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Chevron Deference: A Primer

When Congress delegates regulatory functions to an administrative agency, that agency’s ability to act is governed by the statutes that authorize it to carry out these delegated tasks. In the course of its work, an agency must interpret these statutory authorizations to determine what it *must* do under the statute and what it *may* do within the limits that Congress has set. When agencies act pursuant to those interpretations, the scope of their statutory authority is sometimes tested through litigation. Courts that review challenges to agency actions may give special consideration to agencies’ interpretations, particularly of the statutes they administer. This special consideration is known as “deference.” Whether and when courts should *defer* to an agency’s interpretation of a federal statute, rather than apply the court’s own interpretation, are critical questions in administrative law and judicial review of agency action.

For the better part of four decades, judicial review of such interpretations has been governed by the two-step framework set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council*. The *Chevron* framework of review usually applies if Congress has given an agency the general authority to make rules with the force of law. Within that framework, *Chevron* often requires courts to accept the statutory interpretations that underlie the agency’s implementation of that general authority. Where a statute is susceptible to multiple reasonable interpretations, the *Chevron* framework requires courts to defer to an agency’s reasonable interpretation of the statute. The *Chevron* framework, accordingly, shifts interpretive authority from the federal courts to agencies in certain circumstances.

If Congress has delegated authority to the agency to decide a question—that is, if *Chevron* applies—a court asks at step one whether Congress directly addressed the precise issue before the court, using traditional tools of statutory construction. If, after applying those tools, the statute is clear on its face with respect to the issue before the court, the court must implement Congress’s stated intent.

If the court concludes instead that a statute is silent or ambiguous with respect to the specific issue, the court then proceeds to *Chevron*’s second step. At step two, courts must defer to an agency’s reasonable interpretation of the statute. Courts employ a variety of tools to determine whether an agency’s interpretation is reasonable, including some of the same interpretative tools used in the step one analysis.

Application of the *Chevron* doctrine in practice has become increasingly complex. Courts and scholars alike debate which types of agency interpretations are entitled to *Chevron* deference, what interpretive tools courts should use to determine whether a statute is clear or ambiguous, and how closely courts should scrutinize agency interpretations for reasonableness. A number of judges and legal commentators have even questioned whether *Chevron* should be overruled entirely.

A threshold issue that has recently grown more prominent is whether *Chevron* applies in particular cases. Since 2016, the Supreme Court appears to be moving away from the *Chevron* framework in favor of an alternative interpretative principle, the “major questions doctrine.” Although the major questions doctrine once appeared to be a part of the *Chevron* framework, the Court’s recent silence on *Chevron* has called into question the relationship between the two doctrines. The Court agreed to hear a case seeking to overrule the *Chevron* framework in its 2023 term, which may shed light on *Chevron*’s future. For now, however, the *Chevron* framework remains binding on the lower courts, which resolve the vast majority of all cases filed in the federal judiciary. Accordingly, *Chevron* still plays an important role for most legal challenges to agency actions that involve statutory interpretation. Ultimately, *Chevron* is a judicially created doctrine that rests in large part upon a presumption about legislative intent, and Congress could seek to modify the courts’ use of the doctrine by displacing this underlying presumption.

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Background

Congress has created numerous administrative agencies to implement and enforce federal statutes. Statutes define the scope and reach of agencies' power,¹ granting them discretion to, for example, promulgate regulations,² conduct adjudications,³ issue licenses,⁴ and impose sanctions for violations of the law.⁵ In exercising its statutory authorities, an agency must necessarily determine what the various statutes that govern its actions mean. An agency may explicitly interpret a statute in a rule or adjudication, or it may take an action that implicitly rests on a particular reading of the authorizing statute. This includes statutes the agency is specifically charged with administering as well as laws that apply broadly to all or most agencies.

The Administrative Procedure Act (APA) confers upon the judiciary an important role in policing these statutory boundaries, directing federal courts to “set aside agency action” that is “not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations.”⁶ Courts will thus invalidate an action that exceeds an agency's statutory authorization or otherwise violates the law.

Because both agencies and courts have a role in statutory interpretation—and their interpretations may sometimes differ—judicial review of agency action raises an essential question: Whose interpretation should prevail? In many cases, courts are required by various “deference doctrines” to adopt or allow the agency's own interpretation of a statute, even if a court believes that some other interpretation may be better. This report focuses on the most important of these doctrines, which the Supreme Court established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷

When a court reviews an agency's interpretation of a statute it is charged with administering,⁸ the court will generally apply the two-step framework outlined in *Chevron*. Pursuant to that rubric, at step one, courts examine “whether Congress has directly spoken to the precise question at issue.”⁹ If so, “that is the end of the matter,” and courts must enforce the “unambiguously expressed intent of Congress.”¹⁰ In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise adopted a contrary interpretation.¹¹

¹ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986) (“[A]n agency literally has no power to act ... unless and until Congress confers power upon it.”).

² See CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey (2013).

³ See 5 U.S.C. §§ 556, 557 (mandating certain procedures when agencies conduct formal adjudications).

⁴ See *id.* § 558 (imposing certain requirements on agencies when reviewing applications for a license).

⁵ See, e.g., *Wilson v. Commodity Futures Trading Comm'n*, 322 F.3d 555, 560 (8th Cir. 2003) (noting that “[t]he Commission's choice of sanctions” under 7 U.S.C. § 9 for a violation of the Commodity Exchange Act “will be upheld in the absence of an abuse of discretion”).

⁶ 5 U.S.C. § 706(2)(A), (C).

⁷ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁸ These agency interpretations may be explicitly announced in agency rules or adjudications, or they may be implicit in an agency's action and later announced in court as a defense of that action.

⁹ *Chevron*, 467 U.S. at 842.

¹⁰ *Id.* at 842–43.

¹¹ *Id.* at 843.

This report discusses the *Chevron* decision, explains the circumstances in which the *Chevron* doctrine applies, explores how courts apply the two steps of *Chevron*, and highlights some criticisms of the doctrine, with an eye toward the potential future of *Chevron* deference.

The Origins and Principles of *Chevron* Deference

The *Chevron* case itself arose out of a dispute over the proper interpretation of the Clean Air Act (CAA). The contested statutory provision required certain states to create permitting programs for “new or modified major stationary sources” that emitted air pollutants.¹² In 1981, the Environmental Protection Agency (EPA) promulgated a regulation that defined “stationary source,” as used in the CAA, to include all pollution-emitting activities within a single “industrial grouping”¹³ and thus let states “bubble,” or group together, all emitting sources in a single plant for the purposes of assessing emissions.¹⁴ This allowed a facility to construct new pollution-emitting structures so long as the facility as a whole—that is, the “stationary source”—did not increase its emissions.¹⁵ The Natural Resources Defense Council (NRDC) filed a petition for judicial review, arguing that this definition of “stationary source” violated the CAA.¹⁶ The NRDC claimed that the text of the CAA required EPA “to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source.”¹⁷

A unanimous Supreme Court disagreed and upheld the regulation, determining that EPA’s definition of “stationary source” was “a permissible construction of the statute.”¹⁸ The Court explained that when a court reviews an agency’s interpretation of a statute it administers, it faces 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.¹⁹

Applying this two-step inquiry to review the challenged EPA regulation, the Court first considered the text and structure of the CAA, along with the legislative history regarding the definition of “stationary source.”²⁰ The text of the statute did not “compel any given interpretation of the term ‘source’”²¹ and did not reveal Congress’s “actual intent.”²² The Justices concluded that the statutory text was broad, granting EPA significant “power to regulate particular sources in

¹² *Id.* at 840; 42 U.S.C. § 7502.

¹³ *Chevron*, 467 U.S. at 840–41, 857–58.

¹⁴ *Id.* at 840.

¹⁵ *See id.* at 856.

¹⁶ *Id.* at 841, 859.

¹⁷ *Id.* at 859.

¹⁸ *Id.* at 866.

¹⁹ *Id.* at 842–43.

²⁰ *Id.* at 848–53.

²¹ *Id.* at 860.

²² *Id.* at 861.

order to effectuate the policies of the Act.”²³ The legislative history of the CAA, although “unilluminating,” was likewise “consistent with the view that the EPA should have broad discretion in implementing the policies of” the CAA.²⁴ After probing the statutory text and legislative history and finding no clear answer, the Court concluded that the statute was ambiguous as to the definition of “stationary source.”²⁵ Ultimately, the Court decided that EPA had “advanced a reasonable explanation” of its definition of “source” in light of the policy concerns that had motivated the CAA’s enactment²⁶ and upheld this “permissible construction.”²⁷

The Court gave three related reasons for deferring to an agency’s interpretation of a statute that it administers: congressional delegation of authority, agency expertise, and political accountability.²⁸ First, the Court invoked a judicial presumption about legislative intent:

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.... 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.²⁹

In the Court’s view, because the statutory term “source” was ambiguous and could be read either to prohibit or to allow “bubbling,”³⁰ Congress had implicitly delegated to EPA the ability to choose any definition that was reasonably permitted by the statutory text.³¹ The statutory ambiguity constituted a limited delegation of interpretive authority from Congress, and the agency had acted within that delegation.³² This understanding of the meaning and effect of a statutory ambiguity, although it has been characterized as a “legal fiction” even by some Supreme Court Justices, has nonetheless become one of the leading justifications for judicial deference to agencies under *Chevron*.³³

Second, the Court cited the greater institutional competence of agencies, as compared to courts, to resolve the “policy battle” being waged by the litigants.³⁴ The Court reasoned that, with its superior subject matter expertise, EPA was better able to make policy choices that accommodated “manifestly competing interests” within a “technical and complex” regulatory scheme.³⁵

²³ *Id.* at 862.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 863.

²⁷ *Id.* at 866.

²⁸ *Id.* at 843–44, 865–66. Justice Scalia later noted another justification for *Chevron* deference, rooted in the history of federal court review of agency action before passage of the federal question jurisdiction statute in 1875. *See United States v. Mead Corp.*, 533 U.S. 218, 241–42 (2001) (Scalia, J., concurring) (Justice Scalia asserted that the *Chevron* decision “was in accord with the origins of federal-court judicial review,” because a court would issue “the prerogative writ of mandamus” only if the executive offers “was acting plainly beyond the scope of his authority.”).

²⁹ *Chevron*, 467 U.S. at 843–44 (citations omitted).

³⁰ *Id.* at 860–61.

³¹ *Id.* at 866.

³² *See id.*

³³ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006) (describing how Justices Stephen Breyer and Antonin Scalia, with very different views of the *Chevron* analysis, “both approved of resort to that [legal] fiction”).

³⁴ *Chevron*, 467 U.S. at 864.

³⁵ *Id.* at 865.

Finally, the opinion of the Court also rested implicitly on concerns about the constitutional separation of powers.³⁶ While *judges* should not be in the business of “reconcil[ing] competing political interests,” the Court stated, it was “entirely appropriate for this *political* branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”³⁷

Application of the *Chevron* Framework

An important threshold question for a court reviewing an agency’s interpretation of a statute is whether *Chevron* deference should apply at all. As an initial matter, because *Chevron* deference depends upon the presumption that Congress has delegated interpretative authority to the implementing agency, the *Chevron* framework of review is limited to agencies’ interpretations of statutes they administer.³⁸ The Court has indicated that an agency’s determination of the scope of its jurisdictional authority is entitled to *Chevron* deference in appropriate circumstances.³⁹ However, when an agency interprets legal requirements that apply broadly across agencies, a reviewing court will not defer to the agency’s interpretation.⁴⁰ For instance, courts will review *de novo*, or without any deference at all,⁴¹ agency interpretations of procedural provisions of the APA,⁴² the Freedom of Information Act,⁴³ and the Constitution.⁴⁴

Even when an agency is interpreting a statute that it administers, the Supreme Court has prescribed important limits on the types of agency statutory interpretations that qualify for

³⁶ See *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, J., dissenting) (“*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”); Jonathan H. Adler, *Restoring Chevron’s Domain*, 81 Mo. L. REV. 983, 990 (2016) (explaining the “constitutional roots” of “the delegation foundation of *Chevron*”). Other scholars have argued that separation of powers principles either are not important to *Chevron* deference, see David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 222 (2001); or that they counsel *against* judicial deference to agency interpretations, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989).

³⁷ *Chevron*, 467 U.S. at 865–66 (emphasis added). See also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373 (2001) (arguing the “*Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President,” and is best justified as ensuring that policymaking functions track political accountability).

³⁸ *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (“A precondition to deference under *Chevron* is a congressional delegation of administrative authority.”); *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that “when it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency’s particular interpretation”).

³⁹ See *infra* “Agency Interpretations of the Scope of Its Authority (“Jurisdiction”).”

⁴⁰ See *Chevron*, 467 U.S. at 843–44, 865.

⁴¹ *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006) (explaining that *de novo* review requires the court to “review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered”).

⁴² *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (“[A]n agency has no interpretive authority over the APA.”).

⁴³ *Fed. Lab. Rels. Auth. v. U.S. Dep’t of Treasury, Fin. Mgmt. Serv.*, 884 F.2d 1446, 1451 (D.C. Cir. 1989); *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 164 F. Supp. 3d 145, 155–56 (D.D.C. 2016) (“FOIA, of course, affords complainants who bring suit under Section 552(a)(4)(B) a *de novo* review of the agency’s withholding of information.”).

⁴⁴ See, e.g., *Emp. Solutions Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016); see also *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (declining to extend deference to an agency interpretation that “raises a serious constitutional question”).

