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## The Tailoring Deference to Variety with a Wink and a Nod to Chevron: Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law

J. Lyn Entrikin Goering

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# TAILORING DEFERENCE TO VARIETY WITH A WINK AND A NOD TO *CHEVRON*

## THE ROBERTS COURT AND THE AMORPHOUS DOCTRINE OF JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF LAW

*J. Lyn Entrikin Goering\**

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## INTRODUCTION

Twenty-five years ago, the Supreme Court issued its unanimous opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> Authored by Justice Stevens, the decision was concise and circumspect, and the relatively easy facts of that case should have limited its reach. Certainly, the Court could not have foreseen that *Chevron* would be declared a watershed case.<sup>2</sup> Yet in retrospect, the decision took hold as one of the most controversial in the history of administrative law.<sup>3</sup>

A quarter-century later, Justice Stevens must rue the day he penned the concise words of *Chevron's* central holding.<sup>4</sup> Indeed, after many years of stretching the Court's decision well beyond its original bounds, a shifting majority of the Court appears to be backpedaling in a sporadic effort to devise a

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

2. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 420–421 (Peter L. Strauss ed. 2006) (observing lack of evidence that any of the justices at the time considered *Chevron* “some kind of watershed decision”); see also *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring) (referring to *Chevron* as “our watershed decision”).

3. Merrill, *supra* note 2, at 400.

4. See William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1088 (2008) (noting the “doctrinal tug-of-war” since 1987 between Justices Stevens and Scalia that came to a head in *United States v. Mead Corp.*, 533 U.S. 218 (2001)); see also *Negusie v. Holder*, 129 S. Ct. 1159, 1170 (2009) (Stevens, J., dissenting).

more balanced, nuanced deference framework.<sup>5</sup>

Beginning in 2000, the Rehnquist Court began sketching out the parameters of a more flexible, multi-factor approach to determine the nature and degree of judicial deference warranted for agency interpretations.<sup>6</sup> In doing so, the Court followed a discernable pattern of retrenchment from the unwittingly simplistic approach mapped out in *Chevron*. In a series of decisions, the Rehnquist Court chipped away at *Chevron's* sweeping "domain,"<sup>7</sup> generally confining its doctrine of heightened deference to regulations adopted in notice-and-comment rulemaking.<sup>8</sup>

The most controversial of these was *United States v. Mead Corp.*,<sup>9</sup> decided in 2001. The *Mead* Court breathed new life into *Skidmore v. Swift & Co.*,<sup>10</sup> a 1944 decision predating the Administrative Procedure Act (APA). *Skidmore* had articulated a multifaceted common law deference framework depending upon various enumerated factors the Court credited as lending persuasive value to agency interpretations.<sup>11</sup> While *Mead* expressly revived the more flexible common law deference doctrine, it failed to reconcile *Skidmore* with the superseding provisions of the APA governing judicial review.<sup>12</sup>

By the end of Chief Justice Rehnquist's last term, the Court had settled into a relatively predictable dichotomy. The Court generally applied *Chevron* deference if a rule had been adopted in notice-and-comment proceedings, and otherwise defaulted to classic *Skidmore* analysis of various persuasive factors to determine whether a less formal agency interpretation warranted deference. In its final term, the Rehnquist Court resolved a complex issue concerning the stare decisis effect on agencies of judicial precedents interpreting black-letter law. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>13</sup> the Court held that an agency is bound by a court's prior interpretation of a statute or rule only if the court declared its language unambiguous.<sup>14</sup> In that

5. See *Mead*, 533 U.S. at 236–37 (8-1 decision).

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. . . . The Court's choice has been to tailor deference to variety . . . . This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference . . . .

*Id.* (footnotes omitted).

6. See *Christensen*, 529 U.S. 576 (6-3 opinion).

7. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 835 (2001). Some scholars have referred picturesquely to the trend as "cabining *Chevron*." See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006).

8. See *Mead*, 533 U.S. at 230.

9. 533 U.S. 218 (2001).

10. 323 U.S. 134 (1944).

11. *Id.* at 140; see *infra* note 100 and accompanying text.

12. See 5 U.S.C. § 706 (2006). Justice Souter, writing for the majority, occasionally cited relevant APA provisions in his opinion, but only in passing. See *Mead*, 533 U.S. at 227, 228 n.6, 229.

13. 545 U.S. 967 (2005).

14. *Id.* at 982–83.

event, the prior judicial interpretation controls over any subsequent agency interpretation to the contrary.<sup>15</sup>

Nevertheless, the Rehnquist Court failed to reconcile its generally narrower deference framework with the Court's sweepingly deferential 1997 holding in *Auer v. Robbins*.<sup>16</sup> Authored by Justice Scalia for a unanimous Court, *Auer* held that an agency's interpretation of its own ambiguous regulation was entitled to particularly deferential respect.<sup>17</sup> Moreover, the Court rejected an argument that agencies should apply canons of statutory construction to resolve apparent ambiguities in their own regulations.<sup>18</sup>

While its legacy was a relatively stable yet more complex deference doctrine, the Rehnquist Court essentially disregarded the APA's language governing judicial review.<sup>19</sup> If the Court was unable to resolve an ambiguity in a statute Congress had delegated authority to an agency to administer, the Court applied one of three common law deference frameworks: *Chevron* if the agency had interpreted an ambiguous statute by adopting regulations in notice-and-comment proceedings, *Mead/Skidmore* if the agency had issued its interpretation of an ambiguous statute by informal means such as letter rulings or policy statements, and *Auer* if the agency had interpreted its own ambiguous regulation by whatever means.<sup>20</sup> What remained was for the Court to reconcile *Auer* deference with the less deferential *Skidmore* doctrine revived by *Mead*.

Chief Justice John Roberts, Jr. took up the Court's reins in October 2005. Less than four months later, in *Gonzales v. Oregon*,<sup>21</sup> Roberts joined his first dissenting opinion.<sup>22</sup> The 6-3 majority further narrowed *Chevron's* reach by refusing to defer to Attorney General John Ashcroft's interpretive ruling<sup>23</sup> that sought to unilaterally preempt Oregon's Death with Dignity Act.<sup>24</sup> Justice Kennedy, writing for the majority, reasoned that *Auer* deference did not apply because Ashcroft's "interpretive" ruling had merely "parroted" the relevant statutory language rather than interpreting an ambiguous regulation.<sup>25</sup> Nor could Ashcroft invoke *Chevron* deference because the Controlled Substances Act did not authorize him to unilaterally issue interpretive rules having the force of

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15. *Id.* at 982.

16. 519 U.S. 452 (1997).

17. *Id.* at 461. *Auer* deferred to the Department of Labor's amicus brief interpreting an ambiguous agency regulation. *Id.*

18. *Id.* at 462-63.

19. See 5 U.S.C. § 706 (2006) (providing that "the reviewing court shall decide all questions of law, interpret . . . statutory provisions, and determine the meaning . . . of an agency [rule]"). See *infra* notes 127-131 and accompanying text.

20. An agency's interpretation of its own regulation would surely take shape in a medium less formal than notice-and-comment rulemaking. Thus, it is difficult to square *Auer's* super-deference with the Court's revival of *Skidmore* for interpretations embodied in policy statements, guidelines, litigation documents, letter rulings, and the like.

21. 546 U.S. 243 (2006).

22. *Id.* at 275 (Scalia, J., dissenting, joined by Roberts, C.J. & Thomas, J.).

23. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306).

24. OR. REV. STAT. §§ 127.800-127.995 (2006).

25. *Gonzales*, 546 U.S. at 258; see *id.* at 256-57 (distinguishing *Auer*, 519 U.S. at 461-63).

law.<sup>26</sup>

During its first four terms, the Roberts Court has been anything but consistent in resolving administrative deference issues.<sup>27</sup> A recent empirical study identified no fewer than seven distinct “deference regimes” the Court has applied since it decided *Chevron*.<sup>28</sup> The Roberts Court has drawn unevenly and unpredictably upon each of these approaches, and its reasoning often varies depending on which justice writes the opinion<sup>29</sup> and which justices vote with the majority and thus influence the Court’s reasoning.<sup>30</sup> Nearly a decade after the Rehnquist Court began to narrow *Chevron*’s reach, the unfortunate result is a mish-mash of a muddled mess.<sup>31</sup> And so far, the Roberts Court has done very little to straighten it out.

Rather than continuing the pretense that *Chevron* remains the presumptive default rule,<sup>32</sup> the Roberts Court should reconcile its multiple common law deference doctrines by expressly articulating and systematically applying an integrated approach incorporating the multi-factor standard revived by the Rehnquist Court.<sup>33</sup> While *Chevron* did not expressly invoke the multivariate deference standard rooted in *Skidmore*, the Court surely would have reached the same result had it applied that analysis. Without doubt, the factors articulated in *Chevron* favoring the agency’s interpretation of the controlling statute were highly persuasive, even under the *Skidmore* analysis. The sweepingly broad influence *Chevron* enjoyed during its heyday may have had more to do with the political influence of the Reagan administration and the scholars who championed the decision as revolutionizing administrative law.<sup>34</sup>

While *Chevron* may not be a dead letter,<sup>35</sup> its twenty-five year reign is

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26. *Id.* at 268.

27. See Eskridge & Baer, *supra* note 4, at 1098 (concluding that the Court is “wildly inconsistent” in applying administrative deference doctrines); cf. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1237 (2007) (noting that “the scope of *Skidmore*’s applicability in the post-*Mead* era is still unclear”).

28. Eskridge & Baer, *supra* note 4, at 1098-117.

29. The assignment is made by the Chief Justice if he votes with the majority, or otherwise by the senior justice voting with the majority. See, e.g., Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1731 (2006).

30. See *id.* at 1733-34 (explaining the assigned author’s strategic advantage).

31. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464 (2005), cited in *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2480 (2009) (Scalia, J., concurring in part and concurring in the judgment); Eskridge & Baer, *supra* note 4, at 1157 (“In short, the Supreme Court’s deference jurisprudence is a mess.”); Ann Graham, *Searching for Chevron in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 262 (2008) (referring to “a confusing muddle of decisions which turn on internecine disputes, backfilling from the desired result, and flavor-of-the-week analytical models”).

32. See Einer Elhauge, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 79-80 (2008).

33. See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

34. See, e.g., Kenneth W. Starr et al., *Judicial Review of Agency Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 372 (1987) (quoting panelist Richard K. Willard, then Assistant Attorney General, who referred to *Chevron* as “a helpful way of corralling the open-ended judicial arrogance that is so richly characterized by the D.C. Circuit’s jurisprudence for the past 20 or 30 years”).

35. But see Graham, *supra* note 31, at 239 (“Classic *Chevron* analysis is dead.”).

drawing to a close<sup>36</sup>—and rightly so. It remains to be seen whether federal courts applying the post-*Chevron* deference framework<sup>37</sup> will strike the proper balance, yielding an adequate margin of interpretive discretion to agencies while also imposing sufficient constraints on maverick officials who would otherwise strain the limits of delegated rulemaking authority. Without doubt, federal courts and administrative officials alike need clearer guidance on the appropriate scope of judicial review as well as the factors that influence courts to defer to agency interpretations.<sup>38</sup>

This article attempts to assimilate and synthesize the evolution of the Court's post-*Chevron* deference doctrine over the last decade, reconcile the principal common law deference regimes with the relevant provisions of the APA, and offer suggestions on how to ameliorate confusion among courts, agencies, and Congress regarding how the Court applies common law deference doctrines to agency interpretations of law.

To provide temporal context for the Court's increasingly disjointed deference jurisprudence and some of its missing links, Parts I and II offer an historical overview. Part I begins with the origins of administrative law in the late nineteenth century and discusses the common law deference doctrines that developed during and after the New Deal, culminating with *Chevron* in 1984. Part II analyzes the Court's administrative deference jurisprudence during *Chevron*'s heyday from 1984 until 2000.

Part III seeks to reconcile and synthesize the Supreme Court's judicial deference decisions since the turn of the twenty-first century, beginning with a brief discussion of *Auer*,<sup>39</sup> representing the apex of the Rehnquist Court's attitude of deference to agency interpretations. Part III continues by discussing the Rehnquist Court's decision in *Christensen v. Harris County*,<sup>40</sup> as later refined by *Mead*.<sup>41</sup> It concludes with a summary of the primary common law deference doctrines as they had evolved by the close of the Rehnquist Court's final term.

Part IV addresses the haphazard evolution of administrative deference jurisprudence that has characterized the Roberts Court during its first four terms. Selected decisions illustrate that the Court's deference doctrine turns largely on the interpretive ideology of the justices who command a majority

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36. See Eskridge & Baer, *supra* note 4, at 1098 (“[T]he *Chevron* regime . . . plays a surprisingly modest role in the Court's deference jurisprudence.”).

37. Recent federal circuit opinions suggest an ongoing struggle to sort out and apply the multifarious deference regimes. See Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, 6 VILL. ENVTL. L.J. 19, 34 (2005) (“In an area of doctrine now fraught with rhetorical confusion, some new measure of clarity would be a virtue.”).

38. *Id.*; see also, e.g., *Ohio State Univ. v. Sec'y*, 996 F.2d 122, 123 n.1 (6th Cir. 1993) (noting that the inconsistent standard of judicial deference to administrative interpretations frustrates intermediate appellate courts); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 316 F.3d 913, 921 (9th Cir. 2003) (“After *Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* deference applies, and *Mead* provides an example of when it does not.”), *vacated on reh'g en banc*, 353 F.3d 1051 (9th Cir. 2003), *amended on reh'g en banc in part*, 360 F.3d 1374 (9th Cir. 2004).

39. 519 U.S. 452 (1997).

40. 529 U.S. 576 (2000).

41. 533 U.S. 218 (2001).

vote in any dispute regarding agency interpretations of law.

Finally, Part V makes a few recommendations and identifies unresolved issues that warrant further research, scholarly commentary, and congressional action.

The Supreme Court's common law deference jurisprudence has significantly influenced the nature and degree of judicial oversight of agency rulemaking at all levels of the court system for more than sixty-five years.<sup>42</sup> To ensure that agency rulemaking effectively carries out its purpose, Congress must take affirmative steps to clarify the proper role the federal courts play in ensuring that executive branch agencies exercise rulemaking power within the constraints of their authorizing statutes. For Congress to allow deference jurisprudence to remain in its current muddled state raises troubling constitutional issues regarding separation of powers<sup>43</sup> and the long-dormant nondelegation doctrine.<sup>44</sup>

## I. HISTORICAL OVERVIEW

While *Chevron* has been regarded as "one of the most important decisions in the history of administrative law,"<sup>45</sup> the Supreme Court's administrative deference doctrine did not begin with *Chevron*.<sup>46</sup> More to the point, many aspects of what currently appears to be an "ad hoc approach"<sup>47</sup> can be traced to the historical development of administrative law.<sup>48</sup> Thus, a complete understanding of the significance of *Chevron* and its successors requires an appreciation of its historical context,<sup>49</sup> including the various judicial deference doctrines that ebbed and flowed during most of the twentieth century.

### A. *The Origins of Administrative Law*

The middle fifty years of the twentieth century witnessed unprecedented growth of the "headless fourth branch of government,"<sup>50</sup> beginning with the

42. The administrative deference framework applies not only to federal agency interpretations. Federal courts often review state agency interpretations of federal statutes governing cooperative programs. See, e.g., *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002) (Medicaid); *Batterton v. Francis*, 432 U.S. 416, 420 (1977) (AFDC).

43. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

44. See *infra* notes 70–84 and accompanying text (discussing nondelegation doctrine).

45. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 140 (4th ed. 2002).

46. See, e.g., John H. Reese, *Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 *FORDHAM L. REV.* 1103, 1106–08 (2004) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984)); see also *Negusie v. Holder*, 129 S. Ct. 1159, 1170–71 (2009) (Stevens, J., dissenting) ("Judicial deference to agencies' views on statutes they administer was not born in *Chevron* . . .").

47. Eskridge & Baer, *supra* note 4, at 1157, 1179, 1182.

48. For a concise and informative history of administrative rulemaking, see CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 7–21 (3d ed. 2003).

49. "The spirit of an age has a way of working its way into all the cases with which a court deals." ALFRED G. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 12 (1992).

50. This well-known term originated in the 1937 final report of the Committee on



New Deal in the mid-1930's and ending with *Chevron* in 1984. In the early part of the twentieth century, bench and bar, having grown comfortable with common law jurisprudence, resisted development of the administrative state. Both legal institutions were slow to acknowledge the increasingly important role agencies had assumed in both litigation and lawmaking.

Administrative law originated in the industrial era of the late nineteenth century, when political pressure compelled the federal government to intervene.<sup>51</sup> Controversy resulted from expansion of the railroads and discriminatory tariffs, and congressional initiatives to directly regulate rates proved unworkable.<sup>52</sup> The cumbersome judicial process lacked sufficient continuity to comprehensively address complex social and economic issues associated with the railroads.<sup>53</sup>

In 1887, the political and pragmatic need for ongoing oversight of the railroad industry led Congress to establish the Interstate Commerce Commission, the first federal regulatory agency.<sup>54</sup> In subsequent years, the administrative state began overseeing other segments of the economy, including banking, insurance, and communications.<sup>55</sup> Congress created new administrative agencies to constrain abusive business tactics that the judicial system was ill-equipped to control by traditional means.<sup>56</sup>

During the economic downturn of the 1930's, administrative law's original focus on regulation shifted to protectionism.<sup>57</sup> Beginning with the New Deal, the courts began to accept the role agencies necessarily played in stabilizing the economy and mitigating rampant unemployment.<sup>58</sup> Nevertheless, the

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Administrative Management, appointed by President Franklin Roosevelt to study the reorganization of the executive branch. See PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE, WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 39-41, 74th Cong., 2d Sess. (1937). The Committee used the term to express caution about the proliferation of independent boards and commissions that were not directly accountable to the President. *Id.* The issue remains controversial; the Roberts Court will address the political accountability of independent agencies in its October 2009 Term. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (May 18, 2009) (No. 08-861); see also *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1817 (2009) (plurality opinion) (referring pointedly to the "separation-of-powers dilemma posed by the Headless Fourth Branch" and its effect on the "unitary Executive").

51. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 7-8 (1938).

52. *Id.* at 9.

53. *Id.* at 9, 89. In particular, the judicial process was inadequate to address the rate disparities of a national railroad system, the original impetus for establishing federal administrative agencies. *Id.* at 125.

54. See *id.* at 10, 89.

55. *Id.*

56. *Id.* at 14.

57. See *id.* at 12-16. "The dominant theme in the administrative structure is . . . concern for an industry whose economic health has become a responsibility of government." *Id.* at 12; see AMAN, *supra* note 49, at 12-13.

58. See AMAN, *supra* note 49, at 8 (noting that the courts' "hands-off approach" during and after the New Deal "facilitated agency change and the evolutionary growth of the administrative state"); LANDIS, *supra* note 51, at 14-15 (observing that after the 1929 stock market crash, "a perplexed state relied almost exclusively upon the administrative approach to its many and staggering problems"). Eighty years later, the dramatic economic downturn in 2008-09 and associated political events are stunning reminders of the political pressure on the federal government to intervene when market

unfamiliar remedial process of the administrative state met with continued opposition and suspicion from the legal profession.<sup>59</sup>

In 1938, responding to the Attorney General's request, President Roosevelt appointed a committee of "eminent lawyers, jurists, scholars and administrators,"<sup>60</sup> later known as the Attorney General's Committee on Administrative Procedure.<sup>61</sup> The Committee engaged in a comprehensive two-year investigation of government agencies. Its final report was later declared "a landmark in the field of administrative law."<sup>62</sup>

The reliance on government expertise was a natural outgrowth of the rise of the administrative state during the New Deal.<sup>63</sup> In large part, the philosophical justification for the civil service system, designed to foster political independence and agency expertise, rested on the shared social value of allowing agency officials flexibility and discretion to carry out their responsibilities.<sup>64</sup> Agency expertise was considered a natural extension of the authority granted to elected representatives, who were thought to have more expertise than average voters regarding social and economic policy.<sup>65</sup> From this perspective, the expertise and independence entrusted to agency officials reflected the political values characteristic of representative democracy.<sup>66</sup>

Judicial respect for the specialized expertise of government agencies would soon become a primary principle underpinning early deference doctrines.<sup>67</sup> Indeed, federal courts continue to cite agency expertise as one of the primary factors justifying deference to administrative interpretations of law.<sup>68</sup> As we will see, the deference doctrines that developed as a matter of practical necessity during the New Deal would continue to wield influence for many years to come.<sup>69</sup>

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forces fail.

59. See PIERCE, *supra* note 45, at 12–15; Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 5, 16–18 (1936).

60. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947) [hereinafter APA MANUAL].

61. *Id.*

62. APA MANUAL, *supra* note 60, at 5. The report was the primary source of recommendations later incorporated in the APA. *Id.* The Supreme Court recently cited the APA MANUAL, acknowledging its continuing persuasive value. See *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704 (2009).

63. See AMAN, *supra* note 49, at 22.

64. GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 5 (1987).

65. See AMAN, *supra* note 49, at 15–16. "This willingness to defer to 'experts' after the Great Depression was an understandable, very American approach to complex problems." *Id.* at 16. The Bush and Obama Administrations' bold responses to the current economic crisis, backed by Congress, underscore the longstanding American tradition of deference to administrative agencies during troubled times.

66. *Id.*

67. LANDIS, *supra* note 51, at 150; see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 21 (1982) ("[D]elegation of authority to administrative agencies was the paradigmatic New Deal response to the danger of legal petrification.").

68. See *infra* notes 98, 220, 333–34, 378, 492, 539, & 693 and accompanying text.

69. AMAN, *supra* note 49, at 24.

### B. *The Nondelegation Doctrine*

As early as 1825, the United States Supreme Court articulated what would later be known as the nondelegation doctrine,<sup>70</sup> a corollary to the constitutional principle of separation of powers. Under traditional nondelegation doctrine, “Congress may not constitutionally delegate its legislative power to another branch of [g]overnment.”<sup>71</sup> The Constitution nevertheless permits Congress to “seek assistance” from coordinate branches as long as they operate within properly defined limits known as “intelligible principles.”<sup>72</sup>

The nondelegation doctrine has obvious implications for administrative rulemaking, which always depends on a congressional grant of authority, whether express or implied.<sup>73</sup> Only twice, however, has the Supreme Court relied on the nondelegation doctrine to strike down legislation.<sup>74</sup> Both decisions invalidated parts of the National Industrial Recovery Act, by all accounts unusually broad-sweeping legislation.<sup>75</sup> But never again has the Court invalidated legislation on nondelegation principles.<sup>76</sup>

Some observers have gone so far as to declare the nondelegation doctrine dead.<sup>77</sup> Others consider it “on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it.”<sup>78</sup> Still others have reasoned that the nondelegation doctrine cannot be defended based on constitutional analysis.<sup>79</sup>

While the nondelegation doctrine has only rarely succeeded as a

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70. Two scholars recently coined the arguably more descriptive term “delegation non-doctrine.” Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1036 (2007). The authors observed the proliferation of “‘junior varsity’ legislatures throughout the federal government.” *Id.*

71. *Touby v. United States*, 500 U.S. 160, 165 (1991); see U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States.”).

72. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); see *Touby*, 500 U.S. at 165 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

73. See *PIERCE*, *supra* note 45, at 306.

74. *Id.* at 91; see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935) (striking broad delegation of power by the National Industrial Recovery Act to the President to prescribe codes regulating nationwide trade and industry); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (striking one subsection of the Act as an unconstitutional delegation of power).

75. See, e.g., *PIERCE*, *supra* note 45, at 91–92.

76. *AMAN*, *supra* note 49, at 103; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–19 (2000). In fact, the Rehnquist Court upheld a broad delegation of rulemaking power under the Clean Air Act. See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474–76 (2001); see also Craig N. Oren, *Whitman v. American Trucking Associations—The Ghost of Delegation Revived . . . and Exorcised*, in *ADMINISTRATIVE LAW STORIES* 7, 8 (Peter L. Strauss ed. 2006) (noting the rarity of judicial invocation of the nondelegation doctrine).

77. E.g., Sunstein, *supra* note 76, at 315 & nn. 1–3 (citing sources). But see *id.* at 315 (contending that the doctrine is alive and well); see also Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1299 (2003) (same).

78. Alexander & Prakash, *supra* note 70, at 1038.

79. See Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722, 1762 (2002). Professor Cass Sunstein has taken a middle ground. He suggests that the Supreme Court has recast the doctrine in the form of “nondelegation canons,” which narrowly constrain agency action absent a “clear congressional statement” to the contrary. Sunstein, *supra* note 76, at 316, 338.

constitutional basis for challenging legislative action,<sup>80</sup> it continues to operate as a loose constraint on agency action. In theory, Congress must adequately articulate “intelligible principles” to which administrative agencies must conform in exercising the power to legislate.<sup>81</sup> But in practice, even the most broadly drawn parameters are deemed sufficient to withstand constitutional challenge.<sup>82</sup>

Nevertheless, the nondelegation doctrine implicitly assumes, at least in theory, that an agency will exercise its delegated authority within the specific constraints imposed by Congress in the agency’s authorizing legislation.<sup>83</sup> As applied by the Supreme Court in recent times, the nondelegation doctrine simply means, as a practical matter, that the legal boundaries confining an agency’s interpretive power are primarily statutory rather than constitutional in nature. In the absence of constitutional constraints on delegations of legislative power, judicial review of an agency’s exercise of statutory authority provides a critical check on executive power.

