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Defence Running Riot: eparating Interpretation and Lawmaking Under Chevron

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ARTICLES

Deference Running Riot: Separating Interpretation and Lawmaking Under *Chevron*

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The Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC*[1] is only eight years old, yet it has become perhaps the central case of modern administrative law. It is cited with extraordinary frequency,[2] seems actually to be affecting lower court decisions[3] (perhaps too much so), and has provoked intense debate over its meaning and correctness.[4] *Chevron* receives so much attention because it implicates the basic problems concerning the institutional roles of the different players in the administrative state. It is the decision in which the different ages of administrative law meet; the quasi-constitutional, structural issues that preoccupied early administrative law appear in the context of the

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1. 467 U.S. 837 (1984).

2. A mid-January 1992 Lexis search of Shepard's Citations shows over 2000 citations to *Chevron* in the federal courts.

3. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1028-43, 1058-59. *Chevron*'s effect on the Supreme Court has been inconsistent. Although the Court has taken *Chevron* seriously in occasional cases, overall it has shown no greater acceptance of agency interpretations than it had prior to that decision. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-93 (1992).

4. The large and growing literature on *Chevron* falls into two basic camps: those who read it broadly and are pleased by its overall message of deference, and those who read it narrowly and are troubled by that message. The former includes, among others, Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 505-06, 520-24 (1985); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; and Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986). The latter includes, among others, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989), and Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) [hereinafter Sunstein, *Constitutionalism*]. Professor Sunstein's condemnation of *Chevron* has recently become a good deal less fierce. *See* Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071 (1990) [hereinafter Sunstein, *Law and Administration*].

quasi-procedural, judicial oversight issues that have preoccupied later administrative law.

For a century now, the courts have struggled to determine the limits, if any, on what governmental tasks can be handed over to administrative agencies. The Supreme Court has rarely held that those limits have been exceeded. In particular, apart from an occasional deviation,[5] the Court has consistently upheld delegations of legislative authority.[6] We are well past the point of serious constitutional challenges to broad delegations. What was once decried as "delegation running riot"[7] has long been accepted as the proper, or at least inevitable, functioning of the modern administrative state.[8]

In some ways *Chevron* is the Court's most honest decision about legislative delegation, for it frankly recognizes that Congress does hand over largely unfettered policy-making authority to agencies.[9] In the name of democracy,[10] it forbids judicial interference with an agency's exercise of delegated authority to fill gaps left by Congress.[11] *Chevron* thus accepts the legitimacy of broad congressional delegation, and warns the courts that the delegation is not to them but to the demo-

5. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding unconstitutional delegation of legislative power to President under National Industrial Recovery Act); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (holding unconstitutional standardless delegation to President of power to interdict transportation of petroleum).

6. *See generally* Mistretta v. United States, 488 U.S. 361 (1989) (upholding delegation of power to establish criminal sentences to United States Sentencing Commission).

7. *A.L.A. Schecter Poultry Corp.*, 295 U.S. at 553 (Cardozo, J., concurring).

8. *See* American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1947) (stating that judicial acceptance of vague delegations is "a reflection of the necessities of modern legislation dealing with complex economic and social problems").

9. The links between *Chevron* and nondelegation are explored in Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988).

10. Many of the Court's recent decisions purport to advance the principle of democratic government. For a critical review of the Court's "majoritarian paradigm," under which the judiciary's essential task is to get out of the way of legislative majorities, see Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

11. *Chevron* divides review of agency statutory construction into two steps. "First, always, is the question of 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." *Chevron*, 467 U.S. at 842. Where "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." *Id.* Thus, where Congress "has explicitly left a gap for the agency to fill, . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843. Even where the gap is implicit, the Court may not substitute its judgment for that of the agency. *Id.*

cratically accountable agencies. The substantial controversy surrounding *Chevron* concerns whether the decision does more than delegate power to the agencies. Its detractors portray *Chevron* as itself a delegation, one that abandons to administrative agencies the judicial authority and obligation to "say what the law is."

In this Article I argue that both sides in the *Chevron* debate overstate their case. Although my sympathies are with those who think *Chevron* goes too far, the opinion's basic conclusions are sound and must be taken seriously. On the other hand, courts too often carry deference beyond its appropriate boundaries. Delegation may have run riot, but deference should not, even in the name of respect for such delegations.

Chevron creates two related risks that must inform its application. First, while *Chevron* presupposes and endorses broad legislative delegations, it also undercuts their legitimacy. Historically, the acceptance of broad delegations has rested in part on the assumption that agency action is subject to meaningful judicial review.[12] To the extent *Chevron* is interpreted as letting the agency itself determine the consistency of its action with the terms of the delegation, it destroys this premise. Second, while, as *Chevron* emphasizes, agencies have an edge on courts in accountability, they have no such edge on Congress.[13] To the contrary,

12. *See, e.g.*, Touby v. United States, ___ U.S. ___, 111 S. Ct. 1752, 1758 (1991) (Marshall, J., concurring); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989); American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1947); Yakus v. United States, 321 U.S. 414 (1944); Crowell v. Benson, 285 U.S. 22, 42-46 (1932); Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971) (permitting delegations under "a principle of accountability under which the compatibility with the legislative design may be ascertained not only by Congress but by the courts and the public"); PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 219 (1989); Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 585-86 (1985).

13. Emphasis on *accountability* as a characteristic of administrative agencies is a relatively recent phenomenon. Agency officials are, of course, unelected. Oversight by the elected head of the executive branch is necessarily incomplete, and in certain perverse ways actually may reduce accountability. Thomas O. McGarity, *Presidential Control of Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456-57 (1987). Accordingly, one of the primary objections to delegations of legislative authority is the *lack* of accountability of appointed officials. *See* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (positing that first function of nondelegation doctrine is to "ensure[] . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"); JOHN HART ELY, DEMOCRACY AND DISTRUST 131-134 (1980) (arguing for reinvigorated nondelegation doctrine to ensure that policy is made by elected officials); CHRISTOPHER FOREMAN, SIGNALS FROM THE HILL 2 (1988) (emphasizing need for congressional oversight); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (arguing for renewed nondelegation doctrine in order to prevent legislature from shifting its re-

giving agencies too free a hand trenches on congressional authority, thereby reducing accountability.[14] To the extent Congress has in fact decided something, *Chevron*'s own political theory requires the courts to ensure that agencies act consistently with that decision.

The received lesson of *Chevron*—if the statute is unclear, uphold the agency unless the action is unreasonable—reflects insufficient awareness of these risks. The basic error is a failure to distinguish agency *interpretation*, in a narrow sense, from agency *lawmaking*. *Chevron* does not make agency "interpretations" of statutes binding on the courts; it does require acceptance of agency lawmaking. *Chevron* is understood best in light of the longstanding, if oversimple, distinction between legislative and interpretive rules. Part I discusses this distinction and its application. Part II argues that the distinction remains alive and well, and that *Chevron* does not make agency interpretations in this strict sense binding, even where the statute is unclear. Part III addresses a series of simmering controversies about the scope of deference in light of the understanding of *Chevron* developed in Parts I and II.

I. INTERPRETATION VERSUS LEGISLATION

Separating interpretation from lawmaking is both easy and impossible. The two ought to be different: lawmaking is the process of devising and promulgating the rules; interpretation involves figuring out just what the rules mean, often as applied to particular circumstances. Yet under almost any theory of statutory interpretation,[15] the two overlap. "Interpretation"—at least in any case where a statute is sufficiently unclear as to require judicial explication—must involve some extra-textual clues, even if merely "common sense" or the rules of grammar, as

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sponsibilities to agencies). *Cf.* Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1257 (3d Cir. 1978) (explaining that courts are more skeptical of retroactive agency decisions than of retroactive legislation because "[t]he constitutional legitimacy that inheres in Congress by virtue of its accountability to the electorate is absent" with regard to agencies, who "are not, as a practical matter, accountable to anyone and whose decisions are immune from challenge"). That concern should not be forgotten as a result of *Chevron*'s false, or at least incomplete, dichotomy of judges versus agencies.

14. Or at least that is the theory of our Constitution. Whether it squares with political reality is a more difficult question. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-99 (1985) (arguing that agencies are *more* accountable than Congress).

15. Recent years have seen an explosion of such theories. For a brief catalogue, see Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1614-15 (1991).

to the "better" of two or more possible readings.[16] It also is likely to involve the application of statutory language to unanticipated situations, which will require elements of "lawmaking" as just defined.[17] Despite pleas for judges who will "interpret and not make the law,"[18] they do not really exist.

Nonetheless, administrative law doctrine insists that the two tasks are different, hence the distinction between legislative and interpretive rules. This distinction helps define the appropriate limits of *Chevron*.

A. Interpretive and Legislative Rules

The black-letter principles are easily stated. A legislative, or substantive,[19] rule has the "force and effect of law."[20] The rule itself is the "primary source of legal obligation,"[21] creating new law, rights, or duties.[22] An interpretive rule, in contrast, merely states the agency's view

16. STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211 (1990).

17. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457-58 (1988).

18. In announcing his nomination of Justice Souter, for example, President Bush assured an anxious nation that the nominee "is committed to interpreting, not making the law." Comments by President On His Choice of Justice, N.Y. TIMES, July 24, 1990, at A18, col. 1. In the ensuing question and answer period, he reiterated six separate times that he had sought and was confident he had found a nominee who would "interpret the Constitution" rather than "legislate from the bench." *Id.* President Bush was following a long tradition. *See* HENRY JULIAN ABRAHAM, JUSTICES AND PRESIDENTS 4 (1976) (describing similar assurances by President Nixon on nominating Chief Justice Burger). *See also* American Trucking Ass'n v. Smith, ___ U.S. ___, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring) (stating that "the judicial role . . . is to say what the law is, not to prescribe what it shall be"); *The Federalist Society* (3d unnumbered page) (describing Federalist Society as founded on principle that "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be").

19. The two terms are generally used interchangeably. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (referring to "a substantive rule—or a 'legislative-type' rule"); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (referring to "[l]egislative, or substantive, regulations"); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 180-81 (3d ed. 1991); UNITED STATES DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30, n.3 (1947) (using term "substantive rules"). I will stick with "legislative." *See* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7:9, at 45-48 (2d ed. 1979) (stating that "legislative rules" is preferable term because "substantive" means "nonprocedural").

20. Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977); Paul v. United States, 371 U.S. 245, 255 (1963); Smith v. Russelville Prod. Credit Ass'n, 777 F.2d 1544, 1548 (11th Cir. 1985); WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 151 (1986); SCHWARTZ, *supra* note 19, at 181.

21. Board of Educ. v. Harris, 622 F.2d 599, 613 (2d Cir. 1979).

22. General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984),

of what the statute already requires.[23] The statute remains the basis for any legal obligations or the imposition of liability, and the rule only clarifies or draws attention to the statutory requirements.[24] This distinction is not crystal clear,[25] and often evaporates in the application; nevertheless, it is conceptually coherent and doctrinally entrenched.

A second, slightly less common, line is sometimes drawn between legislative and interpretive rules; only legislative rules are adopted pursuant to a specific delegation of rulemaking authority.[26] Thus, an agency rule that fleshes out a statutory term establishing legal obligations, which is interpretive under the approach outlined above, is legislative if Congress has specifically instructed the agency to issue such rules, even though, for example, the agency could bring an enforcement action with or without promulgating the rule. Perhaps the best-known such case is *Batterton v. Francis*.[27] In *Batterton*, the statute specifically instructed the agency to issue standards that would further define the statutory term, "unemployment." The Court treated these rules as legislative even though issuance of the rules was unnecessary to the operation of the statute.[28] *Batterton* has been criticized as blurring the distinction between legislative and interpretive rules.[29] Certainly the type of rule to which it accords legislative effect often will be interpretive in the sense of explaining or clarifying statutory rights or duties. By virtue of the congressional delegation, however, such rules have the force of law so they are legislative rules.

Whether a rule is legislative or interpretive matters for two reasons. First, the notice and comment requirements of the Administrative Procedure Act (APA) do not apply to interpretive rules.[30] Second, and

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cert. denied, 471 U.S. 1074 (1985).

23. *Id.*

24. Friedrich v. Secretary of HHS, 894 F.2d 829, 834 (6th Cir. 1990); Board of Educ. v. Harris, 622 F.2d 599, 613 (2d Cir. 1979).

25. The District of Columbia Circuit has described it as "enshrouded in considerable smog." *Ruckelshaus*, 742 F.2d at 1565. *See* National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688, 696 (2d Cir. 1975) (noting that "attempts to draw a hard and fast line between 'interpretive' and 'substantive' regulations have been rather unrewarding").

26. K.C. Davis is the leading exponent of this view. 2 DAVIS, *supra* note 19, at § 7:8.

27. 432 U.S. 416 (1977).

28. *Id.* at 425. The same approach occurs in, among other cases, United States v. Morton, 467 U.S. 822, 834 (1984); Heckler v. Campbell, 461 U.S. 458, 466 (1983); Herweg v. Ray, 455 U.S. 265, 274-75 (1982); Addison v. Holly Hill Fruit Prods., 322 U.S. 607 (1944); Wint v. Yeutter, 902 F.2d 76, 81 (D.C. Cir. 1990).

29. Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 353.

30. 5 U.S.C. § 553(b)(A), (d)(2) (1988).

more important for present purposes, interpretive rules receive "less deference" on judicial review;[31] unlike legislative rules, they are not "binding."[32] Interpretive rules are, in the oft-quoted passage from Justice Jackson's opinion in *Skidmore*,[33] "not controlling upon the courts," although they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[34] The respect owed by a court to such an interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control."[35] Thus, "[a]lthough nonlegislative rules have no binding force, they are usually given considerable deference."[36] In contrast, legislative rules bind not only the regulated community and the agency itself, but the courts as well.[37] A reviewing court can set aside a legislative rule only if it exceeds the agency's statutory authority or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[38] In other words, courts scrutinize legislative rules under the *Chevron* step two approach.[39]

B. The Scope of Deference

Its defects notwithstanding, the traditional interpretive/legislative distinction is the best guide through the *Chevron* thicket. It separates two different, if occasionally overlapping, determinations: what an agency thinks Congress decided, on the one hand, and what an agency would decide on its own, on the other. There are sound reasons why an agency's interpretive determinations (its conclusion as to statutory meaning) should not be binding, but its legislative, or policy-based, determinations should be binding.