Chevron deference. One crucial inquiry, sometimes referred to as *Chevron* “step zero,” is whether Congress has delegated authority to the agency to speak *with the force of law*.⁴⁵ This analysis often turns on the formality of the administrative procedures used in rendering a statutory interpretation.

Another situation where the Court has occasionally declined to follow *Chevron* occurs when an agency’s interpretation implicates a question of major “economic and political significance.”⁴⁶ The “major questions doctrine,” however, has been invoked in a seemingly ad hoc manner, leaving unclear exactly how this consideration fits into the *Chevron* framework.⁴⁷

Importantly, even if the *Chevron* framework of review does not apply, a court might still give *some weight* to an agency’s interpretation of a statute.⁴⁸ In the 2000 case of *United States v. Mead Corp.*,⁴⁹ the Court explained that even when an agency’s interpretation was not entitled to *Chevron* deference, it might still merit some weight under the Court’s pre-*Chevron* decision in *Skidmore v. Swift & Co.*⁵⁰ Under *Skidmore*, when an agency applies its expertise to interpret a “regulatory scheme” that is “highly detailed,” a court may accord the agency’s interpretation “a respect proportional to its ‘power to persuade.’”⁵¹ In other words, a court applying *Skidmore* deference accords an agency’s interpretation of a statute an amount of respect or weight that correlates with the strength of the agency’s reasoning.⁵²

An Agency’s Process in Arriving at Its Interpretation

Determining whether *Chevron* deference applies to an agency’s interpretation typically requires a court to examine whether Congress delegated authority to the agency to speak with the force of law in resolving statutory ambiguities. One important indicator of such a delegation is an agency’s use of formal procedures in formulating the interpretation.

The APA requires agencies to follow various procedures when taking certain actions. For instance, agencies issuing legislative rules that carry the force of law must generally follow notice-and-comment procedures, and adjudications conducted “on the record” must apply formal

⁴⁵ Sunstein, *Chevron Step Zero*, *supra* note 33, at 193; Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001).

⁴⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022) (using the term “major questions doctrine” for the first time in a Supreme Court majority opinion); *see also Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665–66 (2022); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) [hereinafter *UARG*]; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

⁴⁷ *See West Virginia*, 142 S. Ct. at 2610–14 (applying the major questions doctrine without mentioning *Chevron*).

⁴⁸ For more information, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole (2016).

⁴⁹ *Mead*, 533 U.S. at 235.

⁵⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act ... 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.”); *United States v. Shimer*, 367 U.S. 374, 383 (1961) (“If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989) (“It should not be thought that the *Chevron* doctrine ... is entirely new law. To the contrary, courts have been content to accept ‘reasonable’ executive interpretations of law for some time.”).

⁵¹ *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

⁵² *Skidmore*, 323 U.S. at 140.

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court-like procedures.⁵³ In contrast, non-binding agency actions, such as agency guidance documents, are exempt from such requirements.⁵⁴ In *Christensen v. Harris County*, the Court ruled that non-binding interpretations issued informally in agency opinion letters—such as those “contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law”—do not receive deference under *Chevron*.⁵⁵ In contrast, the Court held, *Chevron* deference is appropriate for legally binding interpretations reached through more formal procedures, such as formal adjudications and notice-and-comment rulemaking.⁵⁶

Likewise, in *United States v. Mead Corp.*, the Court ruled that tariff classification rulings by the U.S. Customs Service were not entitled to *Chevron* deference because there was no indication that Congress intended those rulings “to carry the force of law.”⁵⁷ The Court held that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”⁵⁸ Such a delegation could be shown by an agency’s authority to conduct formal adjudications or notice-and-comment rulemaking “or by some other indication of a comparable congressional intent.”⁵⁹ The Court found that tariff classifications were not issued pursuant to formal procedures and the rulings did not bind third parties.⁶⁰ Further, their diffuse nature and high volume—over 10,000 classifications issued every year at 46 different agency field offices—indicated that such classifications did not carry the force of law.⁶¹

Mead and *Christensen* thus illustrate that one sign of a congressional delegation of power to interpret ambiguity or fill in the gaps of a statute is the authority to use APA procedures such as notice-and-comment rulemaking or APA-governed adjudications to implement a statute.⁶² An agency’s interpretation of a statute reached through these means is more likely to qualify for *Chevron* deference than is an informal interpretation,⁶³ such as one issued in an opinion letter or internal agency manual.⁶⁴

Nonetheless, the Supreme Court has stated that an agency’s use of formal procedures in interpreting a statute is not a *necessary* condition for the application of *Chevron* deference.⁶⁵

⁵³ 5 U.S.C. §§ 553 (rulemaking), 556, 557 (adjudications).

⁵⁴ CRS Report R44468, *General Policy Statements: Legal Overview*, by Jared P. Cole and Todd Garvey (2016); CRS Legal Sidebar LSB10591, *Agency Use of Guidance Documents*, by Kate R. Bowers (2021).

⁵⁵ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

⁵⁶ *Id.*

⁵⁷ *Mead*, 533 U.S. at 221.

⁵⁸ *Id.* at 226–27.

⁵⁹ *Id.* at 227.

⁶⁰ *Id.* at 233.

⁶¹ *Id.* at 230–34.

⁶² *Mead*, 533 U.S. at 226–27; *Christensen*, 529 U.S. at 587.

⁶³ See *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) (declining to accord *Chevron* deference because the Controlled Substances Act “does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law”); Sunstein, *Chevron Step Zero*, *supra* note 33, at 218; see, e.g., *New York Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 328–29 (2d Cir. 2003); *Shotz v. City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003).

⁶⁴ *Christensen*, 529 U.S. at 587.

⁶⁵ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (“It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency’s interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in (continued...)”).

Mead explained that a delegation of interpretive authority could be shown by an agency’s power to conduct notice-and-comment rulemaking or formal adjudications “or by some other indication of a comparable congressional intent.”⁶⁶ For example, in *Barnhart v. Walton*, the Court deferred to an interpretation of the Social Security Act that the Social Security Administration reached informally.⁶⁷ The majority opinion, written by Justice Breyer, examined a variety of factors in finding that *Chevron* deference was applicable to the agency’s interpretation, such as “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.”⁶⁸ In *Barnhart*, while the agency interpretation was reached informally, it was nonetheless “one of long standing,” having apparently been in place for more than 40 years.⁶⁹

Following *Barnhart*’s case-by-case approach to applying *Chevron*, some lower courts have deferred to certain agency statutory interpretations reached through informal means (e.g., a letter ruling issued to parties), particularly when an agency has expertise in implementing a complex statutory scheme.⁷⁰

Agency Interpretations of the Scope of Its Authority (“Jurisdiction”)

The Supreme Court has ruled that an agency’s statutory interpretation is eligible for deference not only when the agency is acting within the scope of its statutory jurisdiction but also when it is determining the scope and limits of that jurisdiction.⁷¹

In *City of Arlington v. FCC*, the Court examined the Telecommunications Act, which requires state and local governments to act on an application for siting a wireless telecommunications facility within a “reasonable period of time.”⁷² The Federal Communications Commission (FCC) issued a declaratory ruling specifying the number of days that it considered reasonable to reach a decision on those applications.⁷³ This decision was challenged on the ground that the agency did not have delegated authority to interpret the phrase “reasonable period of time.” The FCC asked

other ways, including ways that Justice Scalia mentions. It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.” (citations omitted).

⁶⁶ *Mead*, 533 U.S. at 227.

⁶⁷ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

⁶⁸ *Id.*; see also Kristin E. Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. W. L. REV. 1392, 1438 (2017); *Nat’l Cable*, 545 U.S. at 1003–04 (Breyer, J., concurring) (noting that *Mead* taught that delegation meriting *Chevron* deference can be shown “in a variety of ways,” 533 U.S. at 237).

⁶⁹ *Mead*, 533 U.S. at 221.

⁷⁰ See, e.g., *Atrium Med. Ctr. v. U.S. Dep’t of Health & Human Servs.*, 766 F.3d 560, 572 (6th Cir. 2014) (extending *Chevron* deference to the Center for Medicare and Medicaid Service’s interpretation of the Medicare Act contained in an agency manual); *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004) (extending *Chevron* deference to an interpretation contained in an agency’s letter ruling); *Davis v. EPA*, 336 F.3d 965, 972–75, 972 n.5 (9th Cir. 2003) (extending *Chevron* deference to informal agency adjudication of request to waive emissions requirement).

⁷¹ *City of Arlington*, 569 U.S. at 306.

⁷² 47 U.S.C. § 332(c)(7)(B).

⁷³ The agency determined that 90 days was appropriate for some applications and 150 days was proper for others. See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 24 FCC Rcd. 13994, 14001 (2009).

the Court to defer not only to the agency’s interpretation of that phrase but also its interpretation of whether it had authority to interpret the phrase at all.⁷⁴

The Supreme Court granted certiorari on the question of whether a court should apply *Chevron* to an agency’s determination of its own jurisdiction.⁷⁵ In other words, the Court asked: Did *Chevron* apply to the FCC’s decision that it possessed authority to adopt a binding interpretation of this part of the statute? Or should courts refuse to defer to the FCC’s decision that such authority was within its “jurisdiction”? The Court ruled that the *Chevron* doctrine did apply, questioning whether those two questions could sensibly be distinguished.⁷⁶ According to the majority opinion, every new application of an agency’s statutory authority could potentially be reframed as a questionable extension of the agency’s “jurisdiction,” but ultimately, the question for a court in any case is simply “whether the agency has stayed within the bounds of its statutory authority.”⁷⁷

The Court went on to hold that Congress delegated to the agency the power to speak with the force of law in administering a statute and that the agency reached an interpretation through the exercise of that authority. Accordingly, the Court held that *Chevron*’s two-step framework was applicable to the agency’s determination that it had authority to decide what constituted a “reasonable period of time.”⁷⁸

One way to understand *City of Arlington* is that the Court majority rejected a fine-grained application of *Chevron* “step zero,”⁷⁹ in which a court may ask whether Congress has delegated authority to an agency to interpret the statute. The dissent urged that, before applying the *Chevron* framework, courts should conduct a threshold examination of whether an agency has received a delegation of interpretive authority over *particular* issues,⁸⁰ essentially a “step zero” inquiry. The Court majority rejected that view. Instead, the majority held, the *Chevron* doctrine applied because Congress had vested the FCC with the authority to *generally* administer the Telecommunications Act through adjudication and rulemaking, and the agency had promulgated the disputed interpretation through the exercise of that authority.⁸¹ Once the “preconditions to deference under *Chevron* are [otherwise] satisfied,” the Court should proceed to the *Chevron* two-step framework and determine if the agency has reasonably interpreted the parameters of its statutory authority.⁸²

Chevron Step One

After a court has determined that *Chevron* applies to a particular agency’s interpretation of a statute, the first inquiry in the two-step *Chevron* framework is whether Congress “directly

⁷⁴ See *City of Arlington*, 569 U.S. at 295; 47 U.S.C. § 332(c)(7)(A).

⁷⁵ *City of Arlington*, 569 U.S. at 295.

⁷⁶ See *id.* at 297 (“The argument against deference rests on the premise that there exist two distinct classes of agency interpretations.... That premise is false, because the distinction between ‘jurisdictional’ and ‘nonjurisdictional’ interpretations is a mirage.”).

⁷⁷ *Id.*

⁷⁸ *Id.* at 292, 307.

⁷⁹ See *supra* “An Agency’s Process in Arriving at Its Interpretation”.

⁸⁰ *City of Arlington*, 569 U.S. at 317 (Roberts, J., dissenting) (“But before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.”).

⁸¹ *Id.* at 307 (majority opinion).

⁸² *Id.*

addressed the precise question at issue.”⁸³ A court proceeds to step two only if a statute is “silent or ambiguous with respect to the specific issue.”⁸⁴ If the statute is unambiguous, a court must “give effect” to that congressional intent without deferring to the agency.⁸⁵ The Supreme Court stated in *Chevron* that a court should conduct the step one analysis by “employing traditional tools of statutory construction.”⁸⁶

This “traditional tools” instruction, however, left open for debate the tools that should be employed during *Chevron*’s first step.⁸⁷ There are different theories of statutory interpretation, and each interpretive school has a distinct view of which tools courts should appropriately deploy when they seek to discern statutory meaning.⁸⁸ Notwithstanding these interpretive differences, most courts generally begin by considering the text of the statute.⁸⁹ To give meaning to this text, judges typically seek to determine the “natural reading”⁹⁰ or “ordinary understanding”⁹¹ of disputed words. They often refer to dictionaries to find this ordinary meaning.⁹² A contested statutory term can be further clarified by reference to the statutory context, looking to that specific provision as a whole,⁹³ or by examining how the term is employed in related statutes.⁹⁴ Courts sometimes, but not always, rely on a set of presumptions, or interpretive canons, about how people usually read meaning into text.⁹⁵

⁸³ *Chevron*, 467 U.S. at 843.

⁸⁴ *Id.* The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has introduced a distinct analytical question into the *Chevron* analysis. Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 768 (2017). Before it will afford *Chevron* deference to an agency interpretation, the D.C. Circuit asks whether the agency has interpreted the statute by bringing “its experience and expertise to bear in light of competing interests at stake.” *PKD Labs. Inc. v. DEA*, 362 F.3d 786, 797–98 (D.C. Cir. 2004).

⁸⁵ *Chevron*, 467 U.S. at 842–43.

⁸⁶ *Id.* at 843 n.9.

