# THE MANY HEADS OF THE CHEVRON HYDRA: CHEVRON'S REVOLUTIONARY EVOLUTION BETWEEN 1984 AND 2023

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## ABSTRACT

*Chevron* deference is an integral part of administrative law. However, the Supreme Court has not applied *Chevron* consistently throughout *Chevron*'s nearly forty-year history. While trying to apply what facially appears to be a simple test, the Court has added more steps to the test, contradicted prior cases applying *Chevron*, and undermined *Chevron* itself. The Court has been especially unclear in four areas: deciding when a statute is ambiguous and applying the canons of construction, determining if an agency's interpretation has the "force of law," choosing whether prior precedents or an agency's new interpretation control when they conflict, and deciding whether to defer to an agency's interpretation of the scope of its own authority. This confusion has made *Chevron* unworkable and undermines its durability as a precedent. Litigants have little confidence in how the Supreme Court will apply *Chevron*, let alone how the lower courts will apply it. *Chevron* has outlived its usefulness and should be replaced with de novo review. De novo review frees courts to find the right answer, and although not easy to apply, it is much more straightforward than *Chevron*.

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## I. INTRODUCTION

On June 25, 1984, the United States Supreme Court decided the seminal administrative law case *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc*.[1] On the following day, a newspaper article in the New York Times stated *Chevron* "contained broad language on the need for courts to defer to agency interpretations of ambiguous statutes, language that is likely to find its way into future administrative law rulings on subjects far removed from the Clean Air Act."[2] Looking back nearly forty years and over twelve thousand judicial citations later, that was an understatement.

*Chevron* created the famous two-step test: First, courts ask whether a statute is ambiguous. If so, then the court will defer to the agency's interpretation of the statute so long as the agency's interpretation is

1. 467 U.S. 837 (1984).
2. Linda Greenhouse, *Court Upholds Reagan on Air Standard*, N.Y. TIMES, June 26, 1984, at A8.

reasonable. Although that test became universally famous,[3] it has not been consistently applied, even by the Supreme Court. The Court has gone back and forth over critical questions related to the doctrine, including how to determine whether: a statute is ambiguous ("Step One"), an interpretation is worthy of *Chevron* deference, an agency's new interpretation controls over prior precedent, and an agency can receive deference for interpreting the scope of its own jurisdiction.

Justice John Paul Stevens famously believed that *Chevron* merely applied current law and did not change anything.[4] In many ways, *Chevron did* apply the then-current administrative law jurisprudence. But *Chevron*'s two-step *test* was new: it transformed what had been a principle of deference—courts would defer when an agency's interpretation satisfied a multi-factor balancing test asking if the interpretation was persuasive—into a binding rule: courts were *required* to defer if the statute was ambiguous and the agency's interpretation was reasonable.

The history of *Chevron* shows the difficulty of creating a workable test for judicially reviewing agencies' interpretations. In the first couple of post-*Chevron* agency interpretation cases, the Court interpreted *Chevron* consistently and applied the canons of construction before deferring. But within a few short years, the Court stopped applying *Chevron* consistently and encountered interpretive issues that would not fit cleanly into the two-step test. *Chevron* evolved to try to fit these new situations and became a tool of reflexive deference. Even though Justice Stevens thought he was restating the then-current state of the law,[5] *Chevron* changed the game and became the most important administrative law case in American jurisprudence.[6]

However, *Chevron* has not worked. Its evolution has not been a straight line but a winding, twisting, back-and-forth affair that has deprived litigants of any certainty on how courts will review a given agency's interpretation. As the Supreme Court has flipped back and forth, trying to preserve *Chevron* and properly apply the test in new situations, the irony is that these inconsistencies make it an unworkable precedent that must be overruled.

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3. The case was the subject of a NYU School of Law Student Bar Association dance parody video. *See* Lewie Briggs, *The* Chevron *Two Step*, YOUTUBE (May 4, 2014), https://www.youtube.com/watch?v=uHKujqyktJc [https://perma.cc/7Z5J-PJTR].

4. Justice John Paul Stevens & Linda Greenhouse, *A Conversation with Justice Stevens*, 30 YALE L. & POL. REV. 303, 315 (2012).

5. *Id.*

6. Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 2-5 (2013); Peter M. Shane & Christopher J. Walker, *Foreword, Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475-76 (2014).

*Chevron* created more questions than it answered, becoming the Hydra[7] of American jurisprudence—after answering one question, more grew in its place.

*Chevron* should be replaced with de novo review. De novo review would resolve many of the problems the Court has faced trying to create a test for deferring to an agency's interpretation. Instead of trying to determine if Congress has delegated to the agency so that the Court must defer, de novo review would simplify the separation of powers, and the judiciary would fully exercise all of its judicial and interpretive power in finding the best meaning of the statute. De novo review has its own difficulties, *such as* when courts are faced with complex and technical statutes. But courts have the interpretive tools for even the most complex statutes. De novo review would still allow courts to give weight to the agency's persuasive interpretation, especially when the agency has expertise in that area. Persuasive interpretations are given weight in all types of litigation, including in the private sector. De novo is not easy, but it is simple.

In the October 2023 term, the Supreme Court will have a chance to overrule *Chevron* in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*.[8] The Court should take that opportunity to overrule *Chevron* and make de novo review the required standard of review. This would clarify statutory interpretation and allow courts to find the best interpretation of statutes instead of trying to conform unforeseen interpretive issues with the short-sighted *Chevron* decision. *Chevron* has outlived its usefulness, and as Justice Gorsuch urged in his dissent from denial of certiorari in *Buffington v. McDonough*, it is time to give *Chevron* a "tombstone no one can miss."[9]

Section I of this article discusses the *Chevron* decision and looks at how *Chevron* fits into the standard of review jurisprudence of its day. Section II examines some of the significant court of appeals cases in 1984 that applied *Chevron* and gave *Chevron* its legs. The majority of this article is spent on Section III, which walks through how the Supreme Court applied *Chevron* between 1984 and 2023. The Court has struggled to consistently apply *Chevron*, especially in four areas: finding ambiguity and applying the canons of construction, deciding when an interpretation was issued with the force of

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7. Hydra is a mythical creature whose every severed head is replaced with two new ones. With *Chevron*, the Court would answer one question, but multiple new questions would arise. In addressing the new questions, the Court would contradict its first decision, creating even more *Chevron* heads that needed to be cut off.

8. Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429, 2429 (2023) (mem.); Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325, 325 (2023) (mem.).

9. Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting) (mem.).

law, determining whether an agency could interpret the scope of its own authority, and choosing whether an agency's interpretation or prior precedent controlled. This section also examines other issues the Court has wrestled through, like the major questions doctrine, how much statutory context a court should consider when asking whether a statute is ambiguous, whether conflicting statutes created ambiguity, and whether courts could defer on matters of pure statutory interpretation or only on policy issues, as well as whether there was a difference between statutory and policy questions. Finally, in Section IV, the article briefly explains why de novo review should replace *Chevron* deference.

## II. CHEVRON, U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL, INC.: THE ACCIDENTAL REVOLUTION

At issue in *Chevron* was the Environmental Protection Agency's ("EPA's") interpretation of "stationary source" in the 1977 amendments to the Clean Air Act.[10] The Clean Air Act required permits for "new or modified major stationary sources" of air pollutants.[11] The EPA promulgated a regulation that allowed each plant to be considered a single "stationary source," meaning plants could change or modify individual pieces of equipment without getting a permit so long as the total pollution emitted by the plant remained the same or lower than before.[12] This was referred to as the "bubble" concept.[13] Environmental groups challenged the regulation,[14] and the D.C. Circuit set aside the regulation as "inappropriate" and contrary to the statute's purpose.[15] The EPA petitioned the Supreme Court for review, and the Court granted certiorari.[16]

At the Supreme Court, Justice Stevens wrote for the majority.[17] After explaining the statute, regulation, and procedural posture, the Court gave the two-step standard of review for an agency's statutory interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of

10. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839-40 (1984).
11. *Id.* at 840.
12. *Id.*
13. *Id.*
14. *Id.* at 841 n.3; THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 59 (2022).
15. *Chevron*, 467 U.S. at 841 (quoting Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 724 (D.C. Cir. 1982)).
16. *Id.* at 842.
17. *Id.* at 839.

> the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[18]

Included in this test was the famous Footnote Nine: "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[19]

However, after providing this test, the Court proceeded with a more traditional statutory analysis. The Court examined the statutory text but found it neither defined the term "stationary source" nor referenced the "bubble" concept.[20] The Court then examined the Clean Air Act's legislative history; it too, did not address "the precise issue raised" by the bubble interpretation.[21] After that, the Court turned to the agency's interpretation. The EPA considered adding the plant-wide "bubble" definition of "stationary source" for years leading up to issuing the regulation.[22] In 1980, the EPA rejected this interpretation, stating that Congress intended a permit to be required for each new polluting piece of equipment, not just when the plant created more pollution.[23] But in 1981, after the Reagan administration took over, the agency adopted the bubble interpretation.[24]

After providing this detailed background, the Court turned back to the statutory text and the term "stationary source," concluding that "the language of [the statute] simply does not compel any given interpretation of the term 'source.'"[25] The Court then examined the definition of "stationary source" in a different statutory provision, but it too was unilluminating.[26] Finally, the Court concluded that the agency's interpretation was reasonable and aligned with Congress's intent as far as that was discernible.[27]

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18. *Id.* at 842-43.
19. *Id.* at 843 n.9.
20. *Id.* at 850-51.
21. *Id.* at 852-53.
22. *Id.* at 853-57.
23. *Id.* at 857.
24. *Id.* at 857-58.
25. *Id.* at 859-60.
26. *Id.* at 860-61.
27. *Id.* at 861-62.

> We know full well that [the statutory] language is not dispositive; the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation. To the extent any congressional "intent" can be discerned from this language, it would appear that the listing of overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act.[28]

The environmental groups challenging the EPA's "bubble" interpretation argued that the agency's interpretation should receive no deference since it was inconsistent. The Court responded by explaining that agency interpretations are "not instantly carved in stone" but should be flexible and allow the agency to pivot in "technical and complex arena[s]."[29] The agency's flip-flop was not the agency's fault, the Court explained, because the agency issued its initial interpretation in 1980 in compliance with a D.C. Circuit order.[30] The agency had not changed its own *internal* interpretation of the statute.[31]

Finally, the Court justified deferring as upholding the separation of powers. The Court explained that legislators and administrators made policy decisions, not the judiciary, so it was appropriate for the Court to defer to the more democratically accountable branches.[32] "[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[33] Justice Steven surmised that Congress did not address the specific question at issue for one of three reasons: first, Congress intended the agency to fill the void with its expertise, second, Congress did not think to address it, or third, Congress could not come to a conclusion and kicked the can to the executive branch.[34] The Court stated that even if Congress refused to make policy decisions, that did not justify judges doing so.[35] Rather, the

28. *Id.* at 862.
29. *Id.* at 863.
30. *Id.* at 864.
31. *Id.*
32. *Id.*
33. *Id.* at 865.
34. *Id.*
35. *Id.*

executive branch, which has at least some political accountability, should use its expertise and decide those matters.[36]

Taking a step back, Justice Stevens wrote a thorough opinion that considered multiple avenues of interpretation before deciding that the Clean Air Act was not clear and deferring to the agency's interpretation. The Court considered the Clean Air Act's text, legislative history, purposes, and the agency's interpretation to determine the Act's meaning.[37] Some of these are weak tools of interpretation, but the Court applied numerous tools before deferring.[38] Much has been made of Footnote Nine,[39] and how *Chevron* applied it, but the Court still could not find the answer. Only then did the Court defer, deciding that the agency's interpretation represented Congress's intention.

But the standard of review that the Court actually applied resembled then-current jurisprudence more closely than it resembled the new test that the Court spelled out. For example, *Chevron* quoted *United States v. Shimer* that courts "should not disturb [the agency's choice] unless it appears from the statute or its legislative history that the accommodation [wa]s not one that Congress would have sanctioned."[40] Similarly, the *Chevron* Court analyzed the text and legislative history *before* turning to the agency's interpretation and finding it to be reasonable.[41]

Professor Thomas Merrill pointed out the seeming disconnect between the standard of review contained in *Chevron*'s two-step test and the actual analysis performed in *Chevron*.[42] He suggested that Justice Stevens wrote the statutory analysis sections of the opinion before drafting the opening paragraphs and the two-step test.[43] Per Professor Merrill, Justice Stevens wrote the two-step test as a summary of the statutory analysis he performed, rather than as a test that he systematically worked through in the opinion.[44]

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36. *Id.* at 865-66.

37. *Id.*

38. Legislative history is dubious at best as a tool of construction. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 361-90 (2012).

39. *See* John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 395-96 (2023) (discussing the Court's renewed focus on Footnote Nine); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) (explaining the debate over which canons are traditional canons of construction under Footnote Nine).

40. 367 U.S. 374, 383 (1961).

41. *Chevron*, 467 U.S. at 859-63.

42. MERRILL, *supra* note 14, at 76-78.

43. *Id.* at 76.

44. *Id.* at 76-78.

That is indeed the case. Since Justice Stevens's papers are now available at the Library of Congress, and I examined his drafts of *Chevron*. The two-step test does not appear until a fifth draft, in a footnote. It is not until the sixth draft that the test appears in the body of the text.

In a draft dated May 25, 1984, Justice Stevens wrote an introduction, including the procedural posture, that is very similar to that of the final opinion.[45] But then, Justice Stevens launched into the statutory history, Section III of the final opinion,[46] foregoing any discussion of the standard of review.[47] This initial draft was short—only eleven pages—and it did not discuss legislative history. Instead, the draft focused on the text, but Justice Stevens ended by concluding that the statute's meaning was unclear and left two possible interpretations:

> Thus, this much is clear from the face of the statute. If a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to §172(b)(6) and in order to do so, it must satisfy the §173 conditions, including the LAER requirement. If, however, an old plant containing several large emitting units is to be modernized by the replacement of one unit emitting over 100 tons of pollutant, the question whether the new unit must satisfy the LAER requirement depends on whether the individual unit, or the entire plant, is regarded as the major statutory source.[48]

On May 29, Justice Stevens wrote a more thorough draft (although also labeled "First Draft"), including a detailed analysis of the legislative and regulatory history.[49]

In the fifth draft,[50] he included a section on the standard of review:

> The Court of Appeals addressed the wrong question in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's

45. Chevron v. Nat. Res. Def. Council, JPS Draft #1 [2$1005i, 2$1005if], at 1-2 (May 25, 1984).
46. *Chevron*, 467 U.S. at 845.
47. *Chevron*, JPS Draft #1, May 25, at 4.
48. *Id.* at 10-11.
49. Chevron v. Nat. Res. Def. Council, JPS Draft #1 [2$1005i, 2$1005if] (May 29, 1984).
50. The second through fourth drafts were not available in Justice Stevens's papers.

> view that it is appropriate in the context of this particular program is a reasonable one.[51]

This paragraph ended with a footnote:

> When Congress has implicitly left a gap for the agency to fill, and the agency has been accorded general authority to prescribe such regulations as are necessary to fulfill its statutory mandate, generally a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. . . . The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.[52]

This draft contained much of the reasoning behind the two-step test—searching for congressional intent, asking whether the agency's interpretation was reasonable, refusing to substitute the agency's construction with the court's construction of an ambiguous statute, and deferring to an agency's interpretation even if it was not the best. But this draft did not include the actual two-step test, and much of the reasoning for deferring was contained in the footnote rather than in the mainline text.

Later that same day, Justice Stevens wrote another draft, this time including the language of the famous test:

> Whenever a court is required to review an agency's construction of the statute which it administers, it may be confronted with two quite different questions. First, always, is the question whether Congress has directly spoken [to] the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must obey the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is a permissible interpretation of the statute. That, of course, is a different inquiry than the question that might confront a court that was authorized to place its own interpretation on an ambiguous statute.[53]

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51. Chevron v. Nat. Res. Def. Council, JPS Draft #5 [chevron, chevroni], at 5-6 (June 7, 1984).

52. *Id.* at 6 n.9.

53. Chevron v. Nat. Res. Def. Council, JPS Draft #6 [chevron, chevroni], at 5-6 (June 7, 1984) (footnote omitted).

This language is very similar to the test's language in the final *Chevron* opinion.[54]

Comparing these drafts offers insights into Justice Stevens's thoughts as he was writing. First, before crafting the standard of review, he examined the statutory language, and he concluded that it offered two possible interpretations. Then he reviewed the legislative history. After reviewing the legislative history, he concluded that the statute was silent on the definition of "stationary source," and that the agency's reasonable interpretation should control. Then, after all this, he summed it up with the two-step test. The test is phrased descriptively—when a court is faced with this type of question, this is how the court addresses it—rather than what courts *should* do. The descriptive phrasing here makes sense because Justice Stevens was describing the analysis that *he had already completed*—not the steps of an analysis that he was about to follow.

But even though this section reads as if Justice Stevens was describing what he had just done, parts of the standard of review section have nothing to do with the rest of the case. He wrote that courts should defer to an agency's reasonable interpretation even if the court would have chosen a different interpretation—but nowhere in the rest of his analysis does Justice Stevens question whether the EPA's interpretation of "stationary source" was the best or correct interpretation. Rather, Justice Stevens concluded that there was no interpretation better than the EPA's, and therefore, the EPA's was the proper interpretation.[55]

The statement about deferring even if the interpretation was not the best was irrelevant in this case, and one could argue that it was dicta. However, it does not read like dicta, since it is part of the standard of review that the reader believes the Court is about to apply. What the reader does not know is that this line was written after the bulk of the rest of the opinion was already drafted. Justice Stevens had already decided that the EPA's interpretation

54. *See* Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnote omitted)).

55. *Id.* at 859-60.

was "a permissible construction of the statute" before he ever decided to defer.[56]

Understanding that the two-step test and standard of review came after Justice Stevens's statutory and legislative history analysis gives a very different outlook on *Chevron* deference. It explains Justice Stevens's own belief that *Chevron* was not changing anything.[57] He did not think the test was new and important since it was written later and was a description of the statutory analysis that he had already performed. He also included the test as a description of the analysis that he thought he had performed, rather than a plan of the analysis he *would* perform. And as discussed above, after reading the entirety of the opinion, the analysis that Stevens went through in *Chevron* does not match the two-step test. It does not even match the test he created in his fifth draft, earlier in the day on June 7. This raises the question: would Stevens have written the same test if he had written it first and then explicitly applied it in the opinion? Or would he have recognized that it was as unworkable as later Supreme Court cases would demonstrate? We will never know. Neither will we ever know what prompted Justice Stevens to change the test on the afternoon of June 7 from a standard that was very similar to cases like *Shimer* to the rigid two-step test.

But what we do know is that a test that was written in an afternoon became the most definitive doctrine in administrative law for the next forty years. What humble beginnings for such a giant.

## III. THE BIRTH OF CHEVRON IN THE LOWER COURTS

The lower courts soon began applying *Chevron*, starting with a majority opinion written by then-Judge Stephen Breyer in *Mayburg v. Secretary of Human Services*.[58] In *Mayburg,* the Department of Health and Human Services claimed deference for its interpretation, but the district court interpreted the statute to preclude the agency's interpretation, and the First Circuit Court of Appeals also refused to defer.[59] Even though the agency's interpretation was long-held and consistent, the First Circuit found that the lower court's interpretation was more persuasive.[60] The appellate court explained that, among other things, three circuit courts had rejected the agency's interpretation, the lower court's interpretation was the clearest

56. Chevron v. Nat. Res. Def. Council, JPS Draft #1 [2$1005i, 2$1005if], at 22 (May 29, 1984).

57. *See* Stevens & Greenhouse, *supra* note 4, at 315.