Once it was settled that Congress, within broad constraints, may delegate lawmaking authority to the executive branch, it was a natural evolutionary step for the Court to gradually adopt an attitude of deference to interpretations by agencies of their own authorizing statutes. However, this development would further blur the lines separating the three branches of government.<sup>84</sup>

### C. Early Deference Doctrines

During the New Deal and World War II eras, the Supreme Court declined to apply the same deferential standard of review to agency adjudication and rulemaking as it applied to statutes and judgments. In *SEC v. Chenery Corp.*,<sup>85</sup>

80. For a recent but short-lived example, see *South Dakota v. Dep’t of Interior*, 69 F.3d 878, 884–85 (8th Cir. 1995) (striking down § 465 of the Indian Reorganization Act (IRA) as contrary to nondelegation doctrine), *vacated*, 519 U.S. 919 (1996). *But see, e.g.*, *Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005) (upholding IRA § 465 over nondelegation doctrine challenge), *on reh’g en banc sub nom.*, *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), *rev’d on other grounds sub nom.*, *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

81. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

82. *See generally* *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472–76 (2001) (upholding broad delegation of legislative power to EPA).

83. *See id.* at 475 (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”). *Chevron* itself, and perhaps other deference regimes, may be considered “nondelegation canons.” *See* Sunstein, *supra* note 76, at 316, 338.

84. *See infra* note 682; *see also* Michael E. Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 188 (1992). “[*Chevron*] frankly recognizes that Congress does hand over largely unfettered policy-making authority to agencies.” *Id.* *But cf.* AMAN, *supra* note 49, at 32–33 (expressing concern that intense judicial scrutiny of environmental regulation during the 1970’s blurred constitutionally mandated distinctions among the branches).

85. 318 U.S. 80 (1943). The Court observed that “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” *Id.* at 88. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), still governs when the Court reviews agency adjudications. *See, e.g.*, *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2745 (2008) (FERC adjudication) (citing *Chenery*); *see also* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1838 (2009) (Breyer, J., dissenting) (citing *Chenery*).

for example, the Court insisted that an administrative agency set out its explicit reasoning for developing a disputed policy position.<sup>86</sup> The Court declined to invent its own reasoning to justify agency action,<sup>87</sup> restricting its review to the specific rationale expressly invoked by the agency to support its decision in the first instance.<sup>88</sup>

Two of the Supreme Court's earliest decisions addressing judicial deference to agency interpretations have reassumed center stage: *Skidmore v. Swift & Co.*<sup>89</sup> and *Bowles v. Seminole Rock & Sand Co.*<sup>90</sup> Although both predated the APA, they continue to strongly influence the Supreme Court's evolving deference framework. While neither addressed notice-and-comment rulemaking, both shed helpful light on the various common-law deference regimes regularly invoked by the Roberts Court.

The *Skidmore* plaintiffs worked in defendant's meat packing plant. They sought overtime pay under the Fair Labor Standards Act (FLSA) for time they spent on call at the plant's fire hall after normal duty hours.<sup>91</sup> The Fifth Circuit affirmed the trial court's "conclusion of law" that on-call time was not working time because plaintiffs were entitled to engage in pleasurable activities at the fire hall, subject to call.<sup>92</sup> The Supreme Court reversed, holding that neither the FLSA nor case law precluded the district court *as a matter of law* from classifying waiting time as compensable.<sup>93</sup> Rather, whether plaintiffs had engaged in compensable work while on call was a question of fact under the circumstances.<sup>94</sup>

*Skidmore* noted that no administrative agency was specifically charged with adjudicating FLSA disputes, but Congress had established the Office of Administrator, empowered to seek injunctive relief to remedy violations.<sup>95</sup> As the Court observed, the Administrator had issued "an interpretive bulletin and several informal rulings" concerning FLSA enforcement.<sup>96</sup> The Court notably found no statute suggesting how much deference the courts should pay those interpretations.<sup>97</sup> Nevertheless, the Court concluded that policy statements

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86. *Chenery*, 318 U.S. at 88 (distinguishing review of lower court decisions from review of agency actions).

87. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938) (reasoning that where legislative judgment is questioned, judicial inquiry must be restricted to whether any state of facts could reasonably be assumed that would support it).

88. *Chenery*, 318 U.S. at 94. This stringent standard of judicial review suggests that the Court put the burden of persuasion on the agency to defend its regulatory action, rather than imposing the burden of persuasion on the challenging party.

89. 323 U.S. 134 (1944).

90. 325 U.S. 410 (1945).

91. *Skidmore*, 323 U.S. at 135.

92. *Skidmore v. Swift & Co.*, 136 F.2d 112, 113 (5th Cir. 1943), *rev'd*, 323 U.S. 134 (1944).

93. *Skidmore*, 323 U.S. at 140.

94. *Id.* at 136-37. In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), the Court distinguished the administrative process of applying law to the facts from the judicial function of interpreting law in the abstract. *Id.* at 130-31.

95. 323 U.S. at 137.

96. *Id.* at 138.

97. *Id.* at 139. *Skidmore* was decided two years before the APA was enacted.

issued as part of the Administrator's official duties and based upon his specialized expertise<sup>98</sup> were persuasive, if not binding, legal authority.<sup>99</sup>

[T]he rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>100</sup>

On remand, the district court was directed to consider the persuasive value of the Administrator's interpretive bulletin, without regard to the lower court's initial conclusion that waiting time was not compensable as a matter of law.<sup>101</sup>

A year later, the Supreme Court once again addressed the scope of judicial review of an agency interpretation. This time the Office of Price Administration interpreted its own regulations that in turn had interpreted its authorizing statute.<sup>102</sup> In *Bowles v. Seminole Rock & Sand Co.*,<sup>103</sup> the Court held that judicial deference to an agency's interpretation of law extended as well to an agency's interpretation of *its own regulations*, if promulgated in the exercise of congressional authority.

Since this involves an interpretation of an administrative regulation[,] a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling

98. See *supra* notes 63–68 and accompanying text (noting the importance of agency expertise in justifying broad delegations of statutory authority during the New Deal).

99. *Skidmore*, 323 U.S. at 140. The Court also rejected the notion that the agency's interpretation was any less persuasive in the form of an interpretive ruling rather than an adjudication. *Id.*

100. *Id.*

101. *Id.* To Justice Scalia's consternation, *Mead* breathed new life into *Skidmore* deference. See *Mead*, 533 U.S. at 227. In *Mead*, for example, Scalia noted:

[T]he Court now resurrects, in full force, the pre-*Chevron* doctrine of *Skidmore* deference . . . whereby "[t]he fair measure of deference . . . var[ies] with circumstances[.]" . . . The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' "totality of the circumstances" test.

*Id.* at 241 (Scalia, J., dissenting) (quoting *Skidmore*, 323 U.S. at 140).

102. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 412–13 (1945).

103. *Id.* *Seminole Rock* was decided after *Skidmore* but before Congress enacted the APA.

weight unless it is plainly erroneous or inconsistent with the regulation.<sup>104</sup>

*Seminole Rock* addressed a 1942 price-control regulation applicable to the sale of crushed stone.<sup>105</sup> The Court initially resolved an ambiguity in the regulation as applied to the facts,<sup>106</sup> finding it persuasive that the Office had interpreted the regulation in the same manner in an explanatory bulletin to manufacturers and vendors.<sup>107</sup> Lending additional support, the interpretation was published in the Administrator's first quarterly report to Congress.<sup>108</sup> Finally, the same interpretation had been uniformly offered in "countless" informal responses to others similarly affected by maximum price determinations.<sup>109</sup> The agency's interpretation was ultimately upheld based upon its consistent application over time, in light of the Court's independent interpretation of the ambiguous regulation.<sup>110</sup>

While *Skidmore* and *Seminole Rock* have been criticized,<sup>111</sup> each retains its vitality as a Supreme Court precedent influencing judicial deference to agency interpretations.<sup>112</sup> Both cases anticipated a category of administrative interpretations that the APA would soon define as "interpretative rules," as distinguished from more formal "legislative rules."<sup>113</sup> In Part III, we will return to a discussion of these two cases and their continuing influence on judicial deference doctrines.

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104. See *id.* at 413–14. The *Seminole Rock* Court did not address the statutory or constitutional validity of the agency's interpretation for jurisdictional reasons unique to the times. The only issue was the proper interpretation of the agency's regulation. Even if its validity had been challenged, the Emergency Court of Appeals had exclusive jurisdiction to decide that issue. *Id.* at 418–19.

105. *Id.* at 412.

106. *Id.* at 415–17.

107. *Id.* at 417. Note that the Court independently interpreted the regulation by resolving the ambiguity before turning to the agency's informal interpretation for support. See *id.* at 415–17.

108. *Id.* at 417.

109. *Id.* at 418.

110. *Id.*

111. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 589 (1999) (Scalia, J., dissenting) ("*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations . . . authoritative effect."); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 639–40 (1996) (questioning constitutionality of *Seminole Rock* deference); see also *infra* note 383 (quoting Justice Scalia's recent public comments critiquing *Skidmore* deference).

112. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 269 (2005) (applying *Skidmore* to Attorney General's interpretive ruling, finding it unpersuasive); see also, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (applying "deferential standard" of *Seminole Rock* to uphold interpretation of regulation governing FLSA exemption). *Seminole Rock* has been called "[t]he classic case" espousing "[o]ne of the most venerable doctrines in administrative law." 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 11.26 (2d ed. 2006).

113. See 5 U.S.C. § 553(b)(3)(A) (2006) (generally exempting interpretative rules from notice-and-comment rulemaking procedures). In contrast to legislative rules, interpretive rules lack the force of law. While courts often give them deference, interpretive rules are not binding. *Joseph v. U.S. Civil Svc. Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977). *But cf. Wagner Seed Co. v. Bush*, 946 F.2d 918, 922 (D.C. Cir. 1991) ("[I]t simply is not the law of this circuit that an interpretive regulation does not receive the *Chevron* deference accorded a legislative regulation."). An agency may issue legislative rules only if Congress has delegated that power to the agency. Otherwise, agency rules are merely interpretative. *Joseph*, 554 F.2d at 1154 n.26. See generally Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 42–63 (1990).

#### D. Administrative Procedure Act

Following years of controversy and compromise between the executive branch and the American Bar Association over the ever-expanding role of administrative decision making,<sup>114</sup> Congress in 1946 unanimously enacted the APA.<sup>115</sup> One scholar described the resulting legislation as “a sophisticated instrument of considerable intricacy.”<sup>116</sup> A primary goal of the APA was to strengthen and improve the administrative process, in part by maintaining basic limits on the scope of judicial review.<sup>117</sup>

The APA’s underlying theme was to distinguish rulemaking from adjudication.<sup>118</sup> It expressly acknowledged that the purpose of rulemaking is to determine policy;<sup>119</sup> agency adjudication, on the other hand, is designed to resolve disputes involving specific parties and particularized facts.<sup>120</sup> Thus, the procedures the APA prescribed for rulemaking and adjudication were “radically different,” rendering the proper *classification* of agency action “of fundamental importance.”<sup>121</sup>

Section 4, which governs “informal” rulemaking, was specifically drafted to

114. See *supra* note 59 and accompanying text; see also AMAN, *supra* note 49, at 16 (describing political and philosophical controversies surrounding APA’s enactment); PIERCE, *supra* note 45, at 15; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557, 1570–73 (1996).

[T]he fight over the APA was a pitched political battle for the life of the New Deal. The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal. . . . [T]he shape of the administrative law statute that emerged would determine the shape of the policies that the New Deal administrative agencies would implement.

The APA that finally emerged in 1946 did not represent a unanimous social consensus about the proper balance between individual rights and agency powers. The APA was a hard-fought compromise that left many legislators and interest groups far from completely satisfied. Congressional support for the bill was unanimous only because many legislators recognized that, although the bill was imperfect, it was better than no bill. The APA passed only with much grumbling.

*Id.* at 1560.

115. PIERCE, *supra* note 45, at 15; see also APA MANUAL, *supra* note 60, at 6 (noting that the APA was enacted without dissenting vote). President Truman signed the APA into law on June 11, 1946. *Id.* at 5. The APA, as amended, is codified at 5 U.S.C. §§ 551–59, 701–06, 1305, 3344, 6362, 7562 (2006). PIERCE, *supra* note 45, at 15.

116. Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don’t Get It*, 10 ADMIN. L.J. AM. U. 1, 34 (1996).

117. PIERCE, *supra* note 45, at 15; see APA MANUAL, *supra* note 60, at 9 (summarizing APA’s four basic purposes, which include “restat[ing] the law of judicial review”).

118. APA MANUAL, *supra* note 60, at 15.

119. *Id.*

120. See *id.* at 50. “The [APA] is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions.” *Id.*

121. APA MANUAL, *supra* note 60, at 12; see *id.* at 111 (reprinting APA § 2(c)–(d) as originally enacted); see also 5 U.S.C. § 551(4)–(7) (2006) (defining “rule,” “rule making,” “order,” and “adjudication” in terms virtually identical to the original language).



guarantee the public the right to participate.<sup>122</sup> Agencies generally must provide public notice of a proposed substantive rule, allowing interested persons to present their viewpoints before the agency finalizes the rule.<sup>123</sup> This process is better known as “notice-and-comment” rulemaking.<sup>124</sup>

The APA, then and now, explicitly makes exceptions to the general rule favoring notice-and-comment rulemaking (1) “where notice or hearing is [otherwise] required by statute,”<sup>125</sup> and (2) for “interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>126</sup>

The APA also provides explicit and more or less specific guidelines for judicial review of agency interpretations of law.<sup>127</sup> Section 10<sup>128</sup> unequivocally sets forth the standard of judicial review for agency interpretations, specifically “agency action,”<sup>129</sup> expressly defined in the APA to include agency rules.<sup>130</sup> The relevant APA sections governing judicial review currently provide as follows:

To the extent necessary to [the] decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions

122. APA MANUAL, *supra* note 60, at 26. Section 4 is codified at 5 U.S.C. § 553 (2006).

123. APA MANUAL, *supra* note 60, at 26; *see* 5 U.S.C. § 553(b) (2006).

124. KERWIN, *supra* note 48, at 52; JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 5-6 (3d ed. 1998) (explaining derivation of notice-and-comment label). As distinguished from “informal” notice-and-comment rulemaking, the APA also provides for “formal rulemaking” when a statute (other than the APA) specifically provides for a hearing and rulemaking “on the record.” *Id.* at 5; *see* 5 U.S.C. § 553(c) (2006). These rarely invoked formalities characterize ratemaking proceedings and other narrow categories of rulemaking unique to specific federal agencies. LUBBERS, *supra*, at 5.

125. APA MANUAL, *supra* note 60, at 114 (original text of APA § (4)(a)). *See supra* note 124 (discussion of formal rulemaking).

126. APA MANUAL, *supra* note 60, at 114 (original text of APA § (4)(a)). *Compare id.* with 5 U.S.C. § 553(b) (2006).

127. By 1946, the Supreme Court had already articulated its own administrative deference doctrines in *Skidmore* and *Seminole Rock*. Given the close proximity of those important decisions to the controversial enactment of the APA, its judicial review provisions must be analyzed in light of the common law deference doctrines that were already well under development by 1946.

128. 5 U.S.C. § 706 (2006).

129. *Id.* § 704.

130. *Id.* §§ 551(13), 701. APA § 10, now codified at 5 U.S.C. § 706, took effect on September 11, 1946. APA MANUAL, *supra* note 60, at 93 (citing APA § 12, which provided effective dates for each provision). In Supreme Court briefs filed after its effective date, the Department of Justice took the position that the APA did not apply to cases then pending. *Id.* A year later, noting the absence of any express reference in the Court’s opinions to APA § 10, the Attorney General surmised “that the Court has accepted this construction.” *Id.* at 94 (citations omitted). Perhaps the better implication is that the Court tacitly disregarded APA § 10 altogether.

found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(D) without observance of procedure required by law[.]

....

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.<sup>131</sup>

Ironically, Supreme Court references to the APA have been noticeably lacking, particularly since *Chevron* was decided.<sup>132</sup> The best example of this striking phenomenon is *Chevron* itself. Although the *Chevron* Court claimed to have set forth well-settled principles of judicial deference to agency interpretations,<sup>133</sup> the opinion failed to acknowledge the statutory standards of judicial review in either the APA or the Clean Air Act<sup>134</sup> that explicitly relate to agency rulemaking.

More recent Supreme Court opinions have occasionally cited the APA, but only in passing.<sup>135</sup> Yet the APA unambiguously requires the reviewing court to “decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action,”<sup>136</sup> broadly defined in the APA to include agency rules.<sup>137</sup> It is almost as if the APA’s judicial review provisions were implicitly repealed by *Chevron*.<sup>138</sup>

131. 5 U.S.C. § 706 (2006).

132. Compare *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 548 (1978) and *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 89 (1983) with *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1993) and *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

133. *Chevron*, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations.”) (citations omitted).

134. 42 U.S.C. § 7607(d)(9)(A) (2006).

135. See, e.g., *Negusie v. Holder*, 129 S. Ct. 1159, 1172 n.3 (2009) (Stevens, J., dissenting); *United States v. Eurodif S.A.*, 129 S. Ct. 878, 886–87 n.6 (2009) (Souter, J.); *Rapanos v. United States*, 547 U.S. 715, 765, 786 (2006) (Kennedy, J., concurring). But cf. *Mead*, 533 U.S. at 226, 227 & n.6, 229 (Souter, J.) (citing APA provisions in support of deference analysis applied to Customs tariff classifications).

136. 5 U.S.C. § 706 (2006).

137. 5 U.S.C. § 551(4) (2006) (defining “rule”). As the APA broadly defines the term, “rule” includes both legislative and interpretive rules. See *id.* The uniform APA standard of review undercuts the Court’s common law distinction between “legislative rules” and “interpretive rules.”

138. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 120 (1998). Professor Duffy has acknowledged and aptly described this odd phenomenon of administrative law: “[S]tatutory law and judge-made doctrines continue an uneasy coexistence that cannot be reconciled with the theoretical limits on federal common law.” *Id.* As an example of the

Indeed, Dean Aman has observed that after the APA took effect, “agency interpretations of law rarely received the judicial scrutiny that the APA itself would allow.”<sup>139</sup> Consistent with early common law doctrines, the APA provided for relatively deferential review of agency fact-finding and policy decisions.<sup>140</sup> On questions of policy, the APA codified the “rational basis” doctrine the courts applied when reviewing the constitutionality of social and economic legislation.<sup>141</sup> But Section 10, which undoubtedly applied to questions of law, was silent on the degree of judicial deference due agency interpretations.<sup>142</sup> While the explicit wording of Section 10 plainly allowed for traditional *de novo* review, the courts nevertheless continued to develop elaborate deference doctrines.<sup>143</sup> Judicial deference “regimes,” as some scholars refer to them,<sup>144</sup> are essentially common law doctrines developed without regard to the APA.<sup>145</sup>

The “uneasy coexistence”<sup>146</sup> of federal common law deference doctrines and the APA’s plain language raised provocative questions about the balance of powers between Congress, the federal judiciary, and the executive branch. For example, in 1982, then-Dean Guido Calabresi proposed what he conceded was a “quite radical” approach to the “statutorification of American law and to the growing obsolescence of statutes.”<sup>147</sup> He suggested that courts should have the power to amend outdated statutes, just as they have always modified common law doctrines—by altering or even abandoning the written law.<sup>148</sup> Calabresi argued in favor of “judicial common law review of statutes” that are no longer consistent with “dominant principles.”<sup>149</sup>

In support of his “hypothetical doctrine,”<sup>150</sup> Dean Calabresi suggested that Dean James Landis had foreseen the need for such an approach during the New

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slow transformation of administrative law from “a common-law method to a more rigorous statutory method based on the APA,” he cites *Darby v. Cisneros*, 509 U.S. 137, 145 (1993). *Id.* In *Darby*, the Supreme Court acknowledged and applied an APA provision dealing with exhaustion of administrative remedies, which to the Court’s surprise “had been almost completely ignored in judicial opinions” for more than 45 years. *Darby*, 509 U.S. at 145 (quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 26.12, at 468–69 (2d ed. 1983)).

139. AMAN, *supra* note 49, at 8 & n.8 (comparing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), with APA’s judicial review provisions codified at 5 U.S.C. §§ 702–706 (1982)).

140. 5 U.S.C. § 704 (2006); *see id.* § 706(2)(E), (F).

141. *See* AMAN, *supra* note 49, at 160 n.9; *see also id.* at 22–23 (“On questions of policy, the courts equated administrators with legislators. On matters pertaining to the application of law, courts allowed administrators the interpretive discretion normally reserved to judges.”) (footnotes and citations omitted).

142. *See* *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (noting absence of statute suggesting the level of deference courts should give informal agency interpretations).

143. *See* AMAN, *supra* note 49, at 8.

144. Eskridge & Baer, *supra* note 4, at 1090–91, 1095.

145. *See* 5 U.S.C. § 706.

146. Duffy, *supra* note 138, at 120; *see* CALABRESI, *supra* note 67, at 4–5.

147. CALABRESI, *supra* note 67, at 81, 83.

148. *Id.* at 82.

149. *Id.* at 90.

150. *Id.* at 82.

Deal when he posited that once statutes became a dominant mode of lawmaking, they could no longer “live apart from the common law.”<sup>151</sup> Perhaps coincidentally,<sup>152</sup> Calabresi’s radical proposal predated the Supreme Court’s watershed decision in *Chevron* by just two years. By tacitly ignoring the judicial review provisions of the APA and Clean Air Act, the *Chevron* Court implicitly endorsed Calabresi’s novel and activist approach to judicial review. In that respect, APA Section 10 has become a dead letter by atrophy and judicial nullification.<sup>153</sup>

Thus, the federal courts have declined to abide by the standard of review codified in the APA for questions of law. Instead, they continue, in effect, to exercise common law deference to administrative interpretations of law.<sup>154</sup> As discussed in Part IV, the lenient deference regimes that evolved after the New Deal and before enactment of the APA continue to strongly influence the Supreme Court when it reviews agency interpretations of law.<sup>155</sup> Whether the Court’s common law deference doctrines can be reconciled with the plain language of the APA remains to be seen.

#### E. Presidential and Congressional Initiatives

During the decade following its enactment, judicial interpretations of the APA were generally deferential to its purposes.<sup>156</sup> Yet political controversy continued unabated regarding the scope of quasi-judicial functions undertaken by the executive branch.

In 1955, the President’s Commission on Organization of Executive Branch

151. *Id.* at 85–86 & n.15 (citing JAMES M. LANDIS, STATUTES AND THE SOURCES OF LAW, HARVARD LEGAL ESSAYS 213 (1934)).

152. CALABRESI, *supra* note 67, at 1–2, 7, 21, 81, 163. Dean Calabresi has addressed the “statutorification” or petrification of American law. He observed that “delegation of authority to administrative agencies was the paradigmatic New Deal response to the danger of legal petrification,” *id.* at 21, by which he meant statutory obsolescence. *See id.* at 21–26. Justice Scalia, appointed to the Court in 1986, has famously developed his own rubric that apparently echoes Dean Calabresi’s, frequently chastising the majority for permitting “ossification” of statutory interpretations. *E.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting).

153. *But see Sorrells v. United States*, 287 U.S. 435, 450 (1932) (Hughes, C.J.) (“Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system.”); *cf.* *Graham*, *supra* note 31, at 239.

Classic *Chevron* analysis is dead. In place of *Chevron*, the older *Skidmore* approach is a better predictor of whether courts will uphold or overrule federal agency interpretations of statute. We can also expect courts generally to follow a model . . . which bypasses any consideration of agency regulations and goes right to the court’s own reading of the statute.

*Id.*

154. AMAN, *supra* note 49, at 17 (“The legal discourse used to justify such extensions of agency power relied upon broad notions of congressional intent and was usually cast in a legal rhetoric particularly familiar to the common-law minded judges who wrote these opinions.”) (footnotes and citations omitted); *see also id.* at 24.

155. *Cf. id.* at 22, 24.

156. *See, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36–45 (1950) (describing legislative history and purpose of the APA with approval); PIERCE, *supra* note 45, at 16.

of the Government, better known as the Hoover Commission, issued a controversial report recommending establishment of an Administrative Court within the judicial branch.<sup>157</sup> As proposed, the Court would have initially subsumed the quasi-judicial functions of several major administrative agencies.<sup>158</sup> The Commission predicted that more specialized adjudicatory functions would be transferred to the Court over time as it proved its effectiveness.<sup>159</sup>

The Hoover Commission expressed concern that Congress had frequently authorized only limited judicial review of agency action, or had precluded it altogether.<sup>160</sup> The Commission ominously cautioned that “[t]he courts, as the guardians of the rule of law, must be in a position to review all administrative action, or the rule of law is destroyed.”<sup>161</sup> The Commission’s final report proposed nineteen distinct amendments to the APA to implement its recommendations.<sup>162</sup> The ABA proposed a new Code of Administrative Procedure in response, which would have enacted many of the Commission’s controversial recommendations.

In a 1961 executive order, President Kennedy established the Administrative Conference of the United States as a successor to the Hoover Commission.<sup>163</sup> Its mission was to encourage cooperative efforts to improve federal administrative procedure. The Conference included representatives of the executive branch, administrative agencies, the practicing bar, scholars, and others with special knowledge and experience in administrative law.<sup>164</sup> The President directed the Conference to periodically report its conclusions and recommendations to him.<sup>165</sup> Three years later, Congress enacted the Administrative Conference Act<sup>166</sup> to ensure its continuity.<sup>167</sup>

Perhaps in part because of the ongoing success of the Administrative

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157. PIERCE, *supra* note 45, at 16–17.

158. *Id.*

159. *Id.* at 81.

160. *Id.* at 77.

161. *Id.* (concluding that claimants must “have a day in court to test the exercise of administrative action in the light of the authority conferred by Congress.”).