⁸⁷ *See id.*; Peter L. Strauss, *Overseers or “The Deciders” – The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 820 (2008).

⁸⁸ *See* CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023); *see also* Lisa Shultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 551 (2009) (“In applying *Chevron*, courts rely heavily on the dominant theories of statutory interpretation: intentionalism, purposivism, or textualism.”). *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (“[W]hereas intentionalists believe that legislatures have coherent and identifiable but unexpressed policy intentions, textualists believe that the only meaningful collective legislative intentions are those reflected in the public meaning of the final statutory text.”).

⁸⁹ *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007). *Cf. Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 93 (2007) (“[N]ormally neither the legislative history nor the reasonableness of the Secretary’s method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary’s interpretation.”).

⁹⁰ *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 611 (1991).

⁹¹ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697 (1995). *See also Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 551 (2012) (considering ordinary usage of statutory term “child”).

⁹² *E.g.*, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 227–29 (1994). *Cf. Nat’l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) (“The existence of alternative dictionary definitions of the word ‘required,’ each making some sense under the statute, itself indicates that the statute is open to interpretation.”).

⁹³ *E.g.*, *Nat’l R.R. Passenger Corp.*, 503 U.S. at 410–11, 418–19 (defining statutory term by reference to “statutory presumption” created in subsequent statutory text).

⁹⁴ *E.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (comparing “parallel provisions” of act); *Brown & Williamson*, 529 U.S. at 134–37 (looking to act “as a whole” to determine its “core objectives,” and examining operation of statute); *NLRB*, 499 U.S. at 612 (1991) (reviewing judicial construction of “similar provisions in other regulatory statutes”).

⁹⁵ *E.g.*, *Babbitt*, 515 U.S. at 697–98 (applying canon against surplusage). *Cf. Env’t Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (declining to apply presumption of consistent usage where statutory context suggested otherwise). (continued...)

Other tools of statutory construction, focused on determining legislative intent, have become somewhat more controversial since *Chevron* was decided but are sometimes still deployed in step one analyses.⁹⁶ For example, courts may refer to statutory purpose.⁹⁷ They also cite legislative history at *Chevron* step one,⁹⁸ although this practice is less common in more recent decisions.⁹⁹ Similarly, to help determine congressional intent, courts have looked to past agency practice¹⁰⁰ as well as agency interpretations that were advanced prior to the dispute before the court.¹⁰¹

Courts and scholars debate not only which methods of statutory construction constitute the “traditional tools” embraced in *Chevron*’s step one but also when application of those tools may render a statute sufficiently clear to conclude that Congress has “directly addressed the precise question at issue.”¹⁰² It is an open question whether *Chevron*’s first step presents an ordinary

See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 76–84 (2008) (reviewing judicial approaches to reconciling normative canons with *Chevron* framework); cf. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes are to be Construed*, 3 *VAND. L. REV.* 395, 401–06 (1950) (“[T]here are two opposing canons on almost every point.”).

⁹⁶ Compare, e.g., *Babbitt*, 515 U.S. at 698 (“[T]he broad purpose of the ESA supports the Secretary’s decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.”); with *id.* at 726 (Scalia, J., dissenting) (“Deduction from the ‘broad purpose’ of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or, in this case, the quite simple one) of reading the whole text.”).

⁹⁷ E.g., *Cuozzo Speech Techs., LLC v. Lee*, 579 U.S. 261, 275–79 (2016) (considering purpose of statute). Cf. *Zuni*, 550 U.S. at 107 (Kennedy, J., concurring) (arguing majority opinion erred in considering history and purpose of statute before plain language because, “[w]ere the inversion to become systemic, it would create the impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes”); *MCI Telecomms.*, 512 U.S. at 234 (rejecting arguments regarding legislative purpose in light of clear statutory meaning). But see SCALIA & GARNER, *supra* note 95, at 56 (“Of course, words are given meaning by their context, and context includes the purpose of the text.”).

⁹⁸ E.g., *Astrue*, 566 U.S. at 553 (2012) (considering prior version of statute); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37, 441–42 (1987) (reviewing congressional record and rejection of Senate version of bill).

⁹⁹ See THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 108 (2022); see also *Cardoza-Fonseca*, 480 U.S. at 453 (Scalia, J., concurring) (disapproving of majority’s use of legislative history because courts “are not free to replace [clear statutory language] with an unenacted legislative intent”). Some courts believe legislative history should only be considered at step two of a *Chevron* inquiry. Hemel & Nielson, *supra* note 84, at 781. The *Chevron* decision itself, however, relied heavily on legislative history in coming to its conclusion about the meaning of the Clean Air Act. *Chevron*, 467 U.S. at 851–53.

¹⁰⁰ E.g., *Cardoza-Fonseca*, 480 U.S. at 434–35 (reviewing agency practice under prior version of statute).

¹⁰¹ E.g., *Barnhart*, 535 U.S. 212, 219–20 (2002) (noting the agency’s interpretation was “longstanding”); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs* 531 U.S. 159, 168 (2001) (looking to agency’s original interpretation of a federal statute); *Brown & Williamson*, 529 U.S. at 145–46 (looking to prior agency interpretations of the governing statute, as announced in congressional hearings). Reliance on longstanding agency interpretations as a basis for deference was far more common before *Chevron*. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE*, *supra* note 99, at 134–37. Explicit reference to longstanding agency interpretations is somewhat rare post-*Chevron*. See *id.* at 137–38. After *Chevron*, fewer cases explicitly raise the point. See, e.g., *Cardoza-Fonseca*, 480 U.S. at 434–35; *Barnhart*, 535 U.S. at 219–20; *NLRB v. United Food & Com. Workers Union*, 484 U.S. 112, 124 n.20 (1987). A study of the Court’s opinions citing *Chevron* between 1984 and 2006 found that the Court referred to the longstanding nature of an interpretation less often after *Chevron*. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 984–85, 1018–22 (1992).

¹⁰² *Chevron*, 467 U.S. at 843. For one example of disagreement that may arise when applying these traditional tools of statutory construction, see *Scialabba v. De Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion) (concluding statute “does not speak unambiguously to the issue here”); *id.* at 85 (Sotomayor, J., dissenting) (concluding statute “answers the precise question in this case”). See also Brett M. Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, 129 *HARV. L. REV.* 2118, 2136 (2016) (arguing “there is often no good or predictable way for judges to determine whether statutory text contains ‘enough’ ambiguity to cross the line beyond which courts may resort to ... *Chevron* deference.”); MANNING & STEPHENSON, *supra* note 99, at 171 (“Another concern here is just how one defines or determines ‘ambiguity’ in the statute’s semantic meaning.”).

question of statutory interpretation in which the court should look for ambiguity or clarity as it would any other time it interprets a statute or whether instead a determination that a statute is unambiguous for the purposes of *Chevron* step one requires some higher level of clarity.¹⁰³ Different judges may undertake a more or less searching inquiry, deploying different tools of statutory interpretation and, perhaps as a result, reaching different conclusions regarding whether to proceed to *Chevron* step two.¹⁰⁴ Some decisions have implied that if a court needs to resort to a greater number of tools in the search for a clear meaning, this in itself suggests that a statute is ambiguous.¹⁰⁵

Confusion about the level of statutory ambiguity required to trigger *Chevron*'s step two is compounded by Supreme Court decisions that seemingly blur the line between the two steps. The Court has sometimes held only that an agency's interpretation is "reasonable"¹⁰⁶ or "permitted"¹⁰⁷ without expressing an opinion on whether the statute is sufficiently clear to indicate that Congress in fact unambiguously addressed the specific question before the court.¹⁰⁸ Some scholars have invoked these decisions to argue that *Chevron* review consists of only one inquiry: "whether the agency's construction is permissible as a matter of statutory interpretation."¹⁰⁹

¹⁰³ Compare *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 95 (2017) (concluding Court did not need to consider whether agency interpretation was due *Chevron* deference because that construction "best comport[ed] with [the statute's] text, context, and purpose"), and *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42 (1990) (holding *Chevron* deference was inapplicable because "the statute, as a whole, clearly expresses Congress' intention"), with *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring) (emphasizing that courts may not simply "substitute their interpretation of a statute for that of an agency whenever they face a pure question of statutory construction for the courts to decide") (internal quotation marks and citation omitted). See also Note, "How Clear is Clear" in *Chevron's Step One?*, 118 HARV. L. REV. 1687, 1697 (2005) (arguing "*Chevron* imposes a standard of proof higher than" ordinary statutory interpretation because it shifts the question from "What does the statute mean?" to "Is the statute clear?").

¹⁰⁴ Compare *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659–60 (D.C. Cir. 2011) ("Because at *Chevron* step one we alone are tasked with determining Congress's unambiguous intent, we answer [step one] inquiries without showing the agency any special deference."), and *Abbott Labs. v. Young*, 920 F.2d 984, 994–95 (D.C. Cir. 1990) (Edwards, J., dissenting) ("Underlying the majority's analysis is the assumption that if one can perceive any ambiguity in a statute, however remote, slight or fanciful, the statute must be pushed into the second step of *Chevron* analysis. . . . This fundamentally misconceives the point of *Chevron* analysis.... Minor ambiguities or occasional imprecision in language may be brooked under *Chevron*'s first step, so long as traditional tools of statutory construction reveal Congress' intentions.") (internal quotation marks omitted), with *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) (Wilkins, J., concurring in part and dissenting in part) (stating it is a "high bar to show clear Congressional intent" at step one). See also, e.g., *Merrill & Hickman, Chevron's Domain*, *supra* note 45, at 860 (arguing that because Justice Scalia had "adopted an extremely aggressive conception of the judicial role at step one," he "invokes *Chevron* more consistently than other Justices, but also ends up deferring to agency views less than other Justices").

¹⁰⁵ See, e.g., *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1272 (D.C. Cir. 1994) ("Because we must examine the effective date provision in its statutory context in order to determine which meaning the Congress intended, we cannot say that either the NRDC's or the EPA's reading is the uniquely 'plain meaning' of the provision.")

¹⁰⁶ E.g., *Astrue*, 566 U.S. at 558 (2012) ("The [agency's] interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference under *Chevron*."); *Entergy*, 556 U.S. at 218 (stating agency's "view governs if it is a reasonable interpretation of the statute").

¹⁰⁷ E.g., *Zuni*, 550 U.S. at 84 (phrasing the question before the Court as "whether the emphasized statutory language permits" the agency's reading).

¹⁰⁸ See *Entergy*, 556 U.S. at 219–20 (holding statute did not "unambiguously preclude" agency interpretation); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 (1995) (holding that the agency "better comprehends the Act's terms").

¹⁰⁹ Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009). Cf. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 494 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment) (asserting that "'step 1' has never been an essential part of *Chevron* analysis"); Richard M. (continued...)

Chevron Step Two

If a court determines at step one that the statute is ambiguous or silent on the particular issue in question, the *Chevron* framework next requires consideration of whether the agency’s construction of the statute is “reasonable.”¹¹⁰ Under *Chevron*’s step two analysis, if Congress has delegated authority to an agency to fill in the gaps of a statute, courts will give “controlling weight” to reasonable agency interpretations of a statutory ambiguity.¹¹¹ Accordingly, at *Chevron*’s second step, courts may not substitute their own interpretation of a statutory provision for an agency construction that is reasonable.¹¹² *Chevron* deference thus sometimes requires a court to sanction an interpretation that departs from what the court considers the best reading of a statute so long as the agency’s interpretation is “rationally related to the goals” of the statute.¹¹³ Commentators have noted that, at least in the federal courts of appeals, agency interpretations are more likely to prevail when the case is resolved at *Chevron*’s second step than when a court decides the case at step one or declines to apply the *Chevron* framework at all.¹¹⁴

What qualifies as a permissible statutory construction largely depends on the particular context, although courts applying *Chevron*’s second step may inquire into the sufficiency of an agency’s reasoning¹¹⁵ and may consider the traditional tools of statutory construction.¹¹⁶

Agency Discretion to Change Course

The theory of delegation animating *Chevron* deference implicitly acknowledges that an ambiguous statute permits a range of plausible interpretations.¹¹⁷ Within the parameters of its

Re, *Should Chevron Have Two Steps?*, 89 IND. L.J. 605, 635 (2014) (arguing Supreme Court views step one as distinct but optional).

¹¹⁰ *Chevron*, 467 U.S. at 844.

¹¹¹ *Id.* at 844–45, 865–66; *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (“The reasonableness prong includes an inquiry into whether the agency reasonably filled a gap in the statute left by Congress.”).

¹¹² *See Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 981 (1986) (noting that at *Chevron*’s second step, a court is “preclude[d]” from “substituting its [own] judgement for that of [the agency]”) (internal citations and quotations omitted).

¹¹³ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999); *Pharm. Research & Mfrs. of Am. v. FTC*, 790 F.3d 198, 208 (D.C. Cir. 2015) (quoting *Barrington*, 636 F.3d at 667); *see also Entergy*, 556 U.S. at 218 (“That view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed most reasonable by the courts.”); *Allied Local & Reg’l Mfrs. Caucus v. EPA*, 215 F.3d 61, 71 (D.C. Cir. 2000) (“Under *Chevron*, we are bound to uphold agency interpretations as long as they are reasonable—‘regardless whether there may be other reasonable, or even more reasonable, views.’”) (quoting *Serono Lab., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)).