58. 740 F.2d 100 (1st Cir. 1984).

59. *Id.* at 102-03, 106.

60. *Id.*

reading of the plain statutory language, and the lower court had correctly recognized that the statute at issue was to be broadly construed.[61]

The First Circuit discussed two lines of cases—those where courts deferred to the agency's interpretation and those where courts urged a more engaged form of judicial review.[62] Because of these differing lines of cases, the court held that judges needed to ask when and why a court should defer.[63] Sometimes, courts should defer because the agency has more expertise and better understands Congress's intentions.[64] Other times, courts could defer when Congress delegated interpretive power to the agency.[65] Congress could expressly or implicitly delegate, and the more important the legal issue, the more likely that express delegation would be required.[66] But if the legal issue was more mundane and closely related to the day-to-day activities of the agency, it was more likely Congress intended to implicitly delegate to the agency.[67] Here, since the legal issue was "central to the statutory scheme," the court, not the agency, was tasked with interpreting the statute.[68] The First Circuit concluded that complete deference was not appropriate and that the agency's interpretation was incorrect.[69]

A couple of years later, Judge Breyer recognized that *Chevron* was picking up steam, especially in the D.C. Circuit, even though he did not think that it would last.[70] As Professors Thomas Merrill, Gary Lawson, and others have explained, *Chevron* deference as we know it today came to life in the D.C. Circuit.[71]

In *General Motors Corp. v. Ruckelshaus*, Judge Patricia Wald wrote for the majority in the first D.C. Circuit case to apply *Chevron*.[72] The appellate court held that the agency's interpretation was reasonable and within

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61. *Id.*

62. *Id.* at 105 (discussing Judge Friendly's opinion in *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976)).

63. *Id.*

64. *Id*.

65. *Id.* at 106.

66. *Id.*

67. *Id.*

68. *Id.* at 107.

69. *Id.*

70. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-73 (1986). Then-Judge Breyer noted that *Chevron* was gaining steam in the D.C. Circuit, but he thought the test would not catch on because it was too simple and inadequate for the challenges that agencies regularly face. *Id.* at 373. Breyer's concerns with *Chevron* largely arose from his preference for multi-factor tests that can be molded for all types of circumstances. When he was elevated to the Supreme Court, he brought these concerns with him, and some of his *Chevron* opinions have a balancing test flare to them. *See generally* Barnhart v. Walton, 535 U.S. 212 (2002); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007).

71. MERRILL, *supra* note 14, at 83; Lawson & Kam, *supra* note 6, at 39.

72. 742 F.2d 1561, 1567 (D.C. Cir. 1984).

statutory bounds.[73] The court essentially skipped "Step One" and never asked whether the statute was ambiguous or applied the canons of construction.[74] Rather, the court deferred after deciding that the statute and the legislative history did not "compel[]" the petitioner's reading and that the statute supported the agency's interpretation.[75] Step One has often been forgotten or minimized throughout *Chevron*'s history,[76] so the appellate court's omission is not surprising. It is interesting, however, just how quickly courts began to abandon Step One and the canons of construction. Unlike in *Chevron* itself, the majority in *Ruckelshaus* reflexively deferred.[77]

Judge David Bazelon dissented; he was concerned that the court was deferring to an interpretation that would not have traditionally received deference.[78] His dissent explained that the agency's interpretation should have been reviewed under *Skidmore v. Swift & Co.*'s balancing test.[79] Judge Bazelon was concerned that the agency's interpretation was neither contemporaneous nor longstanding.[80] Prior to *Chevron*, courts had given weight to contemporaneous and customary agency interpretations, two traditional canons of construction, and part of the *Skidmore* test.[81] The *Ruckelshaus* dissent also noted that this interpretive rule presented a legal question, not a factual question, and legal questions normally receive de novo review.[82]

Judge Bazelon's concerns in his dissent were valid: he correctly pointed out that the majority did not apply the proper standard of review under that period's jurisprudence. However, after critiquing the majority for giving binding weight to the agency's interpretation, the dissent agreed that the agency should essentially receive what amounted to *Chevron* deference anyway: "[O]ur inquiry must focus on whether EPA's interpretation is

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73. *Id*.

74. *Id.* One of the problems with *Chevron* is that at a certain point, two separate analyses can merge and become indistinguishable: (1) determining whether Congress spoke to the specific issue and foreclosed the agency's interpretation; and (2) determining whether the agency's interpretation is reasonable.

75. *Id.* at 1567 n.8.

76. *See generally* Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996); Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996); Zuni Pub. Sch. v. Dep't of Educ., 550 U.S. 81 (2007).

77. *Ruckelshaus*, 742 F.2d at 1567.

78. *Id.* at 1572-75 (Bazelon, J., dissenting).

79. 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *see Ruckelshaus*, 742 F.2d at 1573 n.5 (Bazelon, J., dissenting).

80. *Ruckelshaus*, 742 F.2d at 1574 (Bazelon, J., dissenting).

81. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 909 (2017).

82. *Ruckelshaus*, 742 F.2d at 1574-75 (Bazelon, J., dissenting); *see* Lawson & Kam, *supra* note 6, at 40.

reasonable and supportable in light of the statutory language and legislative history."[83]

Later, in 1984, Judge Wald penned another *Chevron* opinion, this time applying each step of the *Chevron* test.[84] The D.C. Court of Appeals explained that the first step was to "determine whether Congress had a specific intent as to the meaning of a particular phrase or provision," which required "analyz[ing] the language and legislative history of the provision."[85] Under *Chevron*, it was the role of the judiciary and not the agency to "ascertain[] the congressional intent underlying a specific provision."[86] If the court could not determine Congress's intent, then the court had to consider "whether Congress implicitly delegated the agency the task of filling the statutory gap."[87] At Step Two, the court "must uphold the agency's interpretation if it 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'"[88]

After examining the statute and legislative history, the appellate court was "unable to find a single, concise statement anywhere in the statute or its legislative history" addressing the specific question at issue.[89] Even so, the court had the "indubitable impression that Congress intended" the *challenger's* interpretation.[90] However, that indubitable impression was not enough to end the analysis at Step One. Instead of applying what the court believed Congress intended, the majority held that the statute was ambiguous and continued to Step Two.[91] At Step Two, the court determined that the agency's interpretation was unreasonable because the arguments the agency made in support of its interpretation were unjustified by policy considerations and unsupported by the statute.[92] Therefore, the agency's interpretation was not reasonable and failed at Step Two.[93]

*Rettig* is both typical and unique among *Chevron* cases. First, like courts in many future *Chevron* cases, the court refused to choose the interpretation it thought was best because it found the statute was "ambiguous." Although *Chevron*'s language calls for this approach, in *Chevron,* the Court only

83. *Ruckelshaus*, 742 F.2d at 1575 (Bazelon, J., dissenting).
84. Rettig v. Pension Benefit Guaranty Corp., 744 F.2d 133, 140-56 (D.C. Cir. 1984).
85. *Id.* at 141.
86. *Id.*
87. *Id.*
88. *Id.* (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).
89. *Id.* at 150.
90. *Id.*
91. *Id.*
92. *Id.* at 151-55.
93. *Id.* at 155.

deferred after it could not find any indication whatsoever as to the meaning of the statute.[94] However, *Rettig* is atypical because the agency lost at Step Two.[95] By some counts, agencies have only lost *three times* at Step Two at the Supreme Court.[96] But Step Two was not intended to be meaningless, as *Rettig* indicates. There, the court made the agency actually prove the reasonableness of its interpretation. Unfortunately, at the Supreme Court, Step Two would become all but a formality.

*Chevron* was then sidelined for much of the rest of 1984.[97] Courts either did not invoke *Chevron* or applied a more muted version of the doctrine than the *Ruckelshaus* and *Rettig* courts.[98] At the end of 1984, Judge Wald wrote another *Chevron* decision.[99] In *Railway Labor Executives' Association v. U.S. Railroad Retirement Board*, Judge Wald applied the *Chevron* two-step.[100] The court found the statute was ambiguous at Step One, but the agency's interpretation again failed at Step Two.[101] The court explained that the agency's reasoning was too cursory, and the court could not determine if the interpretation was reasonable.[102] This opinion reads very similarly to *Rettig* and is another surprising loss at Step Two.

At a high level then, *Chevron* had a rocky start at the D.C. Circuit—the court was initially very deferential but then went the other way and handed agencies some unheard-of losses at Step Two. However, importantly, the court was applying *Chevron*.[103] By 1985, the D.C. Circuit was citing *Chevron* and applying the two-step test as settled law, even if the mechanics of the test were still inconsistent.[104] This inconsistency foreshadowed things to come at the Supreme Court.

## IV. CHEVRON AT THE SUPREME COURT

### A. CHEVRON TAKES ITS PLACE AT SCOTUS

Unlike at the D.C. Circuit, *Chevron* had a quiet first year at the Supreme Court. Of the nineteen cases addressing how much weight to give an agency's

94. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").
95. *Rettig*, 744 F.2d at 151-55.
96. MERRILL, *supra* note 14, at 116-17.
97. Lawson & Kam, *supra* note 6, at 44-45.
98. *Id.* at 46-47.
99. *Id.* at 47.
100. 749 F.2d 856, 860-64 (D.C. Cir. 1984).
101. *Id.* at 862.
102. *Id.* at 860-62.
103. Lawson & Kam, *supra* note 6, at 51.
104. *Id.* at 50-51.

interpretation, the Supreme Court only applied *Chevron* once,[105] in *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc*.[106] In this case, the Clean Water Act directed the EPA administrator not to "modify" the statutory requirements for pollutants.[107] The EPA continued to grant variances for certain pollutants, and the petitioners claimed these variances violated the Clean Water Act because the EPA was modifying the requirements.[108] The Court had to determine the meaning of "modify" in regard to the statutory requirement.[109] The Court applied *Chevron* and started with Step One. [110]

The petitioners argued that "modify" should be read broadly to include "any change or alteration in the standards."[111] However, this interpretation would have prevented the agency from fixing an error or from issuing stricter requirements.[112] Additionally, this construction would have contradicted later express directions in the statute.[113] Because the meaning of "modify" in the statute was ambiguous, the Court held its meaning should be decided by the agency.[114] The Court proceeded to Step Two and held that the EPA's interpretation was reasonable and fit within the statute.[115] The Court's first *Chevron* analysis was a text-book application—the statute was ambiguous, and the agency's interpretation was reasonable and fit within the bounds of the statute and its context.

Next, the Supreme Court decided *Immigration and Naturalization Service v. Cardoza-Fonseca*.[116] This was the first case where the Court internally disagreed about how to apply *Chevron*.[117] The issue before the Court was what standard an asylum claimant had to meet in order to avoid deportation.[118] Section 208(a) of the Immigration and Nationality Act requires asylum seekers to show a "well-founded fear" of persecution in their home country.[119] Section 243(h) of the Immigration and Nationality Act

105. MERRILL, *supra* note 14, at 80; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981 (1992).
106. 470 U.S. 116 (1985).
107. *Id.* at 122-23.
108. *Id.* at 123-24.
109. *Id.* at 125.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 126.
114. *Id.*
115. *Id.* at 126-29.
116. 480 U.S. 421 (1987).
117. *Id.* at 448-50, 453-55 (Scalia, J, concurring).
118. *Id.* at 443-44 (majority opinion).
119. *Id.* at 423 (quoting 8 U.S.C. § 1158(a)).

included a stricter test, requiring asylum seekers to show they were more likely than not going to face persecution.[120] If applicants met the "well-founded fear" test in Section 208(a), they would only be *eligible* for asylum, but if applicants met the stricter more-likely-than-not test in Section 243(h), they would be guaranteed protection from deportation.[121] The agency applied the stricter Section 243(h) standard to the petitioner's 208(a) claim.[122] When the petitioner challenged the decision, the agency argued that the standards were the same and that the only way to prove a "well-founded fear" was to show that persecution was more likely than not to occur.[123] The Court had to determine whether "well-founded fear" was a lower standard or an identical standard.[124]

Justice Stevens, writing for the majority, explained that courts, not agencies, decide "pure question[s] of statutory construction."[125] The Court applied Footnote Nine from *Chevron* and employed the "traditional tools of statutory construction" to find the statute's meaning.[126] Although the term "well-founded fear" contained some ambiguity, the Court was not tasked with interpreting "well-founded fear."[127] Rather, the Court's only task was to decide if the two standards were the same, which was "well within the province of the Judiciary."[128] Looking at the "plain language," symmetry with other statutes, and the legislative history—all of which were normal tools of construction at the time—the statute was clear, and the standards were not the same.[129] In later cases, courts would defer reflexively without applying the tools of construction, but here, Justice Stevens applied the tools before deferring.[130] Since they provided an answer, he did not need to resort to *Chevron*.

Justice Scalia concurred in the judgment and critiqued Justice Stevens's deference analysis.[131] Justice Scalia thought the discussion on deference was unnecessary since the agency's interpretation contradicted the statute's plain

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120. *Id.*
121. *Id.* at 443.
122. *Id.* at 425.
123. *Id.* at 430-31.
124. *Id.* at 446.
125. *Id.*
126. *Id.* at 448 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).
127. *Id.*
128. *Id.*
129. *Id.* at 448-49.
130. *Compare id.* at 446-49, *with* Sullivan v. Everhart, 494 U.S. 83, 93 (1990), PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 712-13 (1994), *and* Holly Farms Corp v. NLRB, 517 U.S. 392, 401 (1996).
131. *Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring in the judgment).

meaning, and charged Justice Stevens with using this "superfluous discussion as the occasion to express controversial . . . and . . . erroneous[] views on the meaning of . . . *Chevron*."[132] *Chevron*, wrote Justice Scalia, required "that courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent."[133] But in fact, that is the inverse of the *Chevron* test—*Chevron* started with determining whether the statute was ambiguous.[134] Only if it was ambiguous would courts move to reasonableness. Justice Scalia described the test as starting with reasonableness and mandating that a reasonable interpretation control unless the statute clearly precluded it.

Justice Scalia also critiqued the majority for employing tools of construction: "[t]he Court first implies that courts may substitute their interpretation of a statute for that of an agency whenever '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute."[135] According to Justice Scalia, this would be "an evisceration of *Chevron*," making it a "doctrine of desperation."[136]

The dueling opinions of Justices Stevens and Scalia revolved around the role of the judiciary. For Justice Stevens, deference was only an option when the judiciary could not properly determine the answer. For Justice Scalia, deference was a tool that kept the judiciary from imposing its will upon Congress and the executive branch. For both Justices, the question of when and how to apply the canons of construction was about the separation of powers; however, the Justices distributed the powers differently. The Justices also disagreed on whether *Chevron* applied to pure statutory questions. Justice Stevens implied that courts should not defer in cases of pure statutory construction,[137] a view that came from the pre-New Deal caselaw.[138] But Justice Scalia responded that *Chevron* itself involved a pure statutory question, and the Court deferred there, so the distinction was meritless.[139]

In *National Labor Relations Board v. United Food & Commercial Workers Union*,[140] the court continued to wrestle with *Chevron* while addressing the difference between the National Labor Relations Board's

132. *Id.* at 453-54.
133. *Id*.
134. *Supra* Section II.
135. *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring in judgment) (quoting *id.* at 446 (majority opinion)).
136. *Id.*
137. *Id.* at 446-48 (majority opinion).
138. *See* Bamzai, *supra* note 81, at 959-62.
139. *Cardoza-Fonseca*, 480 U.S. at 454-55 (Scalia, J., concurring in the judgment).
140. 484 U.S. 112 (1987).

adjudicative and prosecutorial authority. The majority explained that the Court's role on "a pure question of statutory construction" was to determine congressional intent via the traditional tools of construction.[141] If congressional intent was clear, the regulation "must be fully consistent with it."[142] However, if it was unclear what Congress intended for the specific question at issue, courts deferred to the agency's interpretation so long as it was "rational and consistent with the statute."[143] Here, the statutory analysis included both a legal and a policy question.[144] On the legal question, it was clear that Congress created a line distinguishing between the agency's adjudicative and prosecutorial authority.[145] But it was not the role of the Court to decide the policy question of what actions belonged on which side of that line.[146] That was the role of the agency, and the Court only needed to decide if that decision was reasonable, which it was.[147]

Justice Scalia concurred, "writ[ing] separately only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron*."[148] The majority had properly applied *Chevron* and had not strayed down the path of "the dicta of *Cardoza-Fonseca*," which called for a statutory interpretation of any "pure question of statutory construction."[149] According to Justice Scalia, the dicta in *Cardoza-Fonseca* required the Court to "conclusively and authoritatively" determine the meaning of the statute rather than decide whether the agency's interpretation was reasonable.[150] But here, the majority considered the agency's interpretation to be a policy decision, not a legal one.[151]

Justice Scalia argued that the Court's decision could not be squared with *Cardoza-Fonseca* and that the Court had corrected the error it made in *Cardoza-Fonseca*.[152] Justice Scalia seemed to think that the majorities in *Cardoza-Fonseca* and *United Food* performed different analyses: *Cardoza-Fonseca* applied the tools of construction to authoritatively decide the

141. *Id.* at 123.
142. *Id.* (citing *Cardoza-Fonseca*, 480 U.S. at 446-48).
143. *Id.* The Court specifically applied the "rational and consistent with the statute" standard to NLRB's interpretation of the NLRA, citing prior cases including some cases decided before *Chevron*. *Id.* at 123-26.
144. *Id.*
145. *Id.* at 124-25.
146. *Id.* at 124-26.
147. *Id.* at 125-26.
148. *Id.* at 133 (Scalia, J., concurring).
149. *Id.* at 133-34 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 48 (1987)).
150. *Id.* at 134.
151. *Id.* at 132-33 (majority opinion).
152. *Id.* at 133-34 (Scalia, J., concurring).

meaning of the statute, while *United Food* used the tools to see if the statute was ambiguous and then deferred to that ambiguous interpretation. Per Justice Scalia, if the Court had followed *Cardoza-Fonseca* here, the Court would also have interpreted the statute de novo.[153]

That is a possible reading, but another way of squaring these two cases is that in *Cardoza-Fonseca,* the issue before the Court was the statutory issue—whether the standards were the same—and not the policy issue—what the potentially ambiguous term *meant*. And in *Union Foods*, the Court did not have to decide the statutory issue: whether there was a line between adjudicative and prosecutorial authority. Instead, the Court only addressed the policy issue: whether the agency's action was adjudicative or prosecutorial. All of these considerations may well be statutory questions that a court should decide. But regardless of whether the Court was right that one of these questions was statutory and one was policy, the Court was not inconsistent in drawing the distinction between legal and policy issues where it did in each case.

Even though the Court was not necessarily inconsistent in these cases, it is very difficult to distinguish between purely legal and purely policy questions. As courts struggle to decide whether a question is legal or policy, courts will defer to all questions alike, just as Justice Scalia urged. *Chevron* deference naturally wants more jurisdiction over more questions; as these opinions show, *Chevron* is hard to constrain. When *Chevron* covers purely legal questions as well as policy and factual ones, it easily turns into reflexive deference and sidelines the judiciary.