162. CITIZENS COMM. FOR THE HOOVER REPORT, DIGESTS & ANALYSES OF THE NINETEEN HOOVER COMMISSION REPORTS 82–84 (1955).

163. Exec. Order No. 10,934, 3 C.F.R. §§ 464–65 (1963).

164. *Id.*

165. *Id.* As originally established, the Conference was to submit its final report no later than December 31, 1962. The report recommended continuation and expansion of the Conference to include both government representatives and outside experts. See FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: SUMMARY OF THE ACTIVITIES OF THE CONFERENCE (Dec. 15, 1962).

166. Pub. L. 88-499, 78 Stat. 615 (1964) (current version at 5 U.S.C. §§ 591–96 (2006)).

167. Thirty years later, however, Congress failed to appropriate funds for fiscal year 1996, and the Administrative Conference terminated operations. See *Reauthorization of the Administrative Conference of the United States: Hearing Before Subcomm. on Commercial and Admin. Law of the H. Comm. on Judiciary*, 108th Cong, 2d Sess. (May 20 & June 24, 2004), at 17 (remarks of Rep. Watt), available at <http://judiciary.house.gov/Legacy/93774.pdf> (last visited Jan. 23, 2010) [hereinafter *Reauthorization Hearing*]; see Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 137 (1998) (explaining reasons for its termination).

Conference in generating cooperation among competing interests, the political and institutional controversies associated with the Hoover Commission gradually subsided. The Conference worked well to achieve consensus and made a number of significant contributions to administrative law.<sup>168</sup> By 1970, the ABA had abandoned its proposal for a new code in favor of recommending less sweeping revisions to the APA, which the Conference endorsed in part in 1973.<sup>169</sup> Undoubtedly, the Administrative Conference played a significant role in quelling political concerns about administrative agencies' increasingly influential role in lawmaking and adjudication.<sup>170</sup>

#### F. The "Hard Look" Doctrine

Administrative rulemaking, rather than adjudication, became the most pervasive form of agency regulation during the 1970's.<sup>171</sup> Congress enacted numerous initiatives that conferred broad rulemaking powers to agencies such as the Occupational Safety and Health Administration, the Federal Trade Commission, and the Environmental Protection Agency, among others.<sup>172</sup> In particular, technically complex, far-reaching environmental concerns took center stage, supplanting the pressing social and economic issues that had characterized the New Deal.<sup>173</sup> Agencies increasingly adopted rulemaking as their primary mode of decision making.<sup>174</sup> In some instances, Congress established agency-specific rulemaking procedures and judicial review standards that superseded the APA.<sup>175</sup>

The Supreme Court began to devise a more "searching and skeptical" approach to judicial review in response to the burgeoning and more substantively complex rulemaking authority Congress repeatedly delegated to agencies.<sup>176</sup> As one scholar put it, "The deference the courts had shown

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168. See, e.g., *Reauthorization Hearing*, *supra* note 167, at 5-7 (letter from William Funk, Chair, ABA Section of Administrative Law and Regulatory Practice); Sally Katzen, *Testimony Before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States: The Role of the Administrative Conference in Improving the Regulatory Process*, 8 ADMIN. L.J. AM. U. 649, 655-64 (1994).

169. PIERCE, *supra* note 45, at 22-23 (citing 3 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE (1973-1974), at 53-63, 567-609).

170. Congress recently reauthorized the Administrative Conference, appropriating \$1.5 million to fund its operating expenses for fiscal year 2009. See Pub. L. 111-8 (signed March 11, 2009). However, those funds have gone unexpended. On November 3, 2009, President Obama nominated Professor Paul Verkuil to serve as Director of the reestablished Administrative Conference. The Senate Judiciary Committee reported his nomination favorably to the full Senate on December 10, 2009. On March 3, 2010, his nomination was confirmed by the Senate.

171. See Bryner, *supra* note 64, at 23; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384-1385, 1398 (2004).

172. BRYNER, *supra* note 64, at 23; see AMAN, *supra* note 49, at 26 (noting considerable growth in administrative bureaucracy between 1966 and 1981); Magill, *supra* note 171, at 1398.

173. AMAN, *supra* note 49, at 24-26.

174. *Id.*; Magill, *supra* note 171, at 1398.

175. See AMAN, *supra* note 49, at 40 (noting that some "hybrid" rulemaking statutes called for application of a substantial evidence test on judicial review); LUBBERS, *supra* note 124, at 3; see also 5 U.S.C. §§ 559, 701(a) (allowing for specific statutory exceptions to APA judicial review).

176. KERWIN, *supra* note 48, at 260-62.

Congress and its agents during the New Deal era was revoked.”<sup>177</sup> In *Citizens to Preserve Overton Park v. Volpe*,<sup>178</sup> decided in 1971, the Court applied a level of judicial scrutiny to agency reasoning that was “searching and careful.”<sup>179</sup>

The issue in *Overton Park* was whether the Secretary of Transportation had appropriately taken into account the likely effects on the environment in approving a highway project through a city park site.<sup>180</sup> The authorizing statute required the Secretary to undertake “all possible planning to minimize harm”<sup>181</sup> when routing highways over public parklands. Characterizing the issue as one of law rather than policy,<sup>182</sup> the Court held that the appropriate standard of review was more stringent than the APA’s generally deferential “arbitrary and capricious” standard.<sup>183</sup> Specifically, the Court questioned whether the agency had taken relevant factors into account and whether the agency had committed a “clear error” in judgment.<sup>184</sup>

The Court’s new approach to judicial review that scrutinized the reasoning process supporting the agency’s interpretation would become known as the “hard look” doctrine.<sup>185</sup> Throughout the 1970’s and early 1980’s, the Court generally followed a pattern of heightened judicial review of agency rulemaking. The decision that became the hallmark—and the end point—of the “hard look” era was *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*<sup>186</sup> The *State Farm* Court held that an agency rule was invalid

if the agency . . . relied on factors Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it or is so implausible that it could not be ascribed to a difference in view or a product

177. AMAN, *supra* note 49, at 28. Ironically, however, the earliest case cited as an example of the “hard look” doctrine was *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (requiring agency to adequately explain its reasoning for reaching its discretionary decision). See *supra* notes 85–88 and accompanying text.

178. 401 U.S. 402 (1971), *overruled on other grounds by* *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

179. *Id.* at 416. See also AMAN, *supra* note 49, at 28 (arguing that in *Overton Park* “the Court turned an otherwise discretionary environmental statute into an absolutist one”); see also *id.* at 168 n.139.

180. See *Overton Park*, 401 U.S. at 405 & n.2 (quoting 23 U.S.C. § 138 (1964 Supp. V)).

181. *Id.* at 411 (citing 23 U.S.C. § 138).

182. See *id.* at 414–15 (holding that while a presumption of regularity attached, that did not shield the agency’s actions from “a thorough, probing in-depth review”).

183. *Id.* at 416; see also AMAN, *supra* note 49, at 39.

184. *Overton Park*, 401 U.S. at 416.

185. KERWIN, *supra* note 48, at 260–62. Judge Leventhal of the D.C. Circuit has been credited with authoring an early example of the “hard look” doctrine in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). See AMAN, *supra* note 49, at 35, 39. The case involved a television station’s application to renew its operating license. During the proceedings, the FCC departed from its usual practice in reviewing renewal applications. On appeal, Judge Leventhal held that the court was required to take a “hard look” to ensure the FCC had engaged in “reasoned decision-making.” “[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . .” *Greater Boston Television Corp.*, 444 F.2d at 852–53.

186. 463 U.S. 29 (1983).

of agency expertise.<sup>187</sup>

The “hard look” doctrine insisted that agencies make their reasoning process explicit.<sup>188</sup> As one author observed, hard-look deference (or perhaps more accurately non-deference) “tended to demand *right* answers, not just examples of agency reasoning . . . .”<sup>189</sup> In effect, “hard-look” courts adopted a heightened standard of review. Courts exercised greater oversight, and consequently deferred to agencies less often, than did courts applying more deferential New Deal standards of review.<sup>190</sup>

The “hard look” doctrine entailed greater procedural scrutiny in addition to enhancing substantive review of agency reasoning.<sup>191</sup> For the better part of a decade, the Supreme Court was relatively tolerant of the additional procedural constraints federal courts imposed on agency rulemaking. But the Court called a halt in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*<sup>192</sup> *Vermont Yankee* held that a reviewing court could not reverse an agency rule for procedural reasons as long it complied with minimum procedural requirements of the APA.<sup>193</sup> As discussed in Parts III and IV, some of the key features of “hard look” review have nevertheless continued to influence deference jurisprudence.<sup>194</sup>

By the early 1980’s, following election of President Reagan, the constitutionality of broad delegations of legislative power came under renewed scrutiny.<sup>195</sup> Immediately upon taking office, Reagan announced that one of his primary objectives was to get the federal government “off of the backs of the people.”<sup>196</sup> One month later, an executive order<sup>197</sup> directed the Office of Management and Budget to review each “major” rule proposed by an agency.<sup>198</sup> Agencies were directed to submit a Regulatory Impact Analysis for each proposed major rule, including specific information regarding its potential

187. *Id.* at 43.

188. Compare *id.* at 43–44 with *SEC v. Chenery*, 318 U.S. 80, 95 (1943) (“We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.”).

189. AMAN, *supra* note 49, at 40 (emphasis in original).

190. See *id.* at 24–26, 40.

191. *Id.* at 33–35.

192. 435 U.S. 519 (1978).

193. *Id.* at 548–49.

194. E.g., *Mead*, 533 U.S. at 230–31 (emphasizing process considerations); see Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste*, in ADMINISTRATIVE LAW STORIES 124, at 162–63 (Peter L. Strauss ed. 2006) (explaining *Vermont Yankee*’s minimal effect on courts’ expansive readings of the APA’s procedural requirements). But see *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) (5–4 opinion) (rejecting argument that a change in agency policy warrants “more searching review” than an initial policy determination).

195. See AMAN, *supra* note 49, at 103–04. For example, in 1980 and 1981, Chief Justice Rehnquist signaled his interest in resurrecting the nondelegation doctrine. See *Ind. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 446 U.S. 607, 672 (1980) (Rehnquist, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, C.J., dissenting).

196. AMAN, *supra* note 49, at 66 (citations omitted).

197. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 7, 1981).

198. See generally *id.* at § 3; Magill, *supra* note 171, at 1392–93.



costs and benefits.<sup>199</sup>

President Reagan's initiatives to discourage significant legislative rulemaking had their desired effect, sharply curtailing the number of new regulatory proposals.<sup>200</sup> Not long after, the Court, perhaps unwittingly,<sup>201</sup> endorsed congressional delegation of policymaking to agencies<sup>202</sup> when it decided *Chevron*.<sup>203</sup> With that opinion, the Court returned to its more deferential approach to agency interpretations of law.<sup>204</sup>

## II. THE CHEVRON "TWO-STEP"<sup>205</sup> DOCTRINE

Before *Chevron*, federal courts varied widely with respect to the deference they afforded administrative interpretations. As discussed in Part I, the Supreme Court had developed two distinct lines of reasoning.<sup>206</sup> One, originating in the New Deal, held that courts should generally defer to an agency's interpretation of a statute Congress had charged it with administering, at least if the interpretation had a reasonable basis in the law.<sup>207</sup> The other, representing the "hard look" doctrine, took almost the opposite approach,

199. Exec. Order No. 12,291, *supra* note 197, at § 3(d).

200. KERWIN, *supra* note 48, at 16 (graph illustrating sharp reduction in agency rulemaking in the early 1980's).

201. Eskridge & Baer, *supra* note 4, at 1086 & n.7 (referring to Blackmun's notes of Stevens' comments in conference: "When I am so confused, I go with the agency."). Justice Stevens acknowledged years later that the unanimous outcome in *Chevron* "obscured [the Court's] initial uncertainty about the decision." Justice John Paul Stevens, *In Memoriam: Byron R. White*, 116 HARV. L. REV. 1, 2 (2002).

202. See Duffy, *supra* note 138, at 202 ("*Chevron* is primarily a case about delegation, not deference").

203. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984), *quoted in* PIERCE, *supra* note 45, at 27. While *Chevron* was nominally a unanimous opinion, Justices Marshall, Rehnquist, and O'Connor took no part in deciding the case. *Chevron*, 467 U.S. at 866.

204. See Eskridge & Baer, *supra* note 4, at 1086 (observing that in *Chevron*, Justice Stevens "endorsed a very broad rule of deference").

205. The "*Chevron* two-step" moniker originated with Dean Kenneth Starr, then a judge on the District of Columbia Court of Appeals. See Starr, *supra* note 34, at 360–66.

206. RICHARD J. PIERCE, JR. *et al.*, ADMINISTRATIVE LAW & PROCESS 398 (5th ed. 2009); see *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (acknowledging "two lines of Supreme Court decisions . . . which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand"), *aff'd sub nom.*, *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

207. See, e.g., *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944). In *Hearst*, the Court deferred to the NLRB's conclusion that newsboys were "employees" and thus entitled to collective bargaining rights. The Court distinguished between pure questions of law and issues requiring application of law to facts:

Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term . . . the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

scrutinizing the agency's reasoning and procedure, and in some cases substituting the reviewing court's own interpretation.<sup>208</sup>

In the early 1980's, the Supreme Court's decisions reviewing administrative interpretations typically followed one of these two deference frameworks and commonly ignored the other, with little or no explanation.<sup>209</sup> Whether and to what extent the Court would defer to an agency's interpretation of law was unpredictable, leaving the lower courts with little guidance. Like the Supreme Court, the federal circuit courts deferred to agency interpretations in some cases and substituted their own judgment in others.<sup>210</sup> As one administrative law scholar has observed, "The lower courts had tried to decide the deference question on a case-by-case basis, producing a recipe for confusion."<sup>211</sup> Reviewing court decisions were frequently inconsistent regarding the institutional allocation of responsibility for interpreting agency-administered statutes.<sup>212</sup>

Refreshingly, *Chevron* appeared to articulate a straightforward, two-step test for judicial review whenever an agency had interpreted an unclear statute<sup>213</sup> Congress had authorized it to administer.<sup>214</sup> Justice Stevens succinctly stated *Chevron's* central holding:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>215</sup>

While apparently espousing a simple two-step approach, *Chevron* would prove considerably more complex in application.

208. See, e.g., *NLRB v. Bell Aerospace*, 416 U.S. 267, 289 (1974) (rejecting NLRB's conclusion that National Labor Relations Act covered certain managerial employees).

209. See *Natural Res. Def. Council, Inc. v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984) (noting that caselaw under the APA had not "crystallized around a single doctrinal formulation which captures the extent to which courts should defer"); *PIERCE, JR. et al.*, *supra* note 206, at 398; see also 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 375 (2d ed. 1978), *quoted in* *PIERCE*, *supra* note 45, at 137.

210. *PIERCE*, *supra* note 45, at 138.

211. Sunstein, *supra* note 7, at 202.

212. *PIERCE*, *supra* note 45, at 138.

213. Note that *Chevron* did not disturb precedents conferring broad discretion to an agency when interpreting its own ambiguous regulations. See, e.g., *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); see also, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Seminole Rock* with approval).

214. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 846 (1984).

215. *Id.* at 842-43 (footnotes omitted).

*Step One: Has Congress unambiguously addressed the precise issue?*

To begin, deference to an administrative interpretation expressly assumes two important prerequisites. First, the reviewing court must determine whether the statutory language plainly addresses the precise question; if it does, the reviewing court must carry out the unambiguously expressed legislative intent.<sup>216</sup> Stated more concisely, the statute must be “silent or ambiguous with respect to the specific issue”<sup>217</sup> before an agency’s interpretation warrants *Chevron* deference.

A statute is “silent,” for example, if it fails to define a term, leaving its interpretation to the agency charged with implementing the statutory scheme.<sup>218</sup> To illustrate, Congress failed to define the statutory term “legitimate medical purpose” in the Controlled Substances Act, and the Attorney General’s interpretation of that term was central to the dispute in *Gonzales v. Oregon*.<sup>219</sup> When a statute leaves a term undefined, its interpretation is generally considered a question of law,<sup>220</sup> the resolution of which the APA delegates to the reviewing court.<sup>221</sup> Yet *Chevron* yields to the agency’s interpretation of an undefined statutory term if its other requirements are met.

More commonly, *Chevron* applies to ambiguous statutes.<sup>222</sup> While the Court begins with a textual analysis of the statute to determine its ambiguity, it is not enough if the plain language suggests more than one plausible interpretation.<sup>223</sup> At the end of a lengthy footnote, Justice Stevens noted that determining ambiguity – commonly known as *Chevron* “Step One”<sup>224</sup> – requires

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216. *Id.* at 843. While few would disagree with this basic premise of statutory interpretation, the Court’s decisions illustrate that even this threshold issue—whether a statute’s language plainly resolves a legal issue—is highly debatable. *See, e.g.,* Cuomo v. Clearing House Ass’n, 129 S. Ct. 2710 (2009); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002).

217. *Chevron*, 467 U.S. at 843. This point was clarified by Justice Stevens in *INS v. St. Cyr*, 533 U.S. 289 (2001). “We only defer . . . to agency interpretations of statutes that, applying the normal ‘tools of statutory construction,’ are ambiguous.” *Id.* at 320 n.45 (citing *Chevron*, 467 U.S. at 843; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987)). What the Supreme Court considers normal tools of statutory construction, however, is not at all clear, adding yet another dimension to *Chevron*’s complexity.

218. *See, e.g.,* *Creekstone Farms Premium Beef, L.L.C. v. Dep’t of Agric.*, 539 F.3d 492, 503 (D.C. Cir. 2008) (2-1 opinion) (upholding regulation defining an undefined statutory term).

219. 543 U.S. 1145 (2005); *see infra* notes 429–53 and accompanying text.

220. *See, e.g.,* *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001) (reviewing *de novo* an issue of statutory construction, according no deference to district court’s interpretation). *But see* *Gill v. INS*, 420 F.3d 82, 89 (2d Cir. 2005) (affording *Chevron* deference to agency’s interpretation of undefined statutory term given its expertise in immigration law); *cf.* *Kentuckians for Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 443–44 (4th Cir. 2003) (reviewing *de novo* an issue of statutory construction, but applying *Chevron* to determine whether agency action was based on permissible construction).

221. *See* 5 U.S.C. § 706.

222. *See, e.g.,* *Bower v. Fed. Express Corp.*, 96 F.3d 200, 208 (6th Cir. 1996) (“[C]ongressional delegation to an agency of the power to issue regulations interpreting a statute extends *only to the proper extent of ambiguities in the statute.*”) (emphasis in original).

223. *See* *Zuni Pub. Sch. Dist. v. Dep’t of Educ.*, 550 U.S. 81, 98–99 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000).

224. *E.g.,* *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 n.4 (2009); *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009).

the reviewing court to first apply traditional “tools” or canons of statutory interpretation.<sup>225</sup> In other words, the Court must initially engage in traditional statutory interpretation, a classic question of law, to decide whether the agency’s interpretation warrants *any* deference. If “traditional tools of statutory construction”<sup>226</sup> resolve the ambiguity, then the Court’s interpretation controls, even if the agency considers the statute ambiguous and interprets it differently.<sup>227</sup>

To those familiar with Justice Scalia’s role as cheerleader for *Chevron* and his disdain for legislative history, the irony of this analytical step should be obvious.<sup>228</sup> To resolve a statutory ambiguity, one classic canon of statutory interpretation requires a court to consult legislative history to determine the intended meaning.<sup>229</sup> While generally a strong proponent of *Chevron*, Justice Scalia rejects legislative history as a legitimate source to resolve ambiguous statutory language.<sup>230</sup> Therefore, even if *Chevron* applies, it is not clear which canons the Court as a whole considers “traditional tools of statutory construction,” or for that matter, how they apply.<sup>231</sup>

*Step 1.5:*<sup>232</sup> *Has Congress delegated rulemaking authority to the agency, and was the interpretation issued in the exercise of that authority?*

Once the Court concludes that Congress has not unambiguously addressed the issue, it must next determine whether Congress has delegated authority to

225. *Chevron*, 467 U.S. at 843–44 n.9.

226. *Id.*

227. “[T]here is no need to resolve deference issues when there is no need for deference.” *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 n.8 (2002). *But cf.* *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997) (Scalia, J.) (rejecting argument that longstanding canon of construction should have resolved ambiguity in agency regulations, as canons apply only to *judicial* constructions of ambiguous statutes).

228. Justice Scalia consistently continues to sing the *Chevron* refrain at every possible opportunity, even as he eschews legislative history as a means of resolving statutory ambiguity. *See, e.g., Zuni*, 550 U.S. at 108 (Scalia, J., dissenting).

229. *E.g.*, 2A SUTHERLAND STATUTORY CONSTRUCTION § 48:4 (7th ed. 2008); *see, e.g., Zuni*, 550 U.S. at 106 (“Analysis of legislative history is, of course, a traditional tool of statutory construction.”). *But cf.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.) (noting legislative history is vulnerable to serious criticism).

230. *See, e.g., Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., dissenting) (referring to legislative history as “an omnipresent makeweight for decisions arrived at on other grounds”).

231. *See, e.g., Zuni*, 550 U.S. at 99–100, 107 (5–4 opinion) (dividing on whether relevant statutory language was sufficiently ambiguous to warrant *Chevron* deference). In his dissent, Justice Scalia referred to the majority’s statutory interpretation in typically colorful language as “sheer applesauce.” *Id.* at 113 (Scalia, J., dissenting).

232. Some commentators have dubbed this implicit step of the *Chevron* analysis “Step Zero.” *E.g., Merrill & Hickman, supra* note 7, at 836; Sunstein, *supra* note 7, at 191 & n.19. However, it more accurately fits in sequence as Step 1.5. *See, e.g., Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112–13 (2002); *cf.* Note, “How Clear is Clear” in *Chevron’s Step One?*, 118 Harv. L. Rev. 1687, 1693 (2005) (suggesting that institutional considerations inform the determination of ambiguity). *But cf.* Matthew C. Stephenson & Adrian Vermuele, *Chevron Has Only One Step* (Harvard Public Law Working Paper No. 08-24), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1259816#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1259816#) (last visited Jan. 23, 2010).

the agency to administer a program, either explicitly or implicitly.<sup>233</sup> While *Chevron* did not expressly state this prerequisite, its rule of judicial deference was rooted in *Morton v. Ruiz*,<sup>234</sup> which it quoted with approval: “The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>235</sup>

*Chevron* was an easy case; the Clean Air Act explicitly directed the EPA to adopt legislative rules governing ambient air quality.<sup>236</sup> With respect to implicit delegations of authority, however, scholars have argued for years whether *Chevron* applies.<sup>237</sup> Also in doubt is whether *Chevron* applies when Congress has delegated only limited authority to the agency—for example, to regulate procedural but not substantive matters.<sup>238</sup> Nevertheless, Justice Stevens made a point of discussing the application of *Chevron* deference to statutory delegations, whether explicit or implicit, and most courts have interpreted *Chevron* to reach both.<sup>239</sup>

Caselaw, however, suggests that the Court may be less willing to defer if Congress has delegated only general authority to the agency to administer a statute, as opposed to a specific grant of authority to issue regulations to implement a statutory initiative. Under the rationale of *Morton v. Ruiz*,<sup>240</sup> the Court may be more likely to view a specific delegation of authority as an indication of congressional intent that the Court should defer to the agency’s interpretation, assuming it is within the scope of that authority.<sup>241</sup>

*Step Two: Is the agency’s interpretation permissible and reasonable?*

Even if the court concludes that the statute is silent or ambiguous (Step One) and that Congress has delegated the agency authority to administer the statute, whether explicit or implicit (Step 1.5), judicial deference is not guaranteed.<sup>242</sup> *Chevron* “Step Two” requires the agency’s interpretation of

233. See *Chevron*, 467 U.S. at 843–44 (citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); see also *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“[I]f there is no statute conferring authority, a federal agency has none.”).

234. 415 U.S. 199 (1974).

235. *Id.* at 231, quoted in *Chevron*, 467 U.S. at 843–44.

236. See *Chevron*, 467 U.S. at 846.

237. See, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1549–50 (2006).

238. E.g., *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113–14 (2002) (noting that Title VII limits EEOC authority to procedural regulations, but declining to decide scope of deference due because the Court clearly agreed with EEOC’s interpretation).

239. E.g., *Texas v. United States*, 497 F.3d 491, 502–03 (5th Cir. 2007), cert. denied, 129 S. Ct. 32 (2008). To the extent *Chevron* entailed an explicit delegation to EPA, however, its discussion of implicit delegation was mere dicta.

240. 415 U.S. 199 (1974).

241. See *Texas*, 497 F.3d at 502–03; *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); cf. *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“[M]ere ambiguity in a statute is not evidence of congressional delegation of authority.”).

242. *Texas*, 497 F.3d at 502–03 & n.9.

explicitly delegated authority to be based on a “permissible construction of the statute.”<sup>243</sup> Justice Stevens cautioned that in making this determination, the court need not conclude that the agency’s interpretation was the only permissible one, or that the court would have read it the same way had the question been addressed in litigation.<sup>244</sup> Rather, the agency’s interpretation need only fall *within the range of alternatives* the reviewing court deems “permissible” as a matter of law.<sup>245</sup>

*Chevron* went on to elucidate the bounds of a “permissible” construction:

If Congress has explicitly left a gap for the agency to fill, there is an *express* delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such *legislative regulations* are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.<sup>246</sup>

In summary, *Chevron* first requires the reviewing court to apply traditional tools of statutory construction to determine whether the statute unambiguously addresses the specific issue.<sup>247</sup> If it does, no deference is due, and the court’s independent interpretation controls. But if the court concludes that the statute is silent or ambiguous, it must next decide whether Congress *expressly* delegated interpretive authority to the agency seeking deference.<sup>248</sup> If so, a “legislative regulation” will be sustained unless “arbitrary, capricious, or manifestly contrary to the statute.”<sup>249</sup> In other words, deference is relatively broad when Congress has explicitly delegated authority to the agency and its interpretation is issued within the scope of that delegated authority.