¹¹⁴ *See Amy Semet, Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis*, 12 U.C. IRVINE L. REV. 621, 678 (2022) (finding that agencies prevailed far more often when a court applied a “reasonableness” analysis than when it did not); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 6 (2017) (concluding that agencies prevailed at *Chevron*’s second step significantly more often than when cases were resolved at step one or when *Chevron* did not apply).

¹¹⁵ *See, e.g., Zero Zone, Inc. v. Dep’t of Energy*, 832 F.3d 654, 668 (7th Cir. 2016).

¹¹⁶ *See, e.g., Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

¹¹⁷ *See Chevron*, 467 U.S. at 863–64 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency ... must consider varying interpretations and the wisdom of its policy on a continuing basis.”); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996) (“[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”); *Ariz. Pub. Serv.*, 211 F.3d at 1287 (“[A]s long as the agency stays within [Congress’s] delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference.”) (internal quotation marks omitted) (quoting *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995)).

statutory delegation, an agency might have discretion to pursue a variety of different policy objectives.¹¹⁸ One significant consequence of this principle is that agencies are permitted to change their interpretations of ambiguous statutes over time.¹¹⁹ Assuming agencies acknowledge the change and stay within the bounds of a reasonable interpretation,¹²⁰ they may reconsider the wisdom of their policy choices and shift their construction of statutory ambiguities accordingly to reflect altered circumstances or a change in policy preferences.¹²¹

In addition to an agency's discretion to alter its interpretations as long as those interpretations remain reasonable, another implication of *Chevron's* delegation theory is that an agency's construction of a statutory ambiguity can supersede some prior court decisions on the meaning of a statute. In *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*), the Supreme Court held that when a court finds that a statute contains "unambiguous terms ... and thus leaves no room for agency discretion," an agency is foreclosed from adopting a contrary interpretation.¹²² In contrast, if a court has previously upheld an agency interpretation as reasonable based on *Chevron* step two, the agency is free to adopt a countervailing reasonable construction of a statutory ambiguity in the future.¹²³

Judicial Approaches to Step Two Analysis

Given the variety of statutory schemes implemented by federal agencies, as well as the potential for multiple reasonable interpretations of the same statute, precisely what constitutes a reasonable agency construction of a statute is difficult to define in the abstract.¹²⁴ As an initial matter, some courts affirm agencies' interpretations under *Chevron's* step two without any sustained analysis beyond consideration of the statute at step one.¹²⁵ In these situations, courts often appear to anchor their decisions on their prior considerations at step one of the statute's meaning—meaning, for example, that if an agency's position is one of multiple interpretations that the court

¹¹⁸ Judges and commentators have noted that the *Chevron* framework, at least at step two, merges judicial review of traditional legal interpretations of a statute's meaning with policy choices within (or without) the parameters of a statute's terms. See Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (noting that when agencies choose between competing interpretations of an ambiguous statute, "[t]hat sort of choice implicates and sometimes squarely involves policy making"); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) ("*Chevron* is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle."); Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1083 (2016) (considering the implications of eliminating *Chevron* deference and separating judicial review of an agency's legal interpretation from policymaking).

¹¹⁹ See *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991); see generally *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (ruling that when reviewing agency actions under the APA's "arbitrary" and "capricious" standard courts should not apply "more searching review" simply because an agency changed course).

¹²⁰ See *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016); see generally CRS Report R46673, *Agency Rescissions of Legislative Rules*, by Kate R. Bowers and Daniel J. Sheffner (2021); CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole (2016).

¹²¹ *Nat'l Cable*, 545 U.S. at 981.

¹²² *Id.* at 982 ("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.")

¹²³ *Id.*

¹²⁴ See generally Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 659 (2020) (discussing the Court's various approaches to the step two inquiry).

¹²⁵ See *Astrue*, 566 U.S. at 556–59.

found could be reasonable at *Chevron*'s first step, then the court will defer to the agency's interpretation at *Chevron*'s second step.¹²⁶

In other cases, however, courts at step two engage in a more thorough examination of the reasonableness of an agency's interpretation.¹²⁷ In some instances, a court's analysis at step two focuses on the sufficiency of an agency's reasoning,¹²⁸ an examination that can overlap with "hard look" review under the "arbitrary and capricious" standard of the APA.¹²⁹ A 2018 analysis of courts of appeals decisions rejecting agency interpretations at step two of *Chevron* found that courts applied the APA's "arbitrary and capricious" standard more often than any other reasonableness standard.¹³⁰ Some courts may also employ the traditional tools of statutory construction at *Chevron*'s second step.¹³¹ One common inquiry is whether the agency's position comports with the overall purpose of the statute in question.¹³² For example, in *Chevron* itself, the Supreme Court held that the agency's interpretation of the term "source" was "a permissible construction of the statute" in light of the statute's goals "to accommodate progress in reducing air pollution with economic growth."¹³³ Lower courts have followed suit, examining at *Chevron*'s second step whether an agency's interpretation of a statutory ambiguity accords with a statute's policy objectives.¹³⁴ A variety of other indicia can also potentially be relevant in assessing the

¹²⁶ See, e.g., *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227–28 (11th Cir. 2009). Such cases arguably support the notion that *Chevron* ultimately consists of one step. See Stephenson & Vermeule, *supra* note 109, at 598 (arguing that *Chevron*'s two steps ultimately merge into a single reasonableness inquiry).

¹²⁷ See, e.g., *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 710 (D.C. Cir. 2008); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996).

¹²⁸ See, e.g., *Consumer Fed'n of Am. & Pub. Citizen v. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1504–05 (D.C. Cir. 1996); *Env't Def. Fund v. EPA*, 82 F.3d 451, 467 (D.C. Cir. 1996); *Republican Nat'l Comm. v. FEC*, 76 F.3d 400, 406–07 (D.C. Cir. 1995); *Madison Gas & Elec. Co. v. EPA*, 25 F.3d 526, 529 (7th Cir. 1994); see M. Elizabeth Magill, *Judicial Review of Statutory Issues Under the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 93–95 (2005).

¹²⁹ The Court has indicated that the analysis at *Chevron* step two can overlap with an arbitrary and capricious review under the APA. *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011); see also *Arent*, 70 F.3d at 616 n.6 ("The *Chevron* analysis and the 'arbitrary, capricious' inquiry set forth in *State Farm* overlap in some circumstances, because whether an agency action is 'manifestly contrary to the statute' is important both under *Chevron* and under *State Farm*."). But see *Humane Soc'y of the U.S. v. Zinke*, 865 F.3d 585, 605 (D.C. Cir. 2017) ("While analysis of the reasonableness of agency action under *Chevron* Step Two and arbitrary and capricious review is often the same, the Venn diagram of the two inquiries is not a circle. The question thus remains whether the agency arbitrarily and capriciously failed to consider an important aspect of the problem it faces.") (internal quotation marks omitted). For more on the arbitrary and capricious standard of review, see CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole (2016).

¹³⁰ Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1466 (2018). Courts relied on the APA standard in about one-third of the cases in the study. *Id.*

¹³¹ *Id.* The study's authors found that courts of appeals look to purpose to resolve the reasonableness inquiry in about 28% of opinions and look to the text of the statute in about 12% of opinions.

¹³² *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 58 (2011) (upholding the agency's decisions at step two of *Chevron* because they furthered the purposes of the Social Security Act); *Babbitt*, 515 U.S. at 698 ("[T]he broad purpose of the [Endangered Species Act] supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid.").

¹³³ *Chevron*, 467 U.S. at 866.

¹³⁴ See, e.g., *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 117 (D.C. Cir. 1987) (deferring to the EPA's interpretation because, given the overarching goals of the Clean Water Act, the EPA's regulation "reasonably balances and resolves the competing Congressional goals reflected in the provision"); *Kennecott*, 88 F.3d at 1213 (concluding that the agency's construction was "not a reasonable interpretation of the statute, viewed with an eye to its structure and purposes"); *Troy Corp. v. Browner*, 120 F.3d 277, 285 (D.C. Cir. 1997) ("Therefore, under *Chevron*, as the wording of the statute is at most ambiguous, the most that can be required of the administering agency is that its interpretation be reasonable and consistent with the statutory purpose."); *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995) (suggesting (continued...))

reasonableness of an agency interpretation, including whether the agency’s construction serves the public interest¹³⁵ and whether the agency has consistently interpreted the statute in the same manner over time.¹³⁶

Courts may also apply other traditional tools of statutory interpretation at step two, although this practice can sometimes mirror a court’s step one analysis.¹³⁷ For example, courts will examine whether an agency’s interpretation makes sense within the statutory scheme, looking for consistency with other relevant provisions in the statute at issue,¹³⁸ the interactions among various statutory provisions,¹³⁹ or prior judicial precedents interpreting similar provisions.¹⁴⁰ In addition, courts may inquire into the commonly used meaning of a statutory term.¹⁴¹

Importantly, some courts apply a broader range of tools of construction at *Chevron*’s second step than at step one. For instance, some courts will examine a statute’s legislative history at step two to determine if the agency has reasonably complied with Congress’s goals, even if those courts believe that doing so at step one would be inappropriate.¹⁴²

As noted above, some observers have concluded that agencies are more likely to prevail at *Chevron*’s second step than when a court completes its analysis at step one or conducts review de novo of the agency’s position.¹⁴³ Potentially, judicial deference to an agency’s interpretation may lead to relatively greater national uniformity in the implementation of regulatory statutes,¹⁴⁴ a feature arguably endorsed by the Supreme Court.¹⁴⁵ Because *Chevron* instructs courts of appeals

that because the statute is necessarily ambiguous when a court reaches step two of the *Chevron* test, “about all the court can do is determine whether the agency’s action is rationally related to the objectives of the statute containing the delegation”).

¹³⁵ *Cuozzo*, 579 U.S. at 279–81.

¹³⁶ *Id.*; *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1221 (9th Cir. 2015) (deferring at *Chevron*’s second step because, among other things, the agency’s position was “consistent” with its “longstanding policy”).

¹³⁷ *See Bell*, 131 F.3d at 1049 (“Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation; under step two we consider text, history, and purpose to determine whether these *permit* the interpretation chosen by the agency.”); *see infra* “Chevron Step One.”

¹³⁸ *See, e.g., Your Home Visiting Nurse Servs., Inc., v. Shalala*, 525 U.S. 449, 454 (1999); *UC Health v. NLRB*, 803 F.3d 669, 676 (D.C. Cir. 2015) (deferring at *Chevron*’s second step because “[t]he Board’s interpretation of the statute reads every clause of the statutory provision harmoniously”).

¹³⁹ *See, e.g., NationsBank*, 513 U.S. at 258-59.

¹⁴⁰ *See, e.g., Ariz. Pub. Serv.*, 211 F.3d at 1294.

¹⁴¹ *See, e.g., Smiley*, 517 U.S. at 744–45; *Babbitt*, 515 U.S. at 697.

¹⁴² *Barrington*, 636 F.3d at 666 (“Although we would be uncomfortable relying on such legislative history at *Chevron* step one, we think it may appropriately guide an agency in interpreting an ambiguous statute—just how the Board used it here.”); *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 307 (3d Cir. 2015) (“[A]t Step Two we may consider legislative history to the extent that it may clarify the policies framing the statute.”); *see Hickman & Hahn, supra* note 124, at 632 (noting that the courts of appeals are divided over whether evaluating legislative history must be postponed until the court finds the statute ambiguous and engages in the step two inquiry).

¹⁴³ *See Barnett & Walker, Chevron in the Circuit Courts, supra* note 114, at 6 (finding that between 2003 and 2013, in cases where circuit courts applied *Chevron* deference to agency statutory interpretations, the agency prevailed approximately 25% more often than when *Chevron* did not apply); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998) (determining that in 1995 and 1996 courts that reached step two of the *Chevron* test “upheld the agency view in 89% of the applications”); *but see* Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (reviewing various studies examining agency win-rates and concluding that “doctrinally-based differences in outcome are barely detectable”).

¹⁴⁴ Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).

¹⁴⁵ *See City of Arlington*, 569 U.S. at 307 (noting that adoption of the dissent’s rule regarding *Chevron*’s application (continued...))

to defer to reasonable agency interpretations of statutory ambiguities, circuit splits on the meaning of ambiguous statutory provisions may be less likely than would arise without *Chevron* deference.¹⁴⁶

The Supreme Court is arguably less deferential than federal courts of appeals when it applies *Chevron*'s second step.¹⁴⁷ That is, while the Court applies the same basic framework as do lower courts, certain of its decisions at least appear to apply *Chevron*'s second step more stringently.¹⁴⁸ In the 2015 case of *Michigan v. EPA*, for example, the Court rejected as unreasonable the EPA's interpretation of a CAA provision that authorized the agency to regulate certain emissions only where "appropriate and necessary."¹⁴⁹ In making the initial determination whether to regulate at all, the EPA did not consider the cost to industry.¹⁵⁰ The majority opinion applied the *Chevron* framework¹⁵¹ but held at *Chevron*'s second step that it was unreasonable for the EPA not to consider costs when *initially* deciding that it was appropriate and necessary to regulate.¹⁵² In contrast, the dissent would have upheld the EPA's interpretation because the agency considered costs at a later stage—although the dissent agreed with the Court that not considering costs at all would be unreasonable.¹⁵³ Consequently, all the Justices applied *Chevron* in a manner cabining the agency's discretion in interpreting the statute—an approach that contrasts with the deference that lower courts have traditionally given agency interpretations at step two.

would permit "[t]hirteen Courts of Appeals [to] apply[] a totality-of-the-circumstances test . . . and destroy the whole stabilizing purpose of *Chevron*").