In the next case, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*,[154] the concurring and dissenting opinions discussed whether an agency is allowed to decide the scope of its own statutory jurisdiction. The Court addressed whether the Federal Energy Regulatory Commission ("FERC") had preempted state-court review of its order about a cost-sharing agreement.[155] Justice Stevens, writing for the majority, reviewed the FERC's order de novo and determined that the FERC had preempted state review.[156] Even though the FERC had not fully decided in its order whether it was prudent for the parties to enter the agreement (as that question was not

153. *Id.* at 134 ("If the dicta of *Cardoza-Fonseca*, as opposed to its expressed adherence to *Chevron*, were to be applied here, surely the question whether dismissal of complaints requires Board approval . . . would be 'a pure question of statutory construction' rather than the application of a 'standar[d] to a particular set of facts,' as to which 'the courts must respect the interpretation of the agency.'" (quoting *Cardoza-Fonseca*, 480 U.S. at 446-48 )).

154. 487 U.S. 354 (1988).

155. *Id.* at 356-57.

156. *Id.* at 374-76.

raised), the FERC had the authority to decide that question and did explicitly preclude part of the prudence question from review.[157]

Justice Scalia concurred in the judgment and would have deferred to the FERC's interpretation of its own statutory authority to decide the prudence issue.[158] Citing multiple cases, Justice Scalia argued that the Court previously granted deference to an agency's interpretation of its own authority on several occasions.[159] Trying to distinguish between jurisdictional versus non-jurisdictional legal questions is nonsensical "because there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority."[160]

Justice Brennan dissented and spent a portion of his dissent critiquing Justice Scalia's *Chevron* analysis.[161] Justice Brennan stated that deference only applies to an agency's interpretation of statutes it administers and not to an agency's interpretation of statutes limiting its authority.[162] The normal reasons for *Chevron* deference—resolving policy conflicts, utilizing agency expertise, and filling implicit gaps—do not apply when an agency interpreted the scope of its own authority.[163] Disagreeing with Justice Scalia's description of prior cases, Justice Brennan wrote that the Supreme Court had never deferred to an agency's interpretation of a statute that was supposed to curtail that agency's jurisdiction.[164] Even though the jurisdiction issue only came up in concurring and dissenting opinions, it was significant that the issue had already arisen.

These cases show that, even in the first few years of *Chevron* deference at the Supreme Court, there were questions about what types of interpretations could receive *Chevron* deference and whether courts could defer to agencies' interpretations of their own jurisdiction. Some of the questions that would plague *Chevron* over the following decades had already arisen. *Chevron* deference raised more questions than it answered.

### B. CHEVRON FINDS ITS FOOTING

Next, in *Dole v. United Steelworkers of America*,[165] the Court addressed when courts should apply the canons of construction and how courts should

157. *Id.* at 375-76.

158. *Id.* at 380 (Scalia, J., concurring in the judgment).

159. *Id.* at 381; *see also* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 233 (1986); Chemical Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 123, 125-26 (1985).

160. *Id.*

161. *Id.* at 386-87 (Brennan, J., dissenting).

162. *Id.* at 387.

163. *Id*.

164. *Id.*

165. 494 U.S. 26 (1990).

decide whether a statute is ambiguous. The issue here was whether the Paperwork Reduction Act allowed the agency to issue rules regulating disclosures to third parties.[166] No provision of the Act addressed this specific question, but the Court determined that "the language, structure, and purpose of the Paperwork Reduction Act reveal that . . . Congress did not intend the Act to encompass . . . third-party disclosure rules."[167]

Since this was a "pure question of statutory construction," the Court turned to the "traditional tools of statutory construction,"[168] which included looking at the entire statute, its object, and its purpose. [169] Among other tools, the Court applied the tool *noscitur a sociis*, meaning [170] "[a]ssociated words bear on one another's meaning."[171] After applying the tools, the statute's meaning was clear: it did not apply to disclosures to third parties, even though "the grammar of this text can be faulted."[172] The agency's interpretation was "not the most natural reading" of the statute.[173]

Even though the statute clearly prohibited the agency from regulating third-party disclosures, the Court was still left with the question of whether the statute did not cover third-party disclosures at all or whether the statute covered them but exempted them from the agency's compliance method. The agency argued for the second interpretation, but that was "counterintuitive and contrary to clear legislative history," so the Court rejected the agency's reading:[174] "[W]e find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to [the agency]'s interpretation."[175]

Justice White dissented and claimed that the statute must not have been clear since the Court spent ten pages examining the text and legislative history to find the statute's meaning.[176] Instead, Justice White believed that the Court should have applied *Chevron*.[177] Justice White also pointed out that the majority appeared to acknowledge that the agency's interpretation was reasonable; the Court referred to the agency's interpretation as "not the *most* natural reading of this language," which implied that it was still a reasonable interpretation.[178] Justice White argued that the majority should have deferred

166. *Id.* at 32.
167. *Id.* at 35.
168. *Id.* (quoting NLRB v. United Food & Com. Workers, 484 U.S. 112, 123 (1987)).
169. *Id.* (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)).
170. *Id.* at 36.
171. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 195 (2012).
172. *Dole*, 494 U.S. at 40.
173. *Id.* at 35.
174. *Id.* at 40.
175. *Id.* at 42.
176. *Id.* at 43 (White, J., dissenting).
177. *Id.* at 43-44.
178. *Id.* at 45 (quoting *id.* at 35 (majority opinion)).

to the agency's interpretation rather than deciding for itself what was the best interpretation.[179] The dissent concluded by addressing an argument against deference that was raised in the briefs but not discussed by the Court: whether the Court could defer to the agency's regulation since that regulation interpreted the scope of the agency's own jurisdiction.[180] Justice White explained that the Court had never held that agencies were precluded from receiving deference for interpretations of the scope of their own authority, citing Scalia's concurrence in *Mississippi Power*.[181]

There are two key takeaways from this case. First, in a 7–2 majority, the Court worked through a detailed statutory analysis and chose not to defer to the agency despite the agency's interpretation being reasonable. The Court still ultimately had to choose between two interpretations after analyzing the statutory text, basing its decision on the legislative history. *Chevron* probably could have been applied here, but the Court chose to exercise its statutory tools. *Chevron* had not yet become a reactive tool for complex and difficult to interpret statutes.

Second, once again, the issue of deference to the scope of an agency's authority was raised, this time by a different Justice. At this point, three Justices had discussed the issue in separate opinions. Two favored it, and one rejected it. Despite the claims of Justices Scalia and White that multiple decisions of the Court had deferred to an agency's interpretation of its own jurisdiction, this application of *Chevron* did not have the full support of a majority.

In *Sullivan v. Everhart*, with Justice Scalia writing for the majority, the Court deferred after determining that the agency's interpretation was not "an inevitable interpretation of the statute; but . . . assuredly a permissible one."[182] The statute did not define the term in question, and the Court decided at Step One that although the statute supported the respondents' reading, the statute did not preclude the agency's interpretation.[183] The respondents bore the burden to show that the statute not only supported the respondents' interpretation but also prohibited the agency's interpretation.[184] If Congress

179. *Id.* at 45-46.

180. *Id.* at 54.

181. *Id.* (citing Miss. Power & Light Co. v. Mississippi *ex rel*. Moore, 487 U.S. 354, 380 (1988)).

182. 494 U.S. 83, 93 (1990).

183. *Id.* at 89-90.

184. *Id.* at 91-92 ("In our view, however, with this provision as with those discussed earlier, respondents have established at most that the language may bear the interpretation they desire—not that it cannot bear the interpretation adopted by the Secretary.").

had intended the respondents' interpretation, Congress could have crafted the statute more naturally.[185]

Justice Stevens dissented, calling the agency's interpretation "intolerable."[186] Before any deference to an agency's interpretation can be given, courts must apply the "traditional tools of statutory construction."[187] Justice Stevens argued that Congress did not need to "express its intent as precisely as would be possible" here, because the agency's interpretation was so inconsistent with the statute that it was unnecessary for Congress to explicitly prohibit that reading.[188] Further, just because the wording was less than precise did not justify deference: "Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily."[189]

The Court's *Chevron* analysis blurred Steps One and Two. Justice Scalia's majority opinion assumed the term at issue was ambiguous because the statute did not define the term and because it could support more than one interpretation. And since the statute could support the agency's interpretation, the agency's interpretation was reasonable. However, that is not actually ambiguity. For example, if someone crafted a statute that referred to "persons," most people would agree that the statute unambiguously refers to human persons, even though it does not explicitly exclude aliens from outer space.[190] But just because you *could* unnaturally interpret the statute to include aliens does not mean that the statute *is* ambiguous.

One could argue that if a statute permits an interpretation, it does not matter whether the statute is actually ambiguous. However, the premise of *Chevron* is that ambiguity should be read as an implicit delegation from Congress.[191] If courts no longer look for ambiguity but instead defer whenever the agency's interpretation is permissible, the courts are giving binding deference to an interpretation that lacks congressional delegation. Courts often defer to an agency's interpretation that may not be the best interpretation, which is only permissible if Congress delegated authority to the agency. Without that delegation, courts should be finding the best reading of the statute rather than the agency's preferred reading.

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185. *Id.* at 90.

186. *Id.* at 99 (Stevens, J., dissenting).

187. *Id.* at 103 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

188. *Id.* at 106.

189. *Id.*

190. This alien hypothetical was inspired by the father of all good legal hypotheticals, Justice Stephen Breyer. *See, e.g.*, Transcript of Oral Argument at 12-13, Cedar Point Nurseries v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

191. *Chevron*, 467 U.S. at 843-44.

In *Adams Fruit Company, Inc. v. Barrett*, the agency claimed it could adjudicate cases under the statute, but the unanimous Court decided that Congress delegated adjudicative authority to federal courts, not the agency.[192] This case raised a few *Chevron* issues. First, the Court explained that just because a statute did not speak to all potential issues did not mean Congress had left a gap for the agency to fill at Step One.[193] Unlike in *Sullivan*, where the Court decided that the statute was ambiguous because it did not rule out all possible interpretations, in *Adams Fruit,* the statute was *unambiguous* even though it did not rule out all possible interpretations.[194] Second, even if the statute was ambiguous, Congress "expressly established the Judiciary and not the [agency] as the adjudicator . . . under the statute."[195] *Chevron* deference required a delegation of authority to the agency, either explicitly or implicitly, and here, the statute expressly delegated adjudicative authority to the courts, not the agency.[196]

Additionally, the Court rejected the agency's argument that it could interpret the scope of its own authority: "[I]t would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of the [statute]'s judicially enforceable remedy."[197] Although the Court rejected the agency's interpretation because the agency was seeking authority that Congress had already delegated to *another* branch of government, the Court was skeptical of an agency interpreting its own jurisdiction generally:[198]

> This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction."[199]

In *Adams Fruit*, this prohibition against deferring to interpretations of the scope of an agency's authority was limited to situations where an agency sought deference for an interpretation that gave the agency itself jurisdiction

192. 494 U.S. 638 (1990).

193. *Id.* at 649. In this case, just "because a statute [did] not restate the truism that States may not pre-empt federal law" did not create ambiguity. *Id. Cf.* Sullivan v. Everhart, 494 U.S. 83, 93 (1990). Congress did not need to explicitly rule out other potential readings, even if the reading was unnatural. *Id.*

194. *Adams Fruit*, 494 U.S. at 649-50.

195. *Id.* at 649.

196. *Id.* at 649-50.

197. *Id.* at 650.

198. *Id.*

199. *Id.* (quoting Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973)).

over something Congress had already delegated away. But by this point, only six years after *Chevron*, the question of whether a court needed to defer to an agency's interpretation of its own jurisdiction had arisen three different times and was a live issue. It makes sense that this question would arise under *Chevron*. As Justice Scalia explained in his dissent in *Mississippi Power*, if a court defers to an agency rulemaking under delegated authority, how does the court distinguish from agency interpretations about the scope of that authority?[200] In *Chevron*, the Court did not address this question, and it probably could not have given a good answer, especially since the two-step test may have been an afterthought. Although it is hard to draw a reasonable distinction between jurisdictional and non-jurisdictional questions, deference for jurisdictional interpretations does not line up with any of the justifications of *Chevron*.[201] This debate further underscores how the *Chevron* framework was not prepared to handle the questions it would raise.

Although the hallmark of *Adams Fruit* is that deference is not available when Congress expressly grants authority to the judiciary, what is even more pertinent is the Court's internal struggle over when a statute is ambiguous. The unanimous Court explained that there are times when Congress's failure to address all possible interpretations is not an ambiguity, which aligns with Justice Stevens's dissent in *Sullivan*.[202] But in *Sullivan,* the Court deferred *because* the statute did not preclude the agency's interpretation. Comparing *Sullivan* and *Adams Fruit* highlights how difficult it is for judges to decide if a statute is ambiguous and how individual judges themselves fluctuate in their own analysis.[203]

In *Fort Stewart Schools v. Federal Labor Relations Authority*, Justice Scalia again applied an abbreviated Step One analysis.[204] The statutory term was susceptible to at least two readings, and the agency's reading, although not necessarily reasonable "in isolation," was supported by the entire statute in context.[205] Like in *Sullivan*, Justice Scalia did not begin with the question of whether the statute was ambiguous.[206] Instead, he first asked if the statute could bear more than one interpretation and, if so, if it could support the

200. Miss. Power & Light Co. v. Mississippi *ex rel*. Moore, 487 U.S. 354, 380-82 (1988) (Scalia, J., concurring).

201. *See infra* notes 493-506 and accompanying text.

202. *See supra* notes 186-89 and accompanying text.

203. *See* Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134-44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

204. 495 U.S. 641, 645-46 (1990).

205. *Id*. This is another example of the Court looking at the context of the statute to show the agency's interpretation was ambiguous at Step One.

206. *Id.*

agency's interpretation.[207] Once again, by ignoring ambiguity and implicit delegation, the Court's *Chevron* analysis was divorced from congressional delegation.

Next, in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, the Supreme Court addressed whether an agency's interpretation still controlled when it conflicted with prior Supreme Court precedent.[208] The question was what constituted an unreasonable transportation rate or practice under the Interstate Commerce Act.[209] The agency had decided that it was unreasonable for carriers to collect the filed rate—the rate the carriers had filed with the agency that they would charge—after the parties had secretly agreed to a lower rate.[210] But, the Supreme Court had held for over a century that agreeing to a secretive lower rate was a discriminatory practice.[211] When the agency refused to order the parties to pay the filed rate, the agency engaged in the same discrimination that the Court had historically prohibited.[212] The Court explained that an agency's interpretation was subordinate to precedent: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[213]

The *Maislin* Court did not state that the statute's meaning was clear in and of itself, but rather that the prior Court had "determined [the] statute's clear meaning."[214] As Professor Merrill explains, the Court viewed the statute's meaning as clear *after* the earlier Court had interpreted it.[215] This distinction would become important later.[216]

In *EEOC v. Arabian American Oil Co.*,[217] the Court, for the first time, raised the principle that it would not defer to an agency's interpretation which did not have the force of law. Congress had not given the Equal Employment Opportunity Commission authority to create rules or regulations, so the only type of "deference" the agency's guidelines was entitled to was *Skidmore* persuasive deference and its balancing factors for agency interpretations: "the thoroughness evident in its consideration, the validity of its reasoning, its

207. *Id.*
208. 497 U.S. 116 (1990).
209. *Id.* at 119-20, 129-31.
210. *Id.* at 130.
211. *Id.*
212. *Id.* at 130-31.
213. *Id.* at 131.
214. *Id.*
215. MERRILL, *supra* note 14, at 154-55.
216. *See infra* notes 400-04 and accompanying text.
217. 499 U.S. 244 (1991).

consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[218] The Court determined that the Commission's guidelines did not survive this review.[219]

Justice Scalia concurred and argued that the Court should have analyzed the interpretation under *Chevron* instead of *Skidmore*, although he agreed that the rule would not have survived *Chevron* either.[220] Justice Scalia believed that all agency interpretations should receive *Chevron* deference.[221] Justice Scalia continued to make this point in the later "force of law" cases.

### C. CHEVRON'S BACK AND FORTH BEGINS

In *Pauley v. Bethenergy Mines, Inc.*, the Court deferred to the Department of Labor's interpretation of the statute at issue, claiming that the statute implicitly mandated courts to defer. [222] The statute delegated broad policy-making power through the phrase "not . . . more restrictive than," and since Congress had delegated that authority, the agency was entitled to deference.[223] Part of the Department's task in issuing the regulations was to interpret the interim regulations and discern the restrictive limit of its own authority.[224]

The Court concluded that Congress delegated authority to the agency to decide how big the statutory gap was and *then* fill it.[225] Nowhere did the majority actually decide that the statute was ambiguous or even that the statute could be read multiple ways.[226] Rather, the Court claimed that Congress must have delegated interpretive authority to the Department when it required that the Department's regulations "not be more restrictive than" certain interim regulations promulgated by a different agency.[227] No one disputed that Congress could delegate authority to the Department to issue regulations: what the Department wanted was the authority to determine how *broad* its regulations could be. Moreover, the Department was asking for deference when interpreting another agency's statutes.[228]

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218. *Id.* at 257 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).
219. *Id.* at 257-58.
220. *Id.* at 259-60 (Scalia, J., concurring in part and concurring in the judgment).
221. *Id.*
222. 501 U.S. 680, 698 (1991).
223. *Id*. (quoting 30 U.S.C. § 902(f)(2)).
224. *Id.*
225. *Id.* at 697-99.
226. *Contra* Sullivan v. Everhart, 494 U.S. 83, 89 (1990); Fort Stewart Schs. v. Fed. Lab. Rels. Auth., 495 U.S. 641, 645 (1990).
227. *Pauley*, 501 U.S. at 697-98.
228. *Id.* at 707-08 (Scalia, J., dissenting).

Justice Scalia dissented and took issue with the lack of ambiguity analysis: "No one contends that the relevant *statutory* language ('shall not be more restrictive than') is ambiguous."[229] Justice Scalia stated that even though the regulations were "complex, perhaps even 'Byzantine,'" that did not justify neglecting statutory interpretation.[230]

> Deference is appropriate where the relevant language, carefully considered, can yield more than one reasonable interpretation, not where discerning the only possible interpretation requires a taxing inquiry. *Chevron* is a recognition that the ambiguities in statutes are to be resolved by the agencies charged with implementing them, not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.[231]

Justice Scalia then reviewed the statute de novo and concluded that the Department of Labor regulations were too restrictive under the statute.[232]

The Court deferred again in *PUD No. 1 v. Washington Department of Ecology*,[233] and yet again, the Court did not look for ambiguity or a congressional delegation. Instead of looking for ambiguity or applying the tools of construction, the Court stated that its "view of the statute [was] consistent with [the agency]'s regulations implementing [the statute]."[234] The Court analyzed both the petitioners' interpretation and the agency's interpretation, and although the Court appeared to decide that the agency's interpretation was the best, the Court stated that the regulation was "a reasonable interpretation of [the statute], and is entitled to deference."[235] Similar to *Sullivan* and *Fort Stewart,* the Court did not apply Step One but instead deferred after deciding the statute was reasonable.[236]

Justice Thomas dissented, with Justice Scalia joining, criticizing the majority for deferring without finding ambiguity.[237] The dissent pointed out that the government did not ask for deference, which the dissent reasoned was because the agency itself did not have a definitive construction of the statute.[238] Since the agency did not offer a definitive construction of the

229. *Id.* at 707.
230. *Id.* (quoting *id.* at 699 (majority opinion)).
231. *Id.* at 707 (Scalia, J., dissenting).
232. *Id.* at 708.
233. 511 U.S. 700, 712-13 (1994).
234. *Id.* at 712.
235. *Id.* at 711-12.
236. *See supra* notes 182-91, 204-07 and accompanying text.
237. *PUD No. 1*, 511 U.S. at 728 (Scalia, J., dissenting).
238. *Id.* at 728-29.

statute, Justice Thomas argued that the Court should not have deferred to the agency's unclear interpretation.[239]

The Court applied an abbreviated *Chevron* analysis similar to the one used in *Sullivan* and *Fort Stewart*. The problem with this abbreviated analysis was that the Court gave controlling weight to the agency's authority without justifying it as a delegation from Congress. The Court was adopting part of the deference mechanism from *Chevron*—deferring to reasonable agency interpretations—without adopting its constitutional justification: explicit or implicit congressional delegation. Since Step Two was not a meaningful check on agencies—agencies only lost three times at Step Two before the Supreme Court[240]—the erosion of any substantive analysis at Step One led to reflexive deference. In hindsight, considering the pressures of judging, it makes sense that the *Chevron* test would devolve into this. But that is not what the *Chevron* Court had intended.