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31. Frank Diehl Farms v. Secretary, 696 F.2d 1325, 1329 (11th Cir. 1983).
32. Seneca Oil Co. v. Department of Energy, 712 F.2d 1384, 1396 (Temp. Emerg. Ct. App. 1983); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977).
33. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
34 *Id.* at 140.
35. *Id.*; *see* Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) ("By way of contrast [to judicial treatment of legislative rules], a court is not required to give effect to an interpretative regulation.").
36. CHARLES H. KOCH, ADMINISTRATIVE LAW & PRACTICE § 3.53, at 93 (1990 Supp.); *see* 2 DAVIS, *supra* note 19, at § 7:13 (discussing deference given to interpretive rules by courts).
37. 2 DAVIS, *supra* note 19, § 7:10, at 52.
38. Batterton v. Francis, 432 U.S. 416, 425-26 (1977).
39. *See supra* note 11 and accompanying text (describing *Chevron*'s two-step approach to reviewing agency statutory construction).

1. Why Defer?

To understand why interpretations should not be binding, it is necessary to consider the basic justifications for judicial deference to agencies.[40] The justifications fall into two broad categories, reflecting the different ways in which an agency may have a comparative advantage over a court in dealing with a statute. First, the agency's proximity to the legislative process may give it special insight into congressional intent.[41] Second, the agency's expertise and political accountability may make it a preferable body for the formulation of policy.[42] These two advantages argue for different kinds of review.

The most obvious explanation for deference to agency interpretations would be that the agency is better able to understand the statute than is the court. The agency may have helped draft the statute;[43] it may possess an institutional memory about the statute's history and true meaning; it is better informed of Congress' current views; and, in light of its technical expertise and complete familiarity with the statute,[44] it can determine the interpretation that will be most workable in practice and best advance the statute's overall goals.[45] In these ways, the agency interpretation can be trusted to comport with congressional will and statutory purposes, which the agency understands better than the court.

Although this justification for deference has a lengthy pedigree, it is not the theory that underlies *Chevron*. In *Chevron*, the Court deferred not because it deemed the agency to have a superior understanding of the statute, but because there was nothing to understand. Congress had left a "gap" for the agency to fill, thereby implicitly instructing the courts to accept the agency's decision.[46] *Chevron* assumes that Con-

40. Similar summaries of the justifications for deference can be found in, among other sources, STRAUSS, *supra* note 12, at 253-56, and Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 367-69 (1986).

41. *See infra* notes 43-45 and accompanying text (explaining reasons for deference to agency interpretations).

42. *See infra* notes 46-49, 56 and accompanying text (detailing *Chevron*'s justification for deference).

43. Miller v. Youakim, 440 U.S. 125, 144 (1979) (confirming that "[a]dministrative interpretations are especially persuasive where, as here, the agency participated in developing the provision"); Adams v. United States, 319 U.S. 312, 315 (1943) (upholding agencies' interpretation because agencies "cooperated in developing the Act, and their views are entitled to great weight in its interpretation"); United States v. American Trucking Ass'n, 310 U.S. 534, 549 (1940) ("[T]he Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.").

44. Udall v. Tallman, 380 U.S. 1, 16 (1965).

45. Breyer, *supra* note 40, at 368.

46. *Chevron*, 467 U.S. at 865.

gress does not know exactly what it wants but trusts the agency.[47] Under this now common view of the theoretical underpinning of judicial deference,[48] the need for and extent of deference is a function of congressional intent.[49]

The notion that Congress has delegated interpretive authority to the agency is likely to be wholly fictional in any case where the delegation is not express. The rivalry between the legislative and executive branches, compounded by the now longstanding phenomenon of powers separated not only by the Constitution but by political party, should raise doubts that Congress actually wants to hand over power to the agencies.[50] Congress should prefer relatively stringent judicial review of agency interpretations.[51] *Chevron*'s presumption is particularly

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47. Breyer, *supra* note 40, at 369-71.

48. *See, e.g.*, Pauley v. BethEnergy Mines, Inc., ___ U.S ___, 111 S. Ct. 2524, 2534 (1991) ("When Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy making authority to an administrative agency, the extent of judicial review of the agency's policy determination is limited."); Adams Fruit Co. v. Barrett, ___ U.S. ___, 110 S. Ct. 1384, 1390-91 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) ("If the legislation either calls for the agency's decision or contains no disposition of the subject, then the agency has been deputized to make a rule, and its decision should be respected."); STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 285-86 (2d ed. 1985); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1 (1990); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 31 n.184 (1983); Scalia, *supra* note 4, at 516-17.

One other justification for deference bears mention. Because federal agencies have a nationwide jurisdiction and federal courts of appeals do not, greater judicial deference will lend uniformity to federal law. Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121-22 (1987). This justification has nothing to do with whether the agency's view is "correct"; it merely reflects that the easiest way to achieve uniformity is for the 800 federal judges to agree to go along with the one agency.

49. *See* Process Gas Consumers Group v. United States Dep't of Agriculture, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc) (explaining that "[t]he extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue' " (quoting Constance v. Secretary of HHS, 672 F.2d 990, 995 (1st Cir. 1982))).

50. Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1213 (1990). *See* 5 U.S.C. § 706 (1988) (requiring that in reviewing agency action "*court* shall decide *all* relevant questions of law . . . [and] interpret constitutional and statutory provisions") (emphases added).

51. Schuck & Elliott, *supra* note 3, at 1026 (arguing that "[i]f courts are suspicious of agency power, their mistrust only mirrors that of members of Congress and the general public"); *id.* at 1027 (noting Congress' preference for judicial review with

counterfactual in equating ambiguity with delegation.[52] Statutory ambiguity results primarily from time constraints, logrolling, and individual legislator's desire for credit but not blame. As Justice Stevens was fully aware, it is not necessarily the result of a conscious desire of Congress to leave policy-making to the agency.[53] The Court nonetheless indulged the fiction because of its belief in the democratic accountability of agencies. Judges "are not part of either political branch"[54] and "have no constituency";[55] therefore they should yield to agencies' resolution of the policy questions that Congress left undecided.[56]

2. *Deference to What?*

The foregoing rationales justify deference to two very different types of agency conclusions. Although the term "interpretation" is applied to both, they roughly correspond to the interpretive rule/legislative rule distinction. The first rationale—agencies' superior understanding of statutory meaning—concerns "interpretation" in a strict sense; the elucidation or translation of a statutory term. The agency is in a particularly good position to determine what Congress meant. That is the sort of conclusion set out in interpretive rules. In contrast, the second justification—agencies' superior accountability and political legitimacy—is not so much about "interpretation" as it is about lawmaking. The agency is in a particularly good position to determine not what rule Congress prescribed but which rule is best. *Chevron* deference does not reflect the agency's ability to determine the one correct meaning of a statute. Rather, its premise is that no such thing exists. The agency is

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teeth).

52. Farina, *supra* note 4, at 468-76; Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1666-68 (1991); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407, 445 (1989) [hereinafter Sunstein, *Interpreting*] (objecting that "an ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.").

53. Justice Stevens did not claim that Congress consciously desired to let the agency answer the hard questions; his point was that, whatever the explanation, that is what Congress had done:

> Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Chevron, 467 U.S. at 865.

54. *Id.* at 865.

55. *Id.* at 866.

56. *Id.*

not clarifying Congress' decision, it is making the decision itself. Whether by congressional direction, superior accountability, or technical expertise, such lawmaking, holds *Chevron*, must be left to the agency.[57]

The difference is illustrated by the still hardy principle that a long-standing agency "interpretation" is due particular deference.[58] Such enhanced deference is justified primarily on the ground that Congress' apparent acceptance of the interpretation over the years shows that the agency is "correct."[59] Accordingly, deference is heightened even further if Congress has amended the relevant or a related statute but left the portion at issue unchanged[60] or if the interpretation dates from the statute's enactment, when the agency supposedly was most aware of what Congress had in mind.[61] The particular authority of the unwavering interpretation thus lies in its consistency with congressional intent.[62]

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57. The national uniformity justification is of the second type; it has nothing to do with whether the agency interpretation is "correct." Nonetheless, it justifies no more than the deference historically accorded interpretive rules. First, a lack of national uniformity, which is tolerated in a wide variety of settings, is simply not a sufficiently compelling reason to abandon the traditional and necessary role of the courts in insisting that agencies adhere to Congress' decisions. Second, if national uniformity is the goal, that can be achieved equally well by having any subsequent court defer to the first court to decide an issue, an approach no more inconsistent with traditional assumptions than having it defer to the agency. Third, national uniformity will still be promoted, though not guaranteed, by the courts granting *Skidmore* deference to agency interpretations. Finally, the geographical uniformity produced by *Chevron* is offset by a loss of temporal and interagency uniformity. The freedom agencies enjoy under *Chevron* to change their views, *see infra* notes 66-67 and accompanying text, will lead to inconsistency over time and between agencies with costs that may be significant. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post*-Chevron *Era*, 32 B.C. L. REV. 757, 817-20 (1991) (describing inconsistencies in diverse agencies' implementation of similar statutory schemes).

58. *See* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (observing that "construction deserves special deference when it has remained constant over a long period of time"); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (commenting that "longstanding and consistent administrative interpretation is entitled to considerable weight").

59. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (remarking that since Congress has corrected misconstructions of statutes by agencies in past, its failure to modify Internal Revenue Service (IRS) rulings of which it was definitely aware "leave[s] no doubt that the IRS reached the correct conclusion in exercising its authority"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381-82 (1969) (deferring because Congress refused to alter FCC's fairness doctrine for thirty years and then explicitly acknowledged it in statutory amendment).

60. Haig v. Agee, 453 U.S. 280, 300-01 (1981); Corn Prods. Refining Co. v. Commissioner, 350 U.S. 46, 53 (1955).

61. Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 120 (1980); Fulman v. United States, 434 U.S. 528, 533 (1978); National Treasury Employees Union v. United States Merit Protection Bd., 743 F.2d 895, 917 (D.C. Cir. 1984).

62. *See* NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974) (observing that "con-

In contrast, if Congress has turned over the policy-making task to the agency, then an ancient "interpretation" should carry virtually the same weight as the most recent of a series of agency reversals.[63] Indeed, a constantly shifting policy may indicate that the agency is doing its job, reflecting the expertise, accountability, and flexibility that justified placing the decision in its hands. The regulation challenged in *Chevron* was itself a Reagan administration reversal of the position taken by the Carter Environmental Protection Agency (EPA) that many would justify in these terms.[64] The important point is that because in such circumstances the agency's view is not in fact an "interpretation" of a statute, its vintage is irrelevant to its validity.

Although courts, including the Supreme Court, still reflexively recite the principle that longstanding interpretations deserve special deference,[65] *Chevron* clearly reflects the second of these approaches.[66] The

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gressional failure to revise or repeal the agency's [longstanding] interpretation is persuasive evidence that the interpretation is the one *intended by Congress*") (emphasis added). Thus, Judge Posner, operating from the premise that the interpretive task is to determine the enacting legislature's intent, argues that courts should defer *only* to longstanding interpretations. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 280 (1985).

63. I say "virtually" because deference to a longstanding interpretation can also be justified on the ground that reversal will upset settled expectations. This has nothing to do with the interpretation's consistency with congressional intent. Rather, an unsupported change in policy may so harm reliance interests as to render the change arbitrary and capricious, part of the *Chevron* step two inquiry. Similarly, a shift occurring without any explanation would not be upheld. For example, the air bags case, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983), involved no question of *interpretation* whatsoever; the matter of pure policy was in the hands of the agency. Nonetheless, an unjustified shift doomed the agency action. *Cf.* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (Scalia, J., concurring) (stating that secondary retroactive impact of formally prospective regulation may be so severe as to render regulation arbitrary and capricious).

64. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

65. *See* Pauley v. BethEnergy Mines, Inc., ___ U.S. ___, 111 S. Ct. 2524, 2535 (1991) (stating that Department of Labor's interpretation pursuant to express congressional delegation would merit less deference had it been inconsistent with previously held views); Aulston v. United States, 915 F.2d 584, 596 (10th Cir. 1990) (explaining that great deference is given to consistent and longstanding agency interpretations); Commonwealth of Mass. v. Secretary of HHS, 899 F.2d 53, 58 (1st Cir. 1990) (stating that less deference is due to an agency's position that is inconsistent with a prior consistently held agency view).

Invocation of this principle is not always reflexive. The Third Circuit, for example, recently came to the considered and express conclusion that examination of agency consistency is part of the step two inquiry. NLRB v. New Jersey Bell Tel. Co., 936 F.2d 144, 147-48 (3d Cir. 1991). This holding is flatly wrong. *See infra* note 66 and accompanying text (discussing deference to longstanding interpretations).

66. "*Chevron* made crystal clear that an agency interpreting a statute under an express or implied delegation of authority is free to modify its view." Federal Labor Relations Authority v. Department of the Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989). *Accord* Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759, 1769 (1991) (stating

opinion rests on the premise that Congress did *not* decide whether a plant-wide bubble could render new source requirements inapplicable. Rather, Congress created what Peter Strauss has labeled a "zone of indeterminacy,"[67] in which the agency was free to do what it wanted as long as it did not go off the deep end. Judicial review of the bubble policy had nothing to do with a determination of congressional intent; there was no intent to determine. *Chevron* is about legislative rather than interpretive rules.

What "binds" a court, then, under both the traditional interpretive/legislative rule distinction and under *Chevron*, is not agency interpretation but agency legislation—the adoption of a particular policy within the boundaries established by the statute.[68] So viewed, *Chevron* imposes exactly the scheme Professor Monaghan had set out the year before.[69] Monaghan argued that in light of Congress' broad legislative delegations the judicial function is only to determine what authority has been conferred upon the agency. "Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of law making authority to an agency."[70] Where an agency acts pursuant to delegated legislative authority, the task of interpretation is merely to define the boundaries of the zone of indeterminacy.

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that as long as agency supports new interpretation with "reasoned analysis," even sharp break from prior position merits full *Chevron* deference); Starr, *supra* note 4, at 297-98; Strauss, *supra* note 48, at 1125-26.

The same idea underlies the courts' appropriate willingness to accept conflicting agency interpretations of the same term in different sections of the same statute. Abbott Labs. v. Young, 920 F.2d 984, 987 (D.C. Cir. 1990); Comite Pro Rescate v. Sewer Auth., 888 F.2d 180, 187 (1st Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1476 (1990).

67. Strauss, *supra* note 48, at 1124. *See id.* at 1121 (using phrase "range of indeterminacy"); *id.* at 1123 (using phrase "area of indeterminacy").

68. Concededly, the *Chevron* opinion refers repeatedly to "an agency's *construction* of the statute," "an executive department's *construction* of a statutory scheme," and "deference to administrative *interpretations*," concluding that "the Administrator's *interpretation* represents a reasonable accommodation of manifestly competing interests and is entitled to deference." Chevron, 467 U.S. at 842, 844, 865 (emphasis added).