¹⁴⁶ See generally Pojanowski, *supra* note 118 (noting that "[w]ith deference, the EPA can decide what the Clean Air Act means in all fifty states. Without it, critical provisions can mean different things in states covered by, say, the Ninth and Fifth Circuits," but cautioning that the concern over potential diverging statutory provisions may be "overblown"). *But see* Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 114, at 6–9 (identifying significant variations in, among other things, the rate at which courts of appeals apply *Chevron*, the rate at which various agencies receive *Chevron* deference, and the rate at which courts apply *Chevron* to long-standing versus recently adopted interpretations).

¹⁴⁷ See *id.* at 4 ("In other words, the Court's choice to apply *Chevron* deference, as opposed to a less-deferential doctrine or no deference at all, does not seem to affect the outcome of the case. *Chevron* deference—at least at the Supreme Court—does not seem to matter."); see generally Pierce, *supra* note 143, at 85; William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1124–25 (2008).

¹⁴⁸ See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014).

¹⁴⁹ *Michigan v. EPA*, 576 U.S. 743 (2015).

¹⁵⁰ *Id.* at 747–50.

¹⁵¹ *Id.* at 749–53.

¹⁵² *Id.* The Court noted that, in contrast to the strict criteria for regulating other sources, the CAA directed the EPA to regulate power plants only if "appropriate and necessary." In addition, the Court noted that agencies have historically considered cost as a "centrally relevant factor when deciding whether to regulate.... [I]t is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost." *Id.* at 752–53. Finally, the Court pointed to the statutory context as indicative of "the relevance of cost" to the agency's decision. *Id.* at 753.

¹⁵³ *Id.* at 764 (Kagan, J., dissenting).

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Issues to Consider

Criticisms and Future Application of *Chevron*

Until recently, many have seen the Court’s decision in *Chevron* as a foundational case for understanding the modern administrative state.¹⁵⁴ While it is one of the most cited cases by federal courts in administrative law disputes¹⁵⁵ and supplies a background principle of deference to statutory ambiguity against which Congress may legislate,¹⁵⁶ the Supreme Court has not deferred to an agency interpretation of federal law since 2016. *Chevron*’s recent absence at the Court may call into question whether *Chevron* remains good law.¹⁵⁷ In a 2018 dissent, Justice Alito wrote that *Chevron* is now an “increasingly maligned precedent” that the Court feels comfortable “simply ignoring.”¹⁵⁸ Four years later, Justice Gorsuch colorfully quipped that *Chevron* “deserves a tombstone no one can miss.”¹⁵⁹ The Court agreed to take up the question of whether *Chevron* should be curtailed or overruled in its 2023 term in *Loper Bright Enterprises v. Raimondo*.¹⁶⁰ The *Loper* case raises many of the criticisms that members of the Court and some corners of academia have leveled against the *Chevron* framework.¹⁶¹ These criticisms include attacking the presumption that silence is an implicit delegation of interpretive authority and arguing *Chevron* leads to the aggrandizement of the executive at the expense of the judiciary and Congress.¹⁶² Those criticisms and responses to them are discussed in more detail below.

Until agreeing to hear the challenge to *Chevron* in the upcoming *Loper* case, the Court generally seemed content to ignore *Chevron* for nearly seven years. To illustrate, in a trio of opinions from 2022 addressing agency interpretations of federal statutes, the Court did not reference *Chevron* at all.¹⁶³ What is significant about these opinions is not that they determined that statutory language is clear or that Congress did not delegate certain authority to the agency. The *Chevron* framework, as the Court has developed it, explicitly allows courts to reach these outcomes under step one. Rather, what is significant in those three opinions is that the Court came to these conclusions without resort to the *Chevron* framework. These results may, in part, be due to the reluctance of

¹⁵⁴ Sunstein, *Chevron Step Zero*, *supra* note 33, at 191 (asserting that the *Chevron* decision “has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies”).

¹⁵⁵ See Hickman & Bednar, *Chevron’s Inevitability*, *supra* note 68, at 101.

¹⁵⁶ Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 50, at 517.

¹⁵⁷ See Kristen E. Hickman & Aaron L. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1016 (2021); James Kunhardt & Anne Joseph O’Connell, BROOKINGS INST., *Judicial Deference and the Future of Regulation* (Aug. 18, 2022), <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/>.

¹⁵⁸ *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

¹⁵⁹ *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting from denial of certiorari). Justice Kavanaugh has raised concerns that *Chevron* is conceptually muddled, while Chief Justice Roberts has suggested that *Chevron* should be significantly narrowed. See Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, *supra* note 102; *City of Arlington*, 569 U.S. at 323–27 (Roberts, C.J., dissenting) (advancing a narrower theory of *Chevron*).

¹⁶⁰ *Loper Bright Enters. v. Raimondo*, No. 22-451, 2023 WL 3158352 (2023) (order granting petition for certiorari).

¹⁶¹ Petition for Writ of Certiorari at 28-33, *Loper Bright Enters. v. Raimondo*, 2023 WL 3158352 (2023) (No. 22-451).

¹⁶² *Id.*

¹⁶³ See *West Virginia*, 142 S. Ct. 2587 (applying the major questions doctrine without resort to *Chevron*); *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022) (employing “traditional tools of statutory interpretation” to analyze agency rule, without resort to *Chevron*); *Becerra v. Empire Health Found.*, 142 S. Ct. 2354 (2022) (same).

advocates before the Court to press arguments based on *Chevron* that they suspect will not be well-received by some Justices.¹⁶⁴

Adding to the speculation about the future viability of the *Chevron* doctrine, in late 2022, the Court declined to hear a case that squarely presented the question of whether *Chevron* should be overruled.¹⁶⁵ Both Justice Gorsuch and Justice Thomas dissented from the decision not to take the case, arguing that the Court should provide clarity to the lower courts and litigants by explicitly overruling *Chevron*.¹⁶⁶ Although *Chevron* formally remains binding Supreme Court precedent, its ultimate fate before the Court remains open for debate.

The Supreme Court's recent silence on *Chevron*, however, does not mean that the lower courts have followed suit. In a 2018 survey of federal appellate judges, a majority of judges surveyed believed they were still bound to apply *Chevron*, although many expressed criticisms of the doctrine.¹⁶⁷ Despite a handful of notable exceptions to the contrary,¹⁶⁸ the lower courts appear to be applying *Chevron* in the same manner as they have since the Supreme Court adopted it.

The growing criticism of *Chevron* from a plurality of the Justices, and from some corners of legal academia, is partly founded upon a different view than *Chevron* expressed about the respective places of agencies and courts within the constitutional system. As discussed above, one justification *Chevron* itself gave for deferring to agency resolutions of ambiguous statutes was to place these questions in the hands of relatively more politically accountable agencies rather than unelected Article III judges.¹⁶⁹ A number of commentators, however, have criticized *Chevron* deference on these grounds, arguing that *Chevron*'s step two violates separation of powers and due process principles.¹⁷⁰ Recent skepticism from various Justices has arguably brought increased attention to these concerns.¹⁷¹

Justice Gorsuch has criticized the doctrine on multiple occasions, including while he was a judge on the Court of Appeals for the Tenth Circuit.¹⁷² For example, in his dissent from a Supreme

¹⁶⁴ The United States appears to have curtailed seeking *Chevron* deference before the Supreme Court. *See, e.g.*, Brief for the Fed. Respondents at 25, *West Virginia*, 142 S. Ct. 2587 (citing *Chevron* once and only for its interpretation of the Clean Air Act, not deference); Brief for the Respondents at 47, *Am. Hosp. Ass'n.*, 142 S. Ct. 1896 (“Although the government can prevail without any deference to its interpretation under *Chevron* ... , such deference is warranted.”); Brief for the Respondents at 38, *Sackett v. EPA*, No. 21-454 (U.S.) (relegating deference argument to the end of the government’s brief). In a 2019 oral argument, one prominent Supreme Court litigator concluded by admitting “I hate to cite it, but I will end with *Chevron*.” Transcript of Oral Argument at 58, *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893 (2019).

¹⁶⁵ *Buffington*, 143, S. Ct. at 14 (denying writ of certiorari).

¹⁶⁶ *Id.*

¹⁶⁷ Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1348 (2018).

¹⁶⁸ *See, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 45 F.4th 306, 313–14 (D.C. Cir. 2022) (“[T]here is no need to decide what deference, if any, a regulation should receive where we can conclude that the agency’s interpretation of the statute is the best one.”); *J. B-K. v. Sec’y of Ky. Cabinet for Health and Fam. Servs.*, 48 F.4th 721, 729 (6th Cir. 2022) (relying on “traditional tools” of statutory interpretation instead of any deference doctrine).

¹⁶⁹ *Chevron*, 467 U.S. at 865–66; *City of Arlington*, 569 U.S. at 327 (Roberts, J., dissenting) (“*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”).

¹⁷⁰ *See* Pojanowski, *supra* note 118, at 1077–78 (noting various critics of *Chevron* deference).

¹⁷¹ *See, e.g.*, *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment) (“Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations.”).

¹⁷² *See, e.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Judge Gorsuch also criticized the Court’s opinion in *Brand X*, which instructs a court to defer to reasonable agency (continued...)

Court denial of certiorari Justice Gorsuch argued that deferring to agency interpretations under *Chevron* was an “abdication” of the judicial duty.¹⁷³ This shift of responsibility, in Justice Gorsuch’s view, raises due process and equal protection concerns.¹⁷⁴ In particular, he argued that under the *Chevron* framework, regulated parties do not receive fair notice of what the law requires.¹⁷⁵ Instead, Justice Gorsuch argued that *Chevron* introduces a “systematic bias” in favor of the most powerful litigant—the federal government.¹⁷⁶ Further, Justice Gorsuch questioned whether silence or ambiguity in a statute truly reflects congressional intent to delegate interpretive authority to federal agencies¹⁷⁷ and argued that this theory contradicts the APA’s mandate to courts to interpret the law.¹⁷⁸ Finally, as a judge on the Tenth Circuit, then-Judge Gorsuch noted that, at least in some instances, the application of *Chevron* deference might constitute an unconstitutional delegation of legislative authority to the executive branch.¹⁷⁹

Justice Thomas has also raised serious concerns about *Chevron*’s constitutional validity. For instance, he has questioned the doctrine on separation of powers grounds.¹⁸⁰ Like Justice Gorsuch, Justice Thomas objects to “*Chevron*’s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law.”¹⁸¹ He argues that judicial deference to ambiguous agency statutory interpretations contradicts the Constitution’s vestment of judicial power in Article III courts, which requires the judiciary, rather than the executive, to “say what the law is.”¹⁸² In addition, for Justice Thomas, to the extent that agencies are not truly *interpreting* statutory ambiguities but rather *formulating policy* under the *Chevron* deference framework, they may be exercising legislative power that the Constitution provides only to Congress.¹⁸³

Other judges sitting on the federal courts of appeals have raised similar objections to *Chevron* deference.¹⁸⁴ At least one has echoed the separation of powers concerns voiced by Justices

interpretations at *Chevron* step two, even if the court previously reached a different interpretation. He argued that the doctrine “risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law’s meaning ... without the inconvenience of having to engage the legislative processes the Constitution prescribes.” *Id.* at 1151; *see also* *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

¹⁷³ *Buffington*, 143 S. Ct. at 16.

¹⁷⁴ *Id.* at 18–19.

¹⁷⁵ *Id.* at 20.

¹⁷⁶ *Id.* at 18–19 (quoting Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1212 (2016)).

¹⁷⁷ *Id.* at 19 (“A rule requiring us to suppose statutory silences and ambiguities are both always intentional and always created by Congress to favor the government over its citizens ... is neither traditional nor a reasonable way to read laws. It is a fiction through and through.”).

¹⁷⁸ *Id.* at 16–17 (“[T]he [APA] imposed a ‘clear mandate’ for courts to decide questions of law ‘for themselves in the exercise of their own independent judgment.’” (quoting John Dickinson, *Administrative Procedure Act: Scope and Ground of Broadened Judicial Review*, 33 A.B.A. J. 434, 516 (1947))).

¹⁷⁹ *Gutierrez-Brizuela*, 834 F.3d at 1154–55 (Gorsuch, J., concurring).

¹⁸⁰ *See, e.g., Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring).

¹⁸¹ *Cuozzo*, 579 U.S. at 285–86 (2016) (Thomas, J., concurring).

¹⁸² *Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁸³ *Id.* at 761 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

¹⁸⁴ *See, e.g., Solar Energy Indus. Ass’n v. FERC*, 59 F.4th 1287, 1297 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part) (arguing that the D.C. Circuit has wrongly gone down the path of “*Chevron* maximalism” by deferring too easily when the court finds a statutory ambiguity instead of using all of the tools of statutory construction to find the “best reading” of the statute); *Mexican Gulf Fishing Co. v. Dep’t of Com.*, 60 F.4th 956, 976 (5th Cir. 2023) (Oldham, J., concurring) (asserting that the Supreme Court in its most recent cases addressing the reasonableness of agency statutory interpretations directed the lower courts to use “the traditional tools of statutory (continued...)”).