On the other hand, if Congress has only *implicitly* delegated the agency authority to address a particular question, the reviewing court will uphold the agency’s interpretation only if “reasonable.”<sup>250</sup> In Justice Stevens’ words,

243. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (emphasis added).

244. *Id.* at 843 n.11 (multiple citations omitted).

245. *Id.*; see Peter L. Strauss, *Within Marbury: The Importance of Judicial Limits on the Executive’s Power to Say What the Law Is*, 116 YALE L.J. POCKET PART 59, 60 (2009). The Court’s recent decisions blur the apparent distinction between “permissible” and “reasonable” interpretations. See, e.g., *United States v. Eurodif S.A.*, 129 S. Ct. 878, 882, 890 (2009) (holding agency interpretation both “permissible” and “eminently reasonable”).

246. *Chevron*, 467 U.S. at 843–44 (emphasis added) (footnote citations omitted). Note the similarity of this language to APA § 10(2)(A), codified at 5 U.S.C. § 706(2)(A). See *supra* text accompanying note 131 (quoting § 706).

247. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004) (“Even for an agency able to claim all the authority possible under *Chevron*, deference . . . is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987)).

248. See, e.g., *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002) (reasoning that the challenged regulation was within EEOC’s explicit statutory authority to adopt procedural regulations).

249. *Chevron*, 467 U.S. at 844.

250. See *Motion Picture Ass’n of Am. v. Oman*, 750 F. Supp. 3, 7 (D. D.C. 1990), *aff’d*, 969 F.2d 1154 (D.C. Cir. 1992). “In *Chevron* . . . , the Court established that judicial review of an agency action taken with an express grant of authority from Congress is held to an ‘arbitrary and capricious’ standard. By contrast, action taken without that express delegation is held to a ‘deference if reasonable’ standard.” *Id.* at 7–8 (citing *Chevron*, 467 U.S. at 843–44). But see, e.g., *Barnhart v.*

Sometimes the legislative delegation to an agency on a particular question is *implicit* rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a *reasonable interpretation* made by the administrator of an agency.<sup>251</sup>

Justice Stevens' wording suggests that if the delegation is implicit, an agency interpretation warrants less deference—not only must it be within legally permissible bounds, but it must also be “reasonable.” Just how much less deference is due an agency interpretation issued in the exercise of implicitly delegated authority, and what factors the Court considers to decide whether the agency's interpretation is reasonable, remain open questions.

### III. THE REHNQUIST COURT'S LEGACY: REFRAMING *CHEVRON*

After William Rehnquist was appointed Chief Justice in 1986, *Chevron* took center stage as the deference regime of choice. The Rehnquist Court reached the apex of judicial deference to administrative interpretations of law in 1997 when it decided *Auer v. Robbins*,<sup>252</sup> discussed next. But just three years later, the Court began laying the groundwork for reasserting the judicial role in interpreting statutes by reviving the pre-*Chevron* multi-factor approach to determining the scope of deference.<sup>253</sup>

Retrenching from the more deferential *Chevron* framework, the Rehnquist Court generally limited its heightened deference to adjudications and to regulations adopted in notice-and-comment proceedings.<sup>254</sup> At the same time, the Court reinvigorated *Skidmore* deference for agency interpretations adopted by less formal means.<sup>255</sup> By the end of the October 2004 Term, the Court generally applied *Chevron* if the agency followed APA procedures in issuing regulations, and otherwise defaulted to *Skidmore* analysis. What remained was for the Court to reconcile the revived *Skidmore* doctrine with its super-deferential *Auer* standard.

#### A. *Auer* Super-Deference to Agency Interpretations of Regulations

The wave of post-*Chevron* deference arguably crested in 1997 with *Auer v. Robbins*,<sup>256</sup> a unanimous decision authored by Justice Scalia.<sup>257</sup> Some scholars

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Walton, 535 U.S. 212, 217, 224 (2002) (concluding that “the [Social Security Administration's] regulation seems a reasonable, hence permissible, interpretation,” after acknowledging agency's explicit statutory authority); *Edelman*, 535 U.S. at 112-13 (concluding agency's interpretation “reasonable” after acknowledging its explicit statutory authority to promulgate regulations).

251. *Chevron*, 467 U.S. at 843-44 (emphasis added) (footnote citations omitted).

252. 519 U.S. 452 (1997).

253. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 591 (2000) (6-3 opinion).

254. See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

255. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see *supra* notes 98-100 and accompanying text.

256. 519 U.S. 452 (1997).

257. *Id.* at 454.

have suggested that *Auer* and its World War II-era predecessor, *Seminole Rock*,<sup>258</sup> simply mirrored *Chevron* deference.<sup>259</sup> Others, with whom this author agrees, have concluded that *Auer* affords even greater deference to agency interpretations of their own ambiguous *regulations* than *Chevron* yields interpretations of ambiguous *statutes*.<sup>260</sup> Indeed, a careful reading of *Auer* reveals an important basis for distinguishing *Auer* from its predecessors as a form of “super-deference.”<sup>261</sup> In short, *Auer* is an outlier and cannot be reconciled with the Court’s more recent deference jurisprudence.<sup>262</sup>

The dispute in *Auer* involved a claim by St. Louis police officers that the City had erroneously designated them “exempt” from the wage and hour provisions of the Fair Labor Standards Act (FLSA).<sup>263</sup> The Secretary of Labor, carrying out specific rulemaking authority conferred by the FLSA,<sup>264</sup> had issued regulations defining the scope of the exemption,<sup>265</sup> which in part turned on the outcome of the “salary basis test,”<sup>266</sup> defined in the agency’s regulations.<sup>267</sup> As one condition for exempt status, an employee’s salary could not be subject to reduction for variations in “work performance.”<sup>268</sup> The officers argued that the mere *possibility* that their salaries might be reduced was sufficient to defeat exempt status. The City argued that to be nonexempt, the officers had to be realistically vulnerable to an actual pay reduction; a theoretical possibility was not enough.<sup>269</sup>

The Court first concluded that the FLSA did not directly address the issue.<sup>270</sup> At the Court’s request, the Secretary of Labor submitted an amicus

258. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). See *supra* notes 103–10 and accompanying text.

259. See Manning, *supra* note 111, at 627; Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 WM. & MARY L. REV. 559, 569 (2006).

260. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 551 (2003); Eskridge & Baer, *supra* note 4, at 1103; *id.* at 1184 (“To the extent that *Seminole Rock* deference exceeds *Chevron* deference, it is open to abuse by agencies that try to bootstrap unauthorized policy innovations under cover of interpreting vague housekeeping rules.”); Strauss, *supra* note 245, at 59 n.23 (noting that the fox-guarding-the-henhouse problem is compounded by the view that an agency interpreting its own regulations is entitled to even stronger deference than *Chevron*). See generally Manning, *supra* note 111, at 681 (urging the Court to revisit *Seminole Rock*).

261. See Eskridge & Baer, *supra* note 4, at 1103. See generally Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 54–58 (2000).

262. Nevertheless, a slim majority of the Court has very recently (but unconvincingly) attempted the impossible. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2472–74 (2009) (Kennedy, J.) (attempting to reconcile *Auer* super-deference with analysis of *Skidmore*-like persuasive factors).

263. *Auer v. Robbins*, 519 U.S. 452, 455 (1997).

264. 29 U.S.C. § 213(a)(1) (2006).

265. *Auer*, 519 U.S. at 456; see 29 C.F.R. §§ 541.1–.3 (1996).

266. *Auer*, 519 U.S. at 456–57.

267. See 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996).

268. *Auer*, 519 U.S. at 456 (citing 29 C.F.R. § 541.118(a) (1996)) (defining “salary basis” test).

269. *Id.* at 459. One plaintiff’s pay had been reduced for violating the City’s residency rule. *Id.* at 460.

270. *Id.* at 457.



brief that interpreted the ambiguous regulation to mean that plaintiffs were exempt unless the City actually imposed pay reductions – not just in theory but “as a practical matter.”<sup>271</sup> Justice Scalia concluded,

Because the salary-basis test is a creature of the Secretary’s own regulations, his interpretation of it is, under our jurisprudence, controlling unless “plainly erroneous or inconsistent with the regulation.”<sup>272</sup> That deferential standard is easily met here. The critical phrase “subject to [reductions]” comfortably bears the meaning the Secretary assigns.<sup>273</sup>

Admittedly, this language did not vary appreciably from the Court’s previous opinions deferring to an agency’s interpretation of its own regulations.<sup>274</sup> What set *Auer* apart was that it granted super-deference to an informal agency interpretation *expressed in an amicus brief* that the Court had specifically requested.

In an earlier decision,<sup>275</sup> the Court had disregarded an agency interpretation embodied in a litigation brief as a “post-hoc” effort to defend the agency’s action.<sup>276</sup> Distinguishing that case, *Auer* held that the Secretary’s amicus brief was nevertheless entitled to deference, even if not the product of formal rulemaking proceedings, because “[t]here [was] no reason to suspect that the interpretation [did] not reflect the agency’s fair and considered judgment . . . .”<sup>277</sup>

But Justice Scalia did not stop there. In response to the officers’ well-supported argument that FLSA exemptions should be narrowly interpreted against the employer,<sup>278</sup> Justice Scalia declined to impose that longstanding canon of statutory interpretation on the agency:

But that is a rule governing *judicial* interpretation of statutes and regulations, not a limitation on *the Secretary’s* power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since *he is free to write the regulations as broadly as he wishes*, subject only to the limits imposed by the statute.<sup>279</sup>

*Auer* sweeps all too broadly, conflating the *Chevron* analysis as applied to an agency’s interpretation of its own rules.<sup>280</sup> Without citing support, *Auer*

271. *Id.* at 461.

272. *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

273. *Id.* (dictionary citations omitted).

274. *See, e.g.*, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

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

276. *Id.* at 212. The Court has generally given little if any deference to agency interpretations stated as “litigation positions.” *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 485 n.3 (1991) (citing cases).

277. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

278. *Id.*; *see, e.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

279. *Auer*, 519 U.S. at 462–63 (emphasis added).

280. *See Anthony, supra* note 116, at 4 (“The Court has laid down an indulgent if not downright

ignored the reviewing court's responsibility to resolve any apparent ambiguity in an agency's legislative rule before deferring to the agency's informal interpretation.<sup>281</sup>

If the Court's rationale for deferring to an agency's interpretation is that Congress has delegated the agency authority to adopt *legislative* rules, the reviewing court has no less responsibility to resolve regulatory ambiguities than it does statutory ones. In fact, common sense suggests that the Court should apply even more stringent review of an agency's interpretation of its own ambiguous regulation; an agency's post-hoc interpretation is even more attenuated from congressional intent than either a legislative rule or the authorizing statute itself. Whether statutory or regulatory, a legislative rule has the force of law,<sup>282</sup> and each warrants *judicial* interpretation to determine whether or not it is ambiguous. If either can be judicially interpreted to resolve any ambiguity, the reviewing court's interpretation should control.

In subsequent decisions, the Court has repeatedly referred to "*Auer* deference" rather than *Seminole Rock* deference, from which it claims to have been derived.<sup>283</sup> Certainly *Auer's* "super-deference," which apparently absolves the agency of any duty to resolve an ambiguity in its own regulation before adding another layer of interpretive gloss, cannot be reconciled with *Chevron's* "two-step" approach. In effect, *Auer* deference abdicates judicial responsibility for resolving ambiguities, if that can be done. Nor can *Auer* be reconciled with APA section 10(2)(A),<sup>284</sup> which requires the *reviewing court* to decide all questions of law and interpret the terms of "agency action," including, by definition, agency rules.<sup>285</sup>

Notwithstanding its anomalous reasoning, the Court continues to apply *Auer* deference when an agency interprets its own regulations.<sup>286</sup> Nevertheless, a number of scholars have urged reversal of *Seminole Rock* and presumably *Auer*

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object standard of deference toward agencies' interpretations of their own regulations.").

281. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); see also Anthony, *supra* note 116, at 9 (arguing that it is "wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively giving controlling effect to a not-inconsistent agency position").

In a recent keynote address, Justice Scalia candidly admitted that he has "never been a Step One - Step Two person." Antonin Scalia, Keynote Address at the Washington College of Law at American University: *Is Chevron Out of Gas? The State of Judicial Review 25 Years after Chevron U.S.A., Inc. v. Natural Resources Defense Council* (Apr. 24, 2009), <http://media.wcl.american.edu/Mediasite/Viewer/?peid=237e5b365e764f649c12bc265279bf05> (last visited Jan. 23, 2010) [hereinafter *Chevron Symposium*]. In his view, Step One is beside the point because an agency interpretation is inherently unreasonable if contrary to the statute's plain language. *Id.*

282. E.g., APA MANUAL, *supra* note 60, at 30 n.3.

283. See *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008); *Gonzales v. Oregon*, 546 U.S. 243, 257-58 (2006); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

284. 5 U.S.C. § 706 (2006); see Anthony, *supra* note 116, at 9 (opining that the Court's standard of deference to an agency's interpretation of its own regulations is "incompatible with the APA").

285. 5 U.S.C. § 551(13) (2006) (defining "agency action" to include "rule").

286. See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2468 (2009); *Holowecki*, 128 S. Ct. at 1155; *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007). *But cf.*, e.g., *Gonzales*, 546 U.S. at 257 (declining to apply *Auer* because underlying regulation merely parroted relevant statutory language).

as its progeny.<sup>287</sup> It remains to be seen whether, when, and how the Roberts Court will reconcile *Auer* with the increasing constraints a majority of the Court has imposed on the scope of agency discretion to interpret statutes and legislative rules.

### B. *Christensen v. Harris County*

Another question left unanswered by *Chevron* was the appropriate scope of judicial review applicable to agency interpretations issued by less formal procedures than notice-and-comment rulemaking.<sup>288</sup> As noted above, *Auer* deferred to the Secretary of Labor's regulatory interpretation embodied in an amicus brief specifically solicited by the Court.<sup>289</sup> The Court's opinion all but disregarded the fact that the interpretation took the form of an appellate brief rather than a legislative rule.<sup>290</sup> Yet a coalescing majority of the Court would not wait long for an opportunity to distinguish the scope of deference due agency interpretations, depending on the specific nature of the authority delegated and the relative formality of the rulemaking process.

In *Christensen v. Harris County*,<sup>291</sup> the Court effectively curtailed the reach of both *Chevron* and *Auer*. As had *Auer*, *Christensen* interpreted the FLSA as applied to law enforcement officers—this time, 127 deputy sheriffs.<sup>292</sup> The issue was whether the County could require nonexempt deputies to take compensatory time off in order to avoid paying them for working overtime.<sup>293</sup> The FLSA expressly permitted state and county employers to grant compensatory time off rather than pay overtime wages.<sup>294</sup> However, the statute did not address whether an employer could *compel* an employee to deplete earned compensatory time so as not to exceed the number of unpaid overtime hours that would require the employer to pay wages for any excess.<sup>295</sup>

In *Auer*, the Secretary of Labor's interpretation contradicted the plaintiffs' argument that they were nonexempt.<sup>296</sup> But in *Christensen*, the Secretary agreed

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287. See, e.g., Eskridge & Baer, *supra* note 4, at 1184 (urging the Court to abrogate *Seminole Rock* deference as "contributing to doctrinal confusion"); Strauss, *supra* note 245, at 65 n.23 (noting complications associated with conferring more deference to agency interpretations of their own ambiguous regulations). But see Angstreich, *supra* note 261 (defending *Seminole Rock* deference). See generally Manning, *supra* note 111 (criticizing *Seminole Rock*).

288. APA notice-and-comment procedures do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . ." 5 U.S.C. § 553(b)(A) (2006). However, 5 U.S.C. § 706 applies to all "agency actions," not just those issued in notice-and-comment rulemaking. *Chevron* left unanswered whether its heightened deference standard applies to less formal interpretive rules, policy statements, guidances, and manuals. *Christensen* and *Mead* definitively answered that question in the negative.

289. *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997).

290. *Id.* at 461.

291. 529 U.S. 576 (2000) (6-3 decision).

292. *Id.* at 580.

293. See *id.* at 581.

294. 29 U.S.C. § 207(o) (2006).

295. *Christensen*, 529 U.S. at 580 (citing § 207(o)(3)(A)).

296. *Auer*, 519 U.S. at 454, 459.

that the deputy sheriffs should not be compelled to deplete unused compensatory time to keep the County from having to pay overtime wages.<sup>297</sup> As in *Auer*, the agency's interpretation was submitted in an *amicus* brief by special leave of the Court.<sup>298</sup> Moreover, the Department of Labor had issued an opinion letter to Harris County<sup>299</sup> at its request, concluding that a government employer *could not* compel employees to use compensatory time in lieu of paying overtime wages.<sup>300</sup>

The *Christensen* majority took pains to distinguish *Auer*, reasoning that the regulation addressing compensatory time<sup>301</sup> was "plainly permissive," unlike the "ambiguous" regulation at issue in *Auer*.<sup>302</sup> For that reason, the Court concluded that the regulation explicitly allowed Harris County to compel plaintiffs to deplete their compensatory time to avoid the mandate to pay overtime wages.<sup>303</sup> Writing for the majority, Justice Thomas bluntly observed, "To defer to the [Secretary of Labor's] position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the regulation is not ambiguous on the issue of compelled compensatory time, *Auer* deference is unwarranted."<sup>304</sup>

Before concluding that the regulation was unambiguous,<sup>305</sup> the majority applied traditional canons of construction<sup>306</sup> to interpret the statute and its implementing regulations "from scratch."<sup>307</sup> At the same time, the majority disavowed reliance on *Chevron*, noting that agency interpretations "lack[ing] the force of law,"<sup>308</sup> such as opinion letters, were not entitled to *Chevron* deference.<sup>309</sup> Citing *Skidmore*, the Court held that the agency's opinion letter to

297. See *Christensen*, 529 U.S. at 581.

298. *Id.* at 577, 582; see *Auer*, 519 U.S. at 453.

299. *Christensen*, 529 U.S. at 580.

300. *Id.* at 581 (quoting Opinion Letter from Dep't of Labor, Wage & Hour Div. (Sept. 14, 1992), available at 1992 WL 845100); *id.* at 586.

301. 29 C.F.R. § 553.23(a)(2) (1999).

302. "The text of the regulation itself indicates that its command is permissive, not mandatory." 529 U.S. at 588. The Court also accused the agency of "[s]eeking to overcome the regulation's obvious meaning" by claiming that it was ambiguous, thus warranting *Auer* deference to the agency's informal interpretation of the regulation. *Id.* (emphasis added).

303. *Id.*

304. *Id.* Although Justice Scalia concurred in the judgment, *id.* at 589-92, he applied *Chevron* and concluded that the agency's informal interpretations of the statute were not reasonable. See *id.* at 591. In deciding the issue at Step Two, Scalia implicitly reasoned that the statute—and presumably the Secretary's implementing regulation—were both ambiguous. See *id.* at 589 (noting that *Chevron* presumes "that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency"). However, Justice Scalia has consistently conflated the *Chevron* analysis. See *supra* notes 280-81 and accompanying text.

305. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

306. See *id.* at 583.

307. *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002).

308. *Christensen*, 529 U.S. at 587.

309. *Id.*

Here . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy

Harris County was “entitled to respect,” but only to the extent it had “power to persuade.”<sup>310</sup> Having already independently interpreted the statute and overtime regulation, the majority concluded that the agency’s opinion letter was simply “unpersuasive.”<sup>311</sup>

*Christensen* presaged what Justice Scalia would later declare “one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action.”<sup>312</sup> Each justice comprising the *Christensen* majority either authored or joined opinions citing *Skidmore* with approval.<sup>313</sup> By doing so, a solid majority signaled that it considered *Chevron* and *Skidmore* complementary—and hence reconcilable—deference frameworks.<sup>314</sup> The following year, the Court squarely held just that.

### C. *United States v. Mead Corp.*

*Christensen* was only the first of a series of decisions by which the Rehnquist Court would “cabin”<sup>315</sup> *Chevron*’s expansive influence. Just one year later, in *United States v. Mead Corp.*,<sup>316</sup> the Court refused to extend *Chevron* deference to Customs tariff classification rulings. *Mead* likened tariff rulings to “interpretations in policy statements, agency manuals, and enforcement guidelines,” which lack the force of law and thus are “beyond the *Chevron* pale.”<sup>317</sup>

*Mead* squarely limited *Chevron* deference to agency interpretations issued in the exercise of specific congressional authority to make rules “carrying the force of law.”<sup>318</sup> The Court rejected the Federal Circuit’s reasoning that if tariff rulings did not warrant *Chevron* deference for lack of notice-and-comment proceedings, they were due no deference at all.<sup>319</sup> Even if a tariff ruling did not

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statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.

*Id.* (citations omitted). In dicta, the Court observed that *Chevron* deference is warranted for at least two categories of administrative interpretations: (1) legislative rules adopted through notice-and-comment rulemaking and (2) formal agency adjudications. *Id.*

310. *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

311. *Id.* Justice Scalia concurred but explicitly declined to join the holding that *Chevron* did not apply. *Id.* at 589 (Scalia, J., concurring).

312. *United States v. Mead Corp.*, 533 U.S. 218, 261 (2001) (Scalia, J., dissenting).

313. See *Christensen*, 529 U.S. at 587 (Thomas, J., joined by Rehnquist, C.J., & O’Connor, Kennedy & Souter, JJ.); *id.* at 595 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting); see also *id.* at 597 (Breyer, J., joined by Ginsburg, J.).

314. See, e.g., *id.* at 587 (holding that while *Chevron* deference did not apply, the opinion letter was nevertheless due respect under *Skidmore*).

315. See, e.g., Richard Murphy, *The Brand X Constitution*, 2007 BYU L. REV. 1247, 1290. “[A] dominant theme of *Mead* remains the Court’s effort to cabin the scope of *Chevron* deference with procedure.” *Id.*

316. 533 U.S. 218 (2001).

317. *Id.* at 234 (quoting *Christensen*, 529 U.S. at 587).

318. *Id.* at 226–27.

319. See *id.* at 234. The Federal Circuit held that tariff rulings lacked the force of law because none was intended to apply to anyone other than the subject importer. *Id.* at 226.

qualify for *Chevron* deference, *Skidmore* might apply regardless of form depending upon its “power to persuade, if not power to control.”<sup>320</sup> Writing for the majority, Justice Souter succinctly observed, “The Court’s choice has been to tailor deference to variety.”<sup>321</sup> The case was remanded with instructions to consider the persuasiveness of the tariff rulings under *Skidmore*.<sup>322</sup>

*Mead* thus held that even if an agency’s interpretation is not entitled to heightened deference under *Chevron*, it may nevertheless merit *Skidmore* deference based upon its persuasive value.<sup>323</sup> Over Justice Scalia’s strident objections,<sup>324</sup> *Mead* erased any doubt that “*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no [congressional] intent to delegate general authority to make rules with force of law, or where such authority [is] not invoked . . . .”<sup>325</sup>

The central holding of *Mead* should not have been surprising, especially not to Justice Scalia,<sup>326</sup> best known among the justices as a strict textual constructionist. *Mead* simply limited *Chevron*’s holding to its facts and its plain language,<sup>327</sup> reining in those who had expansively interpreted its presumption of deference<sup>328</sup> to apply well beyond its facts: an express statutory delegation of authority to the EPA and a notice-and-comment rulemaking yielding a legislative rule with the force of law.<sup>329</sup> *Mead* held, however, that even if Congress did not expressly grant rulemaking authority, it may have done so implicitly if other circumstances suggest that Congress expected the agency to “speak with the force of law” when resolving statutory ambiguities.<sup>330</sup> In either

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320. *Id.* at 234; *Skidmore v. Swift & Co*, 323 U.S. 134, 139 (1944). The Court’s catchphrase suggests that if *Chevron* deference applies, the interpretation is presumptively binding, while *Mead* or *Skidmore* deference confers more or less persuasive value depending upon various factors. See *Mead*, 533 U.S. at 234.

321. *Id.* at 236 (citations omitted).

322. *Id.* at 238–39.

323. *Skidmore*, 323 U.S. at 140.

324. *Mead*, 533 U.S. at 239 (Scalia, J., dissenting).

325. *Id.* at 237 (acknowledging that the Court was so holding). The latter phrase pointedly suggests that agencies to which Congress has delegated authority to issue rules having the force of law are not entitled to heightened deference if they avoid the procedural formalities. See *id.*

326. *But cf. Mead*, 533 U.S. at 239 (Scalia, J., dissenting). “Today’s opinion makes an avulsive change in judicial review of federal administrative action.” *Id.* More recently, Justice Scalia has referred to *Mead* as “our misguided opinion.” *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479 (2009) (Scalia, J., concurring in part and concurring in the judgment).

327. It is this interpretation of *Mead* that has led a number of scholars to refer to its influence in “cabining” *Chevron*. See *supra* note 7 and accompanying text; e.g., Sunstein, *supra* note 7, at 193 (referring to Supreme Court efforts to “cabin” *Chevron*’s reach); *id.* at 227 (“*Mead* is evidently motivated by a concern that *Chevron* deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures.”).

328. *Mead*, 533 U.S. at 240 (Scalia, J., dissenting) (noting that *Chevron* presumed that when Congress left an ambiguity in a statute, the agency charged with its implementation was intended to resolve the ambiguity).

329. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840–41 (1984) (citing 46 Fed. Reg. 50,766 (Oct. 14, 1981)); see also *id.* at 866 (endorsing “bubble” concept incorporated in EPA’s revised regulation issued in notice-and-comment proceedings).