These references to "interpretation" and "construction" reflect a different usage than mine, not a different meaning. The structure and basic rationale of the opinion indicate that the Court is deferring not to the agency's reading of the Clean Air Act, but to its lawmaking pursuant to congressional delegation. Thus, the Court describes the Environmental Protection Agency (EPA) as "an agency to which Congress has delegated policymaking responsibilities." *Id.* at 865. The Court concludes "that the EPA's use of the bubble concept is a reasonable policy choice for the agency to make." *Id.* at 845. The lawsuit, "fairly conceptualized, really centers on the wisdom of the agency's policy." *Id.* at 866. The Court's emphasis on democratic theory and the inappropriateness of judicial policy-making underlines its view that the case presented no issue of statutory construction but merely a policy choice. *Id.*

69. Monaghan, *supra* note 48.

70. *Id.* at 26.

Consider the purest examples of legislative rules: health, safety, or environmental standards. For example, under the Clean Air Act, EPA establishes national ambient air quality standards (NAAQS) for certain ubiquitous air pollutants.[71] These are legislative rules by any definition; they create binding legal duties where none had existed before and are promulgated pursuant to express congressional delegation. A "primary" NAAQS must be set at the level that ensures, with an adequate margin of safety, protection of the public health.[72] Armed with this delegation, EPA promulgated an ambient standard for ozone of 0.12 parts per million (ppm).[73] Industrial and environmental interests both sought judicial review, the former saying the number was too low, the latter that it was too high. The court reviewed the standard to determine whether it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Not surprisingly, it upheld the regulation.[74]

Although the vocabulary seems incongruous, this was a classic *Chevron* step two case. Congress expressly delegated legislative authority to EPA; the zone of indeterminacy is defined by statutory language requiring protection of the public health. The 0.12 ppm standard is acceptable, but given the scope of the delegation and the uncertainty of the science a court also would have upheld a standard half or twice the one EPA promulgated. The bubble policy, or any other agency determination properly evaluated under *Chevron* step two, is just like the NAAQS—a legislative, policy-based decision that binds the courts, whose only function is to ensure that the rule is within the scope of the delegated authority and not arbitrary. The scope of review is narrow not because the court must accept the agency's interpretation, but because there is so little to interpret.

3. *Binding Interpretations*

Chevron is silent as to how a court should treat an agency's interpretation of *Congress'* decision. As discussed in Part II.B, such an interpretation should be, as interpretive rules always have been, influential but not binding.[75] Suppose, however, that Congress expressly has given

71. 42 U.S.C. § 7409 (1988).
72. *Id.* § 7409(b)(1).
73. 44 Fed. Reg. 8202 (1979), codified at 40 C.F.R. § 50.9 (1991).
74. American Petroleum Inst. v. Costle, 665 F.2d 1176, 1192 (D.C. Cir. 1981) (upholding standards because they were not arbitrary and capricious and were "supported by a rational basis in the record"), *cert. denied,* 445 U.S. 1034 (1982).
75. As the Court said only the term before, "[w]hen an agency's decision is premised on its understanding of a specific congressional intent . . . it engages in the

an agency *binding* interpretive authority. Here, step two is appropriate.[76] Such cases involve *legislative* rules; the agency functions under an express delegation to promulgate binding regulations with the force of law even though they may be interpretations in the strict sense of expressing a congressional decision.[77]

Congress does have the authority to grant agencies such interpretive authority. The courts' traditional role is indisputably reduced where the agency rather than the court makes a conclusive determination of statutory meaning. However, this does not amount to an unconstitutional creation of Article II courts[78] or a contraction of the federal "arising-under" jurisdiction.[79] Nor is this an unconstitutional delegation. It is true that in such circumstances not only does Congress hand over legislative authority to an agency guided by only the vaguest "intelligible principle,"[80] but the agency itself determines what that principle is.[81]

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quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court." Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983). Nothing in *Chevron* is to the contrary.

76. *See, e.g.*, United States v. Morton, 467 U.S. 822, 834 (1984) (holding that because "Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute"); Heckler v. Campbell, 461 U.S. 458, 466 (1983) (holding that Secretary of Health and Human Services has authority to establish administrative guidelines for determination of total disability and judicial review "is limited to determining whether the regulations promulgated . . . are arbitrary and capricious"); Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) (limiting review of regulation to reasonableness standard because of express delegation); Batterton v. Francis, 432 U.S. 416, 425-26 (1977) (holding that where Congress has expressly delegated to agency authority to prescribe by regulation what constitutes "unemployment" under statute, courts can set aside regulations only if they exceed agency's authority or are arbitrary, capricious, or an abuse of discretion).

77. *See supra* notes 20-28 and accompanying text (discussing distinction between legislative and interpretive rules).

78. The argument would be that the judicial function, saying what the law is, is being handed over to the agency, which renders binding, final rulings.

79. In a sense, for Congress to grant binding interpretive authority to agencies removes certain federal questions from judicial purview. This argument fails for two reasons. First, Congress can, to a much-debated extent, define the federal judicial power more narrowly than does Article III. *See generally* Kevin T. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Jurisdiction*, 75 MINN. L. REV. 65, 69-81 (1990) (discussing theories under which Congress may restrict federal courts' jurisdiction). Second, a court's determination that the statute makes the agency interpretation dispositive is itself an exercise of the "arising-under" jurisdiction.

80. Mistretta v. United States, 488 U.S. 361, 371-72 (1989) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

81. The possible unconstitutionality of this lack of congressional control depends on one's view of the core problem with standardless delegations. If the problem is that Congress must make the decisions, then it is highly questionable to allow an agency to

Yet here a greater-includes-the-lesser argument, usually problematic with regard to separation of powers,[82] is perfectly valid. If Congress can hand over legislative authority altogether, it surely can make an initial attempt at legislation and then assign an agency the task of figuring out what it did, subject to judicial review to ensure that the agency's conclusion is "permissible."[83]

Although Congress can grant and has granted such interpretive authority to agencies, there is no justification for establishing a background or default rule to that effect. It is one thing to say, as *Chevron* does, that Congress implicitly delegates to agencies the authority to make policy-based rules within statutorily defined limits, although even that is a bit of a stretch.[84] But it is perverse to assume that Congress also gives agencies binding authority to determine what it is that Congress has done. Not only is such an idea inconsistent with the traditional roles of courts, Congress, and agencies, it also undercuts Congress' assumption that its actions will control unless and until a subsequent Congress makes changes. Laws survive the political coalitions that produced them; the legitimacy of a statute does not depend on current public or congressional opinion.[85] Under the accountability rationale of *Chevron*, this is a reason for placing primary *interpretive* authority with the courts rather than with the agencies. The political

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determine the limits on its own authority. If, on the other hand, the concern is that agencies not act with complete discretion in individual cases, then the agency can adequately tie its own hands through rulemaking and the nondelegation problem is not increased.

82. *Cf.* Bowsher v. Synar, 478 U.S. 714, 732-34 (1986) (rejecting argument that because Congress creates and can eliminate executive branch offices it can remove officeholders); INS v. Chadha, 462 U.S. 919, 953-54 (1983) (rejecting argument that, because Congress can hand over decision to Attorney General entirely, it can hand it over subject to legislative veto); Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (concluding that Congress' power to create and eliminate executive branch offices does not mean that Congress can appoint officeholders).

83. A recent article argues that *Chevron*'s grant of binding interpretive authority to agencies is unconstitutional. *See* Caust-Ellenbogen, *supra* note 57. For the reasons I have sketched out, I disagree, although the argument deserves fuller treatment than I have given it. It bears emphasis, however, that the constitutionality of *Chevron* deference is even open to question only in this setting, i.e., where the agency is interpreting rather than legislating. A true gap-filling, legislative, step-two setting raises no concerns about encroachment of judicial authority, but only a garden-variety nondelegation issue. Professor Caust-Ellenbogen and I would agree, I think, that courts are often too quick to consider cases under step two when they really do present an interpretive question for judicial resolution.

84. *See supra* notes 50-53 and accompanying text (discussing reasons why Congress should prefer stringent judicial review of agency interpretations).

85. *See* Daniel A. Farber, *Legislative Supremacy*, 78 GEO. L.J. 281, 308-09 (1989) (arguing that even radical changes in public opinion do not justify deviations from statutory directives).

result reflected in the statute more likely will be respected by neutral courts than by accountable, politically appointed agencies. Congressional silence should, therefore, be understood to leave this power—the power to say what it is that Congress has done—with the courts, where it has always been.

Indeed, it is illogical to read *Chevron* as establishing that an agency's understanding of what Congress has done is controlling. The court must at least determine that Congress has given such instructions. *That* determination is necessarily a determination of congressional intent. It would be extraordinary for a court not only to deem an agency's interpretations binding, but also to deem the agency's view that its interpretations are binding as binding. At a minimum, the court must make the latter determination.[86]

II. CONFRONTING AMBIGUITY IN STEP ONE

If *Chevron* is a revolutionary case, what makes it so is its apparent hospitality to implied delegations generally, and delegations by ambiguity in particular. If mere ambiguity counts as a delegation, then agency rules that are interpretive in the sense of merely delineating what Congress has decided become binding on the courts despite the absence of express delegation. *Chevron* then would have eliminated the category of interpretive rules, with "the power to persuade, if lacking the power to control,"[87] and made *Skidmore* historical curiosity. A statute either is clear and therefore agency interpretations are irrelevant, or it is un-

86. The point resembles a common refutation of John Marshall's reliance in *Marbury* on the proposition that the power of judicial review derives from the judiciary's duty to "say what the law is." The Court might, in doing so, say that the Constitution grants Congress the authority to determine the constitutionality of its own enactments. That conclusion would itself be an interpretation of the Constitution. David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 658 n.77 (1982); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 26-29. Similarly, a court must interpret the statute to determine if it gives the agency interpretive authority.

Professor Anthony, who seems to have no quarrel with *Chevron* generally, invokes *Marbury* and speaks of the "abdication of judicial duties" in arguing that no more than *Skidmore* deference should apply when a court reviews an interpretive rule. Anthony, *supra* note 48, at 57. The reliance on *Marbury* seems somewhat misplaced, for if Congress has clearly rendered agency interpretations binding, the court is still saying what the law is in determining that Congress has done so. Monaghan, *supra* note 48, at 26-27; *see supra* notes 76-83 and accompanying text (discussing deference due when Congress has expressly granted interpretive authority to agency). Professor Anthony is on solid ground, however, in invoking the courts' traditional role of interpreting congressional intent absent a clear showing that Congress has displaced them with an administrative agency.

87. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *see supra* notes 31-36 and accompanying text (discussing standard of review of interpretive rules).

clear and agency interpretations are binding.

Under this strong reading of *Chevron*, step one cases would be both utterly straightforward and few and far between. In practice, however, the Supreme Court seems to have decided statutory cases on its own, within step one, even where it would be hard to say that Congress truly has spoken to the precise question at issue.[88] Under the reading of *Chevron* advocated in this Article, the Court has not in fact been backsliding. Rather, these cases reflect the fact that in some settings there is room for argument about the proper interpretation of a statute but the question remains one of statutory meaning, not pure policy. For all the traditional reasons, an agency's views will be relevant but not binding in answering the question. In short, there is a role for *Skidmore* deference within step one.

The Court's treatment of this question has been inconsistent. At times it suggests that *Skidmore* is a dead letter, at other times it ritually invokes the *Skidmore* factors. I argue that a mere lack of clarity is not a delegation and reports of *Skidmore*'s death are greatly exaggerated.

A. Types of Ambiguity

Justice Scalia has stated that "the chink in *Chevron*'s armor—the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions"[89]—is uncertainty as to what it takes to move from step one to step two. "How clear is clear?"[90] If there is an express delegation of legislative authority, this problem does not arise. It is inescapable, however, in deciding whether to proceed to step two because the "statute is silent or ambiguous with respect to the specific issue."[91] Courts should not equate a mere lack of clarity with a delegation of decision-making authority to the agency.[92] Congress is rarely crystal clear, and courts resolve statutory ambiguities all the time. Indeed, it is

88. *See generally* Merrill, *supra* note 3, at 990-93, 1000-03 (describing Court's "reformulation" of step one inquiry to allow judicial resolution whenever statute has plain, or clearly preferred, meaning).

89. Scalia, *supra* note 4, at 520.

90. *Id.*

91. *Chevron*, 467 U.S. at 843.

92. The temptation to do so is great. *See* Environmental Defense Fund, Inc. v. EPA, 898 F.2d 183, 189 (D.C. Cir. 1990) (reading "the ambiguities and perplexities of the statute as delegating to the agency a broad interpretive authority"); *see also* Sunstein, *Constitutionalism*, *supra* note 4, at 467 (stating that "[a]lthough the *Chevron* rule of deference is appropriate when Congress purposely has left a gap for agency resolution, a different rule should apply when there is merely ambiguity"); sources cited at *supra* note 52.

when Congress is ambiguous that judicial review is arguably *most* important, for there is the greatest danger that an agency will misread congressional intent.

At what point a statute becomes so ambiguous as to be a delegation is difficult to quantify. In fact, most efforts to do so sound quite a bit alike. For example, Justice Scalia and Justice Stevens have issued opposing warnings about under-stating or over-stating *Chevron*'s reach. Fearing too narrow a reading of *Chevron*, Justice Scalia stresses that it is not necessary for opposing arguments to be in "absolute equipoise" for the necessary ambiguity to exist.[93] Fearing too broad a reading, Justice Stevens warns that "[t]he task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference."[94] I suspect that neither Justice would disagree with the other's admonition at this level of generality and abstraction. Similarly, although their views of *Chevron* are fundamentally different, I doubt that Justice Scalia would disagree with Professor Sunstein that "[i]f the court has a firm conviction that the agency interpretation violates the statute, that interpretation must fail."[95] In the application, however, disagreement reigns as to the clarity of particular statutes. Not surprisingly, since *Chevron*, where some Justices find clarity others discover ambiguity, and that disagreement in turn determines how they would decide the case.[96] Of course, the cynic would suggest the reverse sequence; that the Justices decide on an outcome, which in turn determines whether they find (or label) the statute clear or ambiguous. Whether *Chevron*, or any legal doctrine, constrains anything but judges' vocabulary is a question for another day.

If one is to search for verbal formulations of the extent of ambiguity that triggers step two, Professor Sunstein's seems as good as any. But

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93. Scalia, *supra* note 4, at 520.

94. Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting).