Gorsuch and Thomas.¹⁸⁵ Another has lamented that *Chevron*'s broad scope encourages agencies to aggressively pursue policy goals “unless ... *clearly forbidden*,” rather than fairly determining the best interpretation of a statute's meaning.¹⁸⁶

A 2018 survey found that while all of the 42 federal appellate judges interviewed believe they are bound by *Chevron*, “most do not favor” *Chevron*.¹⁸⁷ The judges surveyed were skeptical of *Chevron*'s underlying premise that statutory ambiguities are implicit delegations to agencies and were also concerned about agency overreach and discounted agency expertise in interpreting statutes.¹⁸⁸ Perhaps significantly, most judges on the D.C. Circuit did not share their colleagues' concerns. All but one judge surveyed on the D.C. Circuit were “admirers” of *Chevron* and “were satisfied with the balance *Chevron* strikes.”¹⁸⁹ The survey found that “D.C. Circuit judges accept ... *Chevron* as part of the basic wiring of how that court decides cases and generally are comfortable with it.”¹⁹⁰ It is therefore not surprising to many legal scholars that the D.C. Circuit also surveyed as the most *Chevron*-friendly circuit.¹⁹¹

Numerous scholars have also questioned the doctrine,¹⁹² critiquing, among other things, its purported historical foundations,¹⁹³ theoretical basis,¹⁹⁴ and inconsistent application by the Court.¹⁹⁵ Further, scholars have criticized the apparent tools provided in *Chevron* to determine the meaning of a statute,¹⁹⁶ the Court's test for when *Chevron* applies,¹⁹⁷ and confusion regarding the mechanics and purpose of the doctrine's framework stemming from *Chevron*'s “unsystematic

interpretation” (quoting *Becerra*, 142 S. Ct. at 1906) and calling *Chevron* the “Lord Voldemort of administrative law” (quoting *Aposhian v. Wilkinson*, 989 F.3d 890, 896 (10th Cir. 2021) (Tymkovich, C.J., dissenting)); *Waterkeeper All. v. EPA*, 853 F.3d 527, 539 (D.C. Cir. 2017) (Brown, J., concurring) (“An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name.”).

¹⁸⁵ See *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278–79 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

¹⁸⁶ See Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, *supra* note 102, at 2152 (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

¹⁸⁷ Gluck & Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, *supra* note 167; see also *Diaz-Rodriguez v. Garland*, 55 F.4th 697, 728 n.30 (9th Cir. 2022) (recognizing that “the future of the *Chevron* deference doctrine has been called into question” but finding that the court “remain[s] bound by past decisions of the Supreme Court until it overrules those decisions”).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1349.

¹⁹¹ Barnett & Walker, *Chevron in the Circuit Courts*, *supra* note 114, at 7 (finding that the D.C. Circuit applied *Chevron* in 88.6% of cases of agency statutory interpretation—the highest application rate of all the circuits). The D.C. Circuit also hears more challenges to agency interpretations than any other circuit (307). *Id.* at 44. The Ninth Circuit is a relatively close second (263). *Id.*

¹⁹² For a survey of the literature criticizing *Chevron* deference, see Christopher J. Walker, *Attacking Auer and Chevron: A Literature Review*, 16 *GEO. J.L. & PUB. POL.* 103 (2018).

¹⁹³ See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* 908, 930–62 (2017); MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE*, *supra* note 99, at 134–35.

¹⁹⁴ See Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 *CONN. L. REV.* 779, 795 (2010).

¹⁹⁵ See Christine Kexel Chabot, *Selling Chevron*, 67 *ADMIN. L. REV.* 481, 484 (2015); John F. Manning, *Chevron and Legislative History*, 82 *GEO. WASH. L. REV.* 1517, 1551–52 (2014).

¹⁹⁶ See Lisa Schultz Bressman, *Chevron's Mistake*, 58 *DUKE L.J.* 549, 551 (2009); Abbe R. Gluck, *What 30 Years of Chevron Teach Us about the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607, 619 (2014).

¹⁹⁷ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 *Vand. L. Rev.* 1443, 1443–48 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 *Geo Wash. L. Rev.* 347, 347 (2003).

origin.”¹⁹⁸ Finally, scholars have debated the merits of each of *Chevron*’s initial justifications, including the presence of an implied delegation of interpretive authority from Congress to an agency, the role of agency expertise, and the importance of political accountability.¹⁹⁹

Despite these critiques, some scholars have argued that *Chevron* has much firmer constitutional footing than its critics recognize. For instance, responding to the argument that *Chevron* unconstitutionally shifts interpretive authority from courts to agencies, some scholars have asserted that determining that a statute delegates authority to an agency to resolve an ambiguity or a gap is consistent with Article III’s requirement that courts interpret the law.²⁰⁰ After all, determining that a statute’s best reading requires delegation is still an interpretation.²⁰¹ Still others argue that courts historically did not think deference implicated constitutional concerns.²⁰²

In a more nuanced defense of *Chevron*’s constitutional foundations, one scholar noted that because Congress has the power to foreclose judicial review of public rights that it creates by statute (e.g., claims against the government created by statute such as those found in the APA), Congress has the authority to decide the nature of judicial review either implicitly or explicitly.²⁰³ *Chevron*’s application to cases concerning public or private rights that Congress did not create (e.g., constitutional claims and common law claims, respectively), however, likely raises constitutional concerns.²⁰⁴ Under this view, *Chevron*’s operation in the core area of administrative law of statutorily created public rights is entirely consistent with Congress’s legislative power but may offend the judiciary’s well-settled constitutional role in adjudicating rights not created by statute.²⁰⁵

As noted above, *Chevron* rests, at least in part, on an assumption that Congress intends ambiguity in statutes to signal a delegation of interpretive authority to agencies. Some have argued that in some instances, the use of general terms in a statute, coupled with an affirmative grant of rulemaking authority to implement the statute, may indicate that Congress’s desire for the agency to interpret ambiguous terms is genuine and not merely a legal fiction.²⁰⁶ More fundamentally, no matter how Congress drafts a statute, some amount of ambiguity is likely inevitable.²⁰⁷ Some scholars and justices have defended *Chevron* as an appropriate constitutional response to ambiguity. To the extent ambiguity calls for policymaking, they argue that *Chevron* ensures that

¹⁹⁸ See Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 4 (2013).

¹⁹⁹ See Evan J. Criddle, *Chevron’s Consensus*, 88 B. U. L. REV. 1271, 1283–91 (2008) (surveying these arguments).

²⁰⁰ Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 941–42, 963, 982 (2018); Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 693–95 (2020). The Supreme Court engages in a similar practice when it permits other branches to provide authoritative interpretations of constitutional questions. Siegel, *supra*, at 965–72 (citing *Utah v. Evans*, 536 U.S. 452 (2002) (Census Clause) and *U.S. Dep’t of Com. v. Montana*, 503 U.S. 442 (1992) (Apportionment Clause)); cf. *Nixon v. United States*, 506 U.S. 224, 235–36 (1993) (Impeachment Clause).

²⁰¹ See Siegel, *supra* note 200.

²⁰² Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 693–94 (2020). “Modern critics have claimed that deference to agencies offends constitutional traditions and values, but it is important to know that most lawyers and judges throughout American history consistently failed to notice.” *Id.* at 694.

²⁰³ Kent Barnett, *How Chevron Deference Fits into Article III*, 89 GEO. WASH. L. REV. 1143, 1189 (2021) (noting that the Court has found no problem with the APA’s limitation on judicial review found in Section 701).

²⁰⁴ *Id.* at 1174.

²⁰⁵ *Id.* at 1171.

²⁰⁶ Merrill & Hickman, *Chevron’s Domain*, *supra* note 45, at 870–72; Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 50, at 516–17.

²⁰⁷ Hickman & Bednar, *Chevron’s Inevitability*, *supra* note 68, at 1448–49.

separation of powers principles are observed by committing policymaking to administrators.²⁰⁸ For instance, when Congress uses terms like “such as public health”²⁰⁹ or “reasonable”²¹⁰ in a statute, some argue that resolving those terms inherently calls for a policy judgment that unelected judges are neither empowered nor have the expertise to make.²¹¹

A 2013 survey of 137 congressional staffers drawn from both parties lends some empirical support to this assumption.²¹² Staffers explained that ambiguity in a statute “sometimes signals intent to delegate” but “often it does not.”²¹³ Accordingly, while one of *Chevron*’s basic assumptions appears to approximate how Congress drafts statutes, it may assume too much.²¹⁴

Even assuming that the existence of ambiguity does not always indicate delegation, this point does not diminish the related argument that *Chevron* reserves policy judgments for administrators with expertise in the relevant subject matter. Scholars supportive of the continued use of the *Chevron* framework argue that when faced with a vague or ambiguous term, a reviewing court should be limited to ensuring that whatever choice the agency made is a reasonable one—that is, applying *Chevron* when a statute is ambiguous.²¹⁵ *Chevron*, accordingly, reserves technical policy choices for expert administrators.²¹⁶ Finally, and relatedly, for at least one scholar, *Chevron* is undergirded by the comparative institutional strengths of both courts and agencies.²¹⁷ Courts have a comparative advantage in enforcing the law and upholding constitutional values, while agencies have an advantage in resolving conflicting public policies.²¹⁸

Given the Court’s recent silence on the continued viability of *Chevron*, at least two Justices’ explicit doubts about the constitutionality of *Chevron*,²¹⁹ and the uncertainty about when an agency interpretation concerns a “major question” that does not merit agency deference,²²⁰ future

²⁰⁸ See *City of Arlington*, 569 U.S. at 327 (Roberts, J., dissenting) (“*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive.”);

²⁰⁹ The Clean Air Act instructs the EPA to set certain air quality standards that “are requisite to protect the public health.” 42 U.S.C. § 7409(b).

²¹⁰ The Natural Gas Act empowers the Federal Energy Regulatory Commission to ensure rates charged by natural gas companies are “just and reasonable.” 15 U.S.C. § 717c(a).

²¹¹ Hickman & Bednar, *Chevron’s Inevitability*, *supra* note 68, at 1448–49; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) (noting that when agencies choose between competing interpretations of an ambiguous statute, “[t]hat sort of choice implicates and sometimes squarely involves policy making”); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, *supra* note 118, at 2610 (“*Chevron* is best taken as a vindication of the realist claim that resolution of statutory ambiguities often calls for judgments of policy and principle.”).

²¹² Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 996 (2013).

²¹³ *Id.*

²¹⁴ See *id.* The same study also found, however, that *Chevron* may be under inclusive of congressional signals of delegation. *Id.* at 994. Congress sometimes signals delegation in ways that fall outside the statutory text such as in legislative history and acquiescence in the longstanding nature of an agency’s interpretation. *Id.*

²¹⁵ Hickman & Bednar, *Chevron’s Inevitability*, *supra* note 68, at 1448–49.

²¹⁶ See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1058 (1998); Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1476 (2012) (arguing that *Chevron* deference “shields courts from engaging in policy balancing and from becoming mired in the technical details of a statute’s application to particular industries”).

²¹⁷ Thomas W. Merrill, *Re-Reading Chevron*, 70 DUKE L.J. 1153, 1155, 1193 (2021).

²¹⁸ *Id.*

²¹⁹ See *Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

²²⁰ See *infra* “The Major Questions Doctrine”.

disagreements about the doctrine seem likely.²²¹ Even if those disagreements do not result in a full rejection of the *Chevron* doctrine in a Supreme Court decision, the Supreme Court or lower courts may employ “doctrinal safety valves” to limit the application of *Chevron* in future cases (or prevent its use in new areas of law).²²² The upcoming case *Loper Bright Enterprises* may shed light on *Chevron*’s future.²²³ The case presents the Court the opportunity to reaffirm *Chevron* in its current form, curtail its application, or overrule it completely.

Although *Chevron* has been central to administrative law for decades, it is not the only available paradigm for the review of agency interpretations of statutes. As noted above, in cases where the Court has declined to apply *Chevron*, it has applied *Skidmore* deference.²²⁴ Under *Skidmore* a court can weigh the agency’s interpretation in light of the strength of the agency’s reasoning.²²⁵ For whatever reason, the Court has not invoked *Skidmore* as its reliance on *Chevron* has waned. Rather, in the Court’s most recent full term, it appears to have replaced the *Chevron* framework with other means of statutory interpretation, dispensing with deference altogether.²²⁶ Whether that trend will continue after the Court decides *Loper* remains to be seen.

The Major Questions Doctrine

Questions about the future of *Chevron* have become even more urgent in light of recent cases applying an alternative tool of statutory interpretation, the “major questions doctrine.”²²⁷ Under that doctrine, the Court has sometimes declined to defer to an agency interpretation under *Chevron* in “extraordinary cases” that present an interpretive question of great “economic and political significance.” The Supreme Court first named the major questions doctrine in a 2022 decision,²²⁸ and it has not yet fully articulated under what circumstances that doctrine applies. Although it has its roots in scattered cases over the course of many years,²²⁹ those cases have not made clear the relationship between *Chevron* and the major questions doctrine. The potential

²²¹ *Compare* *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 75 (2014) (Kagan, J., joined by Kennedy & Ginsburg, JJ.) (“This is the kind of case *Chevron* was built for. Whatever Congress might have meant in enacting § 1153(h)(3), it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable construction consonant with its view of the purposes and policies underlying immigration law.”), *with id.* at 75–76 (Roberts, J., joined by Scalia, J., concurring in the judgment) (“To the extent the plurality’s opinion could be read to suggest that deference is warranted because of a direct conflict between these clauses, that is wrong.”), *and id.* at 79–80 (Alito, J., dissenting) (agreeing with Chief Justice Roberts’ critique of the plurality’s reasoning).

²²² *Pojanowski*, *supra* note 118, at 1079.

²²³ *Loper Bright Enters. v. Raimondo*, No. 22-451, 2023 WL 3158352 (2023) (order granting petition for certiorari).

