpreting function” is “a kind of legal fiction.”⁵⁹ When courts find such an intent, they are really imagining “what a hypothetically ‘reasonable’ legislator would have wanted (given the statute’s objective)” and “looking to practical facts surrounding the administration of a statutory scheme.”⁶⁰

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 best equipped to answer it correctly; hence an ordinary question of agency administration would call for deference.⁶¹ If, however, the question is “an important one,” an 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.”⁶² (That sentence has proven 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.”⁶³ Judge Breyer insisted that the reconciliation of the apparently conflicting lines of cases depends on inquiries of this sort.

⁵⁶ Id. at 365–67.

⁵⁷ Id. at 368.

⁵⁸ Id. at 369.

⁵⁹ Id. at 370.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.; see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2713 (2005) (Breyer, J., concurring) (referring to independent judicial review of “unusually basic” questions); Breyer, *Active Liberty*, *supra* note 52, at 106–07.

⁶³ Breyer, *supra* note 23, at 371.

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."⁶⁴ 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.⁶⁵ 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."⁶⁶

Judge Breyer offered three reasons for this conclusion. The first involved the sheer diversity of situations in which courts might be asked to defer to agency interpretations. No simple formula could fit so "many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures."⁶⁷ Second, and ironically, a simple rule would 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 could be "a waste of time."⁶⁸ Third, the simple view "asks judges to develop a cast of mind that often is psychologically difficult to maintain."⁶⁹ 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."⁷⁰

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."⁷¹ Judge Breyer urged, in short, that *Chevron*

⁶⁴ Id. at 372.

⁶⁵ Id. at 373.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id. at 378.

⁶⁹ Id. at 379.

⁷⁰ Id.

⁷¹ Id. at 380–81.

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.⁷² Far from being a revolution, or even a major departure, *Chevron* should be taken to codify the best understanding of then-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).⁷³ 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 incorrect.⁷⁴ Quoting a lower court with approval, 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.”⁷⁵ For Justice Scalia, as for Judge Breyer, the central issue was 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 recipe for confusion. “*Chevron*, however, if it is 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 meant.”⁷⁶ Here again Justice Scalia is in complete accord with Judge Breyer. But where Judge Breyer challenges the presumption as unacceptably simplistic, Justice

⁷² 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 less young man believes that this conclusion, favoring case-by-case inquiries into the deference question, was mistaken.

⁷³ Scalia, *supra* note 23.

⁷⁴ *Id.* at 514–16.

⁷⁵ *Id.* at 516 (quoting *Process Gas Consumers Group v. U.S. Dep't of Agric.*, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) (quoting *Constance v. Sec'y of Health & Human Servs.*, 672 F.2d 990, 995 (1st Cir. 1982))).

⁷⁶ *Id.*

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 acknowledged that *Chevron* is “not a 100% accurate estimation of modern congressional intent”;⁷⁷ deference does not always capture what Congress wants. But “the prior case-by-case evaluation was not so either”⁷⁸—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 agreed with Judge Breyer on yet another point: Any account of congressional instructions reflects “merely a fictional, presumed intent.”⁷⁹ A judgment about that fictional and presumed intent, Justice Scalia seemed to say, should also be based on a judgment about what would amount to a sensible instruction by a sensible legislature.

What makes sense, however, 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.”⁸⁰ By emphasizing this point, Justice Scalia marked his crucial departure from Judge Breyer. If we are speaking of fictional intent, then *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.”⁸¹ Thus Justice Scalia offers a dynamic rather than static understanding of *Chevron*. Where Judge Breyer questions whether a simple (in his term, “univocal”) deference rule accurately reflects (fictive) congressional understandings, Justice Scalia focuses on the effects of any deference rule on subsequent congressional activity—a focus that, in his view, argues for clarity and simplicity.

⁷⁷ Id. at 517.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

To this Justice Scalia added two points about the scope of *Chevron*. 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.⁸² Second, and more fundamentally, Justice Scalia suggested the distinct possibility that under *Chevron*, it would be necessary to revisit “the distinction among the various manners in which the agency makes its legal views known.”⁸³ Even mere litigating positions might receive *Chevron* deference:

[I]f 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.⁸⁴

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.⁸⁵ “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.”⁸⁶ 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.⁸⁷

⁸² *Id.*

⁸³ *Id.* at 519.

⁸⁴ *Id.*

⁸⁵ *Id.* at 521.

⁸⁶ *Id.*

⁸⁷ *Id.* Note in this regard that, of the nine members of the Court, Justice Scalia, the most enthusiastic defender, has been the least willing to accept agency interpretations

Justice Scalia noticed that *Chevron* had not yet marked a revolution in the law, for “it will take some time to understand that those concepts are no longer relevant, or no longer relevant in the same way.”⁸⁸ But he added his belief that “in the long run *Chevron* will endure and be given its full scope” simply because “it more accurately reflects the reality of government, and thus more adequately serves its needs.”⁸⁹

Whereas Judge Breyer predicted a disintegration of *Chevron*'s simple approach on the ground that it was ill-suited to a complex reality, Justice Scalia contended that *Chevron* would be given its full scope, and amount to a major and novel development, precisely because of its rule-based quality. As we shall see, Judge 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 intolerable 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's subsequent performance, Justice Scalia emphasized, as Judge Breyer did not, that a simple rule would 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,⁹⁰ then Judge Breyer and Justice Scalia might be seen as disagreeing about exactly how to assess those costs.

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 law-

of law! See Miles & Sunstein, *supra* note 3, at 3–4. By contrast, Justice Breyer, *Chevron*'s strongest critic, has been the most willing to accept those interpretations. *Id.*

⁸⁸ Scalia, *supra* note 23, at 521.

⁸⁹ *Id.*

⁹⁰ See Kaplow, *supra* note 27, at 621–23.

making.⁹¹ In numerous contexts, judge-made law has been replaced by administrative regulation, often pursuant to vague or open-ended legislative 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 fresh understandings of fact as well as new values. For banking, telecommunications, national security, and environmental protection—among many other areas—changing circumstances often require agencies to adapt old provisions to unanticipated problems.

Despite the Court's lack of ambition for its decision, the *Chevron* framework, 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 by the interpreter, 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 Co. v. Tompkins*⁹²—as a suggestion that law and interpretation often involve no “brooding omnipresence in the sky”⁹³ 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 an 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 is often involved.⁹⁴ As we shall see, many of the post-*Chevron* cases, read in 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.”

⁹¹ An illuminating study is Price V. Fishback and Shawn Everett Kantor, *A Prelude to the Welfare State: The Origins of Workers' Compensation* (2000). See also Jerry L. Mashaw, *Due Process in the Administrative State* 113–41 (1985), for a valuable discussion in the context of social security disability determinations.

⁹² 304 U.S. 64, 78–79 (1938).

⁹³ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

⁹⁴ See Sunstein, *supra* note 44, for a more elaborate treatment of these points.