Next, the Court again addressed congressional delegation in *MCI Telecommunications Corp. v. AT&T*.[241] The Court was tasked with interpreting the term "modify" and decided that Congress did not delegate authority to an agency to fundamentally alter the statutory scheme.[242] The petitioners, seeking deference to the agency's interpretation, argued that "modify" was ambiguous because there were conflicting dictionary terms in Webster's Third New International Dictionary.[243] Webster's Third included two definitions for "modify": "make a basic or important change in" and "make minor changes in the form or structure of: alter without transforming."[244] The petitioners urged the Court to find the term ambiguous because of these varying definitions.[245] They wanted deference for the agency's definition of "modify," which included changes that would fundamentally alter the statutory scheme.[246]

Justice Scalia, writing for the majority, explained that the supposed "dictionary conflict" did not create ambiguity.[247] Webster's Third was published after the passage of the statute, and it defined "modify" in conflict not only with nearly every other dictionary definition of "modify," but also in conflict with one of its own alternative definitions for "modify."[248] The

239. *Id.* at 729.
240. MERRILL, *supra* note 14, at 116-17.
241. 512 U.S. 218 (1994).
242. *Id.* at 230-31.
243. *Id.* at 225-26.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* at 227.
248. *Id.*

publication of this new dictionary did not make the term ambiguous; the new dictionary's definition was simply out of step with the accepted definition.[249] Justice Scalia defined "modify" to include minor changes, not fundamental ones, and the Court rejected the agency's interpretation.[250]

The Court also rejected the agency's interpretation because the agency was seeking to fundamentally change the statutory scheme without clear congressional authority.[251] "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially . . . regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' [statutory] requirements."[252]

Justice Stevens dissented. He also turned to dictionaries, but he read "modify" broadly to include the agency's interpretation.[253] Not only did Justice Stevens define "modify" more broadly than the majority, but he also did not believe that the agency's interpretation would change the statutory structure.[254] Justice Stevens looked at the impact on the statutory policies rather than the impact on the regulated entities and determined that the new regulation was not a significant change.[255] While Justice Scalia focused on the impact the agency's interpretation would have on the statutory scheme itself, Justice Stevens looked at the impact on Congress's goals.[256] In many ways, this decision hinted at what would later become the major questions doctrine.[257]

*Neal v. United States*,[258] like *Maislin*, decided that prior precedent controlled over new agency interpretations of the same statute. The question was whether, for sentencing purposes, LSD was weighed by itself or with the medium it was mixed with for delivery.[259] Since LSD was sold in minuscule doses, it was often dissolved onto blotter paper, and it made a significant difference whether the LSD had to be weighed alone or together with the blotter paper.[260] The Sentencing Commission's Guidelines changed the calculation for the weight of LSD, presuming a weight of 0.4 mg per dose to

249. *Id.*
250. *Id.* at 227-28.
251. *Id.* at 229.
252. *Id.* at 231.
253. *Id.* at 240-41 (Stevens, J., dissenting).
254. *Id.* at 240-45.
255. *Id.*
256. *See* MERRILL, *supra* note 14, at 204-06.
257. *See infra* text accompanying notes 280-310, 511-22 and accompanying text.
258. 516 U.S. 284 (1996).
259. *Id.* at 285-86.
260. *Id.*

take account of the blotter paper.[261] However, the Supreme Court had two years previously, in *Chapman v. United States*,[262] interpreted the Comprehensive Drug Abuse Prevention and Control Act to require that LSD be weighed with the medium in which it was dissolved.[263]

At the Supreme Court, the petitioner, who was convicted under the old interpretation, argued that the Court should defer to the Guideline's new interpretation.[264] The Court rejected this argument, instead deciding that *Chapman* controlled under stare decisis.[265] First, the Court explained that the Commission's commentary did not reinterpret the statute contrary to *Chapman*.[266] But even if the Commission had reinterpreted the statute, as the petitioner argued, the Court stated that it could not defer because the dose-based method was incompatible with *Chapman*.[267] "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."[268] Similar to *Maislin*, the Court upheld the prior Court's interpretation of the statute, deciding that the statute was clear *because* the Court had previously interpreted it.[269]

Turning again to ambiguity, in *Holly Farms Corporation v. NLRB*, the Court determined that the petitioner's interpretation was "a plausible, but not an inevitable, construction of [the statute]."[270] The Court then moved to Step Two.[271] The Court only spent three sentences analyzing Holly Farms's interpretation before deciding that it was not "inevitable," and the Court then turned to the agency's reading and applied Step Two.[272] Like *Sullivan*, this was a broader application of *Chevron*. The Court ignored Footnote Nine rather than applying all the tools of construction like it had in *Dole v. United*

261. *Id.* at 293 (quoting U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SEN'T COMM'N 1995)).

262. 500 U.S. 453 (1991).

263. *Neal*, 516 U.S. at 288-89.

264. *Id.* at 289-90.

265. *Id.* at 290.

266. *Id.*

267. *Id.* at 294.

268. *Id.* at 295 (first citing Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992); and then citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)).

269. MERRILL, *supra* note 14, at 154-55.

270. 517 U.S. 392, 401 (1996).

271. *Id.*

272. *Id.* It was four sentences if a footnote in response to the dissent is included. *Id.* at 399 n.6 ("The dissent's reading of § 3(f), while a plausible construction of a text we, the Board, and the Secretary of Labor find less than crystalline is inharmonious with a congressional will to create a slim exemption from the encompassing protection the NLRA and the FLSA afford employees in our Nation's commercial enterprises." (citations omitted)).

*Steel Workers*.[273] Justice O'Connor, dissenting, critiqued the majority for spending "the bulk of its opinion" analyzing reasonableness but giving "remarkably short shrift to the statute itself."[274] In a footnote, the majority responded to the dissent and referred to the statute as "less than crystalline," but that was the only other mention of ambiguity.[275]

The Court's statutory analysis was similarly sparse in *Smiley v. Citibank (South Dakota), N.A.*[276] There, since two state supreme courts had arrived at differing interpretations of the same federal statute, the Court claimed "it would be difficult indeed to contend that the word . . . in the [statute was] unambiguous."[277] That was the extent of the Court's Step One analysis: since state courts had split, the term was ambiguous.[278] At Step Two, the Court posited that even though the agency had changed its position, the interpretation could still receive deference, so long as the interpretation was not arbitrary or capricious.[279] Like prior cases, the Court did not apply the canons of construction in either *Holly Farms* or *Smiley*. Instead of interpreting the statute, the Court quickly found ambiguity and reflexively deferred.

In *FDA v. Brown & Williamson Tobacco Corporation*,[280] the Court continued exploring the major questions doctrine. The major questions doctrine, in the context of *Chevron*, requires express delegation from Congress for an agency to regulate a "major" area of political or economic significance.[281] So a court would not defer to an agency's interpretation of an ambiguous statute if the interpretation could significantly impact the country.[282] Interpretations that could significantly impact politics or the economy require clear Congressional authorization.[283]

In *Brown & Williamson*, the Food, Drug, and Cosmetic Act gave the FDA authority to regulate "drugs" and "devices."[284] The statutory definitions of both "drugs" and "devices" required that the object be "intended to affect

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273. *See supra* notes 165-75 and accompanying text.

274. *Holly Farms*, 517 U.S. at 410 (O'Connor, J., concurring in the judgment in part and dissenting in part).

275. *Id.* at 399 n.6.

276. 517 U.S. 735 (1996).

277. *Id.* at 739.

278. *Id.* In a footnote, the Court also mentioned another state supreme court case and a federal court of appeals case that had weighed in on the issue and added to the split. *Id.* at 739 n.2.

279. *Id.* at 742.

280. 529 U.S. 120 (2000).

281. *See, e.g.*, King v. Burwell, 576 U.S. 473, 486 (2015).

282. *See id.*

283. *Id.*

284. *Id.* at 126.

the structure or any function of the body."[285] The FDA promulgated new regulations restricting nicotine as a "drug" and cigarettes and smokeless tobacco as "devices," explaining that nicotine and nicotine products were intended to impact the body.[286] Justice O'Connor, for the majority, looked at the context of the statutory regime and decided that Congress had spoken directly "to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."[287]

The Court looked to the entirety of the statute and found that one of its core goals was to ensure that all products regulated by the FDA were safe.[288] But "the FDA quite exhaustively documented that 'tobacco products [were] unsafe.'"[289] Therefore, if the FDA could regulate nicotine and tobacco products as "devices" under the Act, the FDA would need to remove these products from the market.[290]

However, in a different statute, Congress had permitted the marketing of tobacco products and addressed tobacco safety in at least six pieces of legislation in the prior thirty-five years.[291] Congress was well aware of the health concerns surrounding tobacco products but still allowed the advertising of these products.[292] This indicated that Congress did not intend for tobacco products to be banned.[293] The Court thus concluded that the FDA could not ban tobacco products, as that would "plainly contradict congressional policy."[294] The FDA could not ban nicotine products, but it would have been required to ban them if the FDA had authority over them; therefore, the FDA must not have had regulatory authority over these products.[295]

In determining that this statute was unambiguous, the majority not only examined the entire Food, Drug, and Cosmetic Act but also looked at various

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285. *Id.* (quoting 21 U.S.C. § 321(g)(1)(C)).
286. *Id.* at 127.
287. *Id.* at 133.
288. *Id.* at 133-34.
289. *Id.* at 134.
290. *Id.* at 135.
291. *Id.* at 137-38.
292. *Id.* at 137-39.
293. *Id.* at 139.
294. *Id.*
295. *Id.* at 143 ("Consequently, if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely. But a ban would contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the [statute's] regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.").

other statutes, including statutes enacted within the prior thirty-five years, to determine that Congress had spoken expressly to the question at issue.[296]

The Court also drew another conclusion from the prior thirty-five years of congressional action on tobacco: the FDA had issued "consistent and repeated statements" over the years that it generally lacked authority to regulate tobacco, and Congress had legislated accordingly.[297] Congress had also rejected several bills that would have given the FDA jurisdiction over tobacco products.[298] Congress, therefore, had regularly affirmed the agency's long-held position that it could not regulate tobacco products as "drugs" or "devices."[299] Instead of giving the FDA authority over tobacco, Congress created other detailed regulatory schemes.[300]

The Court explained that the reason it was rejecting the FDA's interpretation was not because the FDA had changed its position: the Court quoted *Chevron*'s line that agency interpretations are not "carved in stone."[301] Rather, Congress legislated tobacco the way it did because the agency had consistently held that tobacco products were neither drugs nor devices.[302] Congress was well aware that the FDA did not have authority over tobacco under the Act, and Congress never delegated such authority to the FDA.[303] And because Congress never delegated that authority, the FDA's interpretation was not entitled to deference.[304]

The final reason why the Court decided Congress had precluded the agency's interpretation is the one for which this case gets so much attention: the Court applied the major questions doctrine and held that in extraordinary cases, courts must hesitate before finding that Congress implicitly delegated authority to agencies via ambiguity.[305]

The agency's interpretation here was extraordinary for a few reasons. First, the FDA was asserting authority to regulate "a significant portion of

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296. *Id.* ("In determining whether Congress has spoken directly to the FDA's authority to regulate tobacco, we must also consider in greater detail the tobacco-specific legislation that Congress has enacted over the past 35 years.").

297. *Id*. at 144.

298. *Id*.

299. *Id*.

300. *Id*. at 148-56.

301. *Id*. at 156-57 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984)).

302. *Id*. at 157.

303. *Id*.

304. *See id.*

305. *Id*. at 159; *see also* Breyer, *supra* note 70, at 370 ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

the American economy."[306] Also, Congress had created other regulatory schemes and refused to give the FDA authority over tobacco.[307] The majority discussed *MCI*'s major questions analysis and the Court's conclusion there "that [i]t [was] highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially [regulated] to agency discretion."[308] Here, the tobacco industry commanded a significant part of the American economy, and the authority the agency sought may have allowed the agency to ban smokeless tobacco and cigarettes outright.[309] The majority was "confident" that since the tobacco industry played such a major role in the American economy, Congress would not have delegated "a decision of such economic and political significance to an agency in so cryptic a fashion."[310]

The other big takeaway from this case is how much statutory context the Court examined before deciding the statute was clear—up to thirty-five years of prior statutes. Although earlier courts had reviewed statutory context to determine the meaning of the statute, *Brown & Williamson* is unique in how much the Court looked at *previous* statutes.[311] The different approaches of the majority and dissent to statutory context were arguably definitive in this case. Both the majority and dissent made compelling arguments, but they reached different outcomes in part because the majority looked at decades of prior congressional enactments, and the dissent did not.[312] The dissent grounded its reasoning more in the text, which, when read by itself, implied that Congress had given the FDA authority over tobacco.[313] As Professor Merrill points out, Justice Breyer's dissent was self-aware that it may not have engaged as well with the context of the statute:[314] "One might nonetheless claim that, even if my interpretation of the [Act] and later statutes gets the words right, it lacks a sense of their 'music.'"[315]

In *Brown & Williamson Tobacco*, the Court applied numerous tools to find the statute's meaning. The statutory analysis spent far more time on the statutory context and the major questions doctrine than it did on textual analysis. At this point, the Court would swing the *Chevron* pendulum

306. *Brown & Williamson Tobacco*, 529 U.S. at 159.
307. *Id*. at 159-60.
308. *Id.* at 160 (quoting MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994)).
309. *Id*. at 159.
310. *Id*. at 160.
311. *See, e.g.*, Fort Stewart Schs. v. Fed. Lab. Rels. Auth., 495 U.S. 641, 645-46 (1990).
312. *See* MERRILL, *supra* note 14, at 206-08.
313. *Brown & Williamson Tobacco*, 529 U.S. at 167-74 (Breyer, J., dissenting).
314. *See* MERRILL, *supra* note 14, at 208.
315. *Brown & Williamson*, 529 U.S. at 189 (Breyer, J., dissenting).

between two extremes: reflexively deferring on the one hand and applying extensive, substantive tools to avoid deference on the other.

### D. THE "FORCE OF LAW" ERA

*Christensen v. Harris County*[316] was the first of a series of cases establishing the principle that an agency interpretation was not entitled to deference if the interpretation lacked the force of law. The requirement that an agency's interpretation have the force of law was raised in *Arabian American Oil*,[317] but it had laid dormant for years. *Christensen* and its progeny more fully established that principle.

In *Christensen*, the Department of Labor had written an opinion letter addressing employees' use of compensatory time.[318] In litigation, the Department sought *Chevron* deference for this letter.[319] The Court, with Justice Thomas writing for the majority, ruled that *Chevron* deference was inappropriate.[320]

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.[321]

Rather, such opinions were "entitled to respect" under *Skidmore*.[322] Under *Skidmore*, the Court dismissed the letter as unpersuasive.[323]

Justice Scalia concurred in part and in the judgment, stating that the Court should have analyzed the opinion letter under *Chevron*.[324] *Skidmore*, per Justice Scalia, "[wa]s an anachronism" and "came to an end with our watershed decision in *Chevron*."[325] *Chevron* deference was appropriate if the opinion letter "represent[ed] the authoritative view of the [agency]."[326] Normally, one letter alone could not represent the view of the agency, but

316. 529 U.S. 576 (2000).
317. 499 U.S. 244 (1991).
318. *Christensen*, 529 U.S. at 580-81.
319. *Id*. at 586-87.
320. *Id*. at 587.
321. *Id*.
322. *Id*. (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
323. *Id*.
324. *Id*. at 589-91 (Scalia, J., concurring in part and concurring in the judgment).
325. *Id*. at 589.
326. *Id*. at 591.

since the United States Solicitor General and Solicitor of Labor also filed an amicus brief presenting the position in the letter as the position of the agency, the position was authoritative and entitled to *Chevron* deference.[327]

*Christensen* created a stir in the legal academy.[328] It raised questions like: why was "force of law" the dividing line between *Skidmore* and *Chevron* deference when that issue did not arise from *Chevron*'s reasoning?[329] *Christensen* also did not take into account regulations that were issued with the force of law but not via notice-and-comment rulemaking, like rules promulgated under the Administrative Procedure Act's "good cause" exception.[330] In the following cases, the Court would continue to wrestle with how important the formality of the interpretation was for showing that the interpretation had the force of law.

A year after *Christensen*, the Court decided *United States v. Mead Corporation.*[331] The Secretary of the Treasury had issued "ruling letters" which indicated the tariff classification that applied to specific imports.[332] "A ruling letter . . . represents the official position of the Customs Service with respect to the particular transaction or issues described therein."[333] The letter could only be applied to transactions of items that were identical to the item that was the subject of the original letter.[334] The letters did not undergo notice and comment prior to issuing, did not need to be published, and—at the time the *Mead* litigation started—could usually be modified without notice and comment, although that was changed during the litigation via statute.[335] Most letters did not contain much reasoning or rationale, although the one at issue in *Mead* explained its rationale.[336]

The agency sought *Chevron* deference for the ruling letter, but the Court explained that *Chevron* deference was only available for agency interpretations issued with the force of law.[337] Although a formal process like notice and comment was a good indicator of an agency acting with the force

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327. *Id*. The Solicitor General's brief alone, even without the opinion letter, would have been entitled to deference, per Justice Scalia. *Id.*

328. *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105 (2001).

329. *Id.* at 846.

330. *Id*. at 846-47.

331. 533 U.S. 218 (2001).

332. *Id*. at 221-23.

333. *Id*. at 222 (quoting 19 C.F.R. § 177.9(a)).

334. *Id.* at 223.

335. *Id*.

336. *Id*. at 224.