²²⁴ *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

²²⁵ *Skidmore*, 323 U.S. at 140.

²²⁶ *Becerra*, 142 S. Ct. at 1906 (employing “traditional tools of statutory interpretation” to analyze agency interpretation, without resort to *Chevron*); *Empire Health Found.*, 142 S. Ct. 2354 (same).

²²⁷ *West Virginia*, 142 S. Ct. at 2609.

²²⁸ Although the Court first used the term in a majority opinion in *West Virginia v. EPA*, it did not coin the term “major questions doctrine.” The phrase emerged from academic work. *E.g.*, *Brown & Williamson*, 529 U.S. at 159, citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration”); *see also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018) (discussing the major questions doctrine generally); Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV’T & ADMIN. L. 479, 480 n.3 (2016) (listing other scholarly labels for the doctrine).

²²⁹ *See, e.g.*, *Brown & Williamson*, 529 U.S. at 159–60.

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further development of the major questions doctrine will therefore be a closely watched issue for observers concerned about the future of *Chevron*.

Applications of the doctrine rest on a determination by the Court that one of the core assumptions underlying *Chevron* deference—that Congress intended the agency to resolve the statutory ambiguity—is no longer tenable.²³⁰ Where major questions are at stake, the Court has said, “there may be reason to hesitate before concluding that Congress ... intended” to delegate resolution of that question to the agency.²³¹ The Court’s hesitation is reflected in survey data of congressional staffers. Of the 137 staffers surveyed, 60% responded that drafters intended Congress—not agencies—to resolve major questions.²³²

The way in which the Court has reached this conclusion about congressional intent, however, has shifted since the Court began applying it. Initially, the Court invoked this concern while applying *Chevron*²³³ to justify concluding that under the two-part test, the Court should not defer to the agency’s construction of the statute.²³⁴ The Court then shifted its approach slightly, holding that the fact that an agency interpretation implicates a major question renders the *Chevron* framework of review inapplicable.²³⁵ In its most recent major questions cases, the Court has invoked the doctrine without resort to *Chevron* at all, possibly indicating that the Court now views the major questions doctrine as a distinct rule of statutory interpretation separate from the *Chevron* framework.²³⁶

The Court first held that a question of great “economic and political significance” might displace *Chevron* deference in *FDA v. Brown & Williamson Tobacco Corp.*²³⁷ The agency action under review in that case was the decision of the Food and Drug Administration (FDA) to regulate

²³⁰ See, e.g., *West Virginia*, 142 S. Ct. at 2609 (“[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.” (quoting *UARG*, 573 U.S. at 324)); *King v. Burwell*, 576 U.S. 473, 485–86 (2015). Some commentators have argued that both the *Chevron* step zero doctrine and major questions doctrine serve to align *Chevron* deference more closely with those situations in which Congress has actually delegated to an agency the authority to interpret a particular statutory provision. See, e.g., Adler, *supra* note 36, at 993, 994.

²³¹ *West Virginia*, 142 S. Ct. at 2634 (quoting *Brown & Williamson*, 529 U.S. at 159).

²³² Gluck & Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, *supra* note 212, at 1003.

²³³ See *City of Arlington*, 569 U.S. at 303 (describing major-questions cases as applications of *Chevron*).

²³⁴ E.g., *Massachusetts*, 549 U.S. at 531 (invoking major questions doctrine during *Chevron* step one); *UARG*, 573 U.S. at 324 (invoking major questions doctrine during *Chevron* step two).

²³⁵ See *King*, 576 U.S. at 485–86 (holding that *Chevron* was inapplicable and instead invoking major questions doctrine); *Gonzales*, 546 U.S. at 267 (invoking major questions doctrine during step zero inquiry).

²³⁶ See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (applying major questions doctrine without mentioning *Chevron*); *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 662 (per curiam) (same); *West Virginia*, 142 S. Ct. 2587 (same). For a more detailed discussion of the Court’s recent major questions cases, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022); CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA’s Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers.

²³⁷ *Brown & Williamson*, 529 U.S. at 159–60. Some commentators have argued that the major questions doctrine has deeper roots in the Court’s case law arising from the Court’s concerns about open-ended delegations of power to executive agencies. See Emerson, *supra* note 228 at 2043; Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 453–57 (2016) (discussing intellectual precursors to *Brown & Williamson*). Other commentators, however, believe the major questions doctrine is of a much more recent vintage. See Asher Steinberg, *Another Addition to the Chevron Anticanon: Judge Kavanaugh on the “Major Rules” Doctrine*, NARROWEST GROUNDS (May 7, 2017), <http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html> (“[T]he best view of the major-questions exception is that it didn’t truly exist until *King v. Burwell* was decided ... Major-questions cases before *Burwell* had, ... far from applying an exception to *Chevron*, applied *Chevron* itself, albeit in ways that felt less deferential than traditional *Chevron* review.”).

tobacco products.²³⁸ The Supreme Court decided that Congress had not given the FDA the authority to regulate tobacco products and invalidated the regulations.²³⁹ The Court acknowledged that its analysis was governed by *Chevron*, because the FDA regulation was based upon the agency’s interpretation of the Food, Drug, and Cosmetic Act (FDCA), a statute that it administered.²⁴⁰ However, the Court resolved the matter at *Chevron* step one, concluding that Congress had “directly spoken to the issue” and “precluded the FDA’s jurisdiction to regulate tobacco products.”²⁴¹

A significant factor in the Court’s decision in *Brown & Williamson* was the fact that Congress had for decades enacted “tobacco-specific legislation” outside the FDCA, acting “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.”²⁴² The Court concluded that the apparent clarity of this legislative and regulatory history, considered against “the breadth of the authority that the FDA ha[d] asserted” when it promulgated the new regulations, undercut the justifications for *Chevron* deference.²⁴³ The Court then articulated what some observers later characterized as the major questions doctrine,²⁴⁴ holding that “[i]n extraordinary cases, ... there may be reason to hesitate before concluding that Congress has intended ... an implicit delegation” of authority “to fill in the statutory gaps.”²⁴⁵ In the Court’s view, this was such an extraordinary case, and the Justices were “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.”²⁴⁶ The Court believed “that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”²⁴⁷ Thus, in *Brown & Williamson*, the Court invoked this major questions consideration under *Chevron*’s first step as a factor supporting its conclusion that the FDCA unambiguously precluded the FDA’s interpretation.²⁴⁸

Since *Brown & Williamson*, the Court has applied the “major questions doctrine,” treating the importance of a legal question as a factor relevant to doctrinal analysis, in a somewhat ad hoc manner.²⁴⁹ In these subsequent cases, the Court has not articulated a precise standard for determining when an agency interpretation raises a question so significant that a court should not defer, nor has it explained why this consideration is relevant in some cases but not others. Further, the Court has gradually stopped applying the *Chevron* framework while at the same time invoking the major questions doctrine more frequently—multiple times in its 2021-2022 term—creating some uncertainty as to the relationship between the two doctrines.²⁵⁰

²³⁸ *Brown & Williamson*, 529 U.S. at 125.

²³⁹ *Id.* at 161.

²⁴⁰ *Id.* at 132.

²⁴¹ *Id.* at 133.

²⁴² *Id.* at 144.

²⁴³ *Id.* at 159–60.

²⁴⁴ *E.g.*, Monast, *supra* note 237, at 457.

²⁴⁵ *Brown & Williamson*, 529 U.S. at 159.

²⁴⁶ *Id.* at 160.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 133.

²⁴⁹ *See* Monast, *supra* note 237, at 462 (“[T]he Court has neglected to articulate the bounds of the major questions doctrine....”);

²⁵⁰ *See, e.g.*, *Becerra*, 142 S. Ct. at 1906 (employing “traditional tools of statutory interpretation” to analyze agency interpretation, without resort to *Chevron*); *Empire Health Found.*, 142 S. Ct. 2354 (same); *Ala. Ass’n of Realtors*, 141 (continued...)

In *Whitman v. American Trucking Associations*, decided one year after *Brown & Williamson*, the Court again invoked the major questions consideration as part of its *Chevron* step one analysis.²⁵¹ The Court held that there was not a sufficient “textual commitment of authority” in the CAA to support the EPA’s assertion that Congress had given the EPA the authority to consider costs when regulating air pollutants.²⁵² In reaching this conclusion, the Court read the statutory text as being primarily concerned with promoting the “public health” rather than cost concerns.²⁵³ Because these provisions were highly important to this statutory scheme, the Court required a “clear” “textual commitment of authority to the EPA to consider costs.”²⁵⁴ The Court observed that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”²⁵⁵

In 2006, the Court invoked the major questions principle as one factor in its analysis at *Chevron* step zero in *Gonzales v. Oregon*.²⁵⁶ The Court held that Congress had not given the U.S. Attorney General the authority to issue an interpretive rule regarding the use of controlled substances in assisted suicides “as a statement with the force of law.”²⁵⁷ Citing *Brown & Williamson*, the Justices refused to conclude that “Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act’s] registration provision.”²⁵⁸ Accordingly, the Court found, *Chevron* did not apply because Congress had not delegated interpretative authority to Attorney General in that instance.²⁵⁹

By contrast, the Court declined to apply the major question exception in *Massachusetts v. EPA*, decided in 2007.²⁶⁰ The Court was reviewing EPA’s interpretation that the CAA did not give it the authority to regulate “substances that contribute to climate change,” including greenhouse gases (GHGs).²⁶¹ As summarized by the Court, EPA argued that “climate change was so important that unless Congress spoke with exacting specificity, it could not have meant the Agency to address it.”²⁶² The Court rejected this claim, deciding that the statutory scheme and congressional and regulatory “backdrop” supported a conclusion that the EPA had authority to regulate GHGs.²⁶³ In

S. Ct. at 2489 (applying major questions doctrine without mentioning *Chevron*); *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 662 (same); *West Virginia*, 142 S. Ct. 2587 (same).

²⁵¹ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). The Court invoked the major questions doctrine in *Whitman* using the terminology of a *Chevron* step one inquiry—analyzing whether the statute was ambiguous. *See id.* The Court, however, did not explicitly invoke the *Chevron* framework until later in the opinion. *Id.* at 481.

²⁵² *See id.* at 468.

²⁵³ *Id.* at 465, 469.

²⁵⁴ *Id.* at 468.

²⁵⁵ *Id.*

²⁵⁶ *Gonzales*, 546 U.S. at 267.

²⁵⁷ *Id.* at 255–56, 267–68.

²⁵⁸ *Id.* at 267.

²⁵⁹ *Id.* at 268. Although *Chevron* did not apply, the Court evaluated the Attorney General’s interpretive rule using *Skidmore* deference. *Id.* Courts can defer to an agency interpretation based on the interpretation’s persuasiveness. *Mead*, 533 U.S. at 235. “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 [the] power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140.

²⁶⁰ *Massachusetts*, 549 U.S. at 531.

²⁶¹ *Id.* at 528.

²⁶² *Id.* at 512.

²⁶³ *Id.* at 531.

coming to this conclusion, the Court arguably applied *Chevron* in lieu of the major questions doctrine to find that EPA had the authority to regulate GHG emissions.²⁶⁴

Massachusetts, however, may stand in tension with *Brown & Williamson*.²⁶⁵ Both cases arose from a question of whether an agency had the authority to assert jurisdiction over a substance that nominally fits within a broad statutory term but that the agency had not historically regulated. In *Brown & Williamson*, FDA proposed to classify tobacco products as a “drug” under the FDCA, while in *Massachusetts*, EPA had to decide whether to classify carbon dioxide as a “pollutant” under the CAA. Despite this apparent similarity, the Court decided that the FDA could not regulate tobacco as a “drug” but that EPA was required to consider regulating carbon dioxide as a “pollutant.” One commentator has argued that the two different outcomes are incompatible, pointing to the fact that regulation of either substance would affect a large swath of the economy and that Congress had not explicitly granted either agency the authority to regulate in either case.²⁶⁶

The Court returned²⁶⁷ to applying major questions principles in *Utility Air Regulatory Group v. EPA*²⁶⁸ and *King v. Burwell*.²⁶⁹ In *UARG*, the Court reviewed EPA rules regulating GHG emissions from stationary sources.²⁷⁰ EPA had concluded that regulation of GHG emissions from motor vehicles triggered GHG permitting requirements for stationary sources.²⁷¹ The Court held at step two of the *Chevron* analysis that the EPA’s interpretation was “not permissible.”²⁷² According to the decision, the regulations represented an unreasonable reading of the statute in part because they would have constituted “an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”²⁷³ In the Court’s view, the “extravagant” and “expansive” power claimed by the EPA fell “comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text.”²⁷⁴

UARG represents the lone example of the application of the major questions doctrine at step two of *Chevron*. The Court’s application of *Chevron*, however, was somewhat atypical. The Court did not engage in a step one inquiry before moving on to step two.²⁷⁵ Rather, the Court appeared to

²⁶⁴ It is not clear whether the Court resolved this case under *Chevron* step one or *Chevron* step two. At one point, the Court held that the statutory text clearly authorized EPA regulation. *See id.* (declining “to read ambiguity into a clear statute”); *id.* at 529 n.26 (“EPA’s distinction ... finds no support in the text of the statute....”). However, it subsequently invoked *Chevron* step two by suggesting EPA’s interpretation “is a plainly unreasonable reading of a sweeping statutory provision” *See id.*

²⁶⁵ Sunstein, *Interpreting Statutes in the Regulatory State*, *supra* note 36, at 490.