II. 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 that expectation is met in many cases.⁹⁵ 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.⁹⁶

In these respects, the tempting idea that Justice Scalia's enthusiastically pro-*Chevron* approach will be more deferential to agencies is far too crude. 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 resolve cases unfavorably to the agency at Step One, by finding that the agency has violated the statutory language. There is some evidence that this is true.⁹⁷

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 when statutory language is ambiguous, Justice Breyer would call for a case-by-case inquiry into (fictional, hypothesized) legislative

⁹⁵ See *Smith v. City of Jackson*, 125 S. Ct. 1536, 1546–47 (2005) (Scalia, J., concurring in part and concurring in judgment) (arguing that the EEOC's reasonable interpretation is entitled to deference); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 601–02 (2004) (Scalia, J., dissenting) (arguing in favor of upholding the EEOC's interpretation of the statute because it is reasonable, and the text does not "unambiguously require a different interpretation") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting)); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714–18 (1995) (Scalia, J., dissenting) (arguing that the statute's language was sufficiently clear as to make the agency's regulation "necessarily unreasonable").

⁹⁶ See *Sweet Home*, 515 U.S. at 714–25 (Scalia, J., dissenting). Note that Justice Breyer joined the majority opinion in *Sweet Home*, ruling that the statute permitted the agency's interpretation. *Id.* at 688, 703–04. Note as well that in the actual application of the *Chevron* framework, Justice Breyer has been far more deferential than Justice Scalia has been. See *supra* note 87.

⁹⁷ *Sweet Home*, 515 U.S. at 714–18 (Scalia, J., dissenting); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–29 (1994); *Miles & Sunstein*, *supra* note 3, at 3–4.

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

Consider, for example, *Young v. Community Nutrition Institute*.⁹⁸ That case involved a provision mandating 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.”⁹⁹ 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 at issue.¹⁰⁰ Without pausing to explore the Step Zero question, the Court deferred to the agency and upheld its interpretation.¹⁰¹

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 an 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 interprets the APA. Is the Food and Drug Administration

⁹⁸ 476 U.S. 974 (1986).

⁹⁹ 21 U.S.C. § 346 (2000).

¹⁰⁰ *Young*, 476 U.S. at 976–77.

¹⁰¹ *Id.* at 980–81. For cases applying the *Chevron* framework without pausing over the Step Zero question, see *NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647–52 (1990); *Mead Corp. v. Tilley*, 490 U.S. 714, 722–23 (1989); *FDIC v. Phila. Gear Corp.*, 476 U.S. 426, 438–439 (1986).

(“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 National Labor Relations Board’s (“NLRB”) 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 inapplicable.¹⁰² 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.¹⁰³

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 CAA does. Is the EPA permitted to interpret those provisions, because the EPA administers the CAA? 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 CAA.¹⁰⁴ 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

¹⁰² See Merrill & Hickman, *supra* note 19, at 893.

¹⁰³ *Id.*

¹⁰⁴ See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180–88 (2000) (resolving standing issue without deferring to agency’s view); *Int’l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1482–84 (D.C. Cir. 1994) (same). But see *Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 720–21 (1st Cir. 1999) (deferring to FAA regulations involving procedures for responding to complaints against the agency); *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989) (deferring to EPA regulations defining “public hearing” for purposes of agency-assessed civil penalties).

stake, Congress should not be taken to have implicitly delegated law-interpreting power to the agency.¹⁰⁵

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.* An evident problem with this attractive reading is that it does not specify what constitutes an "agency" interpretation. Does a lower-level official count as the "agency"? The General Counsel's office? Such questions 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 authoritatively 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, some enforce the criminal law. 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.¹⁰⁶ Congress should not be understood to have

¹⁰⁵ See, e.g., Timothy K. Armstrong, *Chevron* Deference and Agency Self-Interest, 13 Cornell J.L. & Pub. Pol'y 203, 206-07 (2004).

¹⁰⁶ *Crandon v. United States*, 494 U.S. 152, 177-78 (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 prose-

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 immediately above. Note, however, that the resulting reading downplays two features of *Chevron* itself: (1) *Chevron* involved notice-and-comment rulemaking, a procedure that is designed to ensure a degree of public transparency, responsiveness, and reason-giving; and (2) 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 old but important case, *Skidmore v. Swift & Co.*, involving an agency interpretation lacking the force of law, the Court made clear that such an interpretation would have only persuasive authority, and hence that the statutory question would be resolved judicially rather than administratively.¹⁰⁷ Thus the *Skidmore* decision suggested that courts would merely consult such agency interpretations, considering whether they were long-standing, consistent, and well-reasoned.¹⁰⁸ 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 applicability of the *Chevron* framework.

B. A Step Zero Trilogy

I. Christensen

The initial decision was *Christensen v. Harris County*.¹⁰⁹ 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 one and a half hours for each hour worked. In an opinion by Justice Thomas, the

cutors would override that long-established principle. For a contrary view, supporting deference to Department of Justice interpretations of statutes, see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 489–506 (1996).

¹⁰⁷ 323 U.S. 134 (1944).

¹⁰⁸ *Id.* at 140.

¹⁰⁹ 529 U.S. 576 (2000).

Court concluded that *Chevron* deference was inapplicable to the Acting Administrator's opinion letter. Speaking in broad terms, the Court said that "[i]nterpretations 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."¹¹⁰ The Court distinguished opinion letters and their analogues from interpretations "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."¹¹¹ Opinion letters would be treated in the same way as the Administrator's opinion in *Skidmore*—as having merely persuasive authority. In so ruling, the Court made it clear that *Skidmore* had survived *Chevron*.

Nonetheless, the Court's analysis left several ambiguities. By pointing first to the "force of law," and second to the processes that produce 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 the force of law, or that do not emerge from relatively formal procedures, are always to be assessed under *Skidmore*. Nonetheless, the Court made it clear that Step Zero involves an independent inquiry, one that will sometimes 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."¹¹² All that mattered, in his view, was whether the position at issue "represents the authoritative view of the Department of Labor."¹¹³ 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

¹¹⁰ Id. at 587.

¹¹¹ Id.

¹¹² Id. at 589 (Scalia, J., concurring in the judgment).

¹¹³ Id. at 591. 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 Barron & Kagan, *supra* note 24, at 234–57.

Labor, stating that the opinion letter reflected the position of the Secretary of Labor.¹¹⁴

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.¹¹⁵ 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.”¹¹⁶ 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.”¹¹⁷ 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.

2. Mead

The second and most elaborately reasoned case in the trilogy is *United States v. Mead Corporation*.¹¹⁸ The agency action at issue there was a tariff classification ruling by the United States Customs Service. The Court concluded that the ruling was not entitled to *Chevron* deference and that *Skidmore* provided the proper framework for analysis. The key to the holding is the suggestion that *Chevron* applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹¹⁹ It follows that the clearest cases for *Chevron* deference involve an exercise of delegated rulemaking authority. In the Court’s understanding, a delegation of interpretive power “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment

¹¹⁴ *Christensen*, 529 U.S. at 591.