95. Sunstein, *Law and Administration*, *supra* note 4, at 2092.

96. *See* Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759, 1767-69 (1991) (upholding regulation as permissible interpretation of ambiguous statute); *id.* at 1788 (Stevens, J., dissenting) (finding statute clear and agency's interpretation inconsistent with it); Sullivan v. Everhart, 494 U.S. 83 (1990) (upholding regulations as permissible interpretation of statute, which had not spoken directly to issue); *id.* at 973 (Stevens, J., dissenting) (contending that regulations violated congressional intent that was "clear beyond peradventure"); Dole v. United Steelworkers, 494 U.S. 26, 42 (1990) (finding deference inappropriate because "the statute, as a whole, clearly expresses Congress' intention"); *id.* at 43 (White, J., dissenting) (contending that statute was not clear and therefore deference was due); Sullivan v. Zebley, 493 U.S. 521 (1990) (setting aside regulation as manifestly contrary to statute); *id.* at 541 (White, J., dissenting) (contending that regulation must be upheld as permissible interpretation of unclear statute).

no such formulation will ever be sufficient to overcome the blind spots or disingenuousness of individual judges. There will always be cases where only some judges find the statute ambiguous,[97] or where all agree it is pellucid, but disagree as to its indisputable meaning.[98] The situation resembles the application of the "clearly erroneous" standard to district court findings of fact, from which Professor Sunstein borrows his "firm conviction" test.[99] Just what is "clearly erroneous" is difficult to quantify; there is no significant disagreement at the most abstract level, yet results will vary from judge to judge. The quantity of ambiguity simply cannot be defined usefully in the abstract.

Ambiguity varies not only quantitatively, but qualitatively as well, and it is the qualitative difference that really matters. Consider the well-known case of *Young v. Community Nutrition Institute*,[100] in which the Court upheld the view of the Secretary of Health and Human Services that he had discretion as to whether to issue certain regulations. The statute required the Secretary to "promulgate regulations limiting the quantity of [poisonous or deleterious substances in or on food] to such extent as he finds necessary for the protection of public health."[101] The Secretary contended that "to such extent as he finds necessary" qualified his duty to promulgate regulations.[102] The District of Columbia Circuit held that it qualified only the "limiting the quantity" phrase, thus obligating the Secretary to regulate all poisonous substances but leaving him discretion in determining allowable

97. Dissenting judges often accuse the majority of inventing an ambiguity in order to defer and avoid the merits altogether. *See, e.g.*, Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting); Abbott Labs. v. Young, 920 F.2d 984, 994-95 (D.C. Cir. 1990) (Edwards, J., dissenting).

98. In Dole v. United Steelworkers, 494 U.S. 26 (1990), for example, a majority of seven Justices held that the statute unambiguously confirmed the agency's interpretation; the dissenters argued that it unambiguously contradicted the agency. *See also* Presley v. Etowah County Comm'n, ___ U.S. ___, 112 S. Ct. 820, 831-32 (1992) (deciding case under *Chevron*'s step one and rejecting government's position); *id.* at 834-40 (Stevens, J., dissenting) (agreeing with government's position, but relying directly on statute rather than on principle of deference). The Court was split even more severely in K Mart Corp. v. Cartier, 486 U.S. 281 (1988). Justice Kennedy's opinion upheld the regulation as a permissible interpretation of a vague statute. Justice Brennan found that the statute was clear and compelled the agency's interpretation. Justice Scalia found that the statute was clear and contradicted the agency's interpretation.

99. FED. R. CIV. P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

100. 476 U.S. 974 (1986).

101. 21 U.S.C. § 346 (1988).

102. *Young*, 476 U.S. at 979.

amounts.[103] The Supreme Court found the statute ambiguous and the agency's interpretation permissible; it reversed the circuit court under *Chevron*'s step two.[104]

The decision in *Young* prompted a fierce dissent from Justice Stevens[105] and has been roundly condemned by academic commentary.[106] The usual criticism is that the statute simply was not sufficiently ambiguous to merit blind acceptance of the agency's interpretation. The real defect in the opinion is slightly different, however. It is a function of the type rather than the amount of ambiguity. Justice O'Connor states that Congress "*was* speaking directly to the precise question at issue" but failed "unambiguously [to] express[] its intent through its choice of statutory language."[107] If Congress has spoken to the issue, however, *Chevron* deference is inappropriate notwithstanding ambiguity. In such circumstances, unlike in *Chevron*, Congress did have an intent, which binds both the court and the agency. One of the reasons we have courts to interpret statutes is because Congress is often unclear. There is no delegation to the agency in this setting; the only question is what Congress meant. As we have seen, that question is for judicial resolution.[108]

In sum, Congress might mean to express something but do so ambiguously, or it might be ambiguous because it meant to express nothing. *Chevron*'s step two should apply only in the second situation, which is what *Chevron* itself involved.

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103. Community Nutrition Inst. v. Young, 757 F.2d 354, 357-61 (D.C. Cir. 1985), *rev'd*, 476 U.S. 974 (1986).

104. *Young*, 476 U.S. at 974.

105. *Young*, 476 U.S. at 988 (Stevens, J., dissenting) ("The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference.").

106. *See* Farina, *supra* note 4, at 462 ("*Young* graphically demonstrates the extremism of which the new deference is capable."); Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 859 (stating that *Young* indicates Court's "presumption of ambiguity"); Sunstein, *Constitutionalism*, *supra* note 4, at 466-67 & nn.205, 208.

107. *Young*, 476 U.S. at 980 (emphasis added).

108. The distinction might be stated as being between "vagueness" and "ambiguity." As described by Professors Eskridge and Frickey, "[a]mbiguity creates an 'either/or' situation, while vagueness creates a variety of possible meanings." WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 839 (1988). Under this formulation, the statute in *Young* was ambiguous but it was not vague. The *Chevron* opinion, like almost all later commentary, uses the term "ambiguous," but under this formulation it commands deference only when the statute is "vague."

B. Deference Within Step One

The Court has given confusing signals about the role of *Skidmore* deference in the post-*Chevron* era. On the one hand, it has not forgotten the *Skidmore* factors. In *Cardoza-Fonseca*, for example, it seemed to work the *Skidmore* approach into the *Chevron* framework. Explicitly operating within step one, Justice Stevens noted that the weight of the agency's interpretation was diminished because it had been inconsistent over the years.[109] The Court has also indicated that consistency is relevant in evaluating an agency's interpretation under step two.[110] Furthermore, in a recent case involving EEOC interpretive bulletins, Chief Justice Rehnquist's majority opinion relied on *Skidmore* and did not cite *Chevron*,[111] suggesting that there are situations where *Skidmore* applies that fall altogether outside the *Chevron* framework. On the other hand, most deference opinions no longer cite *Skidmore*. Indeed, Justice Scalia has pronounced *Skidmore* dead: "In an era when our treatment of agency positions is governed by *Chevron*, the 'legislative rules vs. other action' dichotomy . . . is an anachronism."[112]

Skidmore deference might seem wholly out of place after *Chevron*.[113] The *Skidmore* factors, which go to the likelihood that the agency's interpretation accurately reflects congressional intent, clearly have no place in step two cases.[114] *Skidmore* could be relevant under step one precisely because there the issue *is* congressional intent. Yet under the usual understanding of step one cases, *Skidmore* deference would be superfluous. In step one, the statute alone provides the answer; the statute is so clear that resort to the agency for guidance is, by definition, unnecessary. In this view, deference is all or nothing;[115] ei-

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109. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987).

110. Pauley v. BethEnergy Mines, Inc., ___ U.S. ___, 111 S. Ct. 2524, 2535 (1991).

111. EEOC v. Arabian Am. Oil Co., ___ U.S. ___, 111 S. Ct. 1227, 1236 (1991). The EEOC took the position that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-(h)(6) (1988), applies to American companies operating abroad. The Court ruled that Title VII applies only within the United States.

112. *Arabian Am. Oil Co.*, 111 S. Ct. at 1236 (Scalia, J., concurring).

113. Justice Scalia views all regulations as meriting full *Chevron* deference and rejects the idea that some have "only the power to persuade." *Id. See also* Schuck & Elliott, *supra* note 3, at 1024 (stating that *Chevron* "[s]wept aside all of these [*Skidmore*] criteria for determining the extent of deference in favor of a dramatic reformulation of the grounds for deferring to agency constructions of statutes").

114. *See supra* notes 66-67 and accompanying text (explaining that consistency of agency's position is irrelevant under *Chevron*).

115. Strictly speaking, to defer means to accept another's decision or authority. WEBSTER'S COLLEGIATE DICTIONARY 263 (1942) (defining "defer" as "[t]o yield or submit to the opinion or wishes of another, or to authority"). In the context of judicial "deference" to agency interpretations, however, courts use the term to mean "respect"

ther agency interpretations control or they are irrelevant.

I have tried to show, however, that there is a class of cases—including, but not limited to, review of interpretive rules—where Congress has not delegated either the interpretive or the legislative task to the agency. The court remains the primary interpreter, and the question is one of statutory meaning, not one of raw policy. The statute is not necessarily crystal clear in these cases. Within step one, the court seeks to determine the meaning of the statute; for all the traditional reasons[116] the agency's view may be helpful in doing so. In fact, the *Chevron* opinion supports the continuing role of *Skidmore* deference. Within step one, the court attempts to determine congressional intent "employing the traditional tools of statutory construction;"[117] one of those tools, of course, is the interpretation of the agency charged with administering the statute.[118]

C. *Are There Interpretive Rules After* Chevron*?*

The traditional principles concerning judicial review of interpretive rules survive *Chevron*. Interpretations in rules fall into three categories: rules that volunteer the agency's understanding of the statute; rules that explain the statute pursuant to an express delegation of interpretive authority; and interpretations that underlie, but are not stated in, legislative rules. Review under step two is appropriate only with regard

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or "weight." Hence the frequent references to degrees of deference. *See, e.g.*, Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst., 450 U.S. 46, 56 (1981) (holding that Board deserved "greatest" deference); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944) (giving varying weight to agency views according to importance of expertise); Center for Auto Safety v. Ruckelshaus, 747 F.2d 1, 5 (D.C. Cir. 1984) (noting that degree of deference is not uniform). *See also* Scalia, *supra* note 4, at 514 (explaining that "[t]he mealy-mouthed word 'deference' does not necessarily mean anything more than considering those views with attentiveness and profound respect, before we reject them").

It has been argued that *Chevron* "modif[ies]" the traditional judicial usage, redefining "deference" to mean controlling weight. Starr, *supra* note 4, at 296. *But see* Strauss, *supra* note 48, at 1126 (*Chevron* step two requires something more than "deference"). As I discuss, the principle of varying degrees of deference survives *Chevron*.

116. *See supra* notes 43-45 and accompanying text (discussing justifications for deference where court's task is to determine statutory meaning).

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

118. Strauss, *supra* note 48, at 1125. "Like the testimony of involved executive branch officials at congressional hearings or the initial interpretations given a statute by the responsible agency, an agency interpretation that has remained constant over the years can plausibly be regarded as evidence of what is assumed to be a determinate congressional meaning, one to be found out by the courts." *Id.* (footnotes omitted). *See* Willam V. Luneburg, *Judicial Review of Agency Statutory Construction: An Introduction*, 2 ADMIN. L.J. 243, 250 (1988) (stating that *Skidmore* deference is "presumably" still applicable within step one).

to the second category.

1. *Traditional Interpretive Rules*

The traditional understanding of interpretive rules is that they explain what Congress has decided. By definition, therefore, review of an interpretive rule must belong in step one. With the notable exception of Justice Scalia,[119] no court or commentator has explicitly stated that *Chevron* eliminates the old rule that interpretive rules are not binding.[120] Nonetheless, numerous decisions have, without discussion, upheld interpretive rules under *Chevron* step two.[121] One author has de-

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119. *See* EEOC v. Arabian Am. Oil Co., ___ U.S. ___, 111 S. Ct. 1227, 1236 (1991) (Scalia, J., concurring) (rejecting any distinction between deference owed legislative rules and that owed other agency actions).

120. For example, in the 1990 Supplement to his hornbook, Professor Koch states:

> The idea that the effect of a validly promulgated rule on the courts is governed by the distinction between legislative and nonlegislative rules has become so strongly established that it may be one of the few "black letter" laws in administrative law. The difference in effect on the courts is immense.
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> . . . .
>
> Because they are made pursuant to delegated authority, legislative rules have the force of law and a court may test them only for arbitrariness. Whereas, [a] nonlegislative rule, the result of no such delegation, may be subjected to agreement (de novo) review.

1 KOCH, *supra* note 36, at 41 (citations and footnotes omitted). Similarly, Professors Pierce, Shapiro, and Verkuil, enthusiastic supporters of *Chevron*, also endorse a less deferential approach to interpretive rules. RICHARD J. PIERCE JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 310 (1985). They comment approvingly on a court decision suggesting that an agency conclusion struck down in the form of an interpretive rule might be upheld as part of a legislative rule. *Id.*

121. *See, e.g.*, Wagner Seed Co. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991); Chaves County Home Health Serv., Inc. v. Sullivan, 931 F.2d 914, 917, 923 (D.C. Cir. 1991); Bethlehem Steel Corp. v. Bush, 918 F.2d 1323, 1327 & n.3 (7th Cir. 1990); Seldovia Native Ass'n, Inc. v. Lujan, 904 F.2d 1335 (9th Cir. 1990); Smith v. Fidelity Consumer Discount Co., 898 F.2d 907, 913-14 (3d Cir. 1990); National Recycling Coalition, Inc. v. Reilly, 884 F.2d 1431, 1432 (D.C. Cir. 1989); Guadamuz v. Bowen, 859 F.2d 762, 768, 771 (9th Cir. 1988); Samaritan Health Serv. v. Bowen, 811 F.2d 1524, 1530 (D.C. Cir. 1987); Hicks v. Cantrell, 803 F.2d 789, 792 (4th Cir. 1986); Wisconsin Dep't of Health and Social Servs. v. Bowen, 797 F.2d 391, 397 (7th Cir. 1986), *cert. dismissed,* 485 U.S. 1017 (1988); Arrow Air, Inc. v. Dole, 784 F.2d 1118, 1125 (D.C. Cir. 1986); American Fed'n of Gov't Employees v. Federal Labor Relations Authority, 778 F.2d 850, 856 (D.C. Cir. 1985); General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1566-67 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1074 (1985). *See also* Public Employee Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 182 (1989) (Brennan, J., dissenting) (invoking *Chevron* where majority had rejected agency's interpretive regulation as being simply inconsistent with statute); Fertilizer Inst. v. EPA, 935 F.2d 1303 (D.C. Cir. 1991) (finding *Chevron* applicable to review of interpretive rule but setting rule aside under step one); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986) (holding that new EPA interpretation set out in mailgram was ripe for review in part because it would command *Chevron* deference from court and therefore had significant legal effect).