330. *Mead*, 533 U.S. at 229.

instance, *Chevron* deference is due.<sup>331</sup>

But what if an agency's interpretation is not entitled to *Chevron* deference because Congress did *not* apparently expect the agency to "speak with the force of law" when addressing statutory ambiguities? *Mead* acknowledged that numerous agencies charged with implementing statutes, even if not authorized to speak with the force of law, make "all sorts of interpretive choices [that] certainly may influence courts facing questions the agencies have already answered."<sup>332</sup>

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.<sup>333</sup>

Thus, if *Skidmore* deference applies, the reviewing court will afford the ruling "respect proportional to its 'power to persuade.'"<sup>334</sup> However, the burden of persuasion apparently rests with the agency to defend its interpretation; if *Skidmore* applies, the agency lacks the benefit of the court's doubt. In contrast, *Chevron* yields presumptive deference to the agency's interpretation unless the challenger rebuts the presumption by convincing the reviewing court that the statute unambiguously precludes the agency's reading (Step One), that the agency's interpretation exceeds the scope of its lawful authority (Step 1.5), or that the agency's interpretation is otherwise unreasonable or impermissible (Step Two).<sup>335</sup>

Notably, Justice Souter, writing for the *Mead* majority, apparently made a conscious effort to reconcile the common law deference framework with the judicial review provisions of the APA.<sup>336</sup> For example, the majority opinion cited the relevant APA section when it observed that *Chevron* deference is due a regulation that carries out an explicit delegation of authority.<sup>337</sup> More tellingly,

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331. *Id.* (citing *Chevron*, 467 U.S. at 842–46). The fact that this passage applies to both explicit and implicit delegations suggests that *Mead* abandoned any distinction *Chevron* initially drew between them. See *Chevron*, 467 U.S. at 843–44; *supra* notes 248–51 and accompanying text.

332. *Mead*, 533 U.S. at 227.

333. *Id.* at 228.

334. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). "Such a ruling may surely claim the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Mead*, 533 U.S. at 235.

335. In this sense, *Chevron* may be considered not only a standard of judicial review for agency actions, but also a burden-shifting doctrine. Under *Mead*, the agency generally bears the initial burden of persuasion that Congress meant its interpretations to have presumptively binding effect. If the agency succeeds and the court applies *Chevron*, the agency's interpretation is presumptively binding *unless* the opponent persuades the court that it is either impermissible, unreasonable, or otherwise beyond the scope of the agency's lawful authority.

336. See *Mead*, 533 U.S. at 227 & n.6.

337. *Id.* (citing 5 U.S.C. § 706(2)). By integrating APA citations using carefully selected citation signals, Justice Souter subtly acknowledged that the common law deference framework is difficult

Justice Scalia's dissent openly acknowledged "some question" whether *Chevron* had been "faithful" to the APA.<sup>338</sup> But he nevertheless went on to justify *Chevron* as consistent with the "origins of federal-court judicial review,"<sup>339</sup> which, of course, predated the APA.<sup>340</sup>

#### D. *Mead's* Progeny

In a series of decisions issued after *Christensen*, the Rehnquist Court sketched out the parameters of a new framework of judicial deference to the various types of less formal administrative interpretations. In mapping out its deference regime, or as Justice Scalia puts it, "administrative-law improvisation project,"<sup>341</sup> the Court identified several factors to consider in determining the degree of deference due an informal agency interpretation. Two broad categories overarch the others: first, the nature, scope, and clarity of the legislative authority delegated to the agency; and second, the specific rulemaking procedures the agency used and the format of the resulting interpretation.<sup>342</sup> Other persuasive but less influential factors include the consistency of the agency's interpretation over time<sup>343</sup> and any prior judicial interpretations of the statute.<sup>344</sup>

The cumulative result of the Rehnquist Court's decisions is difficult to characterize,<sup>345</sup> perhaps because the Court's deference framework continues to evolve. Beginning with *Mead*, the Court mapped out two primary approaches

to square with the APA's express language. *Id.* at 229. Justice Scalia apparently agrees but less subtly; in a recent keynote address, he conceded that the Court has "ignored" the APA's key language. See *Chevron Symposium*, *supra* note 281.

338. *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). In a footnote to his dissent, Scalia essentially conceded that the plain language of 5 U.S.C. § 706 means that "all statutory ambiguities are to be resolved judicially." *Id.* at 241 n.2 (citing Anthony, *supra* note 116, at 9–11). Somewhat grudgingly, however, he went on to criticize the majority opinion for being "no more observant of the APA's text than *Chevron* was—and indeed . . . even more difficult to reconcile with it." *Id.* (emphasis added). In a recent speech, Scalia openly acknowledged that the Court has ignored the APA directive that reviewing courts are to resolve *all* issues of statutory interpretation. See *Chevron Symposium*, *supra* note 281.

339. *Mead*, 533 U.S. at 241–42 (Scalia, J., dissenting).

340. See *supra* notes 85–113 and accompanying text (discussing pre-APA judicial deference doctrines).

341. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting).

342. *But cf. Brand X*, 545 U.S. at 1004 (Breyer, J., concurring) ("[A] formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute."); *Mead*, 533 U.S. at 230–31 ("The want of" notice and comment "does not decide the case.").

343. *Cf., e.g., Brand X*, 545 U.S. at 981. "Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *Id.*

344. See, *e.g., id.* at 985 ("Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction.").

345. "Difficult" puts it mildly. As several scholars have confirmed, "the Supreme Court's deference jurisprudence is a mess." *E.g., Eskridge & Baer, supra* note 4, at 1157; see also Shane, *supra* note 37, at 34 (referring to deference doctrine as "fraught with rhetorical confusion").



to judicial deference that purport to be mutually exclusive: one based upon *Chevron* and the other grounded in *Skidmore*.<sup>346</sup> The Court's hyperfocus on deciding the applicable deference framework regrettably obviates the more important threshold issue that implicates constitutional concerns: Before a reviewing court selects the applicable deference framework, the threshold question must be whether the agency's interpretation is entitled to any judicial deference at all. If not, which deference framework applies is a moot point.

1. Is the agency's interpretation worthy of any judicial deference?

If the reviewing court independently interprets the relevant statute in a manner consistent with the agency's interpretation, "there is no occasion to defer and no point in asking what kind of deference, or how much."<sup>347</sup> If the statutory language is plain or if disputed language has a settled judicial interpretation, then the court simply decides what the law is, and no deference is due the agency's interpretation.

As a corollary, if the court's initial review reaches an interpretation contrary to the agency's, it need not give the agency's interpretation any deference at all. In that event, whether *Chevron* or *Skidmore* deference applies is irrelevant. For example, if the reviewing court concludes after invoking traditional methods of statutory interpretation<sup>348</sup> that the pertinent statute or rule is neither silent nor ambiguous, the court's own interpretation becomes the controlling one and the agency's contrary interpretation warrants no deference whatsoever.<sup>349</sup>

To illustrate, in *General Dynamics Land Systems, Inc. v. Cline*,<sup>350</sup> the Rehnquist Court held that the Age Discrimination in Employment Act (ADEA) did not protect relatively young employees against discrimination favoring older employees, rejecting EEOC's contrary regulatory interpretation.<sup>351</sup> Interpreting the statute *de novo*, the Court concluded that it was

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346. See *Mead*, 533 U.S. at 238 ("[J]udicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore* . . ."). Yet the two deference frameworks are not as independent as the Court suggests. The Court's deference jurisprudence attempts to characterize the degree of deference due by using its own precedents as pigeonholes. Instead, the Court should devise a more abstract deference framework that bridges them all.

347. *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 n.8 (2002). In *Edelman*, a college professor sued for discrimination after he was denied tenure. *Id.* at 109. The district court dismissed for his failure to verify the EEOC charge until after the filing date. *Id.* at 110. An EEOC regulation, however, allowed a charge to be amended for technical defects, with the amendments relating back to the original filing date. *Id.* at 110 n.2. The Supreme Court unanimously reversed, reasoning that EEOC's interpretation in favor of the plaintiff was "unassailable," *id.* at 118, based upon longstanding *judicial* precedent.

348. See, e.g., *id.* at 117 (relying on congressional acquiescence, a longstanding canon of statutory construction).

349. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 585 (2000) (reading the statute "in the context of the overall statutory scheme" to reach "the better reading"); see also *id.* at 592-96 (Stevens, J., dissenting) (finding the statute ambiguous but reaching the opposite interpretation); *id.* at 596 (Breyer, J., dissenting) (same).

350. 540 U.S. 581 (2004).

351. *Id.* at 584.

unambiguous.<sup>352</sup> The majority reasoned that EEOC's admittedly long-standing regulation<sup>353</sup> expressing a contrary interpretation was "clearly wrong."<sup>354</sup> Having reached that conclusion as a matter of judicial interpretation, the majority correctly declined to address the degree of deference the regulation otherwise might have been due.<sup>355</sup>

Echoing *Chevron*,<sup>356</sup> the Court held that an agency's interpretation of a statute is entitled to deference only if "the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."<sup>357</sup> Regardless of the ADEA's plain language favoring the plaintiffs' position, the statute as judicially construed did not prohibit employer favoritism of *older* workers at the expense of *younger* ones.<sup>358</sup> *General Dynamics* is a classic example of traditional *de novo* review, which resolved the interpretive issue as a matter of law based upon judicial precedent, without deference to the agency's regulation.<sup>359</sup>

## 2. If the agency's interpretation warrants deference, which framework applies?

If the reviewing court applies traditional tools of statutory interpretation and concludes that the meaning of the statute remains in doubt, only then must it decide which deference framework applies. In *Mead*, the majority carefully distinguished *Chevron* from *Skidmore* deference, holding that *Chevron* applies only when the authorizing statutes suggest that Congress would have expected the agency to "speak with the force of law" when resolving statutory ambiguities.<sup>360</sup> An *express* delegation of authority to engage in formal

352. The Court relied on its own "consistent understanding that the text, structure, and history point to the ADEA as a remedy for unfair preference based on relative youth, leaving complaints of the relatively young outside the statutory concern." *Id.* at 593. Noting that the lower federal courts had similarly interpreted the ADEA, the Court held that the strength of the judicial consensus, *i.e.*, the settled judicial meaning, was "enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional [judicial] view." *Id.* (footnote omitted).

353. 29 C.F.R. § 1625.2(a) (2003). First adopted in 1981, the regulation had been carried forward from a predecessor regulation adopted in 1968, the year after the ADEA was enacted. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 599 (2004) (citing 33 Fed. Reg. 9172 (1968) (reprinting 29 C.F.R. § 860.91, rescinded by 46 Fed. Reg. 47,724 (1981)).

354. *General Dynamics*, 540 U.S. at 600.

355. *Id.*

356. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

357. *General Dynamics*, 540 U.S. at 600 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987)).

358. *Id.* Justice Scalia disagreed that the agency's interpretation was "clearly wrong." *Id.* at 601 (Scalia, J., dissenting). He noted that the statute did not unambiguously dictate an interpretation other than EEOC's "authoritative conclusion," so it was entitled to deference. *Id.* at 602. In a separate dissent, Justices Thomas and Kennedy accused the majority of "interpretive sleight of hand to avoid addressing the plain language of the ADEA." *Id.* at 613 (Thomas, J., joined by Kennedy, J., dissenting).

359. In *Chevron* terms, EEOC's interpretation was foreclosed at Step One because the statute was rendered unambiguous by applying traditional tools of statutory interpretation.

360. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (quoting *Chevron*, 467 U.S. at 845).

rulemaking or adjudication, while not a necessary prerequisite,<sup>361</sup> is “a very good indicator of delegation meriting *Chevron* treatment.”<sup>362</sup> But the agency’s interpretation may nevertheless warrant “some deference” under *Skidmore*, even if the delegated authority is merely *implicit*, if the procedure used was relatively informal or the interpretation is otherwise “beyond the *Chevron* pale.”<sup>363</sup> The difficulty, of course, is figuring out the dividing lines between the two deference frameworks and how each applies in a particular case.

### E. Shrinking *Chevron*’s Cabin

Of the two alternative deference frameworks, *Chevron* is unquestionably the most deferential. If the reviewing court deems it applicable, *Chevron* deference gives presumptive validity to the agency’s view as long as it adopts a “reasonable” or “permissible” interpretation<sup>364</sup> of the ambiguous statute or legislative rule.

A year after deciding *Mead*, the Rehnquist Court applied its post-*Mead* reformulation of *Chevron* deference in *Barnhart v. Walton*.<sup>365</sup> The case involved an application for disability benefits under the Social Security Act. The relevant statute was ambiguous regarding whether a twelve-month duration requirement for a work disability applied to the applicant’s “inability to engage in any substantial gainful activity” or only to his “impairment.”<sup>366</sup> The agency denied the application because the applicant had taken another job eleven months after losing his teaching position due to a psychiatric disorder.<sup>367</sup> On judicial review, he argued that his *impairment* exceeded the duration requirement, even though he had returned to work within twelve months.<sup>368</sup> But the regulation interpreted the statute to require the *inability to work* to last twelve months, not just the impairment.<sup>369</sup>

The Court first applied *Auer*<sup>370</sup> to the agency’s interpretation of its own regulation.<sup>371</sup> Next, the Court applied *Chevron*, presumably because the regulation had been issued in notice-and-comment proceedings. Writing for the majority, Justice Breyer rearticulated *Chevron*’s two-step analysis but in a negative image of the original: “Hence we must decide (1) whether the statute *unambiguously forbids* the Agency’s interpretation, and, *if not*, (2) whether the

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361. *Id.*; see *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002).

362. *Mead*, 533 U.S. at 229.

363. *Id.* at 234.

364. *Id.* at 229.

365. 535 U.S. 212 (2002) (8-1 opinion). Justice Scalia’s concurring opinion also applied *Chevron*. *Id.* at 226–27 (Scalia, J., concurring).

366. See *id.* at 214–15 (citing 42 U.S.C. § 423(d)(1)(A) (1994)).

367. *Id.* at 215.

368. *Id.* at 222–23.

369. *Id.* at 214–15; see 20 C.F.R. § 404.1520(b) (2001), quoted in *Barnhart*, 533 U.S. at 217.

370. *Barnhart*, 535 U.S. at 217 (“Courts grant an agency’s interpretation of its own regulations considerable legal leeway.”) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965)).

371. *Barnhart*, 535 U.S. at 217.

interpretation, for other reasons, *exceeds the bounds* of the permissible.”<sup>372</sup> As reformulated, the Court’s two-step analysis suggests that the burden of persuasion is on the party seeking judicial review of the agency’s interpretation, which enjoys presumptive validity if *Chevron* applies.

Applying the framework, the majority first concluded that the Act did not “unambiguously forbid the regulation.”<sup>373</sup> While the statute itself did not explicitly impose a duration requirement on the “inability to engage in any substantial gainful activity,” other parts of the Act<sup>374</sup> suggested that a “disability” required an impairment severe enough to preclude any work for at least twelve months.<sup>375</sup> The majority concluded that the agency’s interpretation was a “fair inference” from the ambiguous statutory language<sup>376</sup> and hence permissible.<sup>377</sup>

Finally, in a concise concluding paragraph, Justice Breyer enumerated several factors summarizing the majority’s reasons for applying *Chevron*:

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.<sup>378</sup>

As the reader will note, all of these are similar to the persuasive factors enumerated in *Skidmore*.<sup>379</sup> Yet Justice Breyer invoked them to argue in favor of applying the more deferential *Chevron* framework, suggesting that both deference regimes are cut from the same cloth.

#### F. Reviving *Skidmore*

In contrast to *Chevron* deference, *Mead / Skidmore* is generally less likely to result in judicial endorsement of the agency’s interpretation.<sup>380</sup> Unlike *Chevron*,

372. *Id.* at 218 (citing *Chevron*, 467 U.S. at 843) (emphasis added). *But cf. Chevron*, 467 U.S. at 842–43 (suggesting the agency has the burden of demonstrating that the statute is silent or ambiguous and that its interpretation is permissible).

373. *Barnhart*, 535 U.S. at 218.

374. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1994).

375. *Barnhart*, 535 U.S. at 218.

376. *Id.* at 219.

377. *Id.*

378. *Id.* at 222 (citing *Mead*, 533 U.S. at 218).

379. *See Skidmore*, 323 U.S. at 140; *supra* note 100 and accompanying text (quoting *Skidmore*’s enumerated factors). Although Justice Scalia concurred with the majority in nearly all respects, he disagreed with its reliance on the longstanding nature of the Social Security Administration’s interpretation. *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring). Justice Scalia would have held that the agency’s interpretation warranted *Chevron* deference simply because it had “emerged from notice-and-comment rulemaking.” *Id.* at 227.

380. *But see SEC v. Zandford*, 535 U.S. 813, 819–20 (2002) (Stevens, J.) (unanimous decision) (relying on *Mead* in upholding a formal SEC adjudication of civil fraud based on SEC’s consistently

all that *Skidmore* and *Mead* guarantee is that the court will give the agency's interpretation some consideration.<sup>381</sup> Just how much depends upon a host of factors, some of which appear to overlap with the very factors that trigger *Chevron* deference.<sup>382</sup> As *Mead* noted, the *Skidmore* "approach has produced a spectrum of judicial responses,"<sup>383</sup> depending upon the agency's thoroughness, reasoning, consistency, and other persuasive factors.<sup>384</sup>

The Rehnquist Court applied the *Mead* / *Skidmore* sliding-scale standard in *Clackamas Gastroenterology Associates, P.C. v. Wells*.<sup>385</sup> A bookkeeper claimed that a professional corporation had discharged her on the basis of disability.<sup>386</sup> Plaintiff's claim turned on whether four physicians who were shareholder-directors could be considered "employees"<sup>387</sup> under the Americans with Disabilities Act (ADA),<sup>388</sup> which defines "employee" as "an individual employed by an employer."<sup>389</sup> Finding the ADA definition unhelpful,<sup>390</sup> the Court turned to its own precedents construing similar language in other statutes, which had generally relied on the common law meaning.<sup>391</sup> Indeed, the Court reasoned, "[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law."<sup>392</sup>

broad reading, which was entitled to deference if reasonable).

381. See, e.g., *Raymond B. Yates, M.D., P.C., v. Hendon*, 541 U.S. 1, 18, 20–21 (2004) (advisory opinion entitled to "respectful consideration" under *Skidmore*); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 496–97 (2002) (opinion letter, policy statement, and proposed regulation "warrant[] respectful consideration").

382. See *Mead*, 533 U.S. at 228.

383. *Id.*

384. *Id.* (quoting *Skidmore*, 323 U.S. at 140). Justice Scalia continues to colorfully express his disdain for *Skidmore*. At a recent symposium commemorating the 25th Anniversary of *Chevron*, he responded to a student whose question suggested the continuing need for *Skidmore* deference:

I would eliminate *Skidmore* deference. *Skidmore* deference is a farce! *Skidmore* deference is—you give it as much value as you think it's worth. Give it as much value as you would give a law review article. I mean, you know, of course you take into account who it was that's the author of that article, but still in all, it's moosh! And, you know what's good about it? What's good about *Skidmore* deference and what's good about the new rule is precisely that it's a good 'ol totality of the circumstances rule, which means basically the court can do whatever it wants! Case by case—there *are* no rules. Whatever seems like a good result here. It is empowering—it is empowering of the courts. So, far from thinking that this is something that is going to enable you to lessen the impact of the agencies, I think it's just the opposite. I don't believe in *Skidmore* deference. It's either *Chevron* or—you know, *Chevron* or the road!

*Chevron* Symposium, *supra* note 281.

385. 538 U.S. 440 (2003).

386. *Id.* at 442.

387. *Id.*

388. 42 U.S.C. §§ 12101–12213 (2006).

389. *Wells*, 538 U.S. at 444 (quoting 42 U.S.C. § 12111(4) (2000)).

390. "A definition must not contain, directly or indirectly, the term being defined." REED DICKERSON, LEGISLATIVE DRAFTING § 8.1, at 93 (1954).

391. *Wells*, 538 U.S. at 445 (relying upon, *inter alia*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992)).

392. *Id.* at 447 (citing *Darden*, 503 U.S. at 324–25).

The Court next considered the interpretive guidelines in EEOC's Compliance Manual, conceding they were not "controlling" under *Chevron*.<sup>393</sup> The Court expressly invoked *Skidmore*, observing that EEOC had been granted "special enforcement responsibilities under the ADA" and other statutes with similar employment thresholds.<sup>394</sup> The Court was persuaded by the EEOC guidelines' reliance on six factors grounded in "the common law touchstone of control."<sup>395</sup> Ultimately, the Court endorsed EEOC's guidelines for defining an "employee" as persuasive, while not binding.<sup>396</sup>

The Rehnquist Court's application of the reinvigorated *Skidmore* doctrine reflects the strong influence common law meanings continue to play in administrative law. *Wells* also illustrates the Court's ongoing struggle to strike the appropriate balance as it sorts out the relative influence of Congress, the executive branch, and the courts in determining the proper scope of judicial review.

#### G. Unravelling Stare Decisis: Do Agency Interpretations Trump Statutory Precedent?

One of the last cases decided by the Rehnquist Court, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>397</sup> addressed whether a prior *judicial* interpretation of an ambiguous statutory term controls over a subsequent contrary interpretation by the agency charged with enforcing the statute.<sup>398</sup> Authored by Justice Thomas, the 6-3 decision clarified the Rehnquist Court's deference doctrine in several respects. In particular, the Court applied *Chevron* as a basis for yielding to an agency's interpretation of an ambiguous statutory term, even in light of a prior circuit court opinion reaching a contrary interpretation.<sup>399</sup>

*Brand X* was an appeal from a Federal Communications Commission (FCC) formal rulemaking proceeding.<sup>400</sup> The FCC had ruled that broadband internet service did not qualify as "telecommunications service" if provided by cable companies, which therefore were not subject to FCC regulation.<sup>401</sup> On appeal, the Ninth Circuit, relying on its own precedent to the contrary,<sup>402</sup> vacated the

393. *Id.* at 449 & n.9.

394. *Id.* at 448.

395. *Id.* at 449-50.

396. *Id.* at 449 & n.9, 451.

397. 545 U.S. 967 (2005).

398. *See id.* at 982.

399. *Id.* at 982-83.

400. *Id.* at 977, 979.

401. *Id.* at 977-78 (citing *In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4821-22 (2002)). A Ninth Circuit panel had previously held in an unrelated Oregon case that cable modem service qualified as a "telecommunications service." *See AT&T Corp. v. Portland*, 216 F.3d 871, 880 (9th Cir. 2000). The question in *Brand X* was whether the decision had binding precedential effect on the FCC's subsequent rulemaking process.

402. *See AT&T Corp.*, 216 F.3d at 880.

FCC's decision.<sup>403</sup>

The Supreme Court reversed.<sup>404</sup> In a carefully reasoned decision, Justice Thomas, writing for the majority, reviewed the legislative history of the Telecommunications Act of 1996 and the history of the FCC's proceeding.<sup>405</sup> Without doubt, the FCC had been delegated authority to enforce the Act and to issue binding implementing rules.<sup>406</sup> Further, the FCC's interpretation carried out its statutory authority<sup>407</sup> and was the product of formal rulemaking.<sup>408</sup> The FCC ruling thus met all prerequisites for *Chevron* deference.<sup>409</sup>

The Court next addressed whether the Ninth Circuit precedent trumped the FCC's subsequent interpretation favoring the cable companies.<sup>410</sup> Justice Thomas openly acknowledged the "genuine confusion in the lower courts over the interaction between the *Chevron* doctrine and *stare decisis* principles."<sup>411</sup> He noted that the Ninth Circuit's precedent had not concluded that the key statutory language was unambiguous,<sup>412</sup> nor that its interpretation was the only permissible reading.<sup>413</sup> Rather, the opinion had concluded only that the *best* interpretation of the Act suggested that cable broadband providers did not provide "telecommunications service."<sup>414</sup>

The majority underscored *Chevron*'s presumptive deference to the agency's resolution of a statutory ambiguity.<sup>415</sup> Justice Thomas concluded,

The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* step one standard that applies if the court is reviewing the agency's construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.<sup>416</sup>

In other words, unless a court concludes that Congress has spoken

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403. *Brand X Internet Servs. v. FCC*, 345 F.3d, 1120, 1132 (9th Cir. 2003), *rev'd sub nom.*, 545 U.S. 967 (2005).

404. *Brand X*, 545 U.S. at 1003.

405. *Id.* at 975-79.

406. *See id.* at 980-81; *see also* 47 U.S.C. § 151 (2006) (creating the FCC).

407. *Brand X*, 545 U.S. at 981.

408. *Id.* at 977-78.

409. *See id.* at 982. The Court disregarded the argument that the FCC's interpretation was "inconsistent with its past practice," reasoning that agency inconsistency does not defeat *Chevron* deference as long as (1) the statute is ambiguous and (2) the agency "adequately explains the reasons" for reversing course. *Id.* at 981; *see id.* at 1001 & n.4. In this case, the FCC adequately defended its decision based on changing market conditions, including rapidly expanding access to internet service that justified minimal regulation of broadband. *Id.* at 1001.

410. *Brand X*, 545 U.S. at 982-86.

411. *Id.* at 985.

412. *Id.* at 982 (citing 345 F.2d at 1131).

413. *Id.* at 984.

414. *Id.*

415. *Id.* at 982.

416. *Id.* at 982-83.

*unambiguously* on the issue, even a *judicial interpretation* must yield to the agency's later interpretation if (1) entitled to *Chevron* deference, and (2) within the range of permissible interpretations from which the agency has authority to select.<sup>417</sup>

In light of *Mead* and *Christensen*, *Brand X* left open how the Court would have resolved the matter had the FCC interpretation *not* warranted *Chevron* deference. For example, in the absence of notice-and-comment rulemaking, is an agency bound by a prior judicial interpretation of an ambiguous statute? If a federal district court or a state court holds that a statute is unambiguous, must an agency treat that judicial interpretation as binding, even in a notice-and-comment rulemaking? Moreover, how should a federal district court or state court choose between (1) a federal circuit's otherwise binding interpretation of an ambiguous federal statute, and (2) an inconsistent regulation later adopted by the agency charged with enforcing it?