¹¹⁵ *Id.* at 596 (Breyer, J., dissenting).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 596–97.

¹¹⁸ 533 U.S. 218 (2001).

¹¹⁹ *Id.* at 226–27.

rulemaking, or by some other indication of a comparable congressional intent.”¹²⁰ The linchpin for deference is therefore the power to act with the force of law. Such power follows from the authority to use formal procedures, but it may also be based on other evidence of what Congress intended.

Closely following Judge 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 looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”¹²¹ In the Court’s view, *Chevron* merely offered “an additional reason for judicial deference,”¹²² based on an implicit congressional delegation of authority. When there has been such a delegation, the Court must accept any reasonable agency interpretation of ambiguous terms.

But how can courts know whether Congress has made an implicit delegation of interpretive authority to an agency? A “very good indicator of delegation,” in the Court’s view, is congressional authorization “to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”¹²³ When Congress provides “for a relatively formal administrative procedure,” one that fosters “fairness and deliberation,” it makes sense to assume that “Congress contemplates administrative action with the effect of law.”¹²⁴ In other words, 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 might also be appropriate “even when no such administrative formality was required and none was afforded.”¹²⁵ Thus, the Court in *Mead* squarely rejected a possible reading of *Christensen*: that agency interpretations lacking

¹²⁰ *Id.* at 227.

¹²¹ *Id.* at 228 (internal footnotes omitted).

¹²² *Id.* at 229.

¹²³ *Id.*

¹²⁴ *Id.* at 230.

¹²⁵ *Id.* at 231.

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 *Chevron* deference? A relevant factor was that formal procedures were not involved. Another was the sheer volume of similar agency rulings: nearly fifty customs offices issue tariff classifications, producing thousands annually. The Court believed that “[a]ny 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.”¹²⁶ Hence, the Court held that such rulings should be treated like the policy statements, agency manuals, and enforcement guidelines mentioned in *Christensen*, and *Skidmore*, not *Chevron*, provided the applicable principles.

In response to what he saw as the *Mead* majority “breathing new life into the anachronism of *Skidmore*,”¹²⁷ Justice Scalia’s dissenting opinion emphasized a position that by now should 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.¹²⁸

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.¹²⁹ In this way, Justice Scalia objected that *Mead* would significantly decrease agency flexibility over time, thereby eliminating a primary advantage of *Chevron* itself.

¹²⁶ Id. at 233.

¹²⁷ Id. at 250 (Scalia, J., dissenting).

¹²⁸ Id. at 257.

¹²⁹ Id. at 245–46.

The Court offered a rebuttal to Justice Scalia, one that sounded almost identical to Judge Breyer's discussion of *Chevron* in 1986.¹³⁰ The Court emphasized the "great range" of administrative action and the variety of procedures under which agency action occurs.¹³¹ In light of the immense variety of procedural options that agencies might use, efforts at 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."¹³² 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.¹³³

Thus the Court squarely rejected Justice Scalia's plea for simplicity in favor of a more complex, indeed rule-free inquiry into the Step Zero question.

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* suggests that Congress might, under unidentified circumstances, be best read to call for deference even when an agency is not using formal procedures and that 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*.¹³⁴ Not surprisingly, the Court's opinion was written by Justice Breyer.

At issue in *Barnhart* was a Social Security Administration regulation specifying that a claimant for disability benefits did not have

¹³⁰ See Barron & Kagan, *supra* note 24, at 226 (suggesting 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*").

¹³¹ *United States v. Mead Corp.*, 533 U.S. 218, 236 (2001).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 535 U.S. 212 (2002).

an “impairment” unless he was facing a problem expected to last at least twelve months. This twelve-month rule had been adopted after notice-and-comment procedures, but the Court acknowledged that the agency had initially reached its interpretation through less formal means. In a crucial passage, the Court said that the use of those means did not preclude *Chevron* deference.¹³⁵ 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.”¹³⁶ In the key sentence, Justice Breyer wrote for the Court:

[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.¹³⁷

This sentence represents an extraordinary personal triumph for Justice Breyer. Sixteen years earlier, 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* calls for just such an inquiry. Just as Judge Breyer urged in 1986, whether an agency’s decision is “interstitial” has now become highly relevant to the question of deference. *Barnhart* added 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.”

Barnhart’s influence is already substantial, as a number of lower courts have given *Chevron* deference to agency interpretations that are not a product of any kind of formal process.¹³⁸ Thus, under

¹³⁵ *Id.* at 221.

¹³⁶ *Id.* at 222.

¹³⁷ *Id.*

¹³⁸ See, e.g., *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (according *Chevron* deference to an FDA “decision letter”); *Davis v. EPA*, 336 F.3d 965, 972–75 & n.5 (9th Cir. 2003) (according *Chevron* deference to an informal EPA adjudicatory process and reasoning that “[t]he fact that the EPA reached its interpretation through means less formal than notice and comment rulemaking, however,

Christensen, *Mead*, and *Barnhart*, the real question is Congress's (implied) instructions *in the particular statutory scheme*. The grant of authority to act with the force of law is a sufficient but not necessary condition for a court to find that Congress has granted an agency the power to interpret ambiguous statutory terms.¹³⁹

Justice Breyer's triumph is not unqualified.¹⁴⁰ 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 rules, rather than standards, for application of *Chevron*.¹⁴¹ Notably, Justice Breyer has urged that even when formal rulemaking is involved, and hence the agency's decision has the force of law, an agency might not receive *Chevron* deference "because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue."¹⁴² But as Justice Scalia notes, the Court has yet to adopt this approach.¹⁴³ And when *Chevron* applies, the Step Zero trilogy does not suggest that courts ought to engage in any kind of case-by-case inquiry. Of

does not automatically deprive that interpretation of the judicial deference otherwise due").

¹³⁹ But see *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2712–13 (2005) (Breyer, J., concurring) (suggesting that formal rulemaking authority is neither necessary nor sufficient). It was under this rationale that the Court in *Gonzales* concluded that the Attorney General lacked authority to prohibit physician-assisted suicide: Carefully parsing the relevant statutes, the Court ruled that his interpretations were merely entitled to *Skidmore* deference under Step Zero. *Gonzales v. Oregon*, 126 S. Ct. 904, 924–25 (2006).

¹⁴⁰ See *Barron & Kagan*, *supra* note 24, at 227 (emphasizing the degree of structure imposed by the *Mead* opinion).

¹⁴¹ See, e.g., *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 328–29 (2d Cir. 2003) (quoting *Mead*, 533 U.S. at 226–27) (granting *Chevron* deference to EPA regulations promulgated pursuant to Congressional authorization "to make rules carrying the force of law"); *Shotz v. City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003) (granting *Chevron* deference to DOJ regulations that were promulgated "using conventional notice-and-comment rulemaking procedures").

¹⁴² *Nat'l Cable & Telecomm. Ass'n*, 125 S. Ct. at 2713 (Breyer, J., concurring).