Some courts have stated that interpretive rules are not binding, like legislative rules,

scribed the result as the creation of a class of "interpretative rules with legislative effect."[122]

Under the traditional understanding of interpretative rules as merely a clarification of congressional action, these decisions are plainly incorrect. An interpretive rule by definition adds nothing to what Congress has done. Where the agency issues an interpretive rule, then, congressional intent is necessarily discernable. Yet *Chevron* concerns those situations where Congress is silent and without intent. By its nature, an interpretive rule is subject to step one review, for the basic idea is that rather than delegating the decision to the agency, Congress *has* made the decision which the agency is explicating. On the other hand, if Congress has not acted, as in *Chevron* itself, then the rule cannot be

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but nonetheless merit *Chevron* deference. Rodlin v. Secretary of HHS, 750 F. Supp. 146, 150 (D.N.J. 1990). There is not really space in the taxonomy for such a category. I know of only one decision that expressly finds *Chevron* inapplicable to interpretive as opposed to legislative rules. *See* Capitano v. Secretary of HHS, 732 F.2d 1066, 1076 (2d Cir. 1984) (opinion on denial of rehearing) (rejecting agency's interpretation as inconsistent with statute and noting that *Chevron* does not "change this result since we do not have a legislative regulation here").

The Supreme Court has been unclear. The Court implicitly held *Chevron* inapplicable to interpretive rules in EEOC v. Arabian Am. Oil Co., ___ U.S. ___, 111 S. Ct. 1227 (1991) (citing *Skidmore* but not *Chevron* in rejecting view of statute set out in EEOC interpretive bulletin); *but see id.* at 1236-37 (Scalia, J., dissenting) (according EEOC interpretation full *Chevron* deference), and explicitly declared *Chevron* inapplicable in dictum in Martin v. OSHRC, ___ U.S. ___, 111 S. Ct. 1171, 1179 (1991) (stating that interpretive rules and enforcement guidelines are "entitled to some weight on judicial review" but not "to the same deference as norms that derive from the exercise of . . . delegated lawmaking powers").

122. Saunders, *supra* note 29. Saunders argues that such weight should be accorded only to interpretive rules that have undergone notice and comment. *Id.* at 371-82. This is the most recent variation on a longstanding strain of both judicial opinion and academic commentary arguing that any rule with a substantial impact requires notice and comment. *See* Neighborhood TV Co. v. FCC, 742 F.2d 629, 637 (D.C. Cir.), *cert. denied,* 465 U.S. 1100 (1984) (holding that whether rule is substantive, and therefore subject to APA notice and comment requirements, turns on whether it will have substantial impact on substantive rights and interests); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972) (concluding that "[b]y virtue of this substantial impact both upon the aliens and their employers, notice and opportunity for comment by the public should first be provided"); William T. Mayton, *A Concept of a Rule and the "Substantial Impact" Test in Rulemaking,* 33 EMORY L.J. 889, 898-99 (1984) (arguing that agency action having "palpable effect" across segment of society should be subject to notice and comment); Ricki Rhodarmer Tigert, Note, *A Functional Approach to the Application of Section 553 of the Administrative Procedure Act to Agency Statements of Policy,* 43 U. CHI. L. REV. 430, 432-33 (1976) (arguing that agencies should provide notice and comment when doing so will protect private interests and serve informed policy-making). This approach is on the wane in the federal courts. *See* Fertilizer Inst. v. EPA, 935 F.2d 1303, 1308 (D.C. Cir. 1991); American Mining Congress v. Marshall, 671 F.2d 1251 (10th Cir. 1982); *see generally* Kathleen Taylor, Note, *The Substantial Impact Test: Victim of the Fallout from Vermont Yankee?,* 53 GEO. WASH. L. REV. 118 (1985) (concluding that most circuits have rejected substantial impact test in light of *Vermont Yankee*).

classified as interpretive because there is nothing to interpret. With regard to agency interpretations in this sense, then, *Chevron* by its terms does not make agency conclusions binding.

2. *Express Delegations of Interpretive Authority*

Congress may expressly delegate what seems under the above standard to be "interpretive" authority. Interpretations made pursuant to express legislative delegation should be reviewed under step two. Such rules, of course, would not be deemed interpretive rules precisely because of the delegation.[123] Such delegation must be express.

3. *Interpretations that Underlie Legislative Rules*

This leaves a third category of interpretations: those that underlie but are not stated in legislative rules. Consider the NAAQS again. In implementing the statutory directive to establish safe levels of air pollution, EPA promulgates a rule that is little more than a number identifying the acceptable concentration of a specific pollutant.[124] A reviewing court plainly cannot substitute its judgment for the agency's as to the appropriate concentration. In that sense the rule is "binding" on the courts. The standard itself—the actual number—is of course not a binding *interpretation*, but is based on certain interpretations. For example, to develop a primary NAAQS, EPA must first decide who constitutes the "public" whose health is to be protected. Must the standard be set at the level where the average adult is unaffected? The average child? Asthmatics? The single most sensitive individual? Whether this is a question of interpretation depends on whether there is anything to interpret. Congress might have left this question to the agency, although it is the sort of basic policy question one would expect Congress to decide. The legislative history indicates that Congress viewed the "public" as the most sensitive group,[125] and EPA has so read the Act. The fact that this interpretation of the term "public" was the predicate for a legislative rule should not mean that it binds the courts under *Chevron*. As an interpretation, it merits *Skidmore* deference but no more, and that is what it has received.[126]

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123. *See* Wint v. Yeutter, 902 F.2d 76, 81 (D.C. Cir. 1990) (holding that *Chevron* step two applies "given Congress's explicit delegation to the USDA of the authority to *define*, not merely to apply, the terms in question").

124. *See* 40 C.F.R. part 50 (1991) (setting out National Ambient Air Quality Standards (NAAQS)).

125. S. REP. NO. 1196, 91st Cong., 2d Sess. 10 (1970).

126. *See* Lead Indus. Ass'n. Inc. v. EPA, 647 F.2d 1184 (D.C. Cir.) (upholding

Yet *Chevron*'s strong message of judicial deference is taken to apply with full force to agency interpretations contained in legislative rules. Professor Anthony writes:

> Interpretations are often expressed through the exercise of the agency's statutorily-delegated authority to make law in the form of rules. Interpretations set forth in this format possess the fullest credentials to command judicial acceptance. They are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[127]

To the extent Anthony is discussing situations where there was an express delegation of interpretive authority, I agree. If the suggestion is that, for example, the statutory interpretations that underlie a rule such as the NAAQS are also binding, I disagree.

Assume for now that "interpretations" within legislative rules receive full *Chevron* respect, but those set out in interpretive rules do not.[128] This distinction is not self-evident. One would think that an interpretation is an interpretation. If deference is really to vary with the setting, so that in some cases the ultimate interpretive task is the court's and in others it is the agency's, some relevant differences between the settings must be identified.

One difference between interpretive and legislative rules is that only the latter are the result of notice and comment rulemaking.[129] One could argue that only rules that result from public scrutiny and discussion merit full deference. This reasoning resonates with cases and commentary requiring or suggesting notice and comment procedures even for interpretive rules if they have a substantial impact[130] and with Congress' original rationale for excluding interpretive rules from notice and comment requirements.[131] Such a link between full procedures and deference might also underlie the Supreme Court's rule that agency litigating positions do not merit full *Chevron* deference.[132] However, this

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NAAQS for lead), *cert. denied,* 449 U.S. 1042 (1980).

127. Anthony, *supra* note 48, at 44 (quoting *Chevron*). Professor Anthony also states that the fact that a legislative rule embodies a statutory interpretation does not mean it carries any less force. *Id.* at n.205.

128. That deference should vary with format is the central argument of Anthony, *supra* note 48.

129. 5 U.S.C. § 553 (b)(A), (d)(2) (1988).

130. *See supra* note 122 (discussing view that any rule having substantial impact requires notice and comment).

131. The Senate Report accompanying the Administrative Procedure Act explained that notice and comment was unnecessary for interpretive rules because these "rules—as merely interpretations of statutory provisions—are subject to plenary judicial review." S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946).

132. *See* Gregory v. Ashcroft, ___ U.S. ___, 111 S. Ct. 2395, 2414 n.3 (1991) (White, J., concurring); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988). The Supreme Court also hinted that procedural fullness should bear on

difference is inadequate to justify giving controlling weight to interpretations embodied in legislative rules but not those in interpretive rules.

Notice and comment followed by arbitrary and capricious review is not the equivalent of de novo judicial review without notice and comment. First, notice and comment proceedings are typically geared more to full development of policy concerns than legal issues. Second, even if statutory ambiguities are fully discussed in the comments, when *Chevron* applies, the agency knows that the courts will uphold any "permissible" interpretation. A private party attacking the agency's interpretation is in a weaker position submitting comments to an agency that knows its interpretation will control, than making legal arguments to a court under a de novo standard, even without notice and comment. Full public discussion does not replace meaningful judicial review, for the lack of meaningful judicial review largely undercuts the value of the discussion, at least on legal issues. The second argument for reduced deference to interpretations contained in interpretive rules is that Congress has not delegated to the agency authority to make binding interpretations *in this format*.[133] This is a stronger theoretical argument; it identifies a coherent reason for accepting the agency's interpretation in one setting and not the other. The problem lies in finding some indication that Congress wants interpretations underlying legislative rules to be binding, but does not have such an intent with regard to interpretive rules. One might argue that because interpretive rules have never been deemed binding, Congress must have legislated with this understanding. It therefore presumably intends interpretive rules, but only such rules, *not* to be binding unless it indicates to the contrary. This background rule only gets us so far. First, it rests on a speculative and heroic assumption about Congress' understanding of the doctrinal framework of judicial review of agency action. Second, a delegation to write legislative rules is not in itself a delegation to make binding interpretations of the statute, as the NAAQS example illustrates. Third, there is simply no reason to think that Congress might actually want the agency interpretations to be binding if they underlie legislative rules, but not otherwise.

Finally, even if setting does matter in theory, it may make little practical difference. Professor Anthony posits the situation where an

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whether a rule binds the courts in Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983). There it stated that an FLRA "Interpretation and Guidance" document might carry controlling weight because, among other things, it "was attended by at least some of the procedural characteristics of a rulemaking." *Id.*

133. For an extended statement of this argument, see Anthony, *supra* note 48.

agency possesses the authority to interpret with the force of law, through a legislative rule, but thus far has expressed its interpretation only informally. If that interpretation becomes subject to direct review before the agency has taken concrete action based upon it, the court should not be able to intercept the agency's delegated interpretive authority by taking advantage of the as yet non-legislative status of the agency interpretation and telling the agency what definitive view to adopt. The court should merely decide whether the interpretation is invalid on its face, a quasi-step two inquiry, leaving the agency "untrammeled in its freedom to choose a position anywhere within the zone of indeterminacy."[134] If the underlying distinction is correct, this is a necessary refinement. If the agency has primary interpretive authority, then it would contravene congressional intent and the allocation of responsibility to deprive the agency of such authority by a quirk of timing. It is, however, a rather large exception that eliminates the supposed critical importance of format. Under this approach, if the agency *lacks* authority to issue binding legislative rules, then there has not been the subject matter delegation that must exist to proceed to *Chevron*'s second step. This fact alone is enough to keep the court in step one, regardless of the format of the agency interpretation. If, on the other hand, the agency possesses such authority, then the court is unable to construe the statute independently *even though* the format is nonbinding.

In short, there is no strong reason for saying that interpretations in an interpretive rule have different force than interpretations underlying a legislative rule. If I am right that interpretive rules should not be binding,[135] then it follows that interpretations found in legislative rules should not be binding either. Indeed, as I have defined "interpretations"—agency views of congressional meaning—there is no reason they should be. The difference in judicial deference to legislative and interpretive rules rests on a difference in the relation of these agency determinations to the statute. To the extent the rule, whether interpretive or legislative, rests on, or can be meaningfully reviewed under, the statute, no more than *Skidmore* deference is appropriate. To the extent the agency is operating within a discretionary zone established by Con-

134. *Id.* at 41-42. The same position is taken in Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1343 (D.C. Cir. 1989) (stating that when "dealing with an ambiguous term . . . a court should not interpose its own interpretation of the term *before* the agency has an opportunity to consider the issue and fix on its own statutory construction") (emphasis in original).

135. *See supra* notes 119-22 and accompanying text (discussing review of interpretive rules under step one of *Chevron*).

gress, and therefore not "interpreting" the statute, step two applies.[136]

III. APPLYING *CHEVRON*

All *Chevron* questions reduce to one question: does the statute provide an answer? All efforts to limit *Chevron*—it should not apply to pure questions of law, it should not apply to interpretive rules, it should not apply to an agency's determination of its jurisdiction or the scope of its authority, it should not apply unless the statute is very ambiguous, it should not apply unless and until the court has derived all it can from the statute—are different formulations of one idea. The court must follow the statute before it follows the agency.

To say that the courts must ensure that agencies adhere to what Congress has decided is not a stunning new insight; that much is clear on the face of the *Chevron* opinion. But it is a less trivial point than it seems. *Chevron* stands as a constant invitation to ignore what Congress has decided because it did not decide, in the unfortunate language of the *Chevron* opinion, "the precise question at issue."[137] The remainder of this Article examines these temptations in certain illustrative and controversial settings to identify just when step two kicks in and when it does not.

A. Agencies' Interpretations of Their Own Authority

Many commentators have tripped over the fact that *Chevron* seems to allow agencies to determine the scope of their own authority.[138] The

136. The distinction I have in mind is discussed by Judge Posner:

> Often when there are political pressures to do something about a problem but the legislature cannot agree exactly what to do about it, it will pass a statute the effect (as well as the undisclosed purpose) of which is to dump the problem in the lap of the courts, taking advantage of the fact that the courts are a kind of political lightning rod. But this implies that the courts are expected to try to solve the problem; they have a mandate, though no specific directions. So unless this mode of legislation is thought to be unconstitutional, the courts have a duty and not merely a power to solve the problem in a reasonable way. This is invention rather than discovery; it is "interpretation" only in a special sense . . . .

POSNER, *supra* note 62, at 290. Substitute "agencies" for "the courts" in the foregoing and you have the *Chevron* problem. To the extent Congress has dumped the problem in the agency's lap, what the agency is doing is " 'interpretation' only in a special sense," *id.*, and step two applies. Even there, however, the court must (1) determine on its own whether Congress has done so and (2) enforce those decisions Congress can fairly be said to have made.

137. *Chevron*, 467 U.S. at 842, 843 n.9.