Perhaps not surprisingly, *Brand X*, the Rehnquist Court's last word on judicial deference, raised more questions than it answered. However, *Brand X* underscored the critical nature of the threshold question in deference jurisprudence: whether the statutory language is ambiguous.

#### IV. THE ROBERTS COURT'S AMORPHOUS JUDICIAL REVIEW FRAMEWORK

As we have seen, by the end of the October 2004 Term, the Rehnquist Court had firmly reestablished *Skidmore* alongside *Chevron* as the two primary doctrines of judicial deference.<sup>418</sup> At the end of the term, Justice O'Connor unexpectedly resigned.<sup>419</sup> Less than two months later, cancer claimed the life of Chief Justice Rehnquist.<sup>420</sup> President George W. Bush initially appointed John Roberts, Jr. to replace Justice O'Connor,<sup>421</sup> but later designated him Chief Justice to replace the late Rehnquist.<sup>422</sup> Roberts was confirmed just in time to open the Court's October 2005 Term.<sup>423</sup>

417. Justice Stevens concurred, hinting that the majority's reasoning might not apply if the Supreme Court had issued the statutory precedent, which "would presumably remove any pre-existing ambiguity." *Id.* at 1003 (Stevens, J., concurring). *But see* *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008) (holding that an agency may interpret a statute differently than even the Supreme Court has previously construed it to avoid constitutional doubts, as long as the agency's later interpretation is "reasonable and avoids serious constitutional questions"), *cert. denied*, 130 S. Ct. 1011 (2009).

418. *See Mead*, 533 U.S. at 238; *see also* *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 & n.9 (2003) (declining *Chevron* deference but applying *Skidmore* factors to EEOC Compliance Manual).

419. William Branigin, Fred Barbash & Daniela Deane, *Supreme Court Justice O'Connor Resigns*, WASH. POST, July 1, 2005, <http://www.washingtonpost.com/wp-yn/content/article/2005/07/01/AR2005070100653.html>.

420. Charles Lane, *Chief Justice Dies at Age 80*, WASH. POST, Sept. 4, 2005, at A1.

421. *Bush Nominates Roberts to Supreme Court*, CNN.COM, July 20, 2005, <http://www.cnn.com/2005/POLITICS/07/19/scotus.main/index.html>.

422. *Roberts Sworn in as Chief Justice*, CNN.COM, Sept. 29, 2005, <http://www.cnn.com/2005/POLITICS/09/29/roberts.nomination/index.html>.

423. *See* Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1.



In the meantime, Justice O'Connor had agreed to remain on the Court until her successor was nominated and confirmed.<sup>424</sup> During the transition, Justice O'Connor participated in *Gonzales v. Oregon*,<sup>425</sup> voting with the majority.<sup>426</sup> Just two weeks later, Justice Samuel Alito, Jr. was confirmed and took Justice O'Connor's seat.<sup>427</sup>

#### A. *Gonzales v. Oregon*

On the morning of his third day on the Supreme Court,<sup>428</sup> Chief Justice Roberts opened oral arguments in the case of *Gonzales v. Oregon*.<sup>429</sup> The decision in that case would set the course for a divided Roberts Court on issues involving judicial deference to administrative interpretations of law.

The dispute arose after Attorney General John Ashcroft issued an interpretive ruling<sup>430</sup> concluding that physician-assisted suicide was not a "legitimate medical purpose" as defined by the Controlled Substances Act.<sup>431</sup> Its purpose and effect was to preempt the State of Oregon's Death with Dignity Act,<sup>432</sup> which authorizes registered physicians to lawfully prescribe lethal doses of controlled substances at the request of terminally ill patients under strictly limited circumstances.<sup>433</sup> Moreover, the ruling put Oregon physicians at risk of federal criminal prosecution for actions otherwise consistent with state law.<sup>434</sup>

The State of Oregon, joined by several terminally ill patients and others, secured an injunction blocking enforcement, and the Ninth Circuit affirmed.<sup>435</sup> The Supreme Court granted certiorari to decide whether the Attorney General

424. O'Connor Resignation Letter, CNN.COM, July 1, 2005, <http://www.cnn.com/2005/LAW/07/01/oconnor.letter.nobanner/>.

425. 546 U.S. 243 (2006).

426. *Id.* at 247 (6-3 opinion).

427. David Welna, *All Things Considered: Alito Confirmed as Newest Supreme Court Justice*, NAT'L PUB. RADIO, Jan. 31, 2006, <http://www.npr.org/templates/story/story.php?storyId=5181091>; Charles Babington, *Alito Is Sworn In On High Court*, WASH. POST, Feb. 1, 2006, at A1.

428. See Transcript of Oral Argument at 1, 3, *Gonzales v. Oregon*, 546 U.S. 243 (No. 04-623).

429. 546 U.S. 243 (2006).

430. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001).

431. 21 U.S.C. §§ 801-971 (2006). Ashcroft's ruling expressly reversed an earlier one issued by then-Attorney General Janet Reno. See Letter from Janet Reno, Attorney General, to Sen. Orrin Hatch, on Oregon's Death with Dignity Act (June 5, 1998), reprinted in S. REP. No. 105-372, at 9-10 n.10 (1999).

432. OR. REV. STAT. §§ 127.800-127.995 (2007). Oregon voters had twice approved the Death with Dignity Act. The citizens' initiative was first approved by a slim margin in the 1994 general election. An injunction delayed its implementation until late 1997. In the meantime, Oregon voters defeated a second ballot measure that would have repealed the Act. See OFFICE OF DISEASE PREVENTION & EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT 6 (2006), available at <http://egov.oregon.gov/DHS/ph/pas/docs/year8.pdf> (last visited Jan. 24, 2010).

433. OR. REV. STAT. §§ 127.800-127.995.

434. See 21 U.S.C. § 841(a)(1) (2006) (imposing criminal penalties for knowingly or intentionally dispensing controlled substances without a valid prescription).

435. *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *aff'd sub nom.* *Gonzales v. Oregon*, 546 U.S. 243 (2006).

had permissibly interpreted the Controlled Substances Act and the implementing regulations of the Department of Justice.<sup>436</sup>

A solid majority of the Court affirmed, barring enforcement of the interpretive ruling.<sup>437</sup> The opinion, authored by Justice Kennedy, rejected the Attorney General's argument that the ruling was entitled to *Auer* deference, reasoning that the regulation merely "parroted" the relevant *statutory* terms and therefore did not interpret ambiguous regulations.<sup>438</sup> Nor did *Chevron* deference apply because the ruling exceeded the Attorney General's limited rulemaking authority under the Controlled Substances Act.<sup>439</sup> In short, the ruling failed to pass muster under *Chevron* Step 1.5.<sup>440</sup>

Having concluded that both *Auer* and *Chevron* were inapplicable, the Court held that the ruling was entitled to "deference only in accordance with *Skidmore*."<sup>441</sup> Applying the *Skidmore* factors,<sup>442</sup> the Court concluded that the interpretive ruling was unpersuasive.<sup>443</sup> In particular, the majority expressed concern about the ruling's preemptive effect.<sup>444</sup>

Justice Scalia dissented, joined by Justice Thomas<sup>445</sup> and Chief Justice Roberts.<sup>446</sup> They rejected the majority's reasoning that *Auer* did not apply, arguing that no authority existed for the "parroting" exception.<sup>447</sup> The dissenters also reasoned that the Attorney General's interpretation was correct, even applying *de novo* review.<sup>448</sup> Finally, they took issue with the majority's conclusion that *Chevron* did not apply on the ground that the interpretive ruling exceeded the Attorney General's authority.<sup>449</sup>

*Gonzales v. Oregon* is notable for curtailing the reach of *Auer* and its predecessor, *Seminole Rock*. The Government argued that the interpretive ruling was entitled to substantial deference under *Auer* because it was simply an administrative interpretation of the agency's own ambiguous regulation,<sup>450</sup> and

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436. *Gonzales v. Oregon*, 543 U.S. 1145 (2005).

437. *Gonzales*, 546 U.S. at 275 (6–3 decision).

438. *Id.* at 257.

439. *See id.* at 258–68.

440. *See supra* notes 232–41 and accompanying text.

441. *Gonzales*, 546 U.S. at 268.

442. *Id.* at 268–69.

443. *Id.* at 269.

444. *Id.* at 274. Justice Kennedy disclaimed reliance on "clear statement requirements . . . or presumptions against pre-emption . . . to reach this commonsense conclusion." *Id.* Otherwise, the dispositive portion of the majority's holding suggests traditional *de novo* review consistent with 5 U.S.C. § 706. Ironically, however, the Court never once cited § 706 in its opinion.

445. Justice Thomas also filed his own dissent. *Id.* at 299 (Thomas, J., dissenting).

446. *Id.* at 275 (Scalia, J., dissenting). The fact that the opinion drew the Chief Justice's first dissenting vote is particularly significant because the Roberts Court was noted for unanimity during its initial term. *See* Bill Mears, *Consensus is Roberts' Rule of Order*, CNN.COM, June 2, 2006, <http://www.cnn.com/2006/LAW/06/02/roberts.rules/index.html>.

447. *Gonzales*, 546 U.S. at 275, 277–85.

448. *Id.* at 276, 285–92.

449. *Id.* at 276, 292–97.

450. *See* 21 C.F.R. § 1306.04 (2009) (requiring all prescriptions to be issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice").

the dissenters agreed.<sup>451</sup> The majority rejected that argument, refusing to extend *Auer* super-deference to a regulation that merely restated or “parroted” the disputed statutory terms.<sup>452</sup> The majority’s reasoning signaled its awareness that the lenient deference standard announced in *Auer* for informal interpretations of an agency’s own ambiguous regulations may be readily exploited and is difficult to reconcile with *Mead*’s more constrained deference doctrine.

### B. *Rapanos v. United States*

Shortly after Justice Alito was confirmed, the Court again addressed an issue of administrative interpretation in *Rapanos v. United States*.<sup>453</sup> A four-justice plurality rejected the agency’s regulation as inconsistent with the statute’s plain language.<sup>454</sup> Justice Kennedy concurred based on entirely different reasoning.<sup>455</sup> Justice Stevens authored a dissent, joined by three other justices, that would have deferred to the agency’s longstanding regulation.<sup>456</sup>

The dispute involved dredging permits issued by the U.S. Army Corps of Engineers (Corps). The question was whether the Corps had jurisdiction to require permits for wetlands adjacent to navigable waters.<sup>457</sup> The Clean Water Act<sup>458</sup> defines “navigable waters” to mean “waters of the United States.”<sup>459</sup> A longstanding Corps regulation had defined the term to include not only navigable waters in the traditional sense, but also tributaries and adjacent wetlands.<sup>460</sup> The Supreme Court granted certiorari to decide whether the petitioners’ wetlands qualified as “waters of the United States” under the Clean Water Act.<sup>461</sup> If so, the Corps had jurisdiction to regulate dredging on the petitioners’ property.

Justice Scalia, writing for the plurality, concluded that the Corps’ regulation

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451. *Gonzales*, 546 U.S. at 277.

452. *Id.* at 257 (citing 21 U.S.C. § 830(b)(3)(A)(ii) (2006) (“issued for a legitimate medical purpose”); 21 U.S.C. § 802(21) (2006) (“in the course of professional practice”). Note the anomaly that otherwise would have resulted had the majority not recognized the “parroting” exception. *Auer* declined to require an agency to apply canons of statutory construction to resolve regulatory ambiguities. See *supra* notes 279–81 and accompanying text. Had the *Gonzales* Court granted *Auer* deference, it would have simply deferred to the agency’s interpretation of ambiguous statutory terms, thus insulating the Court from its own interpretive responsibility under *Chevron* Step One. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

453. 547 U.S. 715 (2006). The case was argued on February 21, 2006, just three weeks after Justice Alito was confirmed.

454. See *id.* at 739 (Scalia, J., plurality opinion).

455. *Id.* at 759 (Kennedy, J., concurring).

456. *Id.* at 796–99 (Stevens, J., dissenting). Chief Justice Roberts added a separate concurring opinion, *id.* at 757 (Roberts, C.J., concurring), and Justice Breyer added a separate dissent, *id.* at 811 (Breyer, J., dissenting).

457. *Id.* at 764 (Kennedy, J., concurring).

458. 33 U.S.C. §§ 1251–1387 (2006).

459. *Id.* § 1362(7) (defining “navigable waters”).

460. 33 C.F.R. §§ 328.3(a)(1), (5), (7) (2008); see also *Rapanos*, 547 U.S. at 724.

461. *Rapanos*, 547 U.S. at 730.

was impermissibly broad.<sup>462</sup> In reaching that conclusion, he focused on the isolated term “waters.”<sup>463</sup> While not ambiguous standing alone, the Court’s precedents had acknowledged the “inherent ambiguity in drawing the boundaries of any ‘waters’”<sup>464</sup> because the Corps must decide at what point “water ends and land begins.”<sup>465</sup>

After consulting a dictionary, Justice Scalia concluded that the only “plausible” interpretation limited the term to “relatively permanent, standing or continuously flowing bodies of water . . . that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes[,]’”<sup>466</sup> not including “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”<sup>467</sup> Although Justice Scalia expressly concluded that the Corps’ interpretation was impermissible (*Chevron* Step Two), the plurality’s reasoning suggested instead that the regulations failed Step One because Congress had *unambiguously* limited the Corps’ jurisdiction to “waters” in the narrow sense.<sup>468</sup>

Justice Kennedy concurred based on entirely different reasoning. He primarily relied on two Supreme Court precedents interpreting the same statutory language. In the first, the Court had unanimously upheld the Corps’ regulation interpreting “waters of the United States” to include adjacent wetlands.<sup>469</sup> In the second, the Court had held that a pond located in a former sand and gravel pit, neither adjacent nor connected to any navigable water, was beyond the Corps’ jurisdiction.<sup>470</sup> Synthesizing these precedents, Kennedy concluded that “waters of the United States” require a “significant nexus” with navigable water to fall within the Corps’ jurisdiction.<sup>471</sup> Rejecting the plurality’s interpretation as too narrow,<sup>472</sup> Justice Kennedy nevertheless concluded that “[a]bsent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”<sup>473</sup>

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer.<sup>474</sup> Applying *Chevron*, they concluded that the regulation was “a

462. *Id.* at 737.

463. *Id.* at 740–41.

464. *Id.* at 740 (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985)).

465. *Id.* (quoting *Riverside Bayview Homes*, 474 U.S. at 132).

466. *Id.* at 739 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 2882 (2d ed. 1954)).

467. *Id.*

468. *See id.* at 725. Once again, Justice Scalia conflated the *Chevron* steps by concluding that the Corps’ interpretation was not *permissible*. If, as the plurality reasoned, the plain meaning of “waters” precluded any other interpretation, it was unnecessary to decide whether the Corps’ interpretation was *permissible*.

469. *Riverside Bayview Homes*, 474 U.S. at 135.

470. *Solid Waste Agency of N. Cook County v. Army Corps of Eng’rs*, 531 U.S. 159, 171–74 (2001).

471. *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring).

472. *Id.* at 776–77.

473. *Id.* at 782.

474. *Id.* at 787 (Stevens, J., dissenting). All four *Rapanos* dissenters had joined the majority opinion in *Gonzales v. Oregon*, while three justices in the *Rapanos* plurality had joined the former

quintessential example of the Executive's reasonable interpretation of a statutory provision."<sup>475</sup> The dissent criticized the plurality's "revisionist reading"<sup>476</sup> as inconsistent with the Court's unanimous precedent holding the identical regulation permissible.<sup>477</sup>

*Rapanos* illustrates the complexity and confusion that characterize the Court's evolving deference jurisprudence. The deeply divided Court took three distinctly different approaches in interpreting the Corps' regulatory jurisdiction under the Clean Water Act. Justice Scalia adopted a strict textualist approach, reasoning that unambiguous statutory language precluded the Corps' expansive interpretation.<sup>478</sup> The dissenters reached exactly the opposite conclusion, relying on post-*Chevron* deference jurisprudence to conclude that the agency's interpretation was reasonable.<sup>479</sup> Finally, Justice Kennedy's concurring opinion rejected both the plurality's narrow interpretation and the dissent's highly deferential one, instead adopting a strictly common law analysis based on factually analogous precedents.<sup>480</sup>

One might wonder how the courts below addressed the case on remand without any clear mandate from a majority.<sup>481</sup> Moreover, when the Supreme Court itself is so seriously divided on how to apply its administrative deference doctrine, it should be no surprise when district and circuit courts reach different conclusions on the same or similar questions.<sup>482</sup>

### C. *Long Island Care at Home, Ltd. v. Coke*

One year after its badly divided decision in *Rapanos*, the Court reached a unanimous decision in *Long Island Care at Home, Ltd. v. Coke*.<sup>483</sup> The case involved a Department of Labor regulation interpreting a provision in the FLSA pertaining to domestic companion services. Justice Breyer, writing for the

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dissent. The two cases illustrate why the Court's deference decisions are so inconsistent—a shifting majority (or plurality) means that the Court's administrative deference decisions are virtually impossible to reconcile.

475. *Id.* at 788 (Stevens, J., dissenting).

476. *Id.* at 793.

477. *Id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)).

478. *See id.* at 733–34, 737–38 (Scalia, J., plurality opinion). Justice Scalia is well known as the Court's most strident textualist. Paul Killebrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1896 (2007). "Textualism" is a plain-language methodology for interpreting statutes, commonly associated with Justice Scalia and Judge Easterbrook of the Seventh Circuit. *Id.*

479. *Rapanos*, 547 U.S. at 788, 796–97 (Stevens, J., dissenting).

480. *Id.* at 759 (Kennedy, J., concurring). Consistent with the theme of his concurring opinion, Justice Kennedy has been called by one scholar a "judicial supremacist" and "the Court's most vocal defender of judicial power." Jeffrey Rosen, *The Roberts Court & Executive Power*, 35 PEPP. L. REV. 503, 508 (2008). By relying on the Court's own precedents to synthesize a required "nexus" between wetlands and other waters, Justice Kennedy subjugated the Court's common law deference regimes to classic analogous reasoning.

481. The uncertainty in the wake of *Rapanos* has complicated enforcement of the Clean Water Act. *See, e.g., EPA Staff Describe Drain on Resources of Enforcing Clean Water Act After Rapanos*, 77 U.S.L.W. 2684, 2684–85 (May 12, 2009).

482. For one recent example of a badly split three-judge panel, see *Creekstone Farms Premium Beef, L.L.C. v. Dep't of Agric.*, 539 F.3d 492 (D.C. Cir. 2008) (2–1 opinion).

483. 551 U.S. 158, 161 (2007).

Court, addressed a number of interrelated deference questions involving an unambiguous statute, conflicting regulations, and an advisory memorandum.

Evelyn Coke, a former employee of Long Island Care at Home (Long Island Care), had provided domestic companion services to its clients.<sup>484</sup> She sued for minimum wages and overtime pay.<sup>485</sup> The FLSA exempts “any employee employed in *domestic service employment* to provide companionship services for individuals who . . . are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).”<sup>486</sup> The Department’s “General Regulations,” however, define “domestic service employment” as “services of a household nature performed by an employee in or about a *private home . . . of the person by whom he or she is employed.*”<sup>487</sup> Coke argued that this regulation controlled. Long Island Care, however, cited an “Interpretation,” which specifically exempts domestic companion workers “who are employed by an employer or agency *other than the family or household using their services . . .*”<sup>488</sup> The issue was whether the “domestic service employment” exemption applied to domestic companion workers employed by third-party agencies like Long Island Care.<sup>489</sup>

The Court first noted that the FLSA specifically authorized the Secretary of Labor to issue implementing rules and regulations.<sup>490</sup> Next, the Court acknowledged the agency’s expertise in employment matters and that the dispute involved an “interstitial”<sup>491</sup> issue that Congress had delegated to the agency.<sup>492</sup> Further, the agency had issued its interpretive regulations in a notice-and-comment proceeding.<sup>493</sup> Citing the Department’s broad “definitional authority,” the Court held it was for the agency to answer such questions.<sup>494</sup>

Acknowledging that the agency’s regulations were inconsistent,<sup>495</sup> the Court concluded that the “Interpretation” controlled, in part because it was

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484. *Id.* at 164.

485. *Id.*

486. 29 U.S.C. § 213(a)(15) (2006) (emphasis added), *quoted in Long Island Care at Home*, 551 U.S. at 161–62.

487. 29 C.F.R. § 552.3 (2009) (emphasis added), *quoted in Long Island Care at Home*, 551 U.S. at 163.

488. 29 C.F.R. § 552.109(a) (2009) (emphasis added), *quoted in Long Island Care at Home*, 551 U.S. at 163.

489. *Long Island Care at Home*, 551 U.S. at 164. The Supreme Court had previously vacated the Second Circuit’s decision and remanded for consideration of the Department of Labor’s Advisory Memorandum, issued while the litigation was pending. *Id.*; see *Long Island Care at Home, Ltd. v. Coke*, 546 U.S. 1147 (2006). On remand, the Second Circuit was not persuaded by the Advisory Memorandum and once again held the “Interpretation” unenforceable. See *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48, 52 (2d Cir. 2006), *rev’d*, 551 U.S. 158 (2007). Thereafter, the Supreme Court granted certiorari. *Long Island Care at Home, Ltd. v. Coke*, 549 U.S. 1105 (2007).

490. *Long Island Care at Home*, 551 U.S. at 165.

491. The Court explained in passing that an “interstitial” matter is “a portion of a broader definition.” *Id.*

492. *Id.*

493. *Id.*

494. *Id.* at 168. This is a classic application of *Chevron* Step 1.5. See *supra* notes 232–41 and accompanying text.

495. *Long Island Care at Home*, 551 U.S. at 168–69.

more specific than the conflicting “General Regulation” – its sole purpose was to clarify that the exemption applied to domestic companion employees of third-party agencies.<sup>496</sup> Next, the Court addressed the Secretary’s Advisory Memorandum issued in response to the Coke litigation. Analogizing it to a legal brief, the Court applied *Auer* in concluding that the agency’s interpretation controlled unless plainly erroneous or inconsistent with the regulation.<sup>497</sup>

Coke urged that the “Interpretation” was entitled only to *Skidmore* deference to the extent persuasive.<sup>498</sup> The Court disagreed, emphasizing that it had been the product of a notice-and-comment proceeding, even though not required for interpretive rules.<sup>499</sup> Further, the challenged regulation had been treated as binding for some thirty years<sup>500</sup> and was thus longstanding and consistently applied, both hallmarks of judicial deference.

Finally, the Court observed that “the ultimate question” was whether Congress would have expected a reviewing court to treat the agency action as within its delegated authority.<sup>501</sup>

Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency’s determination.<sup>502</sup>

In short, the Court deferred to the Secretary’s Advisory Memorandum—even though it had been prepared in anticipation of litigation—and held that the agency’s interpretation of its inconsistent regulations was controlling.<sup>503</sup>

In the wake of *Rapanos*, it was as if the Court took pains to demonstrate that it continued to embrace *Chevron* and *Auer*, as well as the more flexible *Skidmore* factors revived by *Mead*. The unanimous decision relied on a merged deference doctrine incorporating *Chevron* criteria as well as *Mead/Skidmore* factors.<sup>504</sup> Acknowledging *Skidmore*’s applicability to interpretive rules, the Court

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496. *Id.* at 170.

497. *Id.* at 171. Note that Justice Breyer did not explicitly refer to the regulations as “ambiguous,” an important criterion for *Auer* deference. Tacitly, the Court reasoned that it was a sufficient ambiguity that there were two conflicting agency regulations. See Transcript of Oral Argument at 35–36, *Long Island Care at Home*, 551 U.S. 158 (No. 06–593) (transcribing colloquy between Justice Scalia and counsel for the respondent on whether contradictory regulations amount to ambiguity).

498. *Long Island Care at Home*, 551 U.S. at 171–72.

499. *Id.* at 173 (citing 5 U.S.C. § 553(b)(A) (2006)).

500. *Id.*

501. *Id.* at 173.

502. *Id.* at 173–74 (citing *United States v. Mead Corp.*, 533 U.S. 218, 229–33 (2001)).

503. *Id.* at 171, 174.

504. *Id.* at 165 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) and *Mead*, 533 U.S. at 227); *id.* at 173–74 (citing *Mead*, 533 U.S. at 229–33) (enumerating “factors” favoring judicial deference).

nevertheless declined to apply it, in part because the disputed rule had been issued in a notice-and-comment proceeding.<sup>505</sup> While not necessary to reach the Court's result, Justice Breyer also deferred to the Secretary's Advisory Memorandum because it interpreted the agency's own regulations and thus warranted *Auer* deference.<sup>506</sup>

The Court's reasoning in *Long Island Care at Home* implicitly suggested that *inconsistent* agency regulations amount to *regulatory* ambiguity that the agency is best equipped to resolve. However, its reasoning disregarded the unambiguous language of the statute itself, which clearly exempts "any employee employed in domestic service employment to provide companionship services . . ." <sup>507</sup> While neither regulation directly contradicted the statutory language, the more specific regulation, to which the Court ultimately deferred, was more consistent with the statute's plain language than the definitional regulation on which Coke relied.