¹⁴³ *Id.* at 2719 n.9 (Scalia, J., dissenting).

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 issue is interstitial, or calls for agency expertise, *always* bears on the deference question, and not merely on the threshold inquiry as to whether *Chevron* is applicable at all. As we shall soon see, a second Step One trilogy moves in this direction, and hence some of the Court’s decisions can be taken to suggest a tacit judgment to exactly that effect.¹⁴⁴ And in an important opinion, Judge Posner appeared to endorse such a reading when he wrote 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.”¹⁴⁵ If indeed there has been a “merger,” meaning that courts would always engage in multifactor analysis in deciding whether to apply *Chevron*, Justice Breyer’s triumph is complete. But notwithstanding Judge Posner’s suggestion, the formal doctrine does not qualify the *Chevron* framework in this way—with one exception to which I will turn in due course.

C. *The Trilogy In the Lower Courts*

As might be expected, the Step Zero trilogy has produced a great deal of complexity in lower court rulings¹⁴⁶—strikingly, in a series of decisions according *Chevron* deference to agency interpretations that did not follow formal procedures.

¹⁴⁴ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (citing then-Judge Breyer’s article and arguing that “there may be reason to hesitate before concluding that Congress has intended” to grant the agency “jurisdiction to regulate an industry constituting a significant portion of the American economy”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703–04, 708 (1995) (citing the agency expertise required for administration and enforcement of the ESA as support for the application of *Chevron* and upholding the EPA’s interpretation); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231–32, 234 (1994) (finding that it is “highly unlikely” that Congress would have granted the agency power to decide such broad, non-interstitial issues for itself). Recall also Justice Breyer’s suggestion that *Chevron* deference is not appropriate for questions that are “unusually basic.” *Nat’l Cable & Telecom. Ass’n*, 125 S. Ct. at 2713 (Breyer, J., concurring).

¹⁴⁵ *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 882 (Easterbrook, J., concurring in the judgment).

¹⁴⁶ See generally Bressman, *supra* note 14, for a valuable treatment.

As a leading example, consider *Davis v. EPA*.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ The EPA interpreted this provision to require that a state "clearly demonstrate" the impact of a waiver on attainment of national standards, and the Ninth Circuit panel treated this interpretation as posing a *Chevron* question.¹⁵⁰ 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.¹⁵¹ Quoting *Barnhart*, it said that "the interpretive method used and the nature of the question at issue" called for application of *Chevron* even though the denial of the waiver was merely "informal" action.¹⁵²

The same approach was followed in *Mylan Laboratories, Inc. v. Thompson*.¹⁵³ The legal question required a judgment about when Mylan Laboratories 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.¹⁵⁴ Under *Mead*, it would certainly have been reasonable to hold that interpretive letters of this kind must be analyzed under *Skidmore* rather than *Chevron*. Mylan urged as much, but the 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.¹⁵⁵ The court added, "the FDA's decision made no great legal leap but

¹⁴⁷ 348 F.3d 772 (9th Cir. 2003).

¹⁴⁸ Id. at 777 (citing 42 U.S.C. § 7545(k)(2)(B) (2000)).

¹⁴⁹ Id. at 776; § 7545(k)(2)(B).

¹⁵⁰ *Davis*, 348 F.3d at 779–80.

¹⁵¹ Id. at 779 n.5.

¹⁵² Id. (citing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

¹⁵³ 389 F.3d 1272 (D.C. Cir. 2004).

¹⁵⁴ Id. at 1277.

¹⁵⁵ Id. at 1279–80.

relied in large part on its previous determination of the same or similar issues and on its own regulations.”¹⁵⁶ Hence *Chevron*, not *Skidmore*, provided the appropriate basis for analysis.

Other cases are in the same vein.¹⁵⁷ 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 are not the result of any kind of formal procedure.¹⁵⁸ But other decisions, reading *Mead* broadly, seem to adopt a presumption that a lack of formality implies a lack of *Chevron* deference.¹⁵⁹ In the important context of IRS Revenue Rulings, for example, *Chevron* deference is denied by analogy to the tariff classifications at issue in *Mead*.¹⁶⁰ Many lower courts seem to choose between *Mead* and *Barnhart*, and the result is a kind of Step Zero chaos.¹⁶¹

D. Bad Fictions: Problems and Puzzles

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

¹⁵⁶ *Id.* at 1280.

¹⁵⁷ See, e.g., *Navajo Nation v. HHS*, 285 F.3d 864 (9th Cir. 2002) (accordng *Chevron* deference to “a mere letter” from the Secretary of HHS denying a request for funds because Congress “delegated to the Secretary the authority to adjudicate” in such an informal manner). But cf. *Glover v. Standard Fed. Bank*, 283 F.3d 953, 961–63 (8th Cir. 2002) (denying *Chevron* deference to HUD Statements of Policy but deferring to them as “determinative authority” nonetheless).

¹⁵⁸ See, e.g., *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002).

¹⁵⁹ See, e.g., *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067–69 (9th Cir. 2003) (en banc) (stating that if a statutory provision were found ambiguous, the application of *Chevron* deference would depend on whether the agency acted with the force of law, adding that formality is a reliable indicator of such action); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 881 (7th Cir. 2002) (holding that *Chevron* deference can be granted only to “something more formal, more deliberative, than a simple announcement,” such as a HUD Policy Statement).

¹⁶⁰ See *Aeroquip-Vickers, Inc. v. Comm’r*, 347 F.3d 173, 181 (6th Cir. 2003) (denying *Chevron* deference, in light of *Christensen* and *Mead*, because “[w]hen promulgating revenue rulings, the IRS does not invoke its authority to make rules with the force of law,” but nonetheless granting *Skidmore* deference to the agency action); *Omohundro v. United States*, 300 F.3d 1065, 1067–68 (9th Cir. 2002) (same).

¹⁶¹ See generally Bressman, *supra* note 14.

the power to act through notice-and-comment rulemaking or formal adjudication. But for several reasons, this analysis is quite confusing; the “force of law” test introduces considerable complexity into the *Chevron* analysis, and it does so for no sufficient reason.

1. 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. First, 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. Second, 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.¹⁶² 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 definition by adding that a decision has the “force of law” if the agency is legally bound by it as well.¹⁶³ This interpretation has the advantage of avoiding any circularity, and it is for that reason the most plausible reading of the Court’s approach in *Mead*.¹⁶⁴

¹⁶² See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 *Admin. L. Rev.* 807, 809 (2002) [hereinafter Merrill, *Mead Doctrine*] (“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 & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 *Harv. L. Rev.* 467, 472 (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 *Am. Mining Cong. v. U.S. Dep’t of Labor*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). But see *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (“It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”).

¹⁶³ See *FEC v. Nat’l Rifle Ass’n*, 254 F.3d 173, 185–86 (D.C. Cir. 2001).

¹⁶⁴ See Merrill, *Mead Doctrine*, *supra* note 162, at 826–30.