138. *See* Anthony, *supra* note 48, at 54-55 (stating that "one may wonder whether *Chevron* will enduringly displace the deeply-rooted doctrine that an 'agency may not finally decide the limits of its statutory power. That is a judicial function.' " (quoting Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946))); Shapiro & Glicksman, *supra*

issue was disputed in the Supreme Court in *Mississippi Power & Light Co. v. Mississippi*.[139] Justice Scalia argued that it is "settled law" that *Chevron*'s deference principle applies with full force to jurisdictional issues. In response, Justice Brennan insisted that deference does not apply to the jurisdictional inquiry, but only to the *application* of statutes that an agency has been "entrusted to administer."[140] As to descriptive accuracy, Justice Scalia has the better of this disagreement.[141] In fact, Justices Marshall and Blackmun, who had agreed with Justice Brennan, later found themselves unsuccessfully urging deference to the EEOC's view that Title VII applies outside the United States.[142] On

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note 106, at 866 (arguing that for administrators "to decide the scope of their own authority . . . violates the idea of separation of powers"); Sunstein, *Interpreting*, *supra* note 52, at 446 (admonishing that "foxes should not guard henhouses"); Sunstein, *Constitutionalism*, *supra* note 4, at 467 (stating also that "foxes should not guard henhouses"). Professor Sunstein's most recent formulation is that *Chevron* should apply where the jurisdictional determination involves "one or a few cases," but not "when the issue is whether the agency's authority extends to a broad area of regulation, or to a large category of cases, except to the extent that the answer to that question calls for determination of fact or policy." Sunstein, *Law and Administration*, *supra* note 4, at 2100.

139. 487 U.S. 354 (1988). Justice Scalia's views were endorsed by Justice White, joined by Chief Justice Rehnquist, in Dole v. United Steelworkers, 494 U.S. 26, 54 (1990) (White, J., dissenting) (citing Justice Scalia's "lucid concurrence" in *Mississippi Power & Light Co.* and noting "that *Chevron* itself and several of our cases decided since *Chevron* have deferred to agencies' determinations of matters that affect their own statutory jurisdiction").

140. Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 386 (1988) (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). The majority opinion did not address the agency's jurisdiction, and so had no need to consider *Chevron*'s relevance to the issue.

The District of Columbia Circuit has likewise raised but failed to resolve the question of *Chevron*'s application to agencies' jurisdictional determinations. *See* Business Roundtable v. SEC, 905 F.2d 406, 408 (D.C. Cir. 1990) (deciding case on other grounds; noting failure of Supreme Court to definitively resolve issue); New York Shipping Ass'n v. Federal Maritime Comm'n, 854 F.2d 1338, 1363 (D.C. Cir. 1988) (stating that deference "may . . . be inappropriate" where agency is interpreting provisions "delimiting its jurisdiction"); Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795, 807 (D.C. Cir. 1988) (Starr, J., dissenting) (applying *Chevron* with full force because "the issue before us is not a question of the agency's power (in the sense of its jurisdictional reach) in which deference to the agency might be less justified").

141. Farina, *supra* note 4, at 463 n.53. Cases in which the Court has applied *Chevron* to jurisdictional questions include K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-93 (1988) (plurality opinion); *id.* at 1827-28 (Brennan, J., concurring), and United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). *But see* Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990); Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986) (rejecting, without citation to *Chevron*, Federal Reserve Board's broad view of which financial institutions were "banks" within its jurisdiction).

142. EEOC v. Arabian Am. Oil Co., ___ U.S. ___, 111 S. Ct. 1227, 1245-46 (1991) (Marshall, J., joined by Blackmun & Stevens, JJ., dissenting). *See also infra* note 149 (discussing reluctance to defer to agency's view of extraterrritorial application of statute it administers).

the merits, however, Justice Scalia and Justice Brennan are, perhaps, both right.

Whatever it is that *Chevron* requires, it requires it equally with regard to substantive and jurisdictional questions. Jurisdiction frequently hinges on a vague statutory term that the agency is charged with defining more specifically. Thus, Congress has delegated to the Army Corps of Engineers, the National Labor Relations Board, the Federal Reserve Board, and the Securities and Exchange Commission the authority to determine, respectively, who or what constitutes "waters of the United States,"[143] an "employee,"[144] a "bank,"[145] and a "security,"[146] under statutes that regulate waters, employees, banks, and securities. The agency's expertise and accountability are as relevant to jurisdictional issues as they are to substantive ones. The agencies are best equipped to decide whether certain difficult to classify places, persons, entities, or financial instruments bear a sufficiently close resemblance to the paradigmatic examples to justify inclusion in those categories. Although allowing agencies to define their own jurisdiction may create opportunities for abuse and self-aggrandizement,[147] and one might worry that expertise and accountability will give way to self-interest in jurisdictional decisions, the same threat is present in substantive agency determinations. The consequences of giving agencies a free hand in jurisdictional matters are not significantly different than those of letting the agency flesh out substantive requirements. Indeed, the jurisdictional regulations may be far less important. The usual industry complaints about being shackled by the Occupational Safety and Health Administration, for example, are in no way jurisdictional; they concern onerous substantive standards rather than an expansive understanding of what counts as a "place of employment."[148] By the same token, undercutting

143. Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1988), requires a permit from the Army Corps of Engineers for the discharge of any dredged or fill material into the "waters of the United States." The program has been controversial because the Corps defines such waters to include swamps and wetlands. In upholding this expansive definition, the Court invoked *Chevron* and inquired only whether the Corps' broad view was "reasonable." United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985).

144. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

145. Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986).

146. Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 137 (1984).

147. *See* Sunstein, *Interpreting*, *supra* note 52, at 446 (observing that need for aggressive judicial review made especially "vivid by imagining cases involving such questions as . . . whether agency jurisdiction extends to new or unforeseen areas").

148. Under the Occupational Safety and Health Act, the Secretary establishes safety and health standards as necessary to ensure "safe or healthful employment and

a regulatory scheme by defining jurisdiction too narrowly—a common enough allegation in many areas of health and safety regulation—is generally not as significant a problem as understating substantive obligations. The point is not that issues of jurisdiction are unimportant or pose no threat of a self-aggrandizing agency running amok. But, effective judicial review is no more essential to the integrity of the regulatory scheme here than elsewhere. There is, therefore, no reason to have different standards of deference for jurisdictional matters.[149]

On the other hand, *Chevron* does not require a court to accept an agency's view of the scope of its delegated *authority*, jurisdictional or substantive. By definition, Congress *cannot* have left this determination to the agency. Even accepting a notion of delegation by ambiguity, it is the court that must determine the bounds of the ambiguity. Suppose, for example, Congress passes a statute directing the National Highway Traffic Safety Administration (NHTSA) to ensure that all "passenger automobiles" are "safe."[150] The key statutory terms are ambiguous, and the agency may have broad interpretive authority. Congress has probably left it to the NHTSA to decide whether to regulate, for example, pick-up trucks used to carry farm produce. Nonetheless, Congress has foreclosed NHTSA regulation of trains, buses, motorcycles, and bicycles[151]—these are outside the agency's authority. Some boundaries are inescapably established by statute and are, therefore, for the courts

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places of employment." 29 U.S.C. § 652(8) (1988). Each "employer" must comply with the standards and provide "a place of employment . . . free from recognized hazards." *Id.* § 654(a).

149. Concerns about agency overreaching, combined with the importance of jurisdictional questions in particular settings, may inform a court's view as to whether Congress has made the delegation necessary to trigger step two. For example, the courts have been appropriately wary about deferring to an agency's view that the statute it administers applies extraterritorially. *See* EEOC v. Arabian Am. Oil Co., ___ U.S. ___, 111 S. Ct. 1227, 1235-36 (1991) (rejecting EEOC's conclusion that Title VII applies extraterritorially); Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493 & n.13 (D.C. Cir. 1984) (rejecting agency's view that statute authorized it to subpoena witnesses and documents outside United States). The refusal to defer in these cases is not the result of the issue being jurisdictional. Rather, it reflects the fact that it would be extraordinary for Congress to have delegated this decision to the agency. Particularly in light of the historic presumption against extraterritorial application of federal statutes, Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949), Congress is presumed to have decided the matter, if only by its silence, and so the case is properly analyzed under step one.

150. This invented statute owes something to, and raises some of the same ambiguities as, H.L.A. Hart's hypothetical rule that no vehicle may be taken into the park. *See* H.L.A. HART, THE CONCEPT OF LAW 125 (1961).

151. This is a fair statement even though a power-aggrandizing agency, backed up by a plain meaning judge equipped with a dictionary but otherwise working in a linguistic and cultural vacuum, could conclude that each is an automobile that carries passengers.

to elucidate.[152] The danger of *Chevron* is that it invites courts to ignore the fact that Congress decided some things because it did not decide everything.[153]

Two interpretive questions are thus always left for the court. First, the court must determine that there has been a delegation.[154] Second, it must determine the scope of that delegation: "Determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."[155] Thus, the agency, armed with this delegated authority, is not free to say that *anything* is a water of the United States, an employee, a bank, or a security. The court must ensure that the agency does not exceed its statutory authority. One implicit "interpretation" within any legislative rule is that the rule is within the agency's authority. Were this interpretation "binding," an agency would always be able to pick itself up by its own bootstraps and insulate itself from any meaningful judicial review and hence any need to comply with the statute.

Suppose, for example, that the Army Corps of Engineers was to require a permit for the discharge of fill material into the sands of the Arizona desert. The Corps cites *Chevron* and *United States v. Riverside Bayview Homes, Inc.*[156] and insists that its interpretation of "waters of the United States"[157] is binding. Any court would reject the Corps' position. The reason why can be put many ways: the intent of Congress is clear; this is a "pure issue of statutory construction";[158] the

152. This hypothetical statute has both a jurisdictional and a substantive ambiguity, further illustrating that there should be no difference between the treatment of the two under *Chevron*. I have discussed the jurisdictional ambiguity (what is a passenger automobile?) in text, but the same point could have been made using the substantive ambiguity (what is safe?). Nor are these the only two categories. For example, this statute seems to leave it to the agency to decide whether "safety" should be achieved through performance standards, technological standards, or merely greater information disclosure to consumers. But it does not allow the agency to say that in its view the market already ensures safe automobiles. The point is that in administering any regulatory scheme an agency must make a huge range of determinations that the statute does not fully settle regarding the scope, stringency, and type of regulation. Both the rationale underlying *Chevron* and the dangers of taking it too far are present with regard to each type of determination.

153. For a specific example, see *infra* note 195.

154. Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984) (deferring "to an agency's interpretation constitutes a *judicial* determination that Congress has delegated the norm-elaboration function to the agency"), *cert. denied*, 474 U.S. 919 (1985).

155. Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 616 (1944).

156. 474 U.S. 121 (1985); *see supra* note 143 (describing permit scheme for discharge of fill into waters of United States).

157. 33 U.S.C. § 1344 (1988).

158. For discussion of "pure questions," see *infra* notes 142-81 and accompanying text.

Corps has exceeded the zone of indeterminacy; the Corps has exceeded its delegated authority; its interpretation is arbitrary, capricious, and an abuse of discretion; the interpretation is unreasonable or inconsistent with any conceivable statutory purpose. Whatever the terminology, the point is the same. The court can say with confidence that Congress did not require permits for the discharge of dredged or fill material in the desert. In calling for deference, the Corps is implicitly arguing that Congress failed to decide when permits are required and left that determination to it. This claim is itself an interpretation of the statute, one to which the court owes *Skidmore* deference, but no more.

This idea works in both directions. Suppose the Corps concludes that the statute unambiguously *requires* a permit for discharge of fill material in wetlands, that wetlands are, by clear congressional mandate, "waters of the United States." Suppose further that the court finds the statute ambiguous; it could, but need not be, applied to wetlands. Wetlands had never crossed Congress' collective mind, or had and Congress decided the Corps should decide whether to include them in the permit program. Does the statute's ambiguity make the agency's view that the statute is *not* ambiguous binding? Such an argument would be incoherent. The court concludes that there was a delegation and the determination of whether wetlands are waters, therefore, belongs in step two. That conclusion, i.e., whether the merits are step one or step two, is made within step one by definition.[159]

Justice Scalia thus is essentially correct that "there is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority."[160] This means, however, that *Chevron*'s step two applies to *neither* of these identical twins, not to *both*. Congress may have given an agency lots of room or almost none, but the boundaries are by definition set by Congress and hence for judicial identification.[161]

159. Regarding what a court should do if an agency deemed its hands tied by what the court considers an ambiguous statute, see *infra* notes 189-99 and accompanying text.

160. Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring). *Compare id.* at 386-87 (Brennan, J., dissenting) (arguing agency interpretations of statutes confining their jurisdiction are entitled to no deference).

161. For an argument that allowing the agency to determine the boundaries of the delegation would violate the separation of powers, see Farina, *supra* note 4, at 487-88, 497-98. As I read Professor Farina, her position and mine are wholly consistent.

B. *"Pure Questions" of Statutory Interpretation*

Chevron has prompted a simmering dispute over whether an exception to its hands-off approach exists when a court addresses "a pure question of statutory construction." Writing for the Court in *Cardoza-Fonseca*,[162] Justice Stevens rejected the agency's plea for *Chevron* deference. The case presented "a pure question of statutory construction for the courts to decide . . . [e]mploying traditional tools of statutory construction."[163] Justice Scalia violently protested that this loose talk was an unprincipled retreat from *Chevron*.[164] Some lower courts have since held that the *Chevron* methodology is inapplicable to "pure questions of statutory interpretation."[165] No such exception exists.

The opinions using this phrase do not define precisely what a "pure question" is. One possible meaning is that a "pure question" is one that does not require the development of a factual record or the application of law to facts, as opposed to a factual question or mixed question of law and fact.[166] Justice Scalia takes this view, arguing that *Chevron*

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162. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

163. *Id.* at 446. Justice Brennan has also stated that in "pure question" cases "our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' " NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987) (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ.). *See* Sunstein, *Interpreting*, *supra* note 52, at 447 (arguing that "[c]ourts, not self-interested regulators, should resolve statutory ambiguities involving pure questions of law"). *But see* Sunstein, *Law and Administration*, *supra* note 4, at 2096 (permitting deference "[e]ven in pure questions of law . . . unless there is some independent reason for distrusting the agency").

164. *Cardoza-Fonseca*, 480 U.S. at 454-55 (Scalia, J., concurring); *see* NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 133 (1987) (Scalia, J., concurring).