337. *Id.* at 230.

of law, the lack of such a formal process would not necessarily preclude an interpretation from receiving *Chevron* deference.[338]

The Court then gave several factors for deciding if the agency issued its rule with the force of law, some positive and some negative. If the interpretation bound more than just the parties at issue, that was an indication in favor of the force of law.[339] If the interpretation had precedential value, that was relevant but was not sufficient evidence for the force of law.[340] If the interpretation was subject to judicial review per a statutory provision, that was strong evidence the interpretation lacked the force of law.[341] If the interpretation was not detrimentally relied on by the parties, that also cut against the force of law.[342] Lastly, if the number of interpretations issued was quite large (e.g., 10,000), it was unlikely each would bear the force of law.[343]

Even if an agency's interpretation was not issued with the force of law, it was still eligible for *Skidmore* "deference."[344] Under *Skidmore*, "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires."[345] The Court remanded the case back to the lower court to analyze the ruling letter under *Skidmore*.[346]

Justice Scalia dissented and echoed his *Christensen* concurrence, reiterating his concerns with the *Skidmore* balancing test.[347] The Justice also critiqued the Court for moving away from the clear lines of *Chevron*.[348] Justice Scalia explained that unlike in *Chevron*, as it was traditionally understood, ambiguity was no longer sufficient to indicate congressional delegation; now, under *Mead,* the agency had to show via other circumstances that Congress expressly or impliedly delegated authority to the agency.[349] Under *Chevron*, agencies had discretion to resolve ambiguities in

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338. *Id.* at 230-31.
339. *Id.* at 232.
340. *Id.*
341. *Id.* at 232-33.
342. *Id.* at 233.
343. *Id.*
344. *Id.* at 234.
345. *Id.* at 234 (citations omitted) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944)).
346. *Id.* at 238-39.
347. *Id.* at 241 (Scalia, J., dissenting).
348. *Id.* at 240 ("Today the Court collapses this doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so.").
349. *Id.*

statutes, but under *Mead,* courts reviewed whether the agency had the authority to resolve those ambiguities.[350]

Justice Scalia raised valid arguments. The majority opinion not only added another step to the analysis—whether the agency spoke with the force of law—but also undermined the reasoning behind *Chevron*. No longer was ambiguity understood to be the delegation of authority; rather, it was the first of two inquiries to determine if Congress delegated the agency authority to speak *with the force of law*. Courts first asked if the statute was ambiguous, and if it was, courts kept looking to determine if the statute or statutory structure showed that Congress intended for the agency to fill in those gaps with the force of law.

The next year, in *Barnhart v. Walton*, the Court examined this issue again, with Justice Breyer writing for the majority.[351] The agency's interpretation was "less formal than 'notice-and-comment' rulemaking"[352] and was contained in an agency ruling, a manual, and a letter, but the Court decided it was still entitled to *Chevron* deference.[353]

Justice Breyer looked to *Mead* to decide *Chevron* was the correct standard, but rather than applying the *Mead* "force of law" factors, the Court created new factors for when *Chevron* was appropriate:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, 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.[354]

*Barnhart* addressed the same issue as *Christensen* and *Mead*: when does an agency issue a rule that can be evaluated under *Chevron*. However, the Court did not once mention "force of law" and created an entirely new test. This test focused on the thoroughness of the agency's interpretation and the expertise of the agency, not whether the interpretation had the force of law.

A couple of the *Barnhart* factors were actually discussed in *Chevron* itself: the complexity of the regulatory scheme and the thoroughness of the agency's consideration.[355] But in *Chevron*, these factors were raised as reasons to defer to the agency's interpretation at Step Two, not as reasons to

350. *Id.* at 241-43.
351. 535 U.S. 212, 214 (2002).
352. *Id.* at 221.
353. *Id.* at 219-22.
354. *Id.* at 222.
355. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

*apply* the two-step test.[356] *Barnhart* essentially added Step Two tools to the "Step Zero"[357] test, and *Barnhart* gave the test significantly more teeth than it had after *Mead*.

Another way this case differed from *Chevron* is that when actually applying Step Two,[358] Justice Breyer considered whether the agency's interpretation was "longstanding."[359] The Supreme Court had not held that courts were to consider whether an agency's interpretation was longstanding for decades.[360] This hearkens back to the customary canon of construction, as well as to *Skidmore*.[361]

Justice Scalia, unsurprisingly, wrote separately, concurring in part, and vented his disagreements with the majority's new test for whether *Chevron* applies.[362]

The "force of law" cases changed *Chevron* deference. Between *Mead* and *Barnhart*, the Court had created an entire analysis that needed to be applied before reaching *Chevron*. Not only had the Court changed the test, but this test undermined the reasoning of *Chevron*. No longer was an implicit delegation through ambiguity sufficient to justify deference. Now, delegation had to be proven through other means, like proof that Congress had intended the agency's interpretation to have the force of law or that the interpretation was thoroughly reasoned and the product of expertise. And the "force of law" cases conflict with each other. It is hard to square *Barnhart* with *Mead*. The ruling letters in *Mead* that did not receive *Chevron* deference are hard to distinguish from the letter, manual, and ruling that did receive *Chevron* deference in *Barnhart*. *Barnhart* created a whole new test that included

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356. *Id.* at 865 ("In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.").

357. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) ("Chevron Step Zero—the initial inquiry into whether the Chevron framework applies at all.").

358. Justice Breyer asked whether the statute "unambiguously forbid[s] the regulation" and whether the "Agency's construction [was] permissible." Barnhart v. Walton, 535 U.S. 212, 213 (2002). The Court mentioned how the interpretation was "longstanding" at the "permissible" stage of its analysis, which I read to be at Step Two. *Id.*

359. *Id.* at 219-20 (citing N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982)) ("In addition, the Agency's regulations reflect the Agency's own longstanding interpretation.").

360. *See* Bamzai, *supra* note 81, at 966-81, 995-97. *See also id.* at 971 (discussing the Court's refusal to defer in *Burnet v. Chicago Portrait Co*, 285 U.S. 1 (1932), because the interpretation was not consistent and explaining how this case was from a bygone era); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom.* Ne. Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977) (explaining that there were two lines of administrative interpretation cases in the mid-twentieth century: one which required deference to agency's application of law to facts and the other line which allowed courts to apply their own judgement when interpreting statutory terms).

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

362. *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part and concurring in the judgment).

*Chevron* Step Two questions as part of a pre-*Chevron* test. And at Step Two, *Barnhart* considered whether the agency's interpretation was longstanding, which had not been a prior part of the *Chevron* analysis.

In *Utah v. Evans*, Justice Breyer, writing for the Court, followed *Barnhart*'s Step Two analysis and included the length of time the agency had consistently held the interpretation as a question for the Court to consider at Step Two.[363] The Court did not need to defer to the agency's interpretation because the Court decided it was the correct interpretation.[364] The Court explained it would have deferred to the agency's consistent interpretation if the question had been a close one:

> The Bureau, which recommended this statute to Congress, has consistently, and for many years, interpreted the statute as permitting imputation. Congress, aware of this interpretation, has enacted related legislation without changing the statute. . . . Although we do not rely on it here, under these circumstances we would grant legal deference to the Bureau's own legal conclusion were that deference to make the difference.[365]

The majority essentially stated that the customary canon was one of the factors the Court would consider when deciding whether to defer. Although courts applied the customary canon regularly in the nineteenth century[366]—and it was also a *Skidmore* factor—it had not been part of *Chevron* deference.[367] Here, the Court followed *Barnhart*'s Step Two analysis, but adding another factor from pre-*Chevron* cases to the *Chevron* analysis. Not only had the "force of law" cases created a pre-*Chevron* step, but *Barnhart* created a different version of Step Two, and *Evans* followed it. It is not surprising that Justice Breyer's opinions in *Barnhart* and *Evans* framed *Chevron* as a multi-factor test, as he was well-known for preferring balancing tests. What is surprising is that Justice Breyer convinced a majority of the Court to sign off on both of these opinions, which created a new test for *Chevron*'s Step Two.[368]

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363. 536 U.S. 452, 472 (2002).

364. *Id.*

365. *Id.* (citations omitted).

366. Bamzai, *supra* note 81, at 930-65.

367. *See* Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740 (1996) ("To be sure, agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist. But neither antiquity nor contemporaneity with the statute is a condition of validity.). *See also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156-57 (2000). *But see* Miss. Power & Light Co. v. Mississippi *ex rel*. Moore, 487 U.S. 354, 388 (1988) (Brennan, J., dissenting).

368. However, future cases did not apply this new version of Step Two.

In *Alaska Department of Environmental Conservation v. EPA*,[369] the majority applied *Skidmore* with a flair of *Chevron*. The agency had issued an "internal guidance memo," which under *Mead* would only receive *Skidmore* review, not *Chevron* deference.[370] The Court's opinion in *Alaska* went back and forth between *Skidmore* deference and a standard more akin to *Chevron*. The Court stated that the petitioners' "arguments do not persuade us to reject as impermissible EPA's longstanding, consistently maintained interpretation."[371] The length of time that the agency had maintained the interpretation was a *Skidmore* factor,[372] but the "impermissible" factor came from *Chevron*.[373] And later in the opinion, the Court called the EPA's interpretation "rational" and "permissible," which are also *Chevron* references.[374] Under *Skidmore*, the question is whether the agency's interpretation is convincing. Under *Chevron*, courts only ask if the interpretation is permitted. When the Court decided that the agency's interpretation was "rational" and "permissible," the Court was applying the more deferential *Chevron* standard of review. The dissent likewise criticized the majority for claiming to apply *Skidmore* but using *Chevron* language and giving more deferential weight to the agency's reading.[375] The dissent claimed that the standard of review was even *more* deferential than *Chevron*.[376]

In this post-*Mead* case, the Court applied *Skidmore* to an agency's interpretive rule, but the Court still seemed to give more deference than appropriate under *Mead*. *Mead* distinguished two standards of review that courts should apply to agency interpretations: *Chevron* deference for regulations and rules promulgated with the force of law and *Skidmore* for agency interpretations that did not have the force of law. But *Alaska* raised the question of how distinct these standards always were in practice. The great irony here is that cases like *Alaska* not only blurred the lines between *Chevron* and *Skidmore* but also undermined *Mead*, which had undermined *Chevron* itself. *Chevron*'s evolution sometimes ate itself.

369. 540 U.S. 461 (2004).
370. *Id.* at 487-88.
371. Id. at 488.
372. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
373. *Alaska Dep't Env't Conserv.*, 540 U.S. at 517 (Kennedy, J., dissenting) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
374. *Id.* at 493 (majority opinion).
375. *Id.* at 517-18 (Kennedy, J., dissenting).
376. *Id.*

### E. CHEVRON'S BELT GETS TIGHTENED, LOOSENED, AND THEN TIGHTENED AGAIN

In *General Dynamics Land Systems, Inc., v. Cline*, the Court addressed when courts should apply the canons of construction instead of deferring to administrative agencies.[377] Justice Souter, for the majority, explained that under *Cardoza-Fonseca* (citing *Chevron*'s Footnote Nine), "deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."[378] The Court found the agency's interpretation was "clearly wrong," and the "regular interpretive method [left] no serious question, not even about purely textual ambiguity in the [statute]."[379] This was *Chevron* as it was supposed to be applied.

In *Smith v. City of Jackson*,[380] Justice Stevens's majority opinion did not cite *Chevron*, nor did the Court defer. The Court decided this case by applying the tools of construction and looking at the text of the statute, the Court's precedent, and the administrative regulations, which all supported the agency's interpretation.[381] Justice Scalia concurred in part and concurred in the judgment, writing that it was "an absolutely classic case for deference to agency interpretation."[382] However, Justice Scalia did not find that the statute was ambiguous.[383] Instead, he focused on the statute's delegation to the agency and the agency's long-held and reasonable interpretation.[384]

Like in prior cases, Justices Stevens and Scalia[385] disagreed on when courts should defer. Here, they disagreed over whether courts should still apply the tools of construction when Congress has *expressly* delegated rulemaking authority to the agency or whether courts should instead skip Step One—because of the express delegation—and defer to the agency's rule if it was reasonable.

*General Dynamics* and *City of Jackson* were in the same line of cases as *Cardoza-Fonseca*, *Dole*, and *Adams Fruit*, where the Court properly applied

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377. 540 U.S. 581, 600 (2004).
378. *Id*. (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987)).
379. *Id.*
380. 544 U.S. 228 (2005).
381. *Id.* at 240.
382. *Id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).
383. *Id.* at 243-45.
384. *Id.*
385. Justice Scalia's *Chevron* jurisprudence was a bit of an enigma. Many times, especially when writing dueling opinions with Justice Stevens, Justice Scalia would defer quickly and barely analyze whether the statute was ambiguous. But other times, like in his dissent in *Pauley* and the dissent he joined in *PUD No. 1*, he would critique the Court for finding ambiguity and not applying the canons of construction. *See* Pauley v. BethEnergy Mines, 501 U.S. 680, 719 (1991) (Scalia, J., dissenting); PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 728 (1994) (Scalia, J., dissenting).

the tools of construction to find the statute's meaning. On the other hand, in *Sullivan*, *Pauley*, *Holly Farms*, and *Smiley*, the Court only performed an abrupt Step One analysis before deferring. The Court had not addressed ambiguity and the canons of construction in several years since *Holly Farms* and *Smiley*, when the Court had performed perfunctory Step One analyses. However, the Court continued its back and forth and went the other way in *General Dynamics* and *City of Jackson*. Although the Court properly applied *Chevron* in these two cases, the Court was still unable to land on a consistent method for deciding if a statute was ambiguous.

That same year, the Court decided the notorious *National Cable and Telecommunications Association v. Brand X Internet Services*, where the Court held that new agency interpretations controlled over prior judicial precedent, unless that precedent decided that the statute was unambiguous.[386] The Court had to decide whether broadband internet suppliers were telecommunications carriers or information-service carriers under the Communications Act.[387] Telecommunications carriers were subject to more regulations under the Act than common carriers.[388] The FCC read the Act to include internet suppliers as information service carriers, not telecommunication service providers.[389] The Ninth Circuit Court of Appeals refused to defer and instead decided that under prior Ninth Circuit precedent, the term "telecommunications service" included internet.[390] The Supreme Court granted certiorari to decide if *Chevron* applied to an agency's interpretation even though it contradicted recent precedent.[391]

The Court, with Justice Thomas writing for the majority, held that *Chevron* applied: "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[392]

Instead of addressing this question like the *Maislin* and *Neal* Courts did through the lens of stare decisis, the Court walked through the reasoning behind *Chevron*. If the statute was ambiguous, Justice Thomas reasoned, then Congress intended the agency to fill the gap, and a prior court's interpretation

386. 545 U.S. 967, 982 (2005).
387. *Id.* at 975.
388. *Id.*
389. *Id.* at 977-79.
390. *Id.* at 979-80 (citing AT&T v. Portland, 216 F.3d 871, 879 (9th Cir. 2000)).
391. *Id.* at 980.
392. *Id.* at 982.

could not preclude the agency from interpreting the statute.[393] Only if the prior court had held that the statute unambiguously foreclosed the interpretation could it preclude the agency's reading of the statute.[394]

*Brand X* interpreted *Chevron*'s premise that Congress delegated implicitly via ambiguity—which had largely been viewed as a legal fiction—to not be fiction at all but be an actual, intentional delegation.[395] Since ambiguity was considered an intentional delegation by Congress, a court that rejected an agency's interpretation in favor of a prior judicial interpretation would be voiding a congressional delegation. This view gave Congress a lot of credit for intending to delegate when, in fact, an ambiguity may mean many things, like a compromise, a disagreement, sloppy drafting, or an oversight.[396]

*Brand X* also created "litigation over litigation" by requiring courts to reevaluate prior decisions and determine whether they were decided at Step One or Step Two.[397] If the case was decided at Step One—the court had decided the statute was unambiguous—then the court must follow the precedent and did not have to defer to the agency's interpretation. But if the case was decided at Step Two—the court had decided the statute was ambiguous—then the court also needed to defer to the agency's new interpretation, so long as it was reasonable. The Court could not follow the prior decision's interpretation as a better reading of the statute since the statute was ambiguous and Congress had delegated interpretive authority to the agency. However, this logic required that prior precedents clearly indicate whether the statute was unambiguous or not, and courts do not always identify whether the interpretation they chose is the only appropriate interpretation or merely the better among equals. When *Brand X* required courts to reevaluate prior cases, parties would need to relitigate prior litigation, and courts would need to judge prior decisions. This would be especially true when prior courts were not clear on whether statutes were ambiguous or not. Not only would this drain judicial efficiency, but as Professors Merrill and Hickman wrote, this second-deciding step could create

393. *Id*.

394. *Id.* at 982-83.

395. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

396. *See id.* at 517-18.

397. Merrill & Hickman, *supra* note 328, at 919.

confusing and contradictory results.[398] This approach would create "litigation over litigation."[399]

The *Brand X* Court addressed its earlier decisions in *Maislin* and *Neal* and categorized them as instances of the Court following prior cases that had held the statute was unambiguous at Step One.[400] According to the majority, those prior cases that the Court followed in *Maislin* and *Neal* were controlling precedents since they had recognized the statutes as unambiguous.[401] "[A] court's interpretation of a statute trumps an agency's under the doctrine of *stare decisis* only if the prior court holding 'determined a statute's *clear* meaning.'"[402] Per the *Brand X* majority, those prior precedents at issue in *Maislin* and *Neal* had decided that the statute was clear.

But another way to read *Maislin* and *Neal* is that the statutory meaning was clear *once* the prior cases had interpreted the statutes, and then the Court followed the precedents. The meaning may have not been clear originally, but it was clear after the Court interpreted the statutes.[403] As discussed above, in context that appears to be the reasoning of the Court in *Maislin* and *Neal*; the prior Court's interpretation gave a clear meaning to the statute.[404]

*Brand X* claimed not to change anything nor create a new test, but under the best reading, *Brand X* contradicted prior precedent. Further, the test it created opened a Pandora's box of potential issues for courts trying to interpret prior decisions through the *Chevron* lens. *Brand X* handicapped the judiciary in a unique way unseen to this point. It gave agencies veto power over prior court decisions unless the prior court had clearly indicated the statute was unambiguous. *Chevron* was a limit on courts' judicial power to state what the law is, but *Brand X* further stripped away judicial authority by allowing agencies to ignore prior caselaw.

*Massachusetts v. EPA* is primarily known as an administrative standing case, but the Court also addressed *Chevron* on the merits.[405] In an unusual posture, the petitioners asked the Court to find that the agency could be *required* to regulate greenhouse gases, and the agency denied it had that authority.[406] Justice Stevens, for the majority, determined that the "statute [wa]s unambiguous" and the "statutory text foreclose[d] EPA's reading."[407]

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398. *Id.*
399. *Id*.
400. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005).
401. *Id.*
402. *Id.* (quoting Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990)).
403. MERRILL, *supra* note 14, at 155.
404. *See supra* text accompanying notes 208-16, 258-69.
405. 549 U.S. 497, 527 (2007).
406. *Id.* at 505-06, 528.
407. *Id.* at 528-29.

The Court engaged with the text and criticized the EPA for not "relying on statutory text."[408] The majority's textual analysis was brief but focused on the textual provision before the Court and found its meaning rather than turning to other sources like legislative history, substantive canons, or even statutory context. Justice Scalia dissented, focusing on the merits, and argued the statute was ambiguous and the agency's interpretation was reasonable under *Chevron*.[409]

The Court's analysis in *Massachusetts v. EPA* stands in stark contrast to *Brown & Williamson*. In *Massachusetts v. EPA*, the Court only looked at the statutory term at issue, but in *Brown & Williamson,* the Court turned to everything else to decide that the statute was unambiguous. *Massachusetts v. EPA* also seemed to be a perfect case for the major questions doctrine, as the petitioners asked the Court to require the agency to regulate all car emissions.[410] This would necessarily have a significant economic impact. The EPA raised the major questions doctrine from *Brown & Williamson*, claiming that it lacked authority to regulate something so significant as car emissions, but the Court dismissed that argument, stating that the FDA's argument in *Brown & Williamson* had "clashed" with "common sense."[411] But the Court never denied that regulating motor vehicle emissions would significantly impact the economy, nor did the Court find that Congress had clearly stated that the agency should do so.[412] Instead, the Court merely claimed that there was "nothing counterintuitive to the notion that EPA can curtail . . . emission[s]."[413] This caused some to think that *Massachusetts v. EPA* had ended the major questions doctrine, since the Court responded in such a blasé manner to the argument that the agency could not regulate such an important industry without clear congressional authorization.[414]

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408. *Id.* at 528-30.