2. 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 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.¹⁶⁵ The Court cannot have meant to say that such rules are not entitled to *Chevron* deference; but the emphasis on formality of procedures seems to leave this possibility open.

3. Adjudications Without the Force of Law

Many adjudications lack the force of law.¹⁶⁶ 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.¹⁶⁷ What does the Step Zero trilogy suggest for agency decisions that follow formal procedures but that do not lead to immediate sanctions in the event that people violate them? It would be exceedingly strange to say that the decisions of the NLRB and the FTC ought not to receive *Chevron* deference. Indeed, the Court has held that at least some NLRB decisions are owed deference,¹⁶⁸ notwithstanding the fact that those decisions do not have the force of law.

4. Fictions and Heuristics

Most importantly, the relationship among “force of law,” formal procedure, and *Chevron* deference is confusing. *Mead* seems to insist on close links among these three moving parts. But what does any one of these have to do with the other two?

¹⁶⁵ 5 U.S.C. § 553(b)(3)(B) (2000).

¹⁶⁶ See Merrill & Watts, *supra* note 162, at 470–71.

¹⁶⁷ *Id.* at 504–06 & n.180, 511.

¹⁶⁸ See, e.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (“[W]e have traditionally accorded the Board deference with regard to its interpretation of the NLRA . . .”).

In *Mead*, 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 the power to act with the force of law. 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.

The Court’s reasoning might be 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.

What, then, is the relevance of relatively formal procedures? There are two possibilities. The first possibility is that 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 cannot easily tell whether an agency can act with the force of law, but an agency is presumed to be entitled to do so if Congress has granted it the power to engage in rulemaking or adjudication. This idea does not fit with long-held understandings of when an agency acts with the force of law, and as a matter of actual legislative instructions, it is probably wrong.¹⁶⁹ Nonetheless, it is not the worst reconstruction of judicial understandings in the last two decades.¹⁷⁰

¹⁶⁹ See Merrill & Hickman, *supra* note 19, at 871–72.

¹⁷⁰ *Id.* at 872.

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 stage or another, 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 therefore might 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 actual and concrete. 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”¹⁷¹—by, for 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 creates an opportunity to participate in agency processes¹⁷² and which operates, in practice, to require agencies to produce detailed explanation for their decisions.¹⁷³ If we emphasize the phrase “fairness and deliberation,” we can see *Mead* as attempting to carry forward a central theme in administrative law: developing surrogate safeguards for the protections in the Constitution itself.¹⁷⁴

By contrast, informal processes—certainly of the sort that result in thousands of 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

¹⁷¹ 533 U.S. 218, 230 (2001).

¹⁷² 5 U.S.C. § 553(c) (2000).

¹⁷³ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43–44 (1983).

¹⁷⁴ See Sunstein, *supra* note 72, for an overview; for important cases implicitly reflecting this theme, see *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378–79 (1998); *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 56; *Zhen Li Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005).

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 and 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 this reconstruction is enough to justify what the Court has been doing—or that it provides an adequate response to Justice Scalia. The initial problem involves the sheer burdens of judicial decisions reviewing agency action. Suppose, as is clear, that the values promoted by *Mead* come at the price of introducing a significantly more complex system of law.¹⁷⁵ 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*.¹⁷⁶ This is a particular problem in light of evidence that when *Chevron* does not apply, judicial ideology ends up playing a large role in judicial judgments about the legality of agency interpretations of law.¹⁷⁷ If all this is so, the burdens of *Mead* may not be worth incurring. This point is buttressed by the fact that the choice between *Chevron* and *Skidmore* will often be irrelevant to the resolution of cases. If the outcome under the two tests is often identical, does it really make sense for courts and litigants to spend a great deal of time obsessing over whether *Skidmore* or *Chevron* governs?

If courts could easily apply the approach suggested by *Christensen*, *Mead*, and *Barnhart*, that method would not be entirely without appeal. Above all, it would ensure that agency interpretations

¹⁷⁵ See Bressman, *supra* note 14, at 4–7; Vermeule, *supra* note 21, at 349.

¹⁷⁶ 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, 1120–21 (1987) (noting that under *Skidmore* courts are responsible for interpreting statutes, whereas under *Chevron*, courts have the simpler task of determining whether the agency interpretation was reasonable).

¹⁷⁷ See Miles & Sunstein, *supra* note 3 (showing that on the Supreme Court, ideological splits between conservative and liberal justices are significantly greater in cases not applying the *Chevron* framework than in cases doing so).

would receive *Chevron* deference only if they were a product of procedures that increase the likelihood of reasoned decision-making. 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. Nevertheless, serious problems would 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. 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 explanation 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. In addition, as Justice Scalia has emphasized, it is not obvious that agencies should generally be encouraged to use more formal procedures, because such procedures tend to ossify the administrative process and hence make it more difficult for agencies to implement the law.¹⁷⁸ 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.¹⁷⁹

Mead is evidently motivated by a concern that *Chevron* deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures. But *Chevron* is no blank

¹⁷⁸ See Stephen Breyer et al., *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 316 (5th ed. 2002).

¹⁷⁹ See E. Donald Elliott, *Re-inventing 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.”).

check to agencies.¹⁸⁰ 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.¹⁸¹ 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*.¹⁸²

I hope that I have said enough to show that identifiable and legitimate concerns lie behind *Mead*. But it is reasonable 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.¹⁸³ 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. This approach, however, seems to be foreclosed by *Mead* and *Barnhart*.

E. Out of the Bind

In short, the Court appears to have placed itself and lower courts into a bind from which extrication is extremely difficult. The Court seems to have opted for a complex standard over a simple rule in precisely the circumstances in which a complex standard makes the least sense: numerous decisions in which little is gained by particularized judgments. These 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

¹⁸⁰ For evidence, see Miles & Sunstein, *supra* note 3.

¹⁸¹ See, e.g., *Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 462–63 (D.C. Cir. 1989).

¹⁸² See, e.g., *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 376–77 (1998); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 56–57 (1983); *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 39 (D.C. Cir. 2005).

¹⁸³ For an argument in this direction, see Merrill, *Mead Doctrine*, *supra* note 162.

issue is the opening question in a vast array of administrative law cases—the Step Zero trilogy forces courts to undertake complex inquiries when it is far from clear that 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 most 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.¹⁸⁴ In *General Dynamics Land Systems, Inc. v. Cline*,¹⁸⁵ the Supreme Court was confronted with the question whether the Age Discrimination in Employment Act (“ADEA”) forbids “reverse age 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 Equal Employment Opportunity Commission (“EEOC”) regulation concluding otherwise. The parties strenuously disputed the (open)

¹⁸⁴ See, e.g., *Ranbaxy Labs., Ltd. v. FDA*, 96 Fed. App'x 1, 1 (D.C. Cir. 2004); *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879–80 (7th Cir. 2002). This strategy is helpfully described as “*Chevron* avoidance” in Bressman, *supra* note 14, at 30. 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. Even in the face of uncertainty, agencies are likely to make changes 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.