165. In Union of Concerned Scientists v. Nuclear Regulatory Comm'n, 824 F.2d 108, 113 (D.C. Cir. 1987), the court suggested that even were congressional intent unclear, it would not proceed to step two in a "pure question" case. Because it could easily discern congressional intent in the case before it, however, it had no need to put that resolution to the test. *See also* Regular Common Carrier Conference v. United States, 820 F.2d 1323 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587, 593-94 (9th Cir. 1987); Miree Constr. Corp. v. Dole, 730 F. Supp. 385, 391 n.14 (N.D. Ala. 1990) (stating that court "cannot defer to the agency's decision with regard to pure questions of law relating to statutory construction," although agency interpretation may still carry some weight), *aff'd*, 930 F.2d 1536 (11th Cir. 1991).

The Supreme Court has denied at least one petition for certiorari directly raising the question whether step two deference applies in pure question cases. Texas Apparel Co. v. United States, 493 U.S. 1024 (1990); *see* 58 U.S.L.W. 3389 (U.S. Dec. 19, 1989) (summarizing petition).

166. *E.g.*, International Union of United Mine Workers v. Federal Mine Safety & Health Review Comm'n, 840 F.2d 77, 81 (D.C. Cir. 1988); Anthony, *supra* note 48, at 9, 21. Thus, in *Cardoza-Fonseca* Justice Stevens distinguished "[t]he narrow legal question whether the two standards are the same" from the "quite different . . . question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts." *Cardoza-Fonseca*, 480 U.S. at

itself was a "pure question" case, since only the "abstract interpretation of the phrase 'stationary source' " was at issue.[167] The issue in *Cardoza-Fonseca* was undeniably a "pure question of statutory interpretation" in this sense. The Court had to decide whether two phrases governing suspension of deportation meant the same thing. It did not have to decide whether the statutory language applied to a particular alien. Clearly, this question did not turn on or even require reference to any facts.

Legal issues this "pure," however, are few and far between. Statutory interpretation usually requires some facts, even if they are only hypothetical. *Chevron* was not as "purely legal" as *Cardoza-Fonseca*. As Justice Scalia points out, it did not involve any factual disputes and did not turn on the facts.[168] Nonetheless, the dispute arose against the background of an undisputed set of hypothetical facts involving offsetting in-plant reductions of air pollution. Indeed, to say what a statute means is to describe its applicability to a particular set of facts.[169] Even if there were an exception for purely legal issues, such as that in *Cardoza-Fonseca*, it would be an extraordinarily narrow exception.[170] Finally, the Court often defers in cases involving no factual issues.[171]

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167. *Id.* at 455 (Scalia, J., concurring).

168. *Id.*

169. *See Cardoza-Fonseca*, 480 U.S. at 448 (observing that ambiguous statute "can only be given meaning through a process of case-by-case adjudication"); Marbury v. Madison, 5 U.S. 137, 177 (1803) (stating that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule"). *See also* HART, *supra* note 150, at 126 (describing how in applying rule to unanticipated facts "we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning . . . of a general word").

170. Professor Anthony points to cases concerning who is an "employee" under the labor laws as other examples of "pure questions." Anthony, *supra* note 48, at 10 (citing Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947)). The legal issues in these cases are not that pure; determining whether foremen are employees (the issue in *Packard*) obviously requires some factual understanding about what foremen do. Professor Anthony contrasts *Packard* with NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (determining whether newsboys are employees), implying that *Hearst* did not involve a purely legal question. Yet, whether foremen are employees turns on the facts just as much as whether newsboys are employees. The difference is that with regard to foremen the facts recur more frequently and are better known.

Hearst did raise a threshold legal issue that was truly "pure," like that in *Cardoza-Fonseca*: whether the common law definition of "employee" controls under the labor laws. *Hearst*, 322 U.S. at 120-22. That question can be answered without defining "employee," just as the Court in *Cardoza-Fonseca* did not have to establish what the two phrases at issue meant in order to say that they did not mean the same thing.

171. For example, Cottage Savings Ass'n v. Commissioner, ___ U.S. ___, 111 S. Ct. 1503 (1991), concerned whether a savings and loan association had realized a loss when it traded one set of participation interests in mortgages for another set with a lower face value. The statutory question was whether there had been a "sale or other

The issue in *Cardoza-Fonseca* was "pure" in a second, more relevant way which better explains the Court's use of that term. It was "pure" in that Congress provided the answer.[172] The Court did not have to go beyond the usual legal materials to resolve it. The distinction is not between issues of law and fact, which does not seem to have much to do with *Chevron*. The distinction is between issues of law and policy, which is at the core of *Chevron*. Thus, a "pure question" is a *Chevron* step one question.

This reading reconciles any tension between *Chevron* and *Cardoza-Fonseca*. Both the majority and Justice Scalia agreed that *Cardoza-Fonseca* was a step one case. Indeed, where the Court has used the "pure question" language[173] it has equated the "pure question" with the "precise question at issue," a term which is in turn taken from *Chevron*'s description of the step one inquiry.[174] Likewise, the "traditional tools of statutory construction" are what resolve "pure questions" under *Cardoza-Fonseca*[175] and what decide step one cases under *Chevron*.[176]

A pure question is, then, a step one case; indeed, defining one by the other is tautological. There is no "exception" for pure questions of statutory interpretation. In using that phrase, Justices Stevens and Brennan were merely repeating precisely what *Chevron* says and what has never been in dispute. Where Congress has decided the issue, its determination, not the agency's, must prevail. This view of "pure questions" can in fact be seen in more recent opinions. In *Dole v. United Steel-*

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disposition of property." 26 U.S.C. § 1001(a) (1988). Under IRS regulations a realized loss occurs if there is an "exchange of property for other property differing materially either in kind or in extent." 26 C.F.R. § 1.1001-1 (1990). The Court upheld the regulation as a "reasonable interpretation" of the statute that merited judicial deference. *Cottage Savings*, 111 S. Ct. at 1508-09. This was a pure question of law in the sense of involving no factual dispute; the Court made no reference to the facts of this or any case. Although the opinion did not cite *Chevron* or use the "pure question" language, it does belie the usual reading of *Cardoza-Fonseca* as abjuring deference where no facts are involved.

172. It is in this sense that *Packard* is arguably a pure question of statutory interpretation and *Hearst* is not. The usual way of reconciling these two decisions is that *Packard* raised a major issue of labor policy as to which Congress surely held views, whereas *Hearst* concerned an interstitial question that Congress probably never thought about. Anthony, *supra* note 48, at 10; Breyer, *supra* note 40, at 371-72. *Packard* thus presented a "pure" question not in the sense that it did not involve application of law to facts, but in the sense that Congress had resolved it.

173. NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (plurality opinion); *Cardoza-Fonseca*, 480 U.S. at 446.

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

175. *Cardoza-Fonseca*, 480 U.S. at 446.

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

workers,[177] for example, Justice Scalia actually joined an opinion by Justice Brennan employing the "pure question" language.[178] Similarly, in *Sullivan v. Stroop*,[179] the Court found that the statute unambiguously confirmed the agency's interpretation, deciding the case under *Chevron* step one and not bothering to invoke the deference principle. The dissent argued that the statute unambiguously contradicted the agency's reading and quoted the "pure question" language.[180] Thus, all the Justices[181] treated this as a step one case. The dissent expressly equated such cases with "pure questions." There was no squabbling over whether *Chevron* applies to such questions. If the dispute over the pure question exception is ebbing, it is the result of the Justices' shared understanding that "pure questions" are nothing more or less than step one questions. They are "purely legal" questions for the courts, as opposed to the policy-based determinations made by agencies where Congress has delegated lawmaking authority. While it is true, then, that a court must stay in step one when resolving pure questions of law, that is not an exception to *Chevron* but a restatement of its holding.

Finally, to return to the themes of this Article, at least one "pure question" exists in *every* judicial review of agency action: the court must determine the scope of the agency's delegated authority. As discussed above, that is a matter that, by definition and at a minimum, Congress will have established. If when faced with a "pure question of statutory construction" the court did not defer, notwithstanding the most confounding ambiguity or the clearest delegation to the agency, that would indeed be quite an exception. It turns out, however, that there cannot be a "pure question" in the face of confounding ambiguity or clear delegation.

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177. 494 U.S. 26 (1990).

178. *Id.* at 35.

179. ___ U.S. ___, 110 S. Ct. 2499 (1990).

180. *Id.* at 2508 (Blackmun, J., dissenting).

181. All but one. Strangely, Justice Stevens, the author of *Chevron*, wrote a brief dissent saying that although he did not consider the case to be "quite as clear" as it was to Justice Blackmun in dissent, "I believe he has the better of the argument." *Id.* at 2510. Many would say that describes exactly the situation when *Chevron*'s step two applies. *See* Silberman, *supra* note 48, at 826-27 (cautioning that merely being able to identify better of two readings does not keep court in step one). Justice Stevens's relation to his most-cited opinion is complicated. In addition to *Stroop*, compare Young v. Community Nutrition Inst., 476 U.S. 974, 988 (1986) (Stevens, J., dissenting) (complaining that "[t]he task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference"), with Maislin Indus., U.S., Inc. v. Primary Steel, Inc., ___ U.S. ___, 110 S. Ct. 2759, 2772, 2779 (1990) (Stevens, J., joined by Rehnquist, J., dissenting) (accusing majority of ignoring statutory ambiguity and failing to follow *Chevron*).

C. Chevron *and* Chenery

In *SEC v. Chenery Corp.*,[182] the Supreme Court established the fundamental principle of administrative law that a reviewing court can uphold an agency only on the basis of the rationale relied on by the agency itself.[183] *Chevron* may undermine this principle. In a step two case, where the agency is free to do what it wishes, it might seem that the agency's particular rationale would not matter. In fact, however, the *Chenery* rule retains its vitality.

1. Chenery *and Agency Freedom of Movement*

One concern underlying the *Chenery* rule is that to uphold an agency action on a ground invented by Department of Justice lawyers or the court itself could lock the agency into a position that it had never in fact espoused and with which it disagrees.[184] This concern is present only if the court's ruling results in final and binding conclusions of law. If the conclusion of the court is, as in *Chevron*, that the agency was free to do what it did, but was and is also free to do the opposite, then the court is not limiting agency options.

If this is the only concern underlying the *Chenery* rule, a court should uphold agency action under step two even if its view of the statute differs from the agency's. The agency then can reverse itself if it wishes. Because in most cases an agency will affirm its prior decision,[185] setting the agency's action aside would only lead to unnecessary delay and pointless additional procedures. Affirming the action still leaves the agency completely free to alter its position if it so chooses, so no harm is done.

Indeed, that agencies need not worry about having their hands tied is demonstrated by a number of remarkable decisions in which courts have wriggled out of apparently dispositive contrary precedents by rein-

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182. 318 U.S. 80 (1943).

183. *Id.* at 87-88.

184. Women Involved in Farm Economics v. Department of Agriculture, 876 F.2d 994, 998-99 (D.C. Cir. 1989); Colloquy, *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to the Agency*, 4 ADMIN. L.J. 113, 140 (1990) (comment of Judge Stephen Williams).

185. Schuck and Elliott's data show that judicial reversal of an agency leads to a "major change" in the agency action forty percent of the time. Schuck & Elliott, *supra* note 3, at 1047-49, 1059-60. Even if this figure is correct (most would agree with Schuck and Elliott that it is surprisingly high), it still means that in 60% of the cases a reversed agency managed to do what it wanted anyway. That figure would be much higher in a subclass of cases where the agency was told that it could do just what it did, it need only say "we choose to" rather than "we have to."

terpreting them as *Chevron* step two cases.[186] *Chevron*'s mystical powers are so great as to "alter the meaning of . . . decisions that were based on a broader notion of judicial review."[187] Thus, prior decisions that would seem to bind the agency and raise exactly the danger *Chenery* guards against are reinterpreted as having accepted the agency's interpretation as "reasonable," perhaps even the "better" interpretation, but not one compelled by statute and so not one with which it is stuck.[188] How much freer, then, will agencies be if their position is up-

186. For example, in Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124 (9th Cir. 1988) (en banc), the legal question was whether an employer could repudiate a prehire agreement it had negotiated with a union. The NLRB had initially ruled that such repudiation was an unfair labor practice, then switched its position, and finally returned to its original view. During the middle period, the Supreme Court had upheld the Board's view that unilateral repudiation did not violate the National Labor Relations Act. The Ninth Circuit had to decide whether the Supreme Court precedents required that it reject the Board's new position. The majority concluded that the Supreme Court had not independently construed the statute; rather, it had merely concluded that the Board's interpretation was reasonable and consistent with the NLRA and accordingly deferred to it. *Id.* at 1136. The opposite interpretation was equally reasonable and consistent with the NLRA. Each of the three dissents took a slightly different tack, but each seemed to view the Supreme Court decisions as constructions of *the statute* and therefore binding.

Other cases where reviewing courts have found that a previous court, unbeknownst to it, had merely deferred to the agency position as being one of many (including its opposite) within the zone of indeterminacy, include National Fuel Gas Supply Corp. v. FERC, 900 F.2d 340, 344-45 (D.C. Cir. 1990); Clinchfield Coal Co. v. Federal Mine Safety & Health Comm'n, 895 F.2d 773, 777-78 (D.C. Cir. 1990); and NRDC v. EPA, 859 F.2d 156, 187 (D.C. Cir. 1988).

A slightly different problem arises when the pre-*Chevron* decision *rejected* the agency's interpretation. In that setting, the anachronistic reading would treat the precedent as a step one case, thus clearly foreclosing any later shift by the agency. Lechmere, Inc. v. NLRB, ___ U.S. ___, 112 S. Ct. 841 (1992), is an example. The Board found an employer had committed an unfair labor practice by refusing to allow nonemployee union organizers on its property. The Court held this decision conflicted with the holding of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). It refused to defer treating *Babcock & Wilcox* as a decision about the meaning of the statute itself. *Lechmere*, 112 S. Ct. at 847-48. In dissent, Justices White and Blackmun argued that even if the majority's understanding of the rule announced in *Babcock & Wilcox* was correct, which they denied, that decision was inconsistent with modern principles of deference. The statute did not answer the question, so the Court should have deferred—both in *Babcock* and in *Lechmere*. *Id.* at 850, 852-53.

187. Clinchfield Coal Co. v. Federal Mine Safety & Health Comm'n, 895 F.2d 773, 778 (D.C. Cir. 1990).

188. Twice recently the Supreme Court rejected agency interpretations that conflicted with previous interpretations upheld in pre-*Chevron* decisions. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., ___ U.S. ___, 110 S. Ct. 2759, 2768 (1990); California v. FERC, 495 U.S. 490 (1990). These decisions do not state that the later, invalid interpretation was within the zone of indeterminacy that would have existed but for the prior ruling. Rather, they strike down interpretations as being simply inconsistent with the statute. *See also* Lechmere, Inc. v. NLRB, ___ U.S. ___, 112 S. Ct. 841 (1992) (rejecting agency interpretation consistent with previous interpretation rejected in pre-*Chevron* decision).

held under step two and with a citation to *Chevron*?