409. *Id.* at 558-60 (Scalia, J., dissenting).

410. *Id.* at 505-06.

411. *Id.* at 531 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). *See* Kevin O. Leske, *Major Questions about the "Major Questions" Doctrine*, 5 MICH. J. ENV'T L. 479, 489 (2016).

412. *See* Nathan Richardson, *Deference is Dead, Long Live* Chevron, 73 RUTGERS L. REV. 441, 467-68 (2021).

413. *Massachusetts*, 549 U.S. at 531.

414. Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 594-95 (2008) ("In *Massachusetts v. EPA* . . . the Court dealt a fatal blow to a fledgling, though controversial, doctrine: the 'major questions' exception to *Chevron* deference. . . . The substantive logic in *Massachusetts* is, in the end, fundamentally incompatible with any substantive justification for a major questions exception. Whereas the denial of deference in *Brown & Williamson* seemed to rest on a view that administrative agencies may not implement 'major' policy changes, the denial of deference in *Massachusetts* ultimately obligated one such agency to implement—or at least seriously to consider implementing—one such major change.").

*Massachusetts v. EPA* and *Brown & Williamson* also showed two very different approaches to Step One.[415] *Massachusetts v. EPA*, at least on its face, only looked at the text and found the answer, while *Brown & Williamson* used every other tool to find the answer when just looking at the text may have resulted in a *different* answer.[416] Yet again, the Court failed to apply Step One consistently.

Two years later, in *Zuni Public School District No. 89 v. Department of Education*, the Court disagreed over the order of the *Chevron* steps.[417] Justice Breyer wrote for the majority, and the Court reversed the *Chevron* steps, starting with reasonableness before turning to whether the statute's language was ambiguous.[418] The Court first looked at "[c]onsiderations other than language," like legislative history and statutory background, to find Congress's intent and decide that the agency's interpretation was reasonable.[419] After deciding that the interpretation was reasonable, the Court then looked at the text of the statute and decided it was ambiguous.[420] In one sense, Justice Breyer combined Steps One and Two, as he was simultaneously analyzing Congress's intent and the reasonableness of the agency's interpretation. But he still had not decided that the statute's *text* was ambiguous, and he instead focused on the legislative and statutory history.[421] Only after deciding that the "history and purpose of [the statute] indicate that the [agency's interpretation] [wa]s a reasonable method that carries out Congress' likely intent in enacting the statutory provision," did Justice Breyer turn to the statute's language.[422] Justice Breyer recognized that his prior analysis of the statute's legislative history and the agency's interpretation were not determinative if the statute was unambiguous.[423] But, after looking at the text, Justice Breyer concluded that the text left "several different possible" interpretations for the agency to employ.[424] Thus, "[t]he upshot [wa]s that the language of the statute [wa]s broad enough to permit the Secretary's reading."[425]

415. *See* Richardson, *supra* note 412, at 468-69.
416. *See id.*
417. 550 U.S. 81, 90-94 (2007).
418. *Id.* at 89-90.
419. *Id.* at 90-94.
420. *Id.* at 93.
421. *Id.* at 90-91.
422. *Id.* at 93.
423. *Id.* at 94.
424. *Id*.
425. *Id.* at 100.

Justice Kennedy concurred, agreeing that *Chevron* applied, but he critiqued Justice Breyer for "invert[ing] *Chevron*'s logical progression."[426] Instead, Justice Kennedy believed that Justice Breyer should have "arrange[d] the opinion differently, following the order of the two-step test given in *Chevron*.[427]

But by inverting these Steps, the Court made the statutory text a mere hurdle for the agency at the end of the statutory analysis rather than a substantive step at the beginning. Congress delegated authority to agencies either expressly in the text, or implicitly via ambiguity under the reasoning of *Chevron*. When the Court asked if the interpretation was reasonable before deciding if Congress had delegated authority, and when the Court started with "[c]onsiderations other than [statutory] language," the Court divorced its analysis from the statute itself and focused more on the reasonableness of the interpretation.[428] That is not how *Chevron* was intended. As Justice Kennedy wrote in his concurrence, if the inversion of the two-step test were to "become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes."[429]

In *Long Island Care at Home, Ltd. v. Coke*, the Court yet again applied a *Mead*-like test for whether Congress intended to delegate "'gap-filling' authority."[430] Justice Breyer, writing for the majority, concluded that the agency's reading was a reasonable interpretation of an ambiguous statute.[431] After deciding that the agency's interpretation survived the *Chevron* two-step test, the Court then considered whether the agency's interpretation filled a gap and was legally binding or merely described the agency's position and only had power to persuade.[432] Similar to the way he had flipped the order of the two-step test in *Zuni*, Justice Breyer diverged from the traditional "force of law" cases and applied the *Chevron* two-step before asking whether the interpretation was issued with binding authority. The Court considered the following factors:

> Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to

426. *Id.* at 107 (Kennedy, J., concurring).
427. *Id.*
428. *Id.* at 90 (majority opinion).
429. *Id.* at 107 (Kennedy, J., concurring).
430. 551 U.S. 158, 173 (2007).
431. *Id.* at 169-72.
432. *Id.* at 171-74. It is interesting that what was often referred to as Step Zero is here Step Three.

> promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.[433]

Although this test was a type of "force of law" test similar to *Barnhart*, it also included elements of *Chevron* itself, as well as introducing new factors not previously considered in prior *Chevron* tests. The factors that the "rule falls within the statutory grant of authority, and where the rule itself is reasonable" are basically just the *Chevron* two-step. Further, although one of the primary takeaways from the "force of law" cases is that notice-and-comment rulemaking is unnecessary for a rule to carry the force of law, here, the Court included that as one of the factors for congressional delegation.[434] *Long Island* listed notice-and-comment rulemaking as one of several *sufficient* factors, while *Barnhart* and *Mead* stated that it was not a *necessary* factor, so *Long Island* does not directly contradict *Barnhart* and *Mead*. But it was strange that the *Long Island* Court emphasized the importance of notice-and-comment rulemaking after *Barnhart* and *Mead* downplayed it.

Looking at some of the other *Long Island* factors, whether the regulation set out individual rights and duties was new to any *Chevron* test. But the factor that the "agency focuse[d] fully and directly upon the issue" was very similar to the *Barnhart* factor of "the careful consideration the Agency has given the question over a long period of time."[435]

Once again, the Court created a new test for whether an agency's interpretation was promulgated with the force of law. The "force of law" issue was a sticking point for the Court in the early 2000s, and the Court struggled to find a consistent test. As Professor Merrill and Professor Hickman have discussed, limiting *Chevron* over the "force of law" was an odd choice, as that issue was not tethered to *Chevron*'s reasoning.[436] In practice, the Court could not consistently decide on how to apply the "force of law" test. The question behind the "force of law" issue—does every agency interpretation receive deference, or is deference reserved for certain interpretations?—is important. However, actually crafting a consistent test that properly distinguishes between interpretations is easier said than done. Like the cases on ambiguity and the canons of construction, the "force of law" cases shows how the Court struggled to address the problems that arose

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433. *Id.*

434. *Compare id.*, *with* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000), United States v. Mead, 533 U.S. 218, 230-31 (2001), *and* Barnhart v. Walton, 535 U.S. 212, 221-22 (2002).

435. *Compare Long Island Care at Home*, 551 U.S. at 173-74, *with Barnhart*, 535 U.S. at 222.

436. Merrill & Hickman, *supra* note 328, at 846.

under the *Chevron* framework. *Chevron* raised questions that were not easily answered.

In *National Association of Home Builders v. Defenders of Wildlife*, the Court decided that a statute was ambiguous if it conflicted with another statute.[437] The Court read the Endangered Species Act in the context of the Clean Water Act's directives for the EPA.[438] Since the agency could not "simultaneously obey the differing mandates," the Court decided that the statute was ambiguous.[439] The issue of whether conflicting statutes created ambiguity would come up again later.[440]

In *Negusie v. Holder*, the Court once again wrestled with when to find a statute ambiguous.[441] The question before the Court was whether the statute barred asylum seekers from obtaining refugee status if they had participated in persecuting others while themselves under coercion or duress.[442] The majority concluded that the statute was ambiguous, but the Court also claimed that the agency deserved deference because this issue raised foreign relations questions that were better handled by the executive than the judiciary.[443] The Court did not analyze the statute under *Chevron*—even though the Court concluded that the statute was ambiguous,—because the agency still needed to interpret the statute on its own.[444] Since the agency had not "exercised its interpretive authority" and instead just applied precedent, the Court remanded to the agency to craft an interpretation using its "*Chevron* discretion."[445]

Justice Stevens concurred in part and dissented in part, explaining that the Court's application of *Chevron* was too broad.[446] The question before the Court was a pure statutory interpretation question that under *Cardoza-Fonseca* was a question for the Court to decide, not the agency.[447] Justice Stevens argued that instead of remanding the question of whether a persecutor was barred from refugee status, the Court should have interpreted the statute; only after deciding that the statute *did not* bar persecutors, should

437. 551 U.S. 644, 666 (2007).
438. *Id.*
439. *Id.*
440. *See* Scialabba v. Cuellar de Osorio, 573 U.S. 41, 57 (2014) (plurality opinion).
441. 555 U.S. 511, 516-18 (2009).
442. *Id.* at 514.
443. *Id.* at 517.
444. *Id.* at 521-24.
445. *Id.* at 522-24.
446. *Id.* at 533-35 (Stevens, J., concurring in part and dissenting in part).
447. *Id.*

the Court *then* have remanded to the agency to decide what constituted coercion or duress.[448]

This goes back to the debate over the role of *Chevron* and whether *Chevron* only applied to policy decisions or also to pure statutory questions.[449] Similar to *Cardoza-Fonseca* and *United Foods*, there were two interpretive questions: a statutory question of whether persecutors were barred from asylum and a more policy-like question of what constituted coercion or duress.[450] Unlike in both *Cardoza-Fonseca* and *United Foods*, the Court deferred to the agency on the statutory question and not just the policy question. A strong argument could be made that both these questions were statutory questions, but the important thing for the purposes of this article is that the Court decided these two-question cases inconsistently. The question of whether courts should defer on pure statutory questions as well as policy issues had plagued the Court since *Cardoza-Fonseca*,[451] and here, the Court chose to defer instead of applying the tools of construction.

*Cuomo v. Clearing House Association, L.L.C.* touched on *Brand X* and the relationship between agencies' interpretations and precedents.[452] The Court, with Justice Scalia writing for the majority, decided that the statute was clear after looking at the history from the time of enactment, the Court's precedents, and the tools of construction.[453] The Court explained that the prior precedents controlled, and the agency's interpretation was wrong.[454] Justice Thomas concurred in part and dissented in part, arguing that the majority's decision failed to apply *Brand X* and failed to give controlling weight to the agency's interpretation.[455] According to the dissent, the prior precedents were narrow and did not preclude the agency's interpretation.[456]

This case demonstrates how much *Brand X* limited the role of the courts. The majority analyzed numerous prior cases, some of them addressing the exact statute in question and others interpreting the definition of the term prior to the statute's passage to understand the meaning of the text. The Court followed the "unmistakable and utterly consistent teaching of [its] jurisprudence" instead of deferring.[457] But the dissent claimed that this

448. *Id.* at 537-38.
449. *See id.*
450. *See supra* text accompanying notes 116-53.
451. INS v. Cardoza-Fonseca, 480 U.S. 421, 454-55 (1987) (Scalia, J., concurring in the judgment).
452. 557 U.S. 519, 525 (2009).
453. *Id.*
454. *Id.* at 526-29.
455. *Id.* at 548-49 (Thomas, J., concurring in part and dissenting in part).
456. *Id.* at 549-50.
457. *Id.* at 529 (majority opinion).

analysis was inappropriate since those cases did not decide that the statute was unambiguous; however, in choosing to defer to the agency's interpretation, the dissent would have neglected the Court's responsibility to find the statute's correct meaning.

The reasoning of the majority and dissent in *Cuomo* is eerily similar to that of Justices Stevens and Scalia in *Cardoza-Fonseca*, when Justice Scalia, in concurrence, criticized Justice Stevens for assuming that courts could "substitute their interpretation of a statute for that of an agency whenever '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute."[458] Only here, Justice Thomas criticized the majority for relying on prior cases and precedent, even if they were "best read to support petitioner's view of the statute;" since the statute was not plainly ambiguous, *Chevron* should have applied.[459] The rationale in both these cases was the same: the majority in each tried to find the meaning of the statutes, but the dissent thought the Court could not reject the agency's interpretation because the agency was exercising congressionally delegated authority. *Brand X* gave agencies controlling interpretive authority over judges, and it handicapped judges' ability to find the right answer. If the right answer was hard to find and the judge turned to prior cases to shine light on the statute, then under the dissent's application of *Brand X*, the court's interpretation would not control over future agency interpretations unless the right answer was unambiguous.

In *Cuomo*, instead of taking *Brand X*'s reasoning to its zenith, the Court got it right and followed precedent. *Brand X* was an attempt to square *Chevron*'s reasoning about congressional delegation with stare decisis, but it created even more problems and contradicted other parts of *Chevron*, namely Footnote Nine's exhortation that courts should try to find the statute's meaning. The *Cuomo* Court wisely sidestepped those issues and applied the precedent.

*Mayo Foundation for Medical Education and Research v. United States* is yet another case where the Court adopted a more expansive pre-deference "choice of law" test.[460] After a detailed analysis of which standard of review to apply, Chief Justice John Roberts's majority opinion determined that *Chevron* deference was appropriate because the *Long Island* multi-factor test was met.[461] Rather than just applying *Mead*, Chief Justice Roberts endorsed Justice Breyer's more searching inquiry into whether the agency's

458. INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment).

459. *Cuomo*, 557 U.S. at 550.

460. 562 U.S. 44 (2011).

461. *Id.* at 58.

interpretation was entitled to *Chevron* review.[462] Justice Breyer's "force of law" revolution that started in *Barnhart* had now received the backing of not only the votes of other Justices but also the pen of the Chief Justice. Although many have critiqued *Mead* for changing *Chevron*,[463] it is even more disturbing how often *Mead* itself changed.

The following year, in *United States v. Home Concrete & Supply, LLC*, the Court again wrestled with applying *Brand X*, this time regarding whether *pre-Chevron* cases could control over agency interpretations if the prior precedent did not specify that the statute was unambiguous.[464] Justice Breyer, writing for a plurality, stated that favoring the agency's interpretation over on-point pre-*Chevron* precedent would be tantamount to overruling the precedent.[465] The prior case—*The Colony, Inc. v. Commissioner of Internal Revenue*—interpreted the statute at issue and stated that "it cannot be said that the language is unambiguous."[466]

Justice Breyer distinguished *Brand X*. He explained that *Brand X* rested on the premise that under *Chevron,* Congress left ambiguity for agencies to gap-fill, and if a court rejected an agency's interpretation, the court effectively nullified a congressional delegation.[467] However, prior to *Chevron,* there was no reason to assume that statutory ambiguity was a congressional delegation; instead, the *Colony* Court applied the tools at its disposal and decided that the statute did not leave a gap for the agency to fill.[468]

The plurality all but acknowledged that *Chevron* was based on a legal fiction, and yet the plurality expected Congress to legislate as if that fiction was a reality and ambiguity was an actual delegation. If the prior case was post-*Chevron*, then the Court assumed Congress left the ambiguity there intentionally as a delegation. If the prior case was pre-*Chevron*, then the Court understood that Congress did not intentionally leave ambiguity to signal a delegation since the prior court was unaware of *Chevron*'s rule.

*Chevron* was premised as nothing new: Justice Stevens believed he was describing the law as it was at the time. However, future Courts treated *Chevron* as revolutionary and expected Congress to be aware of the change and legislate accordingly. *Chevron* assumed that ambiguity was always a

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462. *Id.*

463. *See, e.g.*, Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289 (2002); Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527 (2014).

464. 566 U.S. 478, 483-85 (2012).

465. *Id.* at 483.

466. 357 U.S. 28, 33 (1958); *see also Home Concrete*, 566 U.S. at 486.

467. *Home Concrete*, 566 U.S. at 487-89.

468. *Id.* at 488-89.

delegation, pre-*Chevron* and post-*Chevron*. It was an obvious legal fiction.[469] But future Courts treated *Chevron*'s "ambiguity-as-delegation" premise, not as a fiction but as an actual delegation, and this is most clearly seen in this debate over whether prior judicial interpretations or current administrative interpretations controlled.[470] The irony of *Brand X* is that it tried to follow *Chevron*'s principle of ambiguity as a congressional delegation to its logical conclusion: that an agency's interpretation, made from its exercise of that authority, would control over a court's prior interpretation of that statute. But in so doing, the *Brand X* Court contorted ambiguity from a legal fiction into an actual, intentional delegation from Congress.

In *Home Concrete*, Justice Scalia concurred in part and concurred in the judgment and expounded on this conflict between pre- and post-*Chevron* cases.[471] Justice Scalia critiqued the plurality's reasoning:

> The notion, seemingly, is that post-*Chevron* a finding of ambiguity is accompanied by a finding of agency authority to resolve the ambiguity, but pre-*Chevron* that was not so. The premise is false. Post-*Chevron* cases do not "conclude" that Congress wanted the particular ambiguity resolved by the agency; that is simply the *legal effect* of ambiguity—a legal effect that should obtain whenever the language is in fact (as *Colony* found) ambiguous.[472]

Justice Scalia was correct—*Chevron* adopted a *legal* effect, not an actual effect on Congress—but the Court had to contort *Chevron* to not arrive at ridiculous outcomes under *Brand X*.

The dissent in *Cuomo* and the plurality in *Home Concrete* highlight how *Brand X* exposed *Chevron*'s inconsistencies. While *Brand X* followed *Chevron*'s reasoning about delegation to its ultimate conclusion, these opinions flipped *Chevron* on its head and contradicted what the Court intended. *Chevron* was intended as a doctrine of last resort if the Court could not find the actual meaning of the statute, but if the dissent in *Cuomo* had ruled the day, courts could not have followed precedent to find the clear meaning of the statute. In *Home Concrete*, *Chevron* was treated as a revolution that Congress legislated in light of, and Congress now *intentionally* left ambiguity as a delegation to agencies. Both of these ideas

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469. Scalia, *supra* note 395, at 517; Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 286 (2016) (Thomas, J. concurring) ("But today's decision does not rest on *Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law."); Eben Moglen & Richard J. Pierce Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1212-13 (1990).

470. *See supra* text accompanying notes 395-96 (discussing *Brand X* and the legal fiction).

471. 566 U.S. at 494-96 (Scalia, J., concurring in part and concurring in the judgment).

472. *Id.* at 495.

were foreign to the *Chevron* Court. In other words, as the Court tried to follow *Chevron*'s logic, the Court ended up contradicting *Chevron*. *Chevron* was a Hydra, and the more heads the Court tried to cut, the more heads grew up.