¹⁸⁵ 540 U.S. 581 (2004).

question whether the EEOC regulation should be given *Chevron* or *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 clearly wrong.”¹⁸⁶ 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 between *Skidmore* and *Chevron*, or even to defer, because the EEOC was clearly right.”¹⁸⁷ Similarly, in *Mylan Laboratories, Inc. v. Thompson*, the appellate court noted that “the result would likely be the same” under *Skidmore* or *Chevron*.¹⁸⁸

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

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.¹⁸⁹ Let us turn more specifically to the question of *why* the Court refused to give *Chevron* deference to the tariff classification letter at issue in *Mead*. The Court did not rest content with the observation that such letters were not a product of formal processes. Instead, it said “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.”¹⁹⁰ 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 offices is self-refuting.”¹⁹¹ If these sentences are emphasized, *Mead* emerges as a highly pragmatic case resting on the evident problems with de-

¹⁸⁶ Id. at 600.

¹⁸⁷ Id. (citing *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002)).

¹⁸⁸ *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1280 n.6 (D.C. Cir. 2004).

¹⁸⁹ In the same vein, see Barron & Kagan, *supra* note 24, at 257, emphasizing that “[b]oth 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.”

¹⁹⁰ *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001).

¹⁹¹ Id. at 219.

ferring to the numerous lower-level functionaries who produce mere letter rulings.¹⁹²

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 emphasis in *Barnhart* on the agency's "interstitial" judgment on a complex issue, calling for specialized expertise. 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 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.

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. This debate has returned in a separate Step Zero trilogy involving major questions; I now turn to that trilogy.

III. WINNING BY LOSING: *CHEVRON* AND BIG ISSUES

A. Old Debates

1. *Interstitial Questions, Major Questions*

Recall that in his 1986 article, 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 instead central aspects of the statutory scheme, a degree of independent review is desirable.¹⁹³ *Barnhart* endorses this claim; it suggests that "interstitial" judgments will be reviewed under

¹⁹² See Barron & Kagan, *supra* note 24, at 238–41.

¹⁹³ In the same vein, see Breyer, *Active Liberty*, *supra* note 52, at 105–07.

Chevron, with the clear implication that noninterstitial judgments will be reviewed more independently.¹⁹⁴

The most plausible source of the idea that courts should not defer to agencies on larger questions is the implicit delegation principle, accompanied by an understanding of what reasonable legislators would prefer. Judge Breyer appeared to think that Congress should be understood to want agencies to decide interstitial questions, but to prefer that courts resolve the larger ones, which are necessary to clarify and stabilize the law. But what is the rationale for this conclusion? At first glance, there is no reason to think that the considerations that animate *Chevron* do not apply to large questions. 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 rather than the courts.¹⁹⁵

Indeed, the example is a version of *Chevron* itself. *Chevron* hardly involved an interstitial question of the sort at issue in the everyday administration of the CAA; it involved a significant rethinking of the definition of the statutory term "source." 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."¹⁹⁶ But this argument is unconvincing. If Congress has, in fact, focused upon, and answered, major questions, agencies must accept those answers under *Chevron* Step One. By

¹⁹⁴ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

¹⁹⁵ Note that this particular example is not 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. See Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 *Env'tl. L. Rep.* 10297, 10306-07 (2004).

¹⁹⁶ Breyer, *supra* note 23, at 370.

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. With "major questions," there is no reason to think that Congress, and reasonable legislators, seek a judicial rather than administrative judgment.¹⁹⁷

A better justification for the distinction between interstitial and major questions involves agency incentives. Perhaps there is less reason to trust agencies when they are making large-scale judgments about statutory meaning. Parochial pressures, such as those imposed by interest groups, may distort agency decisions in one or another direction; agency self-interest, such as the expansion of administrative authority, may also increase the likelihood of bias. Judge Breyer might be taken to have suggested that on interstitial questions, involving everyday administration, agencies could be trusted, but not so when a major decision was involved. And if agencies are systematically less 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, and it is hardly clear that courts are in a substantially better position to resolve the "major" questions than are agencies. 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.¹⁹⁸ These constraints produce significant checks on potential agency self-interest and bias.

¹⁹⁷ In fact, evidence shows that often judicial judgments are based on the judge's own policies. See Miles & Sunstein, *supra* note 3.

¹⁹⁸ See cases cited *supra* note 182.

Judge Breyer's challenge to the simple reading of *Chevron* referred more generally to the psychological difficulty that judges may have in believing that an agency interpretation is both reasonable and wrong—a difficulty that might well 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 interpretations, even major ones, are hard to defend but not “irrational.”¹⁹⁹ 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* either generally or for major questions in particular. 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 irrelevant.²⁰⁰

2. Jurisdiction

In an early debate, the Court divided on the question whether *Chevron* applies to jurisdictional disputes,²⁰¹ and this particular Step Zero question remains unsettled in the lower courts.²⁰² It is easy to

¹⁹⁹ See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955).

²⁰⁰ Perhaps Judge Breyer ought to be taken as venturing a version of “ought implies can,” through the suggestion that the Supreme Court should not ask judges to maintain a psychologically unrealistic attitude. So stated, the argument is logical, but the use of lenient standards of review suggests that judges can indeed maintain that attitude.

²⁰¹ Compare *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring in the judgment) (arguing in favor of granting deference to agency interpretations of jurisdictional statutes), with *id.* at 386–87 (Brennan, J., dissenting) (arguing that deference ought not be given to agencies on jurisdictional questions because agencies do not “administer” statutes conferring or confining their jurisdiction).

²⁰² See, e.g., *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) (refusing to defer to an agency interpretation on jurisdictional issue); *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 602–06 (3d Cir. 1996) (deferring on jurisdictional issue involving definition of “employee”); *Alaska v. Babbitt*, 72 F.3d 698, 704 (9th Cir. 1995) (deferring on jurisdictional issue involving definition of “public lands”). A recent discussion can be found in *NRDC v. Abraham*, in which the court, after finding a Step One violation, adds that “it seems highly unlikely that a responsi-

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.”²⁰³ In his view, “agencies can claim no special expertise in interpreting a statute confining its jurisdiction,” and Congress cannot be presumed to have intended the “agency to fill ‘gaps’ in a statute confining the agency’s jurisdiction.”²⁰⁴

But any exemption of jurisdictional questions is vulnerable on two grounds. First, the line between jurisdictional and nonjurisdictional questions is far from clear; hence any exemption threatens to introduce more complexity into the world of *Chevron*. 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.”²⁰⁵ 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. 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.”²⁰⁶ Of course the claim about what “Congress would naturally expect” is a fiction, but perhaps it is the most useful one.

Consider a prominent example. During the Clinton Administration, the EPA contended that it could assert jurisdiction over

ble Congress would implicitly delegate to an agency the power to define the scope of its own power”—and then suggests that *Mead* (!) provided the appropriate framework. 355 F.3d 179, 199–200 (2d Cir. 2004) (quoting *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987)).