But the Court could have resolved the dispute and reached the same result at *Chevron* Step One simply by interpreting the relevant *statutory* language. Instead, it relied on strained reasoning to declare an "ambiguity" based on inconsistent regulations, each of which was unambiguous standing alone. As we will see next, the implicit reasoning in *Long Island Care at Home* would soon become the basis of a more far-reaching decision, which declared an ambiguity based on two apparently inconsistent *statutes* that the majority refused to reconcile.<sup>508</sup>

#### D. *National Ass'n of Home Builders v. Defenders of Wildlife*

The apparent unanimity of the Roberts Court on issues of administrative deference would not last long. Just two weeks after issuing *Long Island Care at Home*, a deeply divided Court decided *National Ass'n of Home Builders v. Defenders of Wildlife*,<sup>509</sup> which addressed an apparent conflict between the Clean Water Act and the Endangered Species Act (ESA).<sup>510</sup> Justice Alito authored the majority opinion, joined by Chief Justice Roberts as well as Justices Scalia and Thomas.<sup>511</sup> Justice Stevens wrote the dissent, joined by Justices Souter, Ginsburg, and Breyer.<sup>512</sup> Justice Kennedy, once again the swing vote, joined the conservative majority to decide the outcome.<sup>513</sup>

The dispute involved the EPA's transfer of authority to the State of Arizona

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505. *Id.* at 173. The Court once again signaled its preference for notice-and-comment procedures.

506. *Id.* at 171 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

507. *See id.* at 162 (emphasis added) (quoting Fair Labor Standards Act of 1938 § 13, 29 U.S.C. § 213(a)(15) (2006)).

508. *See, e.g., Frost v. Wenie*, 157 U.S. 46, 58 (1895) ("[W]here two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both.").

509. 551 U.S. 644 (2007) (5–4 opinion).

510. *Id.* at 649.

511. *Id.* at 647.

512. *Id.* at 673 (Stevens, J., dissenting).

513. *See id.* at 647 (majority opinion).



to issue permits under the National Pollution Discharge Elimination System (NPDES),<sup>514</sup> a cooperative regulatory process designed to mitigate water pollution, as required by the Clean Water Act.<sup>515</sup> The EPA administers the program, but a state may seek transfer of permit authority with continuing EPA oversight.<sup>516</sup> The Clean Water Act specifies nine criteria for transfer of EPA's permit authority, all relating to whether state law gives state officials necessary oversight authority.<sup>517</sup> If all nine criteria are met, the EPA must approve the requested transfer.<sup>518</sup>

In apparent conflict is section 7(a)(2) of the ESA,<sup>519</sup> which requires federal agencies, before taking any proposed action, to consult with Fish and Wildlife Services (FWS) and the National Marine Fisheries Service (NMFS) to avoid jeopardizing endangered species.<sup>520</sup> As the statute requires, the EPA had consulted with FWS, which initially expressed concern about the potentially indirect adverse impact if the transfer should result in the issuance of more discharge permits and therefore more development.<sup>521</sup> Ultimately, however, FWS concluded that the EPA's continuing oversight would sufficiently protect endangered species.<sup>522</sup>

Defenders of Wildlife and other environmental groups sought judicial review.<sup>523</sup> The Ninth Circuit vacated the transfer, reasoning that section 7(a)(2) in effect added a tenth prerequisite to the nine enumerated in the Clean Water Act for transfer of permit authority<sup>524</sup> and that the EPA's transfer decision was arbitrary and capricious.<sup>525</sup>

The Supreme Court reversed.<sup>526</sup> Quoting directly from *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,<sup>527</sup> Justice Alito, writing for the majority, described arbitrary and capricious review as deferential in nature.<sup>528</sup> That the relevant federal agencies had changed their minds during the consultation process was irrelevant as long as they had followed proper procedures.<sup>529</sup> Turning to the merits, the majority

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514. *Id.* at 649–50.

515. *Id.* at 650.

516. *Id.* (citing 33 U.S.C. §§ 1251(b), 1342 (2006)).

517. *Id.* at 650–51 & n.2 (citing 33 U.S.C. § 1342(b)(1)–(9)) (listing the nine prerequisites for the transfer of permit authority to a state).

518. *Id.* at 651.

519. See Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536 (2006).

520. *Nat'l Ass'n of Home Builders*, 551 U.S. at 649, 652 (quoting ESA § 7(a)(2)).

521. *Id.* at 653.

522. *Id.* at 654.

523. *Id.* at 655. The statute allows private parties to petition for judicial review of EPA determinations concerning state permit programs. *Id.* (citing 33 U.S.C. § 1369(b)(1)(D) (2006)).

524. *Id.* at 656 (citing *Defenders of Wildlife v. EPA*, 420 F.3d 946, 965 (9th Cir. 2005)).

525. *Id.* at 655 (citing *Defenders of Wildlife v. EPA*, 420 F.3d at 959); see also *id.* at 656–57.

526. *Id.* at 657.

527. 463 U.S. 29 (1983); see *supra* notes 186–87 and accompanying text (discussing *State Farm*).

528. *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

529. *Id.* at 659 (“[F]ederal courts ordinarily are empowered to review only an agency's final action, see 5 U.S.C. § 704 [(2006)], and the fact that a preliminary determination by a local agency representative is later overruled at a higher level within the agency does not render the decision-

acknowledged that it was required to “mediate a clash of seemingly categorical—and, at first glance, irreconcilable—legislative commands.”<sup>530</sup> But Justice Alito worried that a broad reading of section 7(a)(2) would have the effect of partially trumping every other federal statute calling for agency action, contrary to the Court’s longstanding “presumption against implied repeals.”<sup>531</sup>

Allegedly to resolve the “tension” between the statutes, FWS and the NMFS had issued a joint regulation after notice-and-comment proceedings.<sup>532</sup> The regulation simply stated that section 7 of the ESA applied to discretionary federal actions.<sup>533</sup> The questions on certiorari were whether the regulation lawfully interpreted section 7 and, if so, whether the EPA acted lawfully in transferring its permit authority to the State of Arizona.

Reciting *Chevron’s* two-step test,<sup>534</sup> Justice Alito hypothesized an ambiguity in the ESA that its language simply does not illuminate. Recognizing implicitly that *Chevron* deference does not apply in the absence of an ambiguity,<sup>535</sup> Justice Alito recited a traditional tool of statutory construction: “[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>536</sup> From there, Justice Alito read the otherwise unambiguous, mandatory language of section 7(a)(2) not just in the context of the ESA, but rather “against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed . . . broadly . . .”<sup>537</sup> In other words, the majority considered the ESA’s interpretive context to be virtually unlimited.

Having fabricated a statutory ambiguity out of whole cloth, Justice Alito next deferred to the implementing agencies’ “expert interpretation” that appeared to confine the reach of section 7(a)(2) to discretionary agency actions, thus “harmoniz[ing] the statutes.”<sup>538</sup> Justice Alito concluded that the agencies’ interpretation was “reasonable in light of the statute’s text and the overall statutory scheme . . .”<sup>539</sup> Finally, the majority invoked *Auer* super-deference, citing “formal letter[s]” FWS and NMFS had submitted, which concluded that EPA transfers of NPDES permit authority were not the kind of discretionary actions the regulation described.<sup>540</sup> Without identifying an ambiguity in the regulation, Justice Alito simply declared the agencies’ interpretation entitled to

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making process arbitrary and capricious.”).

530. *Id.* at 661.

531. *Id.* at 663–64.

532. *Id.* at 664–65 (citing 50 C.F.R. § 402.03 (2008)).

533. 50 C.F.R. § 402.03 (“Section 7 [of the ESA] and the requirements of [50 C.F.R. pt. 402] apply to all actions in which there is discretionary Federal involvement or control.”), quoted in *Nat’l Ass’n of Home Builders*, 551 U.S. at 665.

534. *Nat’l Ass’n of Home Builders*, 551 U.S. at 665 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

535. *See id.*

536. *Id.* at 666 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.* at 672.

*Auer* deference.<sup>541</sup>

From there, the majority reasoned that because the *regulation* limited the scope of ESA section 7 to *discretionary* federal actions, its language did not conflict with mandatory statutes, including the Clean Water Act's provisions requiring the transfer of permit authority once the state meets the nine enumerated criteria.<sup>542</sup> The majority thus avoided reconciling the two apparently conflicting statutes by narrowly construing the agencies' interpretive regulation to undercut the mandatory nature of the ESA.

Justice Stevens, writing for the dissenters, recognized that the Court had the duty to reconcile conflicting statutory mandates if possible.<sup>543</sup> He aptly noted that the majority had failed to do so, instead interpreting the regulation to restrict the application of section 7(a)(2) *only* to discretionary actions, thus excluding mandatory ones.<sup>544</sup> Justice Stevens declared that the majority's interpretation contradicted not only the text and history of the regulation, but also the ESA, the very statute it purported to interpret.<sup>545</sup>

The dissent relied heavily on *TVA v. Hill*,<sup>546</sup> better known as the "snail darter case,"<sup>547</sup> in which the Court itself, nearly thirty years earlier, had held that the language of ESA section 7 could not have been more plain:<sup>548</sup> it trumps *all* other federal action.<sup>549</sup> Justice Stevens concluded that the majority had erroneously interpreted the wildlife agencies' regulation to "permit[] a wholesale limitation on the reach of the ESA."<sup>550</sup> Indeed, "both the text of the ESA and [the Supreme Court's] opinion in *Hill* compel the contrary determination that Congress intended the ESA to apply to 'all federal agencies' and to all 'actions authorized, funded, or carried out by them.'"<sup>551</sup>

Furthermore, the regulatory history squarely supports the dissenters' conclusion that the regulation was never intended to limit section 7 to *only* discretionary agency actions, but simply to clarify that section 7 reaches *both* discretionary *and* mandatory actions.<sup>552</sup> Read in its historical context, the regulation simply clarified that ESA section 7 applies to *all* federal agency actions, whether mandatory or discretionary.<sup>553</sup> Finally, the dissent offered alternative ways to reconcile the conflicting federal statutes without limiting

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541. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

542. *Id.* at 665, 673.

543. *Id.* at 673 (Stevens, J., dissenting).

544. *Id.* at 674.

545. *Id.*

546. 437 U.S. 153 (1978).

547. *See Nat'l Ass'n of Home Builders*, 551 U.S. at 674.

548. *Id.* at 677 (quoting *Hill*, 437 U.S. at 173).

549. *Id.* at 678 (citing *Hill*, 437 U.S. at 185).

550. *Id.* at 679.

551. *Id.* at 678 (quoting *Hill*, 437 U.S. at 173).

552. *See id.* at 680–83.

553. *Id.* at 679. The dissent correctly noted that this interpretation makes more sense given the longstanding ambiguity posed by the words "shall" and "may." *Id.* at 691–92. Indeed, federal statutes sometimes use the word "shall" in a manner that allows room for discretion. *Id.* at 691 & n.12.

ESA section 7.<sup>554</sup> In fact, the consultation process set out in section 7 itself provides a method for giving effect to both statutes.<sup>555</sup>

In effect, the majority opinion in *National Ass'n of Home Builders* turned the *Chevron* doctrine on its head. By fabricating an ambiguity to bypass *Chevron* Step One, Justice Alito ignored the requirement that an agency's authority to interpret a statute is constrained by the extent of the statutory ambiguity.<sup>556</sup> Further, by construing the regulation to limit the ESA's reach to discretionary agency actions, the majority essentially eviscerated the mandatory consultation requirements of the ESA and avoided its judicial responsibility to resolve the apparent statutory conflict if at all possible.<sup>557</sup>

The majority opinion reveals the fundamental flaw in *Chevron*: ambiguity is in the eye of the beholder.<sup>558</sup> In this case, the plain language of section 7(a)(2), considered in its proper context—the Act of which it is a part—is unambiguous.<sup>559</sup> Yet the majority *invented* an ambiguity simply by declaring that the language of section 7(a)(2) contradicts a host of other mandatory agency directives.<sup>560</sup> Justice Alito, for the majority, reinterpreted a regulation adopted thirteen years after the ESA's enactment to strikingly curtail the effect of section 7(a)(2).<sup>561</sup> Yet a direct comparison of the regulation's language with the statutory provision it purportedly interprets yields the undeniable conclusion that the *statute* is unambiguous and thus “beyond the *Chevron* pale.”<sup>562</sup> Declaring an agency's strained interpretation of an unambiguous

554. *Id.* at 684–90.

555. *Id.* at 684–86.

556. See *supra* notes 226–27 and accompanying text; see also, e.g., *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996).

We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess *whatever degree of discretion the ambiguity allows*.

*Id.* (emphasis added) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)). Recently, Justice Scalia restated the principle in *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009) (“The [agency] can give authoritative meaning to the [ambiguous] statute within the bounds of that uncertainty.”).

557. See *Nat'l Ass'n of Home Builders*, 551 U.S. at 673–74.

558. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting); cf. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985) (“Yet plain meaning, like beauty, is sometimes in the eye of the beholder.”). As the District of Columbia Court of Appeals once observed, “[S]ome will find ambiguity even in a ‘No Smoking’ sign . . . .” *UAW v. Gen. Dynamics Land Sys. Div.*, 815 F.2d 1570, 1575 (D.C. Cir. 1993).

559. Indeed, the Court had so held in 1978. *TVA v. Hill*, 437 U.S. 153, 173, 194 (1978).

560. See *Nat'l Ass'n of Home Builders*, 551 U.S. at 666.

561. *Id.* at 666–69 (relying on 50 C.F.R. § 402.03 (2009)).

562. *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). The decision also appears inconsistent with the Court's own precedent in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005). As a postscript, the Departments of Commerce and the Interior published a final rule on May 4, 2009, withdrawing a December 16, 2008 rule issued by the Bush Administration, apparently in the wake of *Nat'l Ass'n of Home Builders*. See *Bush Rule on Consultations Withdrawn as Agencies Consider Further Changes*, 77 U.S.L.W. 2684, 2684 (May 12, 2009). The last-minute Bush regulation eased even further federal agencies' consulting obligations under

statute reasonable, even by a majority of the Supreme Court, does not make it so.

### E. *Federal Express Corp. v. Holowecki*

In February 2008, the Court decided whether an EEOC complainant had timely filed a “charge” of age discrimination in *Federal Express Corp. v. Holowecki*.<sup>563</sup> *Holowecki* involved a narrow issue of statutory interpretation: whether an EEOC complainant had timely filed a “charge” at least sixty days before filing suit.<sup>564</sup> The term “charge” was not defined in the ADEA.<sup>565</sup> Although the EEOC had defined the term in various ways, none were conclusive in this case.<sup>566</sup>

Holowecki had filed a completed “Intake Questionnaire” with the EEOC and an affidavit supporting her allegations.<sup>567</sup> Federal Express argued that her questionnaire did not qualify as a “charge” until the EEOC acted upon it.<sup>568</sup> The Government argued that the questionnaire could qualify as a charge, but only if it expressed the filer’s intent to have the EEOC take action.<sup>569</sup> Holowecki took the position that any completed questionnaire qualified as a “charge” for purposes of tolling the sixty-day waiting period for filing suit.<sup>570</sup>

A majority of the Court concluded that the contents of the questionnaire and affidavit, read together, were sufficient to qualify as a “charge” for purposes of the ADEA.<sup>571</sup> In reaching its conclusion, the majority acknowledged, at least implicitly, that the statutory term “charge” was ambiguous<sup>572</sup> and that, even with the aid of EEOC regulations, its meaning was unclear.<sup>573</sup> Under these circumstances, the majority initially invoked *Auer*,<sup>574</sup> deferring to the interpretation suggested by the Government’s *amicus* brief, the EEOC’s Compliance Manual, and internal directives disseminated to field offices over several years.<sup>575</sup>

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the ESA. See *id.* (citing *Endangered Species: Interior Finalizes Rule Limiting Consultation on Endangered Species for Federal Projects*, 77 U.S.L.W. 2361 (Dec. 16, 2008)).

563. 128 S. Ct. 1147 (2008) (7–2 opinion).

564. *Id.* at 1153 (citing 29 U.S.C. § 626(d) (2006)).

565. *Id.* at 1152.

566. *Id.* at 1154.

567. *Id.*

568. *Id.*

569. *Id.*

570. See *id.*

571. *Id.* at 1160.

572. See *id.* at 1154 (“The agency has statutory authority to issue regulations, see [29 U.S.C. § 628 (2006)]; and when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations.”) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984)).

573. *Id.*

574. *Id.* at 1155 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

575. *Id.*; see also *id.* at 1159 (“[T]he agency acted within its authority in formulating the rule that a filing is deemed a charge if the document reasonably can be construed to request agency action and appropriate relief on the employee’s behalf . . .”).

Then Justice Kennedy, writing for the majority, sidestepped. Observing that “charge” was a *statutory* term and not a *regulatory* one, he acknowledged that the EEOC regulations had simply “repeat[ed] language from the underlying statute.”<sup>576</sup> Citing *Gonzales v. Oregon*, the majority conceded that the agency’s informal interpretations of its own regulations therefore were not entitled to *Auer* deference.<sup>577</sup> Nevertheless, the majority concluded that the EEOC’s policy statements interpreting both the statute and the regulation warranted respect “under the less deferential *Skidmore* standard.”<sup>578</sup>

Justice Kennedy noted that one *Skidmore* factor was the consistency of the agency’s interpretation.<sup>579</sup> While the EEOC had been “uneven” in implementing its policy, the agency’s interpretation nevertheless warranted some deference.<sup>580</sup> The Court evaluated the agency’s policy analysis and concluded that it offered a “reasonable alternative” that was consistent with the relevant ADEA provisions.<sup>581</sup> Because “[n]o clearer alternatives are within [the Court’s] authority or expertise to adopt,” the majority held that the EEOC’s interpretation warranted deference under the *Skidmore* framework.<sup>582</sup> The Court then applied the agency’s interpretation of its own ambiguous regulations to the facts, concluding that the claimant’s completed questionnaire and accompanying affidavit provided sufficient information to constitute a “charge.”<sup>583</sup>

Justices Scalia and Thomas dissented.<sup>584</sup> After consulting not one but *three* dictionaries,<sup>585</sup> the dissenters declared that a document is not a “charge” if it “merely describes the alleged discrimination and requests the EEOC’s assistance, but does not objectively manifest an intent to initiate enforcement proceedings . . . .”<sup>586</sup> In Justice Thomas’ view, “charge” is commonly understood to refer to a request to investigate, which is generally kept

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576. *Id.* at 1156 (citing *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)).

577. *See id.* (citing *Gonzales*, 546 U.S. at 257; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

578. *Id.* (citations omitted).

579. *Id.*

580. *See id.*

581. *Id.* at 1157.

582. *Id.* Interestingly, the majority went on to conclude, “We find no reason in this case to depart from our usual rule: Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives.” *Id.* at 1158. The reference to “reasonable alternatives” suggests once again that the agency’s discretion is constrained by the *scope* of the statutory ambiguity.

583. *Id.* at 1159–61.

584. *Id.* at 1161 (Thomas, J., dissenting).

585. *Id.* (citing AMERICAN HERITAGE DICTIONARY 312 (4th ed. 2000); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 377 (1993); BLACK’S LAW DICTIONARY 248 (8th ed. 2004)). Justice Scalia often cites to a veritable library of dictionaries in his textual approach to statutory interpretation. For a colorful and well-documented history of one oft-cited dictionary, see LYNDIA MUGGLESTONE, LOST FOR WORDS: THE HIDDEN HISTORY OF THE OXFORD ENGLISH DICTIONARY (2005). Like the Roberts Court’s concept of ambiguity, “the English dictionary was to emerge as a fluid rather than static construct, with the capacity to change and evolve as circumstances might demand.” *Id.* at 209.

586. *Holowecki*, 128 S. Ct. at 1162 (Thomas, J., dissenting).

confidential from the employer.<sup>587</sup> He agreed with the agency that, at minimum, a “charge” must be in writing and must objectively reflect the complainant’s intent for the EEOC to initiate enforcement.<sup>588</sup> However, Justice Thomas took issue with the majority’s endorsement of a standard that allowed the agency to define “charge” to mean “whatever the [EEOC] says it is.”<sup>589</sup> He criticized the majority’s definition as “broader than the ordinary meaning of the term ‘charge,’ and . . . so malleable that it effectively absolves the EEOC of its obligation to administer the ADEA according to discernible standards . . . .”<sup>590</sup>

Even under the EEOC’s interpretation, the dissenters disagreed that the complainant’s questionnaire and affidavit qualified as a “charge.”<sup>591</sup> They asserted that any interpretation construing Holowecki’s documents as exhibiting an intent to initiate enforcement proceedings was “an unreasonable construction of the statutory term ‘charge’ and unworthy of deference.”<sup>592</sup> The dissent chastised the majority for its “utterly vague criteria”<sup>593</sup> that would allow the EEOC to evade the statutory requirement to notify the employer, and thereby encourage conciliation.<sup>594</sup>

*Holowecki* is notable for invoking each of the deference doctrines, suggesting that a majority of the Roberts Court may be attempting to integrate its administrative deference jurisprudence. However, the majority failed to explicitly recognize and resolve the conflict between *Auer* and *Skidmore*, instead dancing once more on the slippery edge of the “parroting” exception.<sup>595</sup>

#### F. *Negusie v. Holder*

The Roberts Court revisited its evolving administrative deference framework in *Negusie v. Holder*,<sup>596</sup> an asylum case invoking the Immigration and Nationality Act (INA). While the case was an appeal from an adjudication rather than a regulatory challenge,<sup>597</sup> the opinion is worthy of note because it addressed a claim of ambiguity-by-silence that the Court declined to resolve on appeal without remanding for specific guidance from the agency.

*Negusie*, a dual citizen of Ethiopia and Eritrea,<sup>598</sup> sought asylum after

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587. *Id.*

588. *Id.* (citing Brief for United States as Amici Curiae Supporting Respondents, at 14, *Holowecki*, 128 S. Ct. 1147 (No. 06-1322), 2007 WL 2808461).

589. *Id.* at 1161.

590. *Id.* This language implicitly hints that the majority’s interpretation of the statute and the regulation amounted to a delegation of authority to the EEOC without “intelligible principles,” contrary to the nondelegation doctrine. See *supra* notes 70–72 and accompanying text.

591. *Holowecki*, 128 S. Ct. at 1163–68.

592. *Id.* at 1162–63 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984)).

593. *Id.* at 1168.

594. *Id.*

595. See *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (recognizing exception to *Auer* deference when regulations “parrot” ambiguous statutory terms).

596. 129 S. Ct. 1159 (2009).

597. *Id.* at 1162 (Board of Immigration Appeals decision).

598. *Id.*

stowing away to the United States.<sup>599</sup> The issue was whether the INA barred his eligibility for refugee status because he had involuntarily participated in persecuting Eritrean prisoners.<sup>600</sup> The Eritrean government had forced him to work as a prison guard after imprisoning and beating him for refusing to fight against Ethiopia.<sup>601</sup> The narrow question was whether Negusie's involuntary participation in persecution barred him from refugee status under the INA.<sup>602</sup>

The INA's "persecutor bar" applies to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>603</sup> Because the statute did not explicitly restrict the exclusion to voluntary persecutors, the issue was whether its silence on the precise issue rendered it ambiguous as applied to Negusie.<sup>604</sup>

The Bureau of Immigration Appeals (BIA) and the Fifth Circuit both agreed with the immigration judge that Negusie could not qualify for refugee status under the persecutor bar.<sup>605</sup> In reaching that conclusion, they relied on *Fedorenko v. United States*,<sup>606</sup> a Supreme Court asylum case that had similarly interpreted an analogous provision of the Displaced Persons Act of 1948.<sup>607</sup> On certiorari, the Supreme Court held that the lower tribunals had misread *Fedorenko* to mean that Negusie's motives for his conduct were irrelevant.<sup>608</sup> The majority remanded with instructions for the BIA to reconsider the issue without constraint by *Fedorenko*.<sup>609</sup>

Writing for the majority, Justice Kennedy reasoned that the statute's silence was inconclusive and that congressional intent was otherwise unclear.<sup>610</sup> The parties disagreed about whether the undisputed fact of coercion was relevant, and because there was "substance to both contentions," the majority concluded that "the statute has an ambiguity that the agency should address in the first instance."<sup>611</sup> The case was remanded to allow the BIA to consider the question anew in light of the Court's holding that *Fedorenko* did not control the outcome.<sup>612</sup>

While concluding that the INA was ambiguous by omission, the majority failed to apply "traditional tools of statutory interpretation" to resolve the

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599. *Id.* at 1163.

600. *Id.*

601. *Id.* at 1162.

602. *Id.* at 1164.

603. *Id.* at 1162 (quoting 8 U.S.C. § 1101(a)(42) (2006)). The language is known in immigration law as the "persecutor bar." *Id.*

604. *See id.*

605. *Id.* at 1163.

606. 449 U.S. 490 (1981).

607. *See Negusie*, 129 S. Ct. at 1165 (citing *Fedorenko*, 449 U.S. at 495).

608. *Id.* at 1163.

609. *Id.* at 1167.

610. *Id.* at 1164.

611. *Id.* (emphasis added).