In *Holder v. Martinez Gutierrez*, the Court once again ignored Step One.[473] Justice Kagan, for the unanimous Court, skipped Step One and decided that the agency's "position prevail[ed] if it [wa]s a reasonable construction of the statute."[474] The Court did not look for ambiguity or decide that Congress delegated to the agency.[475] Instead, the Court ruled that the agency's interpretation was "consistent with the statute's text," and "the language of [the statute] at least permit[ed]" the agency's reading.[476] The Court acknowledged the agency did not point to an ambiguity, but the Court accepted the agency's claim that this was the best interpretation.[477] "In making that case, the decision reads like a multitude of agency interpretations—not the best example, but far from the worst—to which we and other courts have routinely deferred."[478] Even though it may have read like an interpretation the Court had deferred to before, the Court did not explain how the agency had the congressional authority to support that deference. Again, without a congressional delegation, either explicit or implicit, *Chevron* deference loses all justification.

The next year, in *City of Arlington v. FCC*, for the first time in a majority opinion, the Court addressed whether agencies were entitled to deference for their interpretation of the scope of their own authority.[479] The Telecommunications Act of 1996 required that local or state governments respond to zoning applications for wireless communication towers and antennas within a "reasonable period of time."[480] The FCC issued a declaratory ruling interpreting "reasonable period of time" as ninety days for new antenna site applications and one hundred fifty days for every other type of application.[481] Local governments sued, arguing that the Commission

473. 566 U.S. 583, 591 (2012).

474. *Id.*

475. *Id.*

476. *Id.* at 591-92.

477. *Id.* at 597 ("The Board, to be sure, did not highlight the statute's gaps or ambiguity; rather, it read § 1229b(a)'s text to support its conclusion that each alien must personally meet that section's durational requirements.").

478. *Id.* at 597-98.

479. 569 U.S. 290, 293 (2013). *See also* Isaiah McKinney, Loper Bright—Chevron *Needs a Gravestone, Not Another Exception*, YALE J. ON REG. NOTICE & COMMENT (May 14, 2023), https://www.yalejreg.com/nc/loper-bright-chevron-needs-a-gravestone-not-another-exception-by-isaiah-mckinney/ [https://perma.cc/V5GW-CXP3].

480. *Arlington*, 569 U.S. at 293-94 (quoting 42 U.S.C. § 332(c)(7)(B)(ii)).

481. *Id.* at 295.

lacked authority to interpret a provision of the Act, and the question for the Supreme Court was whether *Chevron* deference applied to an agency's interpretation of its own jurisdiction.[482]

Justice Scalia wrote the majority opinion, and the Court explained that the distinction between jurisdictional and non-jurisdictional agency interpretations was largely meaningless.[483] *Chevron* questions have always hinged on whether agencies acted outside of Congress's bounds, so there was never a question of whether some interpretations were jurisdictional and other acts were not: the issue was always whether the agency had jurisdiction to act.[484]

The petitioners claimed that jurisdictional questions "concern the *who*, *what*, *where*, and *when* of regulatory power" and were distinct from questions of the *application* of an agency's authority.[485] The Court countered that the application of an agency's authority *always* considered the who, what, when, and where of agency authority, and so there was no meaningful distinction between jurisdictional and non-jurisdictional questions.

> But an agency's *application* of its authority pursuant to statutory text answers the same questions. *Who* is an "outside salesman"? *What* is a "pole attachment"? *Where* do the "waters of the United States" end? *When* must a Medicare provider challenge a reimbursement determination in order to be entitled to an administrative appeal? These can all be reframed as questions about the scope of agencies' regulatory jurisdiction—and they are all questions to which the *Chevron* framework applies.[486]

Chief Justice Roberts dissented, explaining that before deferring, courts should determine whether Congress delegated authority to interpret "the ambiguity at issue."[487] A broad delegation of authority is not sufficient: Rather, Congress needed to clearly delegate authority to the agency to interpret the specific statutory provision at issue.[488]

Both of these opinions underscore the issue with *Chevron* deference. Justice Scalia's majority opinion was correct that every *Chevron* question is

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482. *Id*.

483. *Id.* at 297-98.

484. *Id.* ("Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'").

485. *Id.* at 300 (quoting Brief for Respondents International Municipal Lawyers Association et al. at 18-19, *Arlington*, 569 U.S. 290 (Nos. 11-1545, 11-1547)).

486. *Id.*

487. *Id.* at 317 (Roberts, C.J., dissenting).

488. *Id.* at 322-23.

a question about the agency's "jurisdiction" and whether the agency had the authority to interpret the statute in the way the agency had. However, giving agencies *Chevron* deference for the scope of their own authority also gave new, large swaths of power to the agencies. Not only could agencies gap fill, but they also could decide how big the gaps were.[489] This was not the *Chevron* deference that Justice Stevens created in *Chevron*, where the Court deferred on what it understood to be a policy issue, not on how much authority the statute gave the agency.

The dissent though, was not much better, as it limited *Chevron* to an almost unworkably-narrow test. For each specific question at issue, courts would need to ask whether Congress delegated rulemaking authority in the statute, on top of asking whether Congress expected the agency to speak with the force of law under *Mead*. That would have expanded Step Zero to *two* pre-*Chevron* tests addressing delegations of rulemaking authority. Justice Roberts's test in *Arlington* focused more on congressional delegation in the statutory text, while *Mead* looked for delegation in the way the agency's interpretation was promulgated.

Under the tests proffered in the *Arlington* majority and dissenting opinions, there is either an insatiable *Chevron* that allows agencies to decide the scope of their own authority or an anemic *Chevron* that requires courts to ask whether agencies had congressional authority twice, first by looking to make sure Congress delegated authority in the statute and then checking if the interpretation had the force of law. Courts and agencies would be better off with no *Chevron* at all and de novo review.

*Arlington* did not necessarily contradict prior caselaw—there was no precedent that agencies could *not* interpret the scope of their own authority.[490] Rather, the Court affirmed a position that had only previously been taken in concurring and dissenting opinions: Justice Scalia's concurrence in *Mississippi Power*[491] and Justice White's dissent in *Dole*.[492] The Court had also expressed skepticism of deferring to the agency's interpretation of its own jurisdiction in *Adams Fruit*.[493]

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489. *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696-99 (1991); *supra* text accompanying notes 222-28.

490. Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2673 (2003) ("The issue of whether *Chevron* deference can be applied to jurisdictional questions has not been clearly settled by the Court.").

491. Miss. Power & Light Co. v. Mississippi *ex rel*. Moore, 487 U.S. 354, 380-81 (1988) (Scalia, J., concurring in the judgment); *supra* text accompanying notes 158-60.

492. Dole v. United Steelworkers of Am., 494 U.S. 26, 43 (1990) (White, J., dissenting); *supra* text accompanying notes 176–81.

493. Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638, 650 (1990); *supra* text accompanying notes 197-201.

Even though *Arlington* did not directly contradict precedent, it did expand *Chevron* in ways the *Chevron* majority did not foresee. *Chevron* had a few stated goals: giving credence to agencies' expertise, finding Congress's intent, and upholding the separation of powers and democratic accountability, among others.[494] But the *Arlington* decision and deferring to the agency's interpretation of its own jurisdiction did not square with those goals.

Looking at each of the goals of *Chevron* in turn, starting with congressional intent, Step One of *Chevron* centered around finding Congress's intent.[495] But when it comes to agencies' jurisdiction, as Professor Cass Sunstein explained, Congress was unlikely to want agencies to "decide on the extent of their own powers" because that would give agencies license to self-deal.[496] It was also unusual for those who were limited by the law to decide the scope of those limits.[497] Unlike *Chevron*, which tried to follow Congress's intent, deferring to an agency's interpretation of its own authority was probably *not* what Congress intended, and that would not achieve *Chevron*'s goal here.[498]

Looking at expertise, agencies generally have technical and policy expertise—deciding the statutory bounds of their authority is not their area of expertise.[499] One counterargument is that their technical expertise may be useful for determining if expanding their authority will achieve Congress's goals.[500] But Professors Sales and Adler explain that an agency's expertise will not answer the question of whether Congress intended to delegate authority to an agency to exercise *all* its expertise:

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494. Sarah Zeleznikow, *"Leaving the Fox in Charge of the Hen House": Of Agencies, Jurisdictional Determinations and the Separation of Powers*, 71 N.Y.U. ANN. SURV. AM. L. 275, 292-98 (2016).

495. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 n.9 (1984).

496. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2099 (1990). *See also* Zeleznikow, *supra* note 494, at 299-300 (describing Professor Sunstein's view on Congress's intent regarding agencies interpretation of their own jurisdiction). But Professor Sunstein's later works walk back this point. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2605 (2006) ("First, the line between jurisdictional and non-jurisdictional questions is far from clear, and hence any exemption threatens to introduce much more complexity into the deference inquiry. Second, and far more importantly, the considerations that underlie *Chevron* support 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.").

497. Zeleznikow, *supra* note 494, at 299-300.

498. *Chevron,* 467 U.S. at 843 n.9.

499. *See, e.g.*, Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 561-62 (2007) (Breyer, J., concurring in part and dissenting in part) ("[R]eview by generalist judges is important, both because technical agency decisions are often of great importance to the general public and because the law forbids agencies, in the name of technical expertise, to wrest themselves free of public control.").

500. Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 ILL. L. REV. 1497, 1535.

> In enacting statutes, Congress necessarily resolves tradeoffs between competing policy goals and inevitably grants agencies less power than was conceivably possible. Whether or not broader agency jurisdiction would serve the agency's mission does not mean Congress delegated such authority, nor does it mean courts should defer to the agency's interpretation.[501]

Congress still needs to decide how much of an agency's expertise it should exercise, and that is a question the agency's expertise will not answer.

Finally, for this article, democratic accountability and the separation of powers are more likely to be achieved when legal questions, like the scope of an agency's statutory authority, are left to the judicial branch, which interprets the law rather than given to the executive branch, which enforces policy.[502] The judiciary has been tasked with judicial review of Congress's decisions, not agencies.[503]

Although *Arlington* did not directly conflict with prior precedent, decision broke away from the Court's prior reluctance to defer to an agency's determination of its own authority, as well as breaking from the reasoning of *Chevron* itself. However, even if Chief Justice Roberts's dissent had won the day, the result would still have departed from traditional *Chevron* deference. The question of whether agencies receive deference for interpreting the scope of their own authority naturally arises from *Chevron*, but no matter how one answers the question, the answer is unsatisfactory. Either way, it changes *Chevron*. *Arlington* shows that *Chevron* cannot answer all the questions that it raises. Once again, the *Chevron* Hydra had struck. *Arlington* was the last significant expansion of *Chevron* deference.

### F. FURTHER NARROWING OF CHEVRON

The next few years marked a narrowing of *Chevron*, as the Court refined *Chevron* in a couple of significant ways, but unlike in past years, the Court did not correspondingly broaden the doctrine. But even while narrowing it, the Court continued to apply *Chevron* regularly.

In *Scialabba v. De Osorio*, the Court once again split over when a statute was ambiguous.[504] Justice Kagan, writing for a plurality, wrote that internal tension within the statute made it ambiguous:

> The two faces of the statute do not easily cohere with each other: Read either most naturally, and the other appears to mean not what

501. *Id.* at 1535-36.
502. Zeleznikow, *supra* note 494, at 302-03.
503. *Id.*
504. 573 U.S. 41, 69 (2014) (plurality opinion).

> it says. That internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts. And when that is so, *Chevron* dictates that a court defer to the agency's choice . . . .[505]

After deciding the statute was ambiguous, the plurality deferred to the agency's reasonable interpretation.[506] This outcome was similar to the Court's holding in *National Association of Home Builders*, where the Court held that a statute was ambiguous because it conflicted with another statute.[507]

Chief Justice Roberts concurred, but he explained that a self-contradictory statute was not ambiguous—that just meant the statute was poorly written.[508] Getting to the heart of *Chevron*, Chief Justice Roberts explained that courts defer to ambiguous statutes because ambiguity is seen as a delegation from Congress, but when a statute directs an agency to both do and not do a certain action, that is not a delegation.[509] "*Chevron* is not a license for an agency to repair a statute that does not make sense."[510]

This concurrence raised an interesting question at the heart of *Chevron*: what is the purpose of deferring to an agency's interpretation of an ambiguous statute? Is ambiguity, as the plurality claimed, a signal to an agency to fill in the gaps Congress left, for whatever reason Congress left them, even when Congress made a mistake? If so, that untethers deference from *Chevron*'s congressional delegation moorings. Once *Chevron* deference is no longer about congressional delegation, it has no constitutional support whatsoever.

*King v. Burwell* expanded the major questions doctrine.[511] The Affordable Care Act created a tax subsidy system for those buying insurance from state exchanges, and the issue was whether those subsidies were also available for people purchasing insurance from the federal exchange, since several states did not offer insurance.[512] The IRS issued a rule that tax credits were available at both the state and federal exchanges.[513] This rule had significant implications for the economy and the Affordable Care Act: if the tax credits were *not* available in federal exchanges, potentially seventy

505. *Id.* at 57.
506. *Id.* at 73.
507. Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007); *see also supra* text accompanying notes 437-39.
508. *Scialabba*, 573 U.S. at 76 (Roberts, C.J., concurring in the judgment).
509. *Id.*
510. *Id.*
511. 576 U.S. 473, 483 (2015).
512. *Id.*
513. *Id.*

percent fewer people would be able to purchase healthcare under the Affordable Care Act program.[514]

The IRS sought deference for its statutory interpretation, but the Court declined to defer because this was an "extraordinary case."[515] The tax credits involved billions of dollars, and whether they were available on federal exchanges was a "question of deep 'economic and political significance' that [wa]s central to this statutory scheme."[516] If Congress had wanted an agency to answer that question, it would have expressly delegated that issue. Also, it was unlikely Congress intended an agency like the IRS to address such a question since the agency lacked expertise in health insurance policy.[517] The Court refused to defer but then found that the statute unambiguously supported the agency's interpretation.[518]

The majority opinion laid out two exceptions to *Chevron*: the major questions doctrine and an agency-expertise exception.[519] After *Massachusetts v. EPA*, *King v. Burwell* may very well have re-established the major questions doctrine and given it a significant place in *Chevron* jurisprudence.[520] The major questions doctrine is alive and well to this day, although it often comes up in non-*Chevron* cases.[521] Even though agency expertise was one of the reasons for *Chevron* originally, the Court had never before refused to give *Chevron* deference because the agency lacked expertise.[522]

Mere days later, the Court decided *Michigan v. EPA*,[523] which was one of the few times the Court refused to defer at Step Two.[524] Justice Scalia, writing for the majority, rejected the EPA's interpretation of whether certain environmental regulations were "appropriate and necessary" under the Clean Air Act because the agency did not consider the costs of the regulations.[525] Although the text did not specify that the agency needed to account for costs, the statutory context—the full text of the statutory provision—made that

514. *Id.* at 494.

515. *Id.* at 485 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

516. *Id.* at 485-86.

517. *Id.* at 486.

518. *Id.* at 492, 496-98.

519. Richardson, *supra* note 412, at 479-81.

520. *Id.* at 482-83.

521. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2607-09 (2022); Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023).

522. *See* Richardson, *supra* note 412, at 481. Expertise was a factor in *Barnhart* and its progeny, but the Court never refused to defer because the agency lacked expertise. *See id.* at 458.

523. 576 U.S. 743 (2015).

524. MERRILL, *supra* note 14, at 117-18.

525. *Michigan*, 576 U.S. at 751.

clear.[526] The Court criticized the agency for picking parts of the full statute to follow but ignoring other parts.[527] However, the Court did not create a clear rule of what context agencies need to consider; instead, the Court just emphasized its importance. Although the Court had previously emphasized the importance of statutory context in cases like *Fort Stewart*[528] and *Brown & Williamson*,[529] the Court has never explained what context or how much context courts should consider when applying *Chevron*. This case was no different.

Some commentators thought *Michigan v. EPA* was a signal of things to come: a rolling back of *Chevron* through a constrained Step Two.[530] That has not happened yet, and it seems unlikely. If *Chevron* will be (is being?) narrowed out of existence, that is more likely to come through Step One. And yet, *Michigan v. EPA* showed that Step Two still has a role in reviewing agencies' interpretations.

Speaking of Step Two, *Cuozzo Speed Technologies, LLC v. Lee*, heard the following term, was the last time the Court deferred at Step Two.[531] Justice Breyer wrote for the majority, and the Court decided the statute at issue was ambiguous because it permitted two different standards.[532] Congress had delegated to the agency to issue regulations governing the administrative review of patent claims.[533] By leaving open the choice of two different standards, Congress had left a gap for the agency to fill, and the Court deferred to the agency's reasonable choice.[534]

Justice Thomas concurred, and he pointed out that the Court did not defer to an implicit delegation but rather that Congress had explicitly delegated authority to the agency to govern its proceedings.[535] This case did not implicate *Chevron*'s fiction of implicit congressional delegation, and Justice Thomas urged the Court to revisit *Chevron* and examine the legitimacy of that fiction.[536]

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526. *Id.* at 753-56.

527. *Id.* at 754.

528. Fort Stewart Schs. v. Fed. Lab. Rels. Auth., 495 U.S. 641, 645-46 (1990); *see supra* text accompanying notes 204-07.

529. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); *see supra* text accompanying notes 297-300, 311-15.

530. Richardson, *supra* note 412, at 485. *See generally* Connor Schratz, Michigan v. EPA *and the Erosion of* Chevron *Deference*, 68 ME. L. REV. 381, 397-98 (2016).

531. 579 U.S. 261, 280 (2016).

532. *Id.* at 277-80.

533. *Id.* at 265-66, 276.

534. *Id.* at 277-80.

535. *Id.* at 286-87 (Thomas, J., concurring).

536. *Id.* at 286.

Justice Thomas was correct: *Cuozzo* was not really a *Chevron* case at all because there was no question of ambiguity. Instead, the agency made a policy choice, and the Court essentially applied arbitrary and capricious review under the Administrative Procedure Act.[537] Thus, even the last application of Step Two was not a traditional case of the Court deferring to an ambiguous statute. Instead, like in Justice Scalia's concurrence in *Smith v. City of Jackson*,[538] Congress explicitly delegated rulemaking authority to the agency, and the Court decided the agency's rule was reasonable.

### G. THE SILENT YEARS

Starting in 2016, the Court entered a period where it has not deferred at Step Two, instead deciding most cases at Step One or not even referencing *Chevron* at all.

In the same term as *Cuozzo,* the Court decided *Encino Motorcars, LLC v. Navarro* and clarified whether arbitrary and capricious agency interpretations could receive *Chevron* deference.[539] The Court decided that a regulation that changed old policy, if it was not sufficiently justified, was procedurally defective and could not enjoy *Chevron* deference.[540] However, agencies could change their position as long as they "provide a reasoned explanation for the change."[541] If an agency failed to explain its reasoning for changing a policy and the change was arbitrary and capricious, then it would not be entitled to *Chevron* deference.[542] This clarified some confusing language from *Brand X* about arbitrary and capricious interpretations.

In *Brand X*, before discussing whether an agency's interpretation could control over a prior precedent, the Court addressed the fact that the agency's interpretation was inconsistent with the agency's prior interpretations.[543] The Court stated that unexplained inconsistencies in an agency's interpretation were reason to find the interpretation arbitrary and capricious, but an inconsistent interpretation could still receive *Chevron* deference if the change was "adequately explain[ed]."[544]

But the *Brand X* Court did not explain whether an arbitrary and capricious interpretation could still receive *Chevron* deference. On one hand,

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537. *See* Gary Lawson, *The Ghosts of* Chevron *Present and Future*, 103 BOS. U. L. REV. 1647, 1656-57 (2023).