²⁰³ *Miss. Power & Light*, 487 U.S. at 387 (Brennan, J., dissenting).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 381 (Scalia, J., concurring in the judgment).

²⁰⁶ *Id.* at 381–82.

greenhouse gases under ambiguous provisions of the CAA.²⁰⁷ During the Bush Administration, the EPA contended that it could not do so.²⁰⁸ The difference is undoubtedly attributable to some combination of political commitments and readings of relevant evidence. If this is so, there is every reason to give deference to the agency's jurisdictional judgment under *Chevron*. In the end, there is no sufficient basis for an exception to *Chevron* when jurisdictional issues are involved.

B. The Major Question 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 of 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 interstitial and major questions. Ironically, Justice Breyer dissented from the most important and explicit of these decisions, which borrowed from and cited his central argument.

1. An "Unlikely" Delegation: MCI

The first case in the Major Question trilogy is *MCI Telecommunications Corp. v. AT&T*.²⁰⁹ 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.²¹⁰ As part

²⁰⁷ See J. Christopher Baird, Note, Trapped in the Greenhouse?: Regulating Carbon Dioxide after *FDA v. Brown & Williamson Tobacco Corp.*, 54 Duke L.J. 147, 150 (2004); Nicholle Winters, 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, 2000–01 (2004).

²⁰⁸ Baird, *supra* note 207, at 178; Winters, *supra* note 207, at 1996; see also Memorandum from Robert E. Fabricant, EPA General Counsel, to Marianne L. Horinko, Acting EPA Administrator (Aug. 28, 2003), <http://www.epa.gov/airlinks/co2petitiongcmemo8-28.pdf>.

²⁰⁹ 512 U.S. 218 (1994).

²¹⁰ 47 U.S.C. § 203(b)(2) (1988) (current version at 47 U.S.C. § 203(b)(2) (2000)).

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 were not required to do so.

At first glance, this was a straightforward Step One question, and by a 6-3 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 definition that, in the Court's view, permitted only "moderate" or "modest," rather than fundamental, change.²¹¹ Justice Stevens's dissenting opinion pointed out, however, that a long-established meaning of "modify"—"to limit or reduce in extent or degree"—was fully compatible with the FCC's decision.²¹² 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. Perhaps Justice Scalia's opinion should be taken as a vindication of his 1989 promise 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."²¹³ 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."²¹⁴ 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."²¹⁵ 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. Indeed, the Court's emphasis on the important, and hardly interstitial, nature of the question at issue might

²¹¹ *MCI*, 512 U.S. at 225.

²¹² *Id.* at 242 (Stevens, J., dissenting).

²¹³ *Id.* at 231 (majority opinion).

²¹⁴ *Id.*

²¹⁵ *Id.*

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*.²¹⁶ At issue was a provision of the Endangered Species Act ("ESA") that makes it unlawful to "take" a member of an endangered species.²¹⁷ The word "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."²¹⁸ By regulation, the Department of the Interior adopted a broad understanding of the word "take," interpreting it to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."²¹⁹ 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").²²⁰ The Court might have held that the context forbids an interpretation that would include mere habitat modification and unintended injury to members of endangered species. Indeed, Justice Scalia, true to his account in 1989 and emphasizing dictionaries as he did in *MCI*, was willing to find a "plain meaning" of the statute that prohibited the agency's understanding.²²¹ But the Court took neither of

²¹⁶ 515 U.S. 687 (1995).

²¹⁷ 16 U.S.C. § 1538(a)(1) (1988) (current version at 16 U.S.C. § 1538(a)(1) (2000)).

²¹⁸ 16 U.S.C. § 1532(19) (1988) (current version at 16 U.S.C. § 1532(19) (2000)).

²¹⁹ 50 C.F.R. § 17.3 (1994) (current version at 50 C.F.R. § 17.3 (2004)).

²²⁰ 16 U.S.C. § 1532(19).

²²¹ *Sweet Home*, 515 U.S. at 714, 736 (Scalia, J., dissenting). The Court might have invalidated the regulation by reference to some canon of construction, perhaps in-

these approaches. Instead it embarked on its own 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 manifest[ed] its intent" to forbid the regulation.²²² The Court then 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."²²³ 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)."²²⁴ As it happens, page 373 of this essay contains the heart of Judge Breyer's attack on *Chevron*, on the ground that the proper judicial attitude toward review of questions of law cannot "be reduced to any single simple verbal formula."²²⁵

This 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; on the contrary, it goes to the heart of the ESA. 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. At the same time, however, 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.

volving the protection of property rights. Indeed, Justice Scalia's opinion contains an opening gesture in that direction. *Id.* at 714.

²²² *Id.* at 703 (majority opinion).

²²³ *Id.*

²²⁴ *Id.* at 703–04.

²²⁵ Breyer, *supra* note 23, at 373.

Unlike in *MCI*, the agency in *Sweet Home* 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 citation to the 1986 essay, appear to endorse Judge 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 Tobacco Corp.*²²⁶ At issue 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.”²²⁷ 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 the case presented 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 recent decades—legislation that, in the Court’s view, should “preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products.”²²⁸ This argument had a degree of fragility, as the Court appeared to appreciate; repeals by implication are disfavored,²²⁹ 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

²²⁶ 529 U.S. 120 (2000).

²²⁷ 21 U.S.C. § 321(g)(1)(C) (1994) (current version at 21 U.S.C. § 321(g)(1)(C) (2000)).

²²⁸ *Brown & Williamson*, 529 U.S. at 155.

²²⁹ See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–90 (1978) (citing *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974)).

some measure, by the nature of the question presented.²³⁰ *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.”²³¹ 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.”²³² 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.”²³³

Ironically, Justice Breyer dissented from the Court’s conclusion; even more ironically, he offered a powerful rebuttal to his own argument from 1986. He acknowledged that “one might claim” a “background canon of interpretation” to the effect that decisions with enormous social consequences “should be made by democratically elected Members of Congress rather than by unelected agency administrators.”²³⁴ In this way, he suggested, even more clearly than the Court, that some rejections of agency interpretations of statutes might be rooted in nondelegation principles, reflecting a reluctance to take ambiguous provisions as grants of “enormous” discretion to agencies. In this case, however, he found any such background principle inapplicable, because the decision to regulate tobacco is one for which the incumbent administration “must (and will) take responsibility.”²³⁵ He reasoned that because of its high visibility, that decision would inevitably be known to the public, and officials would 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

²³⁰ *Brown & Williamson*, 529 U.S. at 159.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 160.

²³⁴ *Id.* at 190 (Breyer, J., dissenting).

²³⁵ *Id.*

the entire Nation elects.”²³⁶ 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.”²³⁷

There is a close link between Justice Breyer’s arguments in *Brown & Williamson* and the Court’s emphasis on procedural protections 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’s confidence in these safeguards is well-founded and that his argument casts serious doubt on his own claims 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* suggests that *Chevron* deference is not owed 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 CAA?²³⁸ 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. Under *Mead* and *Brown & Williamson*, however, it would be easy to argue that Congress, and not the EPA, should decide whether the EPA ought to be regulating greenhouse gases. This is a fundamental question about the reach of federal environmental law. In fact, the EPA’s General Counsel under President Bush has used this argument.²³⁹

²³⁶ Id.