612. *Id.* at 1166–67 ("The BIA deemed its interpretation to be mandated by *Fedorenko*, and that error prevented it from a full consideration of the statutory question here presented.").



ambiguity on its own.<sup>613</sup> The majority rationalized its reluctance to interpret the statute without the benefit of the BIA's reasoning, reasserting the *Chevron* fiction that "'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."<sup>614</sup>

Justice Thomas dissented,<sup>615</sup> interpreting the INA to "unambiguously preclude[] any inquiry into whether the persecutor acted voluntarily . . ."<sup>616</sup> Reiterating the *Chevron* doctrine, Justice Thomas noted that if the statute's plain language resolves the issue, both the agency and the reviewing court must follow Congress' expressed intent.<sup>617</sup> He concluded that both the specific statutory language and the INA as a whole demonstrated that the persecutor bar applied to Negusie, whether or not his conduct had been coerced.<sup>618</sup>

Justice Thomas rightly chastised the majority to the extent that it declined to apply *Chevron* Step One, which requires the *reviewing court* to apply the tools of statutory construction in an effort to resolve a statutory ambiguity.<sup>619</sup> As Thomas cautioned, "[T]he Court should not, 'in the name of deference, abdicate its responsibility to interpret a statute' simply because it requires some effort."<sup>620</sup> He reasoned that by omitting the qualifying term "voluntary" from the persecutor bar, Congress must not have intended to restrict the nature of the persecution that would bar an asylum applicant from the benefits of refugee status.<sup>621</sup>

Justice Stevens, joined by Justice Breyer, concurred in part and dissented in part.<sup>622</sup> Like Justice Thomas, they disagreed with the majority's decision to remand without first interpreting the statutory language, which they too considered unambiguous.<sup>623</sup> Quoting his own words from *Chevron*, Justice Stevens emphasized that "[t]he judiciary is the final authority on issues of statutory construction."<sup>624</sup> Unlike Justice Thomas, however, Justices Stevens

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613. *See id.* at 1172 (Stevens, J., concurring in part and dissenting in part). *But see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

614. *Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 867, 980 (2005)). In further support, the majority cited *Gonzales v. Thomas*, 547 U.S. 183 (2006) (*per curiam*), in which the Court had summarily reversed a Ninth Circuit decision holding that a family qualified as a protected social group for purposes of claiming refugee status. *Negusie*, 129 S. Ct. at 1167 (citing *Thomas*, 547 U.S. at 186). *Thomas* held that the case should have been remanded for the agency to apply the law to the facts. *Thomas*, 547 U.S. at 187.

615. *Negusie*, 129 S. Ct. at 1176 (Thomas, J., dissenting).

616. *Id.*

617. *Id.* at 1178 (citing *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 664, 665 (2007)).

618. *See id.* at 1179.

619. *Id.* at 1183.

620. *Id.* at 1183 (quoting *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 77 (2007) (Thomas, J., dissenting)).

621. *Id.* at 1184–85.

622. *Id.* at 1170 (Stevens, J., concurring in part and dissenting in part).

623. *Id.* at 1173 ("[T]he threshold question the Court addresses today is a 'pure question of statutory construction for the courts to decide.'") (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)).

624. *Id.* at 1171 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843

and Breyer would have held that the persecutor bar does *not* apply to involuntary persecutors.<sup>625</sup>

*Negusie* illustrates the starkly different approaches the justices continue to take when addressing issues of statutory interpretation and agency deference. One thing is clear: the Court remains seriously divided on how to apply *Chevron*. As the dissenting opinions suggested, the majority erroneously conflated the *Chevron* framework in a manner that leap-frogged the Court's threshold responsibility to interpret the statute in the first instance. As the APA plainly requires, the *reviewing court* is to decide all issues of law, including the meaning of disputed statutory language.<sup>626</sup>

#### G. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*

One of the last cases the Court decided in its 2008 Term offered a clear opportunity to resolve the conflict between *Auer* super-deference and *Skidmore* sliding-scale deference, as reinvigorated by *Mead*. The Court not only declined to do so, but also further obscured the distinctions among the common law deference regimes it has articulated and applied over the last decade.

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,<sup>627</sup> the Court once again addressed the Clean Water Act and regulations adopted by the EPA and the Corps. The question was whether Coeur Alaska could lawfully carry out its plan to discharge slurry and other waste from a proposed "froth-flotation" gold mine into a small lake in a national forest, which all parties agreed met the statutory definition of "navigable water."<sup>628</sup>

Section 306 of the Clean Water Act imposes stringent effluent limitations on new point sources of water pollution. The statute also charges the EPA with issuing regulations establishing mandatory "performance standards."<sup>629</sup> The Act plainly prohibits *any* discharge in violation of the EPA's performance standards.<sup>630</sup> In compliance with the Act's directives, the EPA issued a performance standard for new mining facilities, including gold mines using the "froth-flotation" process.<sup>631</sup> The standard flatly prohibits new mines from discharging wastewater into navigable waters.<sup>632</sup>

In apparent conflict with the EPA's mandatory authority to regulate new point sources are two other sections of the Act that give *discretionary* permit authority to the EPA and the Corps, respectively, to regulate certain kinds of discharges.<sup>633</sup> In general, the EPA "may" issue permits for pollutants under

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n.9 (1984)).

625. *See id.* at 1176.

626. 5 U.S.C. § 706 (2006).

627. 129 S. Ct. 2458 (2009) (6-3 opinion).

628. *Id.* at 2464.

629. *See* 33 U.S.C. § 1316(b)(1)(A)-(B) (2006).

630. *Id.* § 1316(e).

631. 40 C.F.R. § 440.104(b)(1) (2008).

632. *Id.*

633. 33 U.S.C. § 1342(a) (2006) (EPA); *id.* § 1344(a) (Corps).

section 402 “[e]xcept as provided” in section 404, which grants similar authority to the Corps for “fill material.”<sup>634</sup> All parties agreed that Coeur Alaska’s slurry and wastewater are regulated pollutants and also qualify as “fill material” under jointly-issued regulations.<sup>635</sup>

Several environmental groups filed suit challenging the Corps’ permit, issued after consultation with the EPA, that allowed Coeur Alaska to discharge slurry and other mining waste into the lake under specified conditions, including reclamation plans for the lake after mining ceased.<sup>636</sup> The Court upheld the permit in a 6–3 opinion authored by Justice Kennedy.<sup>637</sup> Justices Stevens and Souter joined Justice Ginsburg’s opinion in dissent.<sup>638</sup>

Considered in its entirety, the majority opinion demonstrates the Court’s tendency to find statutes or regulations ambiguous, thus justifying its apparent enthusiasm for deferring to agency interpretations. Initially, Justice Kennedy dodged the question of whether the statutes granting discretionary permit authority are ambiguous for lack of clarity about whether each agency’s permit authority is mutually exclusive.<sup>639</sup> Deferring to the agencies’ resolution of the issue, the majority declared that if the Corps has *discretionary* authority to issue permits for discharge of fill material, then the EPA is “forbid[den]” from doing so.<sup>640</sup>

Having decided that the Corps’ discretionary authority to regulate fill material trumps the EPA’s discretionary authority to regulate pollutants (including fill material),<sup>641</sup> the majority next turned to the more important issue. The overarching question was whether the Corps had lawfully issued a discharge permit to Coeur Alaska that would undoubtedly result in the discharge of slurry and wastewater into navigable waters, contrary to the EPA’s new source performance standards. This time, the majority declared that the Clean Water Act does not directly speak to the ““precise question”” because it allows the Corps to issue permits regulating fill material.<sup>642</sup>

Next, the majority concluded that the Act was ambiguous as to whether the

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634. *Id.* § 1344(a).

635. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2468 (2009) (citing 40 C.F.R. § 232.2 (2008)).

636. *Id.* at 2465–66.

637. *Id.* at 2463.

638. *Id.* at 2480 (Ginsburg, J., dissenting).

639. *See id.* at 2467 (majority opinion). Justice Kennedy first concluded that the Act was “best understood” to provide that if the Corps has discretionary authority to issue a permit, the EPA does not. *Id.* “Even if there were ambiguity on this point, the EPA’s own regulations would resolve it.” *Id.* (citing 40 C.F.R. § 122.3 (2008)). Furthermore, by avoiding a conclusion that the statutes are *unambiguous*, the majority stopped short of foreclosing agency discretion to interpret the statutes differently in the future. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005); *see also supra* notes 397–418 and accompanying text. Instead, the majority simply assumed, without deciding, that the joint regulation reasonably resolved the apparent overlap in permit authority. By failing to decide the threshold question of ambiguity, the majority effectively delegated the interpretive issue to the agencies.

640. *Coeur Alaska*, 129 S. Ct. at 2468.

641. *Id.* at 2469.

642. *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

EPA's new source performance standards apply to fill material at all, again because it grants "blanket authority" to the Corps to permit discharges of fill material.<sup>643</sup> This reasoning, however, erroneously elevates the Corps' narrow *discretionary* authority to issue permits for fill material to override the Act's plain language that *prohibits* effluent discharges in violation of the EPA's new source performance standards.

Nevertheless, the majority declared the regulations inconclusive about whether the new source performance standards apply to fill material.<sup>644</sup> That determination led the majority to an internal EPA memorandum concluding that its "'regulatory regime[,] . . . including effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . do not apply" to Coeur Alaska's proposed discharge.<sup>645</sup> From this informal interpretation, the majority, using at best strained reasoning, concluded that if a discharge of fill material permitted by the Corps does not require an EPA *permit*, then the EPA's *performance standards* do not apply either.<sup>646</sup>

The majority's consideration of the EPA's internal memorandum squarely presented the Court, once again, with the conflict between *Auer* and *Mead/Skidmore*. On the one hand, *Auer* would confer super-deference to the agency's interpretation of its own ambiguous regulations, even in the form of a litigation position or some other informal policy statement.<sup>647</sup> On the other, *Mead* provides that informal agency interpretations such as memoranda merit *Skidmore* deference at most, and then only to the extent the reviewing court finds them persuasive.<sup>648</sup>

Regrettably, neither the majority nor the dissent recognized and resolved the conflict. However, Justice Scalia implicitly acknowledged the irreconcilability in his concurring opinion.<sup>649</sup> After first excoriating the majority for failing to apply *Chevron* to the EPA's internal memorandum, he went on to criticize the majority for applying *Auer*. As he noted, the ambiguity was not limited to the agency's own regulations; rather, it also involved *their conformity to the governing statute itself*, which Scalia deemed ambiguous as well.<sup>650</sup> In that sense, *Auer* was not controlling, and Justice Scalia thought the majority should have applied *Chevron* instead.<sup>651</sup> In the end, however, he concurred in the result, noting his "pleasure" in joining an opinion that "effectively ignore[d]" *Mead* altogether.<sup>652</sup>

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643. *Id.* at 2471–72.

644. *Id.* at 2472–73.

645. *Id.* at 2473 (quoting Memorandum from Diane Regas, Director, EPA Office of Wetlands, Oceans and Watersheds, to Randy Smith, Director, EPA Office of Water 3 (May 17, 2004), available at [http://www.vnf.com/assets/attachments/EPAs\\_2004\\_Regas\\_Memo.pdf](http://www.vnf.com/assets/attachments/EPAs_2004_Regas_Memo.pdf)).

646. *See id.* Words fail.

647. *See supra* notes 256–81 and accompanying text (discussing *Auer*).

648. *See supra* notes 315–35 and accompanying text (discussing *Mead*).

649. *Coeur Alaska*, 129 S. Ct. at 2479–80 (Scalia, J., concurring in part and concurring in the judgment).

650. *Id.* at 2479.

651. *Id.*

652. *Id.* at 2480.

Not surprisingly, Justice Ginsburg's dissent concluded that the majority's reasoning "strain[ed] credulity."<sup>653</sup> She read the Act to plainly prohibit effluent discharges in violation of the EPA's new source performance standards.<sup>654</sup> Therefore, if a new source discharge were to be authorized at all, the EPA was the appropriate agency to do so, as Congress had delegated it primary authority to issue effluent permits.<sup>655</sup> Justice Ginsburg convincingly reconciled the Act's overlapping permissive agency authority with its mandatory effluent limitations on new source discharges. She concluded that if fill material otherwise qualified for a Corps permit but would violate the EPA's new source performance standards, then the proposed discharge of slurry and wastewater—if permitted at all—it should be regulated by the EPA, not the Corps.<sup>656</sup>

#### H. *Cuomo v. Clearing House Ass'n*

On the final day of its October 2008 Term, the Roberts Court issued *Cuomo v. Clearing House Ass'n*.<sup>657</sup> The opinion demonstrates the difficulty of achieving consensus in the deference arena, even on the threshold question of whether a statutory term is ambiguous, let alone which deference framework applies.

The New York Attorney General sought to enforce state lending laws against national banks. In that process, he requested information from several national banks in lieu of issuing subpoenas.<sup>658</sup> The United States Office of the Comptroller of the Currency (OCC) and a trade group sought injunctive relief, relying on an OCC regulation<sup>659</sup> that interpreted a provision of the National Bank Act.<sup>660</sup> Adopted in a notice-and-comment proceeding, the regulation generally bars state officials from "exercis[ing] visitorial powers with respect to national banks," including requiring the banks to produce records or "prosecuting enforcement actions."<sup>661</sup> The petitioners argued that the OCC regulation preempted New York's effort to enforce its fair-lending laws against national banks.<sup>662</sup>

Surprisingly, this time Justice Scalia's majority opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer.<sup>663</sup> At the outset, Justice Scalia conceded "some ambiguity" with respect to "visitorial powers" because the term's boundaries are unclear.<sup>664</sup> The OCC admittedly had authority to

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653. *Id.* at 2483 (Ginsburg, J., dissenting).

654. *Id.* at 2482.

655. *See id.* at 2482–83.

656. *Id.* at 2483.

657. 129 S. Ct. 2710 (2009).

658. *Id.* at 2716, 2721.

659. 12 C.F.R. § 7.4000(a)(1) (2009).

660. 12 U.S.C. § 484(a) (2006).

661. 12 C.F.R. § 7.4000(a)(1), *quoted in Cuomo*, 129 S. Ct. at 2715.

662. *See Cuomo*, 129 S. Ct. at 2714.

663. *Id.*

664. *Id.* at 2715.

interpret the statute to the extent of its ambiguity, subject to the “outer limits of the term” as determined by the Court.<sup>665</sup>

After reviewing sovereigns’ historical use of “visitorial powers” to oversee corporate operations,<sup>666</sup> the majority held that the term, in its modern sense, narrowly refers to *administrative* oversight, excluding enforcement of state statutes of general applicability.<sup>667</sup> The majority concluded that the regulation, properly interpreted, did not bar New York from enforcing state law against national banks.<sup>668</sup> To the extent the OCC had expansively interpreted “visitorial powers” to preclude states from filing state-law enforcement suits against national banks, its interpretation was not a reasonable one.<sup>669</sup>

Justice Thomas dissented in part, joined by Chief Justice Roberts and Justices Kennedy and Alito.<sup>670</sup> Unlike the majority, the dissenters considered the term “visitorial powers” ambiguous, so they would have deferred to the OCC regulation as a reasonable interpretation.<sup>671</sup>

All justices agreed that *Chevron* was the appropriate framework, but they differed on how to apply Step One—whether an undefined statutory term is ambiguous. In dissent, Justice Thomas reasoned that the term “visitorial powers” was indeed ambiguous because it was “susceptible to more than one meaning.”<sup>672</sup> Next, he consulted nineteenth century dictionaries that disclosed a “broad dictionary definition” of the term, concluding that the OCC regulation was reasonable because it was well within the bounds of that definition.<sup>673</sup>

## V. CONCLUSION

On the final day of the 2008 Term, the Roberts Court once again split 5–4 in a case in which all nine justices *agreed* that *Chevron* was the applicable deference framework.<sup>674</sup> At twenty-five years of age, *Chevron* continues to confound the Court in its application. No longer can Justice Scalia rationally endorse *Chevron* as a predictable rule of judicial deference “against which Congress can legislate.”<sup>675</sup>

Only *once* did any of the Court’s four separate opinions in the recent case of *Negusie v. Holder* cite the controlling statute: APA section 10.<sup>676</sup> Justice Stevens alone acknowledged the controlling rule of law in a footnote to his

665. *Id.*

666. *Id.* at 2715–17.

667. *See id.* at 2718, 2721.

668. *Id.* at 2718–19.

669. *See id.* at 2721.

670. *Id.* at 2722 (Thomas, J., concurring in part and dissenting in part).

671. *See id.* at 2723–24.

672. *See id.* at 2723.

673. *Id.* at 2727 (“Put simply, OCC selected a permissible construction of a statutory term that was susceptible to multiple interpretations.”).

674. *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710 (2009).

675. *See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989); *see also Chevron Symposium, supra* note 281.

676. *See* 5 U.S.C. § 706 (2006) (codifying APA § 10).

dissenting opinion: “The [APA provides] that courts ‘shall decide all relevant questions of law [and] interpret constitutional and statutory provisions’ but shall review ‘agency action, findings, and conclusions’ under the arbitrary and capricious/abuse of discretion standard.”<sup>677</sup> Unlike the Supreme Court’s common law deference doctrines,<sup>678</sup> the language of the APA, at least with respect to issues of law, is plain and unambiguous. In reviewing agency actions, including legislative rules, interpretive regulations, and adjudicatory rulings, it is for *the courts* to decide relevant questions of law, including the meaning of ambiguous statutes and regulations.<sup>679</sup> And it is for *agencies* to decide how to apply the law, as interpreted by the courts, to the facts and circumstances of a particular case.<sup>680</sup>

While continuing to cite *Chevron* and pretending to apply it as a distinct deference framework, the Court appears to have delegated away to agencies its own statutory responsibility to “decide all relevant questions of law.”<sup>681</sup> After twenty-five years, the Supreme Court has become immersed in the immensely complicated thicket of *Chevron* and its progeny, with no clear resolution in sight. The venerable and much-loved doctrine is simply unworkable because the courts have been unable to apply it in a consistent, predictable way.<sup>682</sup>

#### A. Reconciling and Unifying Deference Jurisprudence

The various common law deference regimes can and should be reconciled and merged into a unified, integrated deference framework. It makes no sense for the Court to engage in elaborate judicial debates over whether *Chevron* deference, *Auer* deference, *Skidmore* deference, or some other common law regime applies.<sup>683</sup> In fact, the *Chevron* Court would have reached precisely the

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677. *Negusie v. Holder*, 129 S. Ct. 1159, 1172 n.3 (2009) (Stevens, J., dissenting) (quoting 5 U.S.C. § 706).

678. Even Justice Scalia recently conceded that the Court’s deference doctrine has become muddled, although he simplistically attributes the blame to *Mead*. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479–89 (Scalia, J., concurring in part and concurring in the judgment).

679. As the Court’s deference regimes acknowledge, there may be a range of permissible interpretations within the boundaries of an agency’s delegation of authority. Under that circumstance, however, it remains the reviewing court’s responsibility to determine the statutory boundaries that constrain the agency’s interpretive discretion.

680. 5 U.S.C. § 706.

681. See *id.* When Congress delegates lawmaking authority to an agency and then delegates to the courts the power to review agency lawmaking, separation of lawmaking and judicial powers is presumably preserved. But when the courts in turn delegate to the agency the power to interpret the agency’s own legislative rules, then both lawmaking and judicial review authority repose in the same administrative agency Congress has charged with enforcing those laws. Thus, the outcome of the Court’s administrative deference doctrine raises troubling separation of powers issues. See *supra* note 84 and accompanying text.

682. See, e.g., *Coeur Alaska*, 129 S. Ct. at 2479 & n.\* (Scalia, J., concurring in part and concurring in the judgment) (citing conflicting federal circuit decisions).

683. In *Coeur Alaska*, Justice Scalia insisted, “If we must not call that practice *Chevron* deference, then we have to rechristen the rose.” *Id.* at 2479. To the contrary, debating how best to “rechristen the rose” begs the question of whether the agency’s interpretation is due *any* deference. That determination requires the Court to carry out its institutional and statutory responsibility to

same result had it applied traditional *Skidmore* multi-factor deference. The Court would have deferred to the EPA's "bubble" definition of "point source" because the factors in that case were highly persuasive according to *Skidmore's* sliding scale of deference.<sup>684</sup>

As Justice Stevens has recently reminded us,

Judicial deference to agencies' views on statutes they administer was not born in [*Chevron*], nor did the "singularly judicial role of marking the boundaries of agency choice," die with that case. In the years before *Chevron*, this Court recognized that statutory interpretation is a multifaceted enterprise, ranging from a precise construction of statutory language to a determination of what policy best effectuates statutory objectives. We accordingly acknowledged that a complete interpretation of a statutory provision might demand both judicial construction and administrative explication.<sup>685</sup>

The Roberts Court occasionally appears to be striving to devise a deference framework that merges *Chevron*, *Auer*, and *Mead*—certainly a laudable goal.<sup>686</sup> However, federal agencies and reviewing courts need clear guidance *now*. And after four years, the Roberts Court has demonstrated its inability to reach a consensus.

### B. Reviving Congress

It is time for Congress to step in. To its credit, the House Judiciary Committee has embarked on a multi-year bipartisan study known as the Administrative Law, Process and Procedure Project for the 21st Century.<sup>687</sup> One of its purposes is to make a case to Congress for reinstating the Administrative Conference of the United States.<sup>688</sup>

#### 1. Revising the APA to Clarify Judicial Review of Agency Actions

As part of that project, Congress should enact comprehensive revisions to the APA and clearly set forth what circumstances trigger deference by the courts and what conditions constrain judicial deference to agency interpretations of law. Until it does, the Court will continue to assume that

interpret the law in the first instance, rather than argue internally about how to "christen" various common law deference doctrines of the Court's own making.

684. See *supra* note 100 and accompanying text.

685. *Negusie v. Holder*, 129 S. Ct. 1159, 1170–71 (2009) (Stevens, J., dissenting) (quoting *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 988 (1986)).

686. See, e.g., *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1156 (2008).

687. SUBCOMM. ON COMMERCIAL & ADMIN. LAW, H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 1 (Comm. Print 2007), available at <http://judiciary.house.gov/about/pdf/31505.pdf> (last visited Feb. 14, 2010).

688. *Id.*; see *supra* notes 167–70 (discussing efforts to reestablish Administrative Conference).



Congress has acquiesced in its haphazard application of common law deference doctrines, notwithstanding the clear language of the APA that directs *the courts* to decide all questions of law.<sup>689</sup>

As we have seen, APA section 10, for all practical purposes, is a dead letter.<sup>690</sup> Courts have devised common law deference frameworks that have little or no relationship to the APA's provisions dictating the scope of judicial review of agency interpretations of law. Once Congress legislates anew, the courts will have no choice but to *begin* with the statute's deference framework rather than continuing to rely primarily, if not exclusively, on convoluted common law deference regimes that predate the APA. After all, the underlying theory of all deference regimes is that *Congress* intended to delegate policymaking authority to the executive branch. Thus, Congress must accept—and execute—its responsibility for clarifying the applicable standard of judicial review when a litigant challenges an agency's exercise of its congressionally delegated authority.

## 2. Reestablishing the Administrative Conference

Congress should also breathe new life into the Administrative Conference of the United States to address the difficult and complex issues of judicial review and separation of powers.<sup>691</sup> The reconstituted Conference should operate in a manner similar to the Judicial Conference of the United States, but with a focus on administrative law. By bringing together representatives of the bench, the bar, the academic community, and Congress, the Conference is fundamentally necessary to provide a focal point for resolving the delicate balance about which Justice Kennedy wrote in *Gonzales v. Oregon*.<sup>692</sup>

### C. *Articulating a Reasoned Framework for Determining Ambiguity*

The threshold determination of ambiguity remains the most troubling aspect of the Court's deference jurisprudence. The seemingly endless and unduly heated debate among the justices about *which* deference regime applies begs the question. The appropriate scope of deference is simply irrelevant

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689. See 5 U.S.C. § 706 (2006).

690. The District of Columbia Court of Appeals recently sought to preserve judicial review under 5 U.S.C. § 706 by reasoning, "Even when an agency's construction of its statute passes muster under *Chevron*, a party may claim that the disputed agency action is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (quoting 5 U.S.C. § 706(2)(A)). It remains unclear whether the Court's common law deference regimes entirely displace § 706, or whether it serves as a stop-gap standard even if an agency's interpretation passes muster under whatever common law deference framework the Court sees fit to apply.

691. On March 3, 2010, just before this article went to press, the Senate confirmed presidential nominee Paul Verkuil to direct the reestablished Administrative Conference of the United States. See *supra* note 170.

692. 546 U.S. 243, 255 (2005) ("[B]alancing the necessary respect for an agency's knowledge, expertise, and constitutional office with the courts' role as interpreter of laws can be a delicate matter . . .").

unless the Court first determines, as a matter of law, that a statute is ambiguous after applying traditional tools of statutory construction. Only then is it appropriate to consider the agency's interpretation, and only then should the Court address the degree of deference due, if any.

The Rehnquist Court's decision in *Brand X* has underscored the overarching nature of the threshold question, which must be resolved before deciding the appropriate standard of review. For if the reviewing court determines that a statute is *unambiguous*, *Brand X* teaches that the judicial interpretation is binding on agencies that have already reached—or may subsequently reach—a different conclusion.

Yet the Supreme Court has never adopted a disciplined framework for deciding whether a statute—or an agency regulation, for that matter—is sufficiently ambiguous to warrant deference to the agency to resolve the ambiguity within permissible statutory boundaries. Lacking such a framework, the Court all too often ducks its responsibility to resolve ambiguities and instead becomes embroiled in bitter ancillary debates about which deference doctrine applies. Moreover, the Court's inclination to dodge the resolution of legal issues by declaring ambiguity sets up a poor incentive for Congress and agencies alike to draft statutes and legislative rules with clarity.

If one factor explains the degree of deference (or lack of deference) courts ultimately pay agency interpretations of law, it is the outcome of the threshold determination of ambiguity, inherently a *judicial* function. Legislative ambiguities will always be with us as an inherent aspect of reaching political compromise. Under any of the Court's modern deference doctrines—*Chevron*, *Auer*, *Mead*, or *Gonzales*—the extent to which a reviewing court takes initiative to resolve an apparent ambiguity using traditional tools of statutory construction ultimately determines the degree of deference it will likely accord an agency's interpretation rather than its own.

Just what traditional tools of statutory construction the federal courts should consistently apply to decide whether a rule or statute is ambiguous is a topic that warrants further research and scholarly debate. More often than not, a shifting majority of the Roberts Court appears to cherry-pick among them to reach its desired result, which all too often punts the interpretive ball back to the executive branch.