538. 544 U.S. 228, 243-44 (2005) (Scalia, J., concurring in part and concurring in the judgment).

539. 579 U.S. 211, 221-22 (2016).

540. *Id.* at 220-22.

541. *Id.* at 221.

542. *Id.* at 221-22.

543. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

544. *Id.*

the Court stated that inconsistency was not a reason to refuse deference, and "[u]nexplained inconsistency [wa]s, at most, a reason for holding an interpretation to be an arbitrary and capricious change . . . under the Administrative Procedure Act."[545] This statement implied that if "at most" the interpretation would be arbitrary and capricious, a court may still defer to it. On the other hand, the Court contrasted an unexplained interpretation that was arbitrary and capricious with an *adequately* explained change in policy that *was* deserving of *Chevron*, which would imply that arbitrary and capricious interpretations *could not* receive *Chevron* deference.[546]

In *Brand X,* the Court never addressed the middle ground of whether an inadequately explained interpretation could be arbitrary and capricious and yet worthy of *Chevron*. Further adding to the confusion, other decisions adopted this language from *Brand X* and implied that *Chevron* was still available for inadequately explained changes in agency policy, but the Court did not explicitly decide the issue one way or the other.[547]

*Encino Motorcars* clarified any confusion from that section of *Brand X*.[548] Inconsistently explained interpretations did not receive *Chevron* deference.[549] But this was also a slight divergence from *Chevron* itself because *Chevron* involved a new agency interpretation, and the Court did not analyze whether that change was justified.[550] In *Chevron*, the agency had promulgated a different interpretation in response to a court order rather than changing its own internal interpretation, so the change was certainly justified. However, *Chevron* never applied the same form of scrutiny to the EPA's interpretation as the Court called for in *Encino Motorcars*. This seemed to be yet another break from the *Chevron* opinion, albeit a small one.

*Digital Realty Trust, Inc. v. Somers* is a good example of how the Court's jurisprudence evolved to rely more on textualism and tools of construction, focusing on the statutory text.[551] The statute explicitly defined the term at issue, and the Court followed that definition, even though it differed from the term's ordinary meaning.[552] The Court refused to defer.[553] The agency argued that the interpretation the Court espoused would limit the statute's impact;

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545. *Id.*
546. *Id.*
547. *See, e.g.*, United States v. Eurodif S.A., 555 U.S. 305, 316 n.7 (2009).
548. 579 U.S. 211, 221-22 (2016).
549. *Id.*
550. *See supra* text accompanying notes 22-31. *See also* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN L. REV. 673, 689 n.60 (2007).
551. 583 U.S. 149 (2018).
552. *Id.* at 160-62.
553. *Id.* at 164-66, 169.

the Court responded that its task was to give the statute the meaning the language suggested, no matter how limited that may be.[554] Written by Justice Ruth Bader Ginsburg, the Court's opinion reads as a textualist tour de force, not exactly what one would expect from the liberal icon. The Court had entered an era of applying the canons and explicitly refusing to defer.

*SAS Institute, Inc. v. Iancu* addressed the goal of the Court when applying the canons of construction.[555] The Court refused to apply *Chevron* because after applying the canons of construction, the statute was clear.[556] Although the majority applied the tools of construction "to discern Congress's meaning,"[557] the dissent applied the tools "to see whether the relevant statutory phrase is ambiguous or leaves a gap."[558] Although both applied the tools, the majority used them to find the statute's true meaning, and the dissent applied the tools as a necessary step before deferring.

*Epic Systems Corporation v. Lewis* also denied the agency *Chevron* deference because the statute was clear after the Court applied the tools of construction.[559] Also, the agency's interpretation affected another statute besides the one that the agency administered, so the interpretation could not receive *Chevron* deference.[560]

In *Periera v. Sessions*, the Court also refused to defer because the statute "supplied a clear and unambiguous answer to the interpretive question at hand."[561] Justice Sonia Sotomayor wrote for the majority, and similar to Justice Ginsburg's majority in *Digital Realty*, the majority opinion here was surprisingly textual. Among other things, the majority chastised the government for attempting to "salvage its atextual interpretation" by invoking "the alleged purpose and legislative history of the [agency's] rule."[562] Once again, the Court stuck to the statute's text.

Justice Kennedy, concurring, expressed his concerns with the way *Chevron* was applied in other cases, and he bemoaned that *Chevron* deference had become a mode of reflexive deference far beyond what the original opinion intended or permitted.[563]

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554. *Id.* at 166.
555. 138 S. Ct. 1348 (2018).
556. *Id.* at 1358.
557. *Id.* (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).
558. *Id.* at 1360 (Breyer, J., dissenting) (citing *Chevron*, 467 U.S. at 842-43).
559. 584 U.S. 497, 521 (2018).
560. *Id.* at 519-20.
561. 585 U.S. 198, 208 (2018).
562. *Id.* at 219 (citing Brief for the Respondent at 37-40, *Periera*, 584 U.S. 497 (No. 17-459)).
563. *Id.* at 219-21 (Kennedy, J., concurring).

In *BNSF Company v. Loos*, the Court applied the tools of construction, including the customary canon, giving weight to "the IRS's long-held construction."[564] The Court performed a robust statutory analysis and decided the agency's interpretation "fit comfortably within [the statute's] definition."[565]

In 2021, two healthcare cases were seen as an opportunity for the Court to overrule, or at least reconsider, *Chevron*:[566] *American Hospital Association v. Becerra*[567] and *Becerra v. Empire Health Foundation* ex rel. *Valley Hospital Medical Center*.[568] In *American Hospital*, the Court addressed the Department of Health and Human Services's authority under the Medicare statute.[569] The Medicare statute provided the agency with two options for deciding hospital rates: if the agency surveyed hospital acquisition costs, the agency could vary the rates, and if the agency did not survey the hospitals, it could not vary the rates.[570] The agency claimed it could vary the rates without having completed the hospital survey because the statute allowed it to "adjust the average price."[571] The Court declined to defer and employed the traditional tools of interpretation: "In sum, after employing the traditional tools of statutory interpretation, we do not agree with [the agency]'s interpretation of the statute."[572]

The Court did not reference *Chevron* at all, even though the Court and parties mentioned *Chevron* forty-nine times during oral argument.[573] During the oral argument, Justice Alito asked the petitioners' counsel, "If the only way we can reverse the D.C. Circuit is to overrule *Chevron*, do you want us

564. 139 S. Ct. 893, 899 (2019).

565. *Id.* at 900.

566. *See* Eli Nachmany, *SCOTUS Faces a Chevron Decision Tree in* American Hospital Association v. Becerra, YALE J. REG. NOTICE & COMMENT (Aug. 9, 2021), https://www.yalejreg.com/nc/scotus-faces-a-chevron-decision-tree-in-american-hospital-association-v-becerra-by-eli-nachmany/ [https://perma.cc/RN4D-D2DC]; Brian R. Stimson et al., *Pending Supreme Court Decision in* AHA v. Becerra *May be Felt Well Beyond the Healthcare Industry*, NAT'L L. REV. (Feb. 15, 2022), https://www natlawreview.com/article/pending-supreme-court-decision-aha-v-becerra-may-be-felt-well-beyond-healthcare [https://perma.cc/YU9K-RYUF]; Katie Keith & Joseph Wardenski, *Supreme Court Hears Two Medicare Disputes*, GEO. L. O'NEILL INST. (Dec. 9, 2021), https://oneill.law.georgetown.edu/supreme-court-hears-two-medicare-disputes/ [https://perma.cc/HJP2-JZH9].

567. 596 U.S. 724 (2022).

568. 597 U.S. 424 (2022).

569. 596 U.S. at 727.

570. *Id.*

571. *Id.* at 736.

572. *Id.* at 739.

573. Transcript of Oral Argument at 6-7, 29, 31-36, 62-63, 66-72, 74, 76, 77, 83, *Am. Hosp.*, 596 U.S. 724 (No. 20-1114), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1114_l6h2.pdf [https://perma.cc/ZS25-JQJH].

to overrule *Chevron*?"[574] Petitioner's counsel responded, "Yes. We want to win the case. Yes."[575] And yet, despite *Chevron* receiving so much attention during oral argument, the Court dodged *Chevron* and applied the tools of construction.

In *Becerra v. Empire Health Foundation*, the Court examined how the Department of Health and Human Services counted Medicare and Medicaid patients for hospital reimbursement.[576] The statutory scheme was complicated, but the Court decided that the statute's meaning was "surprisingly clear"[577] after turning to the "[t]ext, context, and structure."[578] After applying the tools of construction, the Court upheld the agency's interpretation.[579] Similar to *American Hospital*, the case appeared to be a perfect case for applying *Chevron* deference.[580] But during oral argument, the Justices were skeptical and pestered the government with questions about *Chevron* and whether the agency's interpretation was entitled to deference.[581] The Justices questioned whether *Chevron* was appropriate in light of procedural defects in the interpretation, the government's financial interests, and the agency's own confusion about the statute.[582] But as Professor Lawson explained, the Justices' skepticism towards *Chevron* was not supported by caselaw, and adopting any of their critiques would have broadened Step Zero and made *Chevron* nearly unrecognizable.[583] Instead of limiting *Chevron*, the Court ignored *Chevron,* and both the majority and dissent decided the statute was clear.[584]

Similar to the *Becerra* cases, the Court could have again addressed *Chevron* in the 2022 term in *Pugin v. Garland*.[585] The petitioners challenged the Fourth Circuit's decision to defer under *Chevron* and asked that the Court apply one of the lenity canons to the ambiguous statute.[586] Conversely, the

574. *Id.* at 30. *See also* Lawson, *supra* note 537, at 53-54.

575. Transcript of Oral Argument at 30, *Am. Hosp.*, 596 U.S. 724 (No. 20-1114).

576. 597 U.S. 424, 428 (2022).

577. *Id.* at 434.

578. *Id.* at 445.

579. *Id.*

580. Lawson, *supra* note 537, at 62.

581. Transcript of Oral Argument at 14-15, 24, 29, 44-45, 52, 60, 62, 74, *Empire Health*, 597 U.S. 424 (No. 20-1312), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1312_j5fl.pdf [https://perma.cc/87WU-2XX8]; Lawson, *supra* note 537, at 63-65.

582. Transcript of Oral Argument at 14-15, *Empire Health*, 597 U.S. 424 (No. 20-1312).

583. Lawson, *supra* note 537, at 65.

584. *Empire Health*, 597 U.S. at 2362; *id.* at 448-49 (Kavanaugh, J., dissenting).

585. 599 U.S. 600 (2023).

586. Petition for a Writ of Certiorari at 32-37, *Pugin*, 599 U.S. 600 (No. 22-23), https://www.supremecourt.gov/DocketPDF/22/22-23/229589/20230203182113163_22-23%20Petition.pdf [https://perma.cc/RG29-24AB].

government argued that *Chevron* applied.[587] But the Supreme Court, after "applying the traditional tools of statutory interpretation," decided that the statute was unambiguous and declined to either defer or apply a canon of lenity.[588]

Looking at these recent cases, for once, the Court has been very consistent: the Court has applied the canons of construction and has refused to give deference to agencies. Over the past forty years, the Court has inconsistently gone back and forth on when and how to apply *Chevron*. However, within the past seven years, the Court has consistently declined to defer. Although this change is very welcome, the Court should not content itself with ignoring *Chevron*. Just as quickly as the Court turned to the canons of construction recently, it could, in the near future, turn back to reflexive deference. Despite the Court's practice of applying the canons of construction and thoroughly analyzing statutes, the status of *Chevron* is ambiguous. It is currently unclear whether an agency's interpretation could ever receive deference or if the Court has completely discarded *Chevron*. Meanwhile, the lower courts regularly defer to agencies under *Chevron*.[589] In recent years, the circuit courts have not followed the Court's lead in applying the canons of construction, but instead, they regularly find statutes to be ambiguous. Moreover, it is hard to imagine that *Chevron* deference at the lower courts has been much more consistent or workable than at the Supreme Court. For these reasons, although *Chevron* is lying dormant at the Supreme Court right now, it is not dead, and is time for the *Chevron* Hydra to finally meet its end.[590]

## V. THE SOLUTION: DE NOVO REVIEW

*Chevron* is self-contradictory, is not a workable precedent, and it needs to be replaced with de novo review. When a case's standard is not "manageable" and "is incapable of principled application," it is no longer a workable precedent.[591] And "when governing decisions are unworkable," the Court is not constrained to follow those precedents.[592] In the context of

587. Brief for the Attorney General at 51-53, *Pugin*, 599 U.S. 600 (Nos. 22-23, 22-331), https://www.supremecourt.gov/DocketPDF/22/22-23/254916/20230215205223562_22-23%20Garland%20Merits%20Br.pdf [https://perma.cc/4CJW-7Z7T].

588. *Pugin*, 599 U.S. at 610.

589. Isaiah McKinney, *The* Chevron *Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REG. NOTICE & COMMENT (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/ [https://perma.cc/QWU5-LPH2]; *see also* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 5 (2017).

590. *See* Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) ("[*Chevron*] deserves a tombstone no one can miss.").

591. *See* Bamzai, *supra* note 81, at 959-62.

592. *See id.*

*Chevron*, litigants cannot rely upon an evenhanded application, and the Court's jurisprudence is inconsistent and contradictory.

*Chevron* tried to create a simple test that could be easily applied, yet it raised more questions than it answered. Over its forty-year history, the Court has gone back and forth, trying to solve problems as it created new ones. Narrowing *Chevron* is not the answer. That has been tried, and it has not worked, as the lower courts show. *Chevron* is a walking contradiction, and it needs to go.

But what should replace it? De novo review. Historically, courts reviewed agency's interpretations de novo,[593] and de novo review is also required by Section 706 of the Administrative Procedure Act.[594] Section 706 requires that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[595] Courts are to review all legal questions instead of deferring to the agency.

This raises the question of whether a different standard of review should apply to policy questions. However, the lines between law and policy quickly blur. In *Cardoza-Fonseca*, *United Food*, and *Negusie*, there was at least one opinion arguing that there was both a legal and policy issue in the case.[596] There was also at least one opinion in each case claiming that there was no such distinction between law and policy there. Similar to trying to find ambiguity, the results of trying to distinguish between law and policy will vary as much as the individual judges or justices deciding the case.[597] Instead of distinguishing between law and policy, courts should decide all statutory questions de novo.

If a court is confronted with an especially complex or technical statute, the court will still be free to follow the agency's persuasive interpretation, just like it is free to follow the persuasive interpretation argued by any party. Applying a persuasive interpretation is not deference, and it is what courts do on a regular basis in private litigation. De novo review would give courts the freedom to pick the best interpretation, would avoid the confusion and contradictions of *Chevron*, and would incentivize agencies to make strong, reasoned arguments to convince the court. Applying de novo review will not be easy, but simplifying the standard of review for all administrative interpretations will create more consistent results than *Chevron* has historically produced.

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593. *See id.*
594. 5 U.S.C. § 706(2)(F).
595. *Id.*
596. *See supra* text accompanying notes 96-119, 441-51.
597. *See* Kavanaugh, *supra* note 203, at 2134-44.

## VI. CONCLUSION

This overview of post-*Chevron* cases shows how the Court has gone back and forth applying *Chevron*. The Court has struggled to resolve issues like deciding when a statute is ambiguous and when to apply the canons of construction, when an agency's interpretation has the force of law, whether agencies can receive deference for the scope of their authority, and whether prior precedent or an agency's interpretation controls when they conflict. Also, the Court has often divorced *Chevron* from what constitutional underpinnings it had, further stripping it of legitimacy.

On the issue of ambiguity and canons of construction, cases have fallen into two camps. On the one hand, in cases like *Cardoza-Fonseca*, *Dole*, *Adams Fruit*, *General Dynamics*, *City of Jackson*, *SAS Institution*, *BNSF*, *American Hospital*, *Empire Health*, and *Pugin*, the Court engaged in a rigorous statutory interpretation, applied the "traditional tools of statutory construction," and did not defer. On the other hand, in cases like *Sullivan*, *Fort Stewart*, *Pauley*, *PUD No. 1*, *Holly Farms*, *Smiley*, *Zuni Public School*, *Negusie*, *Holder*, and *Scialabba*, the Court either did not apply the canons of construction, swapped the order of *Chevron*'s two steps, or reflexively deferred without thoroughly analyzing the statutes.

Similarly, the Court has evolved on how to decide when an agency's interpretation had the force of law. In *Christensen* and *Mead*, the Court adopted a test for whether an interpretation had the force of law, and in both cases, the Court refused to grant *Chevron* deference to opinion and ruling letters. But in *Barnhart*, the Court created a new test with additional factors, and the Court gave *Chevron* deference to opinion letters. The Court had just refused to defer to these types of informal interpretations in *Christensen* and *Mead*, but then it completely reversed course. In *Long Island* and *Mayo Foundation*, the Court created a new test with different factors than *Barnhart*.

The Court did not address whether an agency was entitled to deference when interpreting the scope of its own authority in a majority opinion until *Arlington*. But even though *Arlington* did not contravene precedent, it did undermine the premises of *Chevron* itself. The *Chevron* Court did not anticipate this type of deference, and *Arlington* enlarged the scope of *Chevron* and gave agencies even more authority.

The Court also reversed course on whether prior precedent or an agency's interpretation controlled. In *Maislin* and *Neal*, the Court held that once the Court had interpreted the statute in a precedential decision, the statute's meaning was clear by definition, and agencies would not receive deference for contrary interpretations going forward. However, in *Brand X*, the Court decided that under the reasoning of *Chevron*, an agency's

interpretation controlled unless the prior precedent clearly stated that the statute was unambiguous. This contradicted prior cases, which had decided that once a precedent interprets a statute, the statute *is* clear.

*Brand X* shifted the power balance between agencies and precedent when the two conflicted. However, in *Cuomo*—decided after *Brand X*—the Court applied precedent even though the prior cases did not state that the statute only had one possible interpretation. *Cuomo* showed how *Brand X* ignored *Chevron*'s requirement that courts find the meaning of the statute before deferring. In *Home Concrete*, the plurality exposed how *Brand X* treated *Chevron*'s premise that ambiguity was a congressional delegation, not as a legal fiction as it was traditionally considered to be, but as an actual delegation. Because of this, the Court held that only in post-*Chevron* cases would ambiguity be considered a delegation—in pre-*Chevron* cases, Congress could not have known that it was delegating when leaving ambiguity in a statute.

The Court has also wrestled through other issues, like how much context a court should consider at Step One, when and whether to apply the major questions doctrine, whether courts should defer on pure statutory questions, whether a statute was ambiguous when it conflicted with another statute, and whether an arbitrary and capricious regulation was entitled to *Chevron* deference. *Chevron* has been anything but simple to apply, and it has evolved in inconsistent ways. It is time for the confusion to end, and instead, courts should review agency interpretations de novo.

*Chevron* has outlived any viability it originally had, and the Supreme Court should overrule it in *Loper Bright* and *Relentless*. *Chevron* needs a gravestone, not another lease on life. *Chevron* has raised more questions than it ever answered. The Court should end the revolutionary evolution of the *Chevron* Hydra.