²³⁷ Id. at 190–91.

²³⁸ See generally Baird, *supra* note 207; Winters, *supra* note 207.

²³⁹ See Memorandum from Robert E. Fabricant, *supra* note 208.

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 large or fundamental questions must be resolved judicially rather than administratively. I believe that despite some of their language, *MCI* and *Brown & Williamson* 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 by courts rather than agencies. In fact, there are two problems with that conclusion. The first is that, as with the distinction between jurisdictional and non-jurisdictional questions, the difference between interstitial and major questions is extremely difficult to administer. Even if sensibly administered, it raises doubts about an array of judicial decisions, including *Chevron* itself. The second problem is that expertise and accountability, the linchpins of *Chevron*'s legal fiction, are highly relevant to the resolution of major questions; it follows that so long as the governing statute is ambiguous, such questions should be resolved by agencies, not by courts.

Assume, for example, that the statutes in *MCI* and *Brown & Williamson* were genuinely ambiguous—that the relevant sources of interpretation could plausibly be read either 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 the FDA. But would it really be better to understand Congress to have delegated the resolution of those questions to federal courts, with their own political inclinations?²⁴⁰ I have referred to the concern that on major questions, interest-group power and agency self-dealing might produce

²⁴⁰ See Miles & Sunstein, *supra* note 3.

a real risk, one that is sufficient to call for a reduced degree of judicial deference. But even if that concern is well-grounded, the standard *Chevron* framework provides ample constraints on bias and self-dealing.

2. *Chevron vs. Nondelegation*

Perhaps *MCI* and *Brown & Williamson* should not be understood to say that major questions will be resolved by courts rather than agencies. Perhaps 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.²⁴¹

On this view, *MCI* and *Brown & Williamson* are not Step Zero decisions at all; 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. Under this approach, it does not matter if this principle is described in terms of *Chevron* Step Zero or *Chevron* Step One. 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 ambiguous statutes so as to apply beyond the territorial boundaries of the United States.²⁴² Nor are agencies allowed to interpret ambiguous statutes to apply retroactively.²⁴³ An agency cannot construe an ambiguous statute so as to raise serious constitutional doubts.²⁴⁴ In

²⁴¹ For a valuable discussion, see John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223.

²⁴² *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

²⁴³ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

²⁴⁴ See *id.*; see also *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (“Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach con-

these and other contexts, courts have insisted on a series of *non-delegation canons*, which require legislative, rather than merely executive, deliberation on the issue in question.²⁴⁵ 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 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.²⁴⁶

For those who are enthusiastic about the nondelegation doctrine, this background principle will have considerable appeal, above all because it 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 products). But the principle faces three problems. The first is the uncertain foundations of the argument for the nondelegation doctrine itself.²⁴⁷ As a matter of text and history, the doctrine does not have a clear constitutional pedigree, and it is controversial, to say the least, 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, for both cases involved large-scale questions of policy and

stitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.²⁴⁵).

²⁴⁵ See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000) (analyzing the use of nondelegation canons in recent cases). *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), may depend on a nondelegation canon to the effect that federal intrusions on state authority must be explicit; but Justice Scalia offers a powerful criticism of this account of the outcome. *Id.* at 935–36 (Scalia, J., dissenting) (arguing that federalism canons should be limited to constitutional avoidance and preemption, and this case involved neither).

²⁴⁶ Cf. Manning, *supra* note 241 (discussing and challenging the use of nondelegation principles as tools of statutory construction in *Brown & Williamson*).

²⁴⁷ See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002) (questioning the existence of the nondelegation doctrine).

what might be seen as fundamental changes in the existing statutory scheme—yet in both, the Court accorded deference to the agency's interpretation.

The third and most serious problem is that expertise and accountability are entirely relevant to questions about contraction or expansion of statutory provisions.²⁴⁸ If a nondelegation principle is meant to prevent agencies from significantly altering 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, based on the Court's refusal to accept the agency's modification of the tariff scheme as within statutory bounds. Since regulatory programs last for decades and operate 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 version of the old (and discredited) idea that statutes in derogation of the common law should be narrowly construed.²⁴⁹ *Brown & Williamson* could be understood to reflect that idea insofar as it bans the FDA from expanding the reach of its governing statute. If so, the Court should not build on *Brown & Williamson*. Of course, it is true that in the modern state, agencies cannot be permitted to act 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 interpretations do not

²⁴⁸ See generally Manning, *supra* note 241.

²⁴⁹ See *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 623–25 (1927); *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305–07 (1924). But see Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 *Vand. L. Rev.* 438 (1950) (arguing that rules of statutory interpretation taking the form of presumptions, including the canon that statutes derogating from the common law must be strictly construed, should be discarded).

violate a particular interpretive principle, such as the principles against extraterritoriality, retroactivity, and serious constitutional doubts.²⁵⁰

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 aspect of the Step Zero inquiry, refusing to apply the *Chevron* framework to major questions. When such questions are involved, Steps One and Two continue to provide the appropriate framework. There is no sufficient reason for a “major question” exception to *Chevron*.

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,²⁵¹ 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. In his 1986 article, Judge Breyer 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 reasonable 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.

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. To a significant extent, 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

²⁵⁰ See Sunstein, *supra* note 44.

²⁵¹ See Percival, *supra* note 2, at 10613.

the force of law, *Chevron* applies, and agency decisions that result from formal procedures are taken to have the force of law.²⁵² Nonetheless, the *Christensen-Mead-Barnhart* trilogy, creating a Step Zero inquiry, represents a significant triumph for Justice Breyer's efforts to domesticate *Chevron*.

At the same time, *Sweet Home*, *MCI*, and *Brown & Williamson*—the Major Question trilogy—seem to be Step Zero decisions in Step One guise.²⁵³ 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. For this reason, the decisions suggest the possibility of a significant addition to the inquiry under Step Zero, by which courts deny deference to agency decisions involving major questions of policy.

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 over rules in precisely the context in which rules make the most sense: numerous and highly repetitive decisions in which little accuracy is to be gained by a more particularized approach. Since 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 should handle the Step Zero question either by noticing that the choice between *Chevron* and *Skidmore* usually will not matter, or by applying the ordinary *Chevron* framework to most cases, as the Court did in *Barnhart*. 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 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

²⁵² As I have noted, some agency actions do not have the force of law, even if based on formal procedures (e.g., the decisions of the NLRB. See *supra* Section II.D.3.).

²⁵³ Cf. Manning, *supra* note 241 (exploring *Brown & Williamson* in nondelegation terms).

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 not through Step Zero but 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. In this context, however, the extraordinary complexity introduced by the emerging law of Step Zero serves no useful purpose.