2. Chenery's *Continued Importance*

Notwithstanding the foregoing, if an agency considers its interpretation *compelled*, and the court concludes that it is merely *permissible*, the court should remand, not affirm. Even though the court's decision will not tie the agency's hands, the agency must rethink its decision in light of its actual freedom of movement.

The point is illustrated by a recent case arising under the Resource Conservation and Recovery Act (RCRA).[189] RCRA requires federal agencies to buy recycled products.[190] This obligation is triggered when EPA designates a product that is available in recycled form and issues regulations to guide federal agencies in procuring it.[191] Agencies need not purchase designated recycled products if they are available "only at an unreasonable price."[192] EPA's guidelines for recycled paper products define "unreasonable" as anything more than the price for comparable virgin paper.[193]

In *National Recycling Coalition, Inc. v. Reilly*,[194] a coalition of recyclers and an environmental organization unsuccessfully challenged this definition of "unreasonable price." The court's analysis was pure *Chevron*. Congress entrusted RCRA's administration to EPA; "unreasonable" is an inherently ambiguous term; the language, structure, and history of the RCRA are not completely dispositive as to its meaning; therefore, because EPA's reading is "consistent with the Act's overall purpose," the court must "accede" to it.[195] The complication is that

189. 42 U.S.C. §§ 6901-6992k (1988).

190. *Id.* § 6962(c)(1). Congress reasoned that by purchasing recycled products the government would both lead by example and stimulate the market for recovered materials. H. REP. NO. 1491, 94th Cong., 2d Sess. 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6289; S. REP. NO. 988, 94th Cong., 2d Sess. 21 (1976).

191. 42 U.S.C. § 6962(e) (1988).

192. *Id.*

193. 40 C.F.R. § 250.21 (1991).

194. 884 F.2d 1431, *reh'g denied*, 890 F.2d 1242 (D.C. Cir. 1989). The author was counsel for one of the petitioners.

195. *Id.* at 1435-37. The court's approach illustrates the threat that a court will find utter ambiguity where the statute in fact provides some guidance. Accepting that Congress left it to the agency to flesh out exactly what constituted an "unreasonable" price does not mean that this is a step two case, plain and simple. That the term will support *many* readings does not mean that it will support *any*. A court is singularly ill-equipped to say whether a price of fifty cents per ream more for recycled than virgin paper is "unreasonable," but the term is not devoid of judicially interpretable meaning. The question before the court was not the meaning of the phrase "unreasonable price," but whether Congress at least meant it to include some price premium over the lowest-priced virgin paper. As Judge Wald wrote in dissent, "the case really turns on the

although the *court* treated this as a step two case, the *agency* saw it as a step one case. EPA did not think that it was filling an explicit or implicit gap; it thought that it was interpreting a statutory term consistent with Congress' actual determination of the point at issue. EPA declined to endorse price preferences in its guidelines on the ground that it thought Congress had foreclosed that option; "RCRA Section 6002 does not provide explicit authority to EPA to authorize or recommend payment of a price preference."[196]

The basic premise of *Chevron* loses all validity if the court goes to step two where the agency stopped at step one. Had EPA known, for example, that Congress had left it room either to endorse or reject a price preference, as the court held, it might not have written the same rule. The reason EPA actually gave for not endorsing a price preference is that Congress had forbidden it. EPA considered the scope of its authority narrower than the court did. Where the agency purported to find statutory clarity, the court found ambiguity. It is silly to "defer" to the agency's conclusion when its premise has been rejected.[197] Indeed,

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narrower question of whether Congress intended to authorize the [EPA] . . . to recommend that federal procurement agencies . . . pursue a strategy that involves never paying *any* premium over the lowest bid price for such items." *Id.* at 1438 (Wald, J., dissenting) (emphasis added). That narrower question is a step one, judicial inquiry notwithstanding the ambiguity of the term "unreasonable." The Supreme Court, in an unrelated case, has since confirmed that the *National Recycling Coalition* court's approach was mistaken. It quite correctly refused to hide behind *Chevron* in setting aside the Interstate Commerce Commission's view of an "unreasonable practice." Maislin Indus., U.S., Inc. v. Primary Steel, Inc., ___ U.S. ___, 110 S. Ct. 2759 (1990); *id.* at 2771 (Scalia, J., concurring). The issue is also comparable to that in *Cardoza-Fonseca.* There the Court acknowledged that, for example, fleshing out the meaning of "well-founded fear of persecution" in concrete cases against specific facts would involve agency discretion and place a case within step two. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987). That did not mean that *any* interpretive question about the statutory term is left to the agency. The Court could independently decide whether Congress meant to equate a "well-founded fear of persecution," 8 U.S.C. § 1101(a)(42) (1988), with proof that it was "more likely than not that the alien would be subject to persecution," INS v. Stevic, 467 U.S. 407 (1984). Even with a highly ambiguous term, then, the Court must determine what it "cannot mean, and some of what it must mean." Monaghan, *supra* note 48, at 27.

196. EPA, Guideline for Recovered Material Content in Paper Products Procured by the Federal Government, 53 Fed. Reg. 23,559 (1989). *See* 50 Fed. Reg. 14,080 (1985). One might argue that EPA did not actually see its hands as tied but was merely swayed by the lack of "*explicit* authority." I do not think this is the case, but even if it were, the general proposition remains unchanged and this decision just becomes a weak illustration.

197. The District of Columbia Circuit is in good company. The Supreme Court seemed to do the same thing in Herweg v. Ray, 455 U.S. 265, 276 (1982). In other cases, the District of Columbia Circuit has correctly remanded where the agency's rationale was that its hands were tied and the court disagreed. *See, e.g.,* American Petroleum Inst. v. EPA, 906 F.2d 729, 740 (D.C. Cir. 1990); Kamargo Corp. v. FERC, 852 F.2d 1392 (D.C. Cir. 1988); Baltimore & O. R.R. v. ICC, 826 F.2d 1125 (D.C. Cir.

absent express delegation of interpretive authority, whenever an agency says, explicitly or implicitly, "we think Congress intended . . . ," its conclusion must be reviewed under step one. What Congress intended is a question for the courts. It may be that the agency is wrong, and Congress had no intent, but that is for the court to decide. This is not just a point about the different players' proper roles. This approach is necessary to keep the agency honest. Especially given the accountability rationale of *Chevron*, an agency should not be able to hide from its critics by saying that its hands are tied when they are not.

Where an agency underestimates its freedom of movement, the proper relief is to remand to the agency, not to uphold the agency action. This reflects not only standard principles of administrative law settled since *Chenery*,[198] which was itself a case of this sort,[199] but also the basic theory of *Chevron*, which is that agencies should be left free to make policy determinations where Congress has not. *Chevron*'s distinction between step one and step two situations thus confirms the importance of upholding an agency only on the basis of its articulated rationale. The court should allow, or force, the agency to operate with the flexibility and responsiveness that, under *Chevron*, are its strengths.

D. A Different Metaphor for Agency "Interpretations"

Justice Stevens' opinion in *Chevron* speaks of agencies "filling gaps" left by Congress.[200] Although this is the dominant metaphor, it is misleading. It implies that agencies complete a line only partly sketched by Congress. But agencies do not operate on the same horizontal plane as Congress. A better metaphor would be vertical rather than horizontal and so capture the role of agencies in adding specificity to the generalized statements of Congress. One possibility is the scheme of biological classification. In its broadest enactments, Congress has identified the

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1987).

198. SEC v. Chenery Corp., 318 U.S. 80, 87-88, 95 (1943); *see* International Bhd. of Elec. Workers v. NLRB, 814 F.2d 697, 708 (D.C. Cir. 1987).

Judge Wald's dissent makes this point: "[E]ven if Congress did not *compel* the EPA to recommend that procurement agencies be allowed to give some price preference to recycled goods, I believe that the agency's mistaken conclusion that Congress *forbade* it to do so is itself a sufficient basis on which to overturn the challenged rule." National Recycling Coalition, Inc. v. Reilly, 884 F.2d 1431, 1444 (D.C. Cir. 1989) (Wald, J., dissenting).

199. In *Chenery*, the SEC initially based its decision on its reading of judicial precedent. The Court held that the SEC had misread the cases, which did not in fact condemn the stock purchases rejected by the SEC. The Court remanded for the agency to have another crack at the case, now fully informed as to its freedom of movement. *Chenery*, 318 U.S. at 87-88.

200. *Chevron*, 467 U.S. at 843.

kingdom and nothing else. Congress occasionally gets down to the species level,[201] but that task is generally left for agencies. Under this metaphor, the courts' role is to ensure that as the agency becomes more specific it remains within the larger boundaries established by Congress.

Consider *Chevron* in this regard. Congress imposed stringent requirements on new sources in dirty-air areas but left room for arguing about what counted as a new source. As Justice Stevens states, the difficulty was that Congress had not balanced the conflicting interests "at the level of specificity presented by this case."[202] What is often overlooked is that even if Congress had legislated at "the level of specificity presented by this case" there still would have been another case in which further refinement was necessary. Suppose the statute had stated that new source requirements "shall not apply to any new, discrete emissions unit from which do not exceed prior reductions from another discrete emissions unit within the same plant or facility." That is the bubble policy as approved in *Chevron*. Yet it leaves numerous questions at the next level of specificity. How recent must the compensating reductions have been? Must they have been of the same pollutant? The same or a more dangerous pollutant? What sort of geographical, physical, or business link must there be for the bubbling sources to be part of the same "plant or facility?" Can prior reductions offset new emissions if the reductions were legally mandated? The answers to these questions are critical to the actual implementation of the bubble policy, and EPA's regulations do address them.[203] But the questions do not indicate "gaps" in the hypothetical statutory language. Rather, they reflect increasingly specific questions of a sort inescapable in the application of any statutory provisions.

The advantage of the metaphor of biological classification is that it reminds us of the respective roles of Congress, courts, and agencies. The gap-filling metaphor implies that because Congress has said nothing, i.e., left a gap, the agency must make the decision, and there is little for a court to do other than to make sure the agency is not being irrational. It also suggests that the agency can reach whatever Con-

201. *See, e.g.*, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990), *reprinted in* 1990 U.S.C.C.A.N. (104 Stat.) 2399.

202. *Chevron*, 467 U.S. at 865.

203. For example, any reduction in the prior five years counts against new emissions. 40 C.F.R. § 52.24(f)(6)(ii)(a) (1991). The Court might be surprised that the bubble policy, which in most descriptions involves essentially simultaneous offsetting reductions and increases, is applied so loosely. Yet under *Chevron* the five-year rule would be hard to attack, even under the hypothetical statutory language set out in text.

gress has left alone. The biological classification metaphor, in contrast, implies that Congress always has said something and reminds us that an agency cannot reach what Congress has not. The statute may identify only the broadest outlines, but it always limits the agency's authority to some extent. The role of the court is to ensure that as the agency spells things out with increasing specificity it stays within the boundaries established by Congress.

IV. CONCLUSION

Chevron is generally perceived as a "landmark"[204] or "watershed" decision[205] that "was intended to be a sea change in the way the courts reviewed agency decisions."[206] The decision would indeed be a landmark if it required courts to abandon to administrative agencies their traditional task of interpreting statutes. On the contrary, the author suggests that *Chevron*'s modest, citation-laden opinion is consistent with the rather less dramatic import of its holding. *Chevron* merely refines longstanding principles most evident in the distinction between standards for judicial review of interpretive and legislative rules. An agency's view as to what Congress meant is entitled to *Skidmore* deference, but no more. An agency's decision within the sphere of delegated authority binds the courts. Congress never implicitly delegates the authority to make binding determinations of what Congress had in mind; that interpretive task remains for the courts. Congress does and can delegate the authority to make binding rules where it has not made them. That legislative task must be left to the agencies.

The objection to this scheme is, of course, that distinguishing legislation from interpretation is impossible. Undeniably, any "interpretation" of a statute that goes beyond a literal repetition of its terms is a sort of legislative undertaking. This is to some extent a problem for a different article, and more a law professor's problem than a judge's problem, as shown by the continued vitality of the arguably meaningless distinction between legislative and interpretive rules.[207] But even accepting the va-

204. Schuck & Elliott, *supra* note 3, at 1023; Silberman, *supra* note 48, at 822.
205. Starr, *supra* note 4, at 283.
206. Colloquy, *supra* note 184, at 139 (comment of Cornish Hitchcock).
207. The overlap of interpretation and legislation is clear but also irrelevant where Congress expressly gives an agency binding interpretive authority. *See supra* notes 26-28, 123 and accompanying text (stating that when Congress specifically instructs agency to define statutory term, such rules will be deemed legislative). If Congress leaves it to the agency to elaborate on the meaning of a statutory term, the line between interpretation and lawmaking is extremely fine and perhaps nonexistent. The express delegation places these situations in step two, however, so the haziness of the distinction does not matter.

lidity of this objection, courts must to the fullest extent possible search for and implement statutory meanings. To the extent Congress has made a decision or even just pointed the way, its decision must be respected, and it is the courts' role to ensure that it is. Interpretation, that is, figuring out what it is Congress said—even if it is merely that the agency is to decide—is always up to the judiciary.

The *Chevron* controversy parallels the debate over when, and to what extent, judicial review of agency action is precluded because the decision has been committed to agency discretion.[208] This exception to the general rule that review is available applies only when there is "no law to apply."[209] A *Chevron* step two case is, in a sense, one in which there is "no law to apply." Yet the courts have by and large been careful to keep the committed-to-agency-discretion exception confined to narrow bounds. Even where a decision is largely discretionary, there is still in many respects "law to apply"—the decision may be arbitrary, unconstitutional, procedurally defective, and so on.[210] The court must be careful to determine just what has been committed to agency discretion. Similarly, in interpreting statutes, the court must not assume that the entire interpretive task has been handed over to the agency. Rather, it must make a searching inquiry into the boundaries of agency discretion and delegated authority. The court must enforce and adhere to all the law there is to apply.

208. 5 U.S.C. § 701(a)(2) (1988).

209. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 401 (1971).

210. *See generally* Cass R. Sunstein, *Review of Agency Inaction after* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985) (insisting that notwithstanding Supreme Court's presumption against reviewability of agency nonenforcement decisions there remain numerous grounds for judicial review of agency inaction).