²⁶⁶ *Id.*

²⁶⁷ A number of commentators had previously declared the major questions doctrine to be dead. *See* David Baake, *Obituary: Chevron’s “Major Questions Exception,”* HARV. ENV’T L. REV.: HELR BLOG (Aug. 27, 2013), <http://harvardelr.com/2013/08/27/obituary-chevrons-major-questions-exception/> (concluding Court “unceremoniously killed” major questions doctrine in *Massachusetts*, 549 U.S. at 531 (majority opinion), and *City of Arlington*, 569 U.S. at 303) (quoting Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Non-Interference (Or Why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 598 (2008)).

²⁶⁸ *UARG*, 573 U.S. at 324.

²⁶⁹ *King*, 576 U.S. at 485–86.

²⁷⁰ *UARG*, 573 U.S. at 312–13.

²⁷¹ *Id.* at 311–12.

²⁷² *Id.* at 321.

²⁷³ *Id.* at 324.

²⁷⁴ *Id.*

²⁷⁵ *See id.* at 321–24.

collapse the two steps into a single reasonableness inquiry focused primarily on the structure and purpose of the statute.²⁷⁶

In *King v. Burwell*,²⁷⁷ the Court considered whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act.²⁷⁸ The Court found the interpretation of that statute to present an “extraordinary case” in which the Court had “reason to hesitate before concluding that Congress” implicitly delegated to the Internal Revenue Service (IRS) the authority to “fill in the statutory gaps.”²⁷⁹ The Court concluded:

Whether [the tax] credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.²⁸⁰

The *King v. Burwell* decision arguably represented a break from prior major questions cases: In past cases, the Court had considered the economic or political significance of the regulation as one factor during its *application* of the *Chevron* framework of review.²⁸¹ In *King*, the Court concluded that the significance of the issue rendered *Chevron* entirely *inapplicable*.²⁸²

In its 2021-2022 term, the Court issued three major questions doctrine decisions.²⁸³ Each decision applied the doctrine without discussing the *Chevron* framework in any way. The Court’s silence on *Chevron* in its latest major questions cases has led some commentators to argue that the Court has moved away from seeing the doctrine as a reason not to defer under *Chevron* or an exception to *Chevron* and toward a view that the doctrine is an independent inquiry unrelated to the

²⁷⁶ See *id.* That the Court blended *Chevron*’s step one and step two analyses is not altogether surprising. Justice Scalia, the author of the majority opinion in *UARG*, was a leading proponent of collapsing the *Chevron* inquiry into just one reasonableness analysis. See *Home Concrete*, 566 U.S. at 494 n.1 (Scalia, J., concurring in part and concurring in the judgment) (arguing that “‘step 1’ has never been an essential part of *Chevron* analysis”).

²⁷⁷ *King*, 576 U.S. at 482.

²⁷⁸ 42 U.S.C. § 18031; 26 U.S.C. § 36B(b)-(c).

²⁷⁹ *King*, 576 U.S. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

²⁸⁰ *Id.* at 485–86 (quoting *UARG*, 573 U.S. at 324).

²⁸¹ See Note, *Major Questions Objections*, 129 HARV. L. REV. 2191, 2201 (2016).

²⁸² See *King*, 576 U.S. at 485–86. Although the doctrine was also invoked in *Gonzales* to render *Chevron* inapplicable, it was cited in the course of a step zero analysis and not on its own. *Gonzales*, 546 U.S. at 267. In *King*, the Court cited only the major questions doctrine, without any other *Chevron*-related inquiry. See *King*, 576 U.S. at 485–86. See also Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 795 (2017) (“[T]he Court in *King* saw majorness as a hard, ‘on/off’ trigger for, rather than a ‘soft’ and nonexclusive guiding factor of, the *Chevron* inquiry. Indeed, *King* for the first time applied the [major questions exception] as a pre-*Chevron* device, citing to majorness and majorness alone as a sufficient basis for withholding judicial deference altogether.”).

²⁸³ *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (vacating the Centers for Disease Control and Prevention’s eviction moratorium because it was of major national significance and the CDC did not have clear Congressional authority to implement such a program); *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 662 (invalidating OSHA’s vaccine mandate for private employers because OSHA lacked clear statutory authorization); *West Virginia*, 142 S. Ct. at 2612 (vacating EPA’s greenhouse gas emissions regulations for power plants because it is unlikely that Congress granted EPA the authority to “balanc[e] the many vital considerations of national policy implicated in deciding how Americans will get their energy”). For a more detailed discussion of the Court’s recent major questions cases, see CRS In Focus IF12077, *The Major Questions Doctrine*, by Kate R. Bowers (2022); CRS Legal Sidebar LSB10791, *Supreme Court Addresses Major Questions Doctrine and EPA’s Regulation of Greenhouse Gas Emissions*, by Kate R. Bowers.

Chevron framework.²⁸⁴ In light of the Court’s recent silence on *Chevron*, it remains to be seen whether future cases, such as *Loper*, will confirm this view.

Under the Supreme Court’s precedents as they now stand, when reviewing an agency’s interpretation of a statute, depending on the nature and significance of the question purportedly delegated to the agency, a court has several options: It could find that the interpretive question before it is not one of great economic or political significance (and thus the major questions doctrine is irrelevant), it could apply the major questions doctrine as a factor in the course of its *Chevron* analysis,²⁸⁵ or it could conclude that the *Chevron* framework is altogether inapplicable.²⁸⁶ Consequently, the major questions doctrine has the potential to alter the doctrine of *Chevron* deference, shifting the power to interpret ambiguous statutes from agencies to courts in some cases.²⁸⁷

Other commentators would characterize the Court’s recent application of the major questions doctrine as a kind of “clear statement rule.”²⁸⁸ A clear statement rule is a court-imposed rule of statutory construction that requires Congress to speak clearly when it wants to dislodge a background legal presumption, especially presumptions that protect constitutional values.²⁸⁹ One of *Chevron*’s core presumptions is that statutory ambiguity implies that Congress has delegated authority to an agency. The major questions doctrine appears to flip *Chevron*’s presumption on issues that the Court finds to be “major,” requiring in those cases a clear statement from Congress that it *did* intend the agency to exercise discretion.²⁹⁰ Accordingly, the Court’s application of major questions outside the *Chevron* framework might allow it to reject the agency’s interpretation simply upon a finding that the agency has adopted an interpretation that Congress did *not* require rather than having to determine (at *Chevron* step one) what interpretation the text *does* require.

Still other scholars have argued that the major questions doctrine serves as a “constitutional avoidance canon.”²⁹¹ A constitutional avoidance canon is a general rule whereby a court will not

²⁸⁴ Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN L. REV. 475, 477 (2021) (describing the “strong” and “weak” versions of the major questions doctrine, and noting that *West Virginia* represents the strong version, which is not rooted in *Chevron*); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–64 (2022) (arguing that the Supreme Court’s recent major questions cases “unhitched” the major questions doctrine from *Chevron*); Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1192 (2021) (arguing that the major questions doctrine allows judges to “set aside the ordinary *Chevron* framework altogether”).

²⁸⁵ *E.g.*, *Brown & Williamson*, 529 U.S. at 132.

²⁸⁶ *E.g.*, *King*, 576 U.S. at 485–86.

²⁸⁷ *See* Coenen & Davis, *supra* note 282, at 796–99; Leske, *supra* note 228, at 499; *Major Questions Objections*, *supra* note 281, at 2202.

²⁸⁸ Sunstein, *There Are Two “Major Questions” Doctrines*, *supra* note 284, at 483–84.

²⁸⁹ *See* CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon (2023); Manning, *Textualism and the Equity of the Statute*, *supra* note 88, at 121–22.

²⁹⁰ *See* Daniel Deacon & Leah Liman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 6) (arguing that the major questions doctrine “flips the normal *Chevron* analysis on its head”).

²⁹¹ Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN L. REV. 19, 23 (2010) (“[T]he elephants-in-mouseholes doctrine is an attempt to address nondelegation concerns indirectly without actually having to decide whether Congress has delegated too much authority to an agency.”); Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 Tex. L. Rev. (forthcoming 2023) (manuscript at 38–39); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO STATE L.J. (forthcoming 2023) (manuscript at 32–33). *But see* Sohoni, *supra* note 284, at 300 (arguing the major questions doctrine as it appears in the Court’s 2022 and 2023 decisions is so attenuated from the traditional view of constitutional avoidance that “it is a strain to call it constitutional avoidance at all”).

“pass on questions of constitutionality ... unless such adjudication is unavoidable.”²⁹² The canon is rooted in concerns about an unelected judiciary issuing sweeping judgments on controversial issues of constitutional law unless it cannot avoid doing so.²⁹³ The major questions doctrine may serve as a way for the Court to avoid making a decision based on constitutional concerns about the application of *Chevron* in some cases.²⁹⁴ On this point, as the previous section discussed, some believe *Chevron* shifts interpretative authority from the judiciary to the executive in a way that is inconsistent with the Constitution.²⁹⁵ The major questions doctrine, accordingly, may shift interpretive authority back to courts in a way that some argue is more in line with the requirements of Article III.²⁹⁶ Nonetheless, until the Supreme Court provides more guidance about what constitutes a “major question,” or how the major questions inquiry should be factored into the *Chevron* analysis—if at all—it seems equally plausible that lower courts may be reluctant to invoke the doctrine with regularity.²⁹⁷

Could Congress Eliminate *Chevron*?

Chevron is a judicially created doctrine that rests, in part, upon a presumption made by courts about congressional intent: that where a statute is silent or ambiguous, Congress would have wanted an agency, rather than a court, to fill in the gap.²⁹⁸ Accordingly, Congress can determine whether a court will apply *Chevron* review to an agency interpretation. When it drafts a statute delegating authority to an agency, it may “speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”²⁹⁹ Thus, Congress can legislate with *Chevron* as a background presumption, using ambiguity to delegate interpretive authority to agencies or writing clearly to withhold that authority. Nonetheless, the Court’s recent decision not to apply *Chevron* in several cases where it would have likely played a role in the past makes it difficult to predict how the Court will treat statutory ambiguity in future cases. In other words, because a fundamental interpretive question—how courts handle statutory ambiguity—

²⁹² *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); see also *Ashwander v. TVA*, 297 U.S. 288, 345–48 (Brandeis, J., concurring) (identifying various forms of constitutional avoidance). For a deeper discussion of the canon of constitutional avoidance, see CRS Report R43706, *The Doctrine of Constitutional Avoidance: A Legal Overview*, by Andrew Nolan (2014) (to discuss the doctrine of constitutional avoidance more generally, please contact Valerie Brannon).

²⁹³ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). Alexander Bickel dubbed this concern the “countermajoritarian difficulty” for the way the unelected judiciary can, at times, thwart policy decisions of the elected branches. *Id.*

²⁹⁴ See Loshin & Nielson, *supra* note 291. Specifically, some commentators have argued that it would raise constitutional concerns to find that, by virtue of ambiguity, a statute vests an agency with broad regulatory authority over issues of major economic and political significance. See Chen & Estreicher, *supra* note 291, at 38–39; Capozzi, *supra* note 291, at 32–33. The major questions doctrine helps the Court avoid weighing in on that debate. *Id.*

²⁹⁵ See Kavanaugh, *Fixing Statutory Interpretation Judging Statutes*, *supra* note 102, at 2120 (“Article I assigns Congress, along with the President, the Power to make laws. Article III grants the courts the “judicial power” to interpret those laws....”); *Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring).

²⁹⁶ See Leske, *supra* note 228, at 500.

²⁹⁷ See, e.g., Coenen & Davis, *supra* note 282, at 780 (arguing that because Supreme Court has not defined “what makes a question ‘major,’” lower courts should not apply doctrine); but see, e.g., *Louisiana v. Biden*, 55 F.4th 1017, 1031 (2022); *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 422 n.4 (2017) (Kavanaugh, J., dissenting) (concluding lower courts are constrained to apply major questions doctrine).

²⁹⁸ *Chevron*, 467 U.S. at 843–44 (“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.”).

²⁹⁹ *City of Arlington*, 569 U.S. at 296 (majority opinion). See also Barron & Kagan, *supra* note 36, at 212 (“Congress . . . has the power to turn on or off *Chevron* deference.”).

may be shifting, Congress may consider the extent to which drafting statutory language relies on the regular and continued application of the *Chevron* framework in the courts.

Alternatively, if it deemed such action appropriate, Congress could also act more directly to try to control how courts will review agency action. Congress has the authority to shape the standards used by courts to review agency actions. Perhaps most notably, Congress has outlined the standards that should generally govern judicial review of agency decisions in the APA.³⁰⁰ Although *Chevron*'s place within the APA framework is a matter of dispute,³⁰¹ it is within Congress's power to codify, modify, or displace entirely the *Chevron* framework by amending the APA to specify a standard of review.³⁰²

As a more limited approach to working outside of *Chevron*, Congress also has the power to prescribe different judicial review standards in the specific statutes that grant agencies the authority to act.³⁰³ Congress took such a step when it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010.³⁰⁴ A provision of the act instructs courts that, when they review "any determinations made by the Comptroller [of the Currency] regarding preemption of a State law," they should "assess the validity of such determinations" by reference to a series of factors outlined in the Supreme Court's opinion in *Skidmore v. Swift & Co.*³⁰⁵ The *Skidmore* standard, unlike *Chevron*, does not require deference to reasonable interpretations of ambiguous

³⁰⁰ 5 U.S.C. § 706.

³⁰¹ See Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1643–44 (2019) (arguing that prior to the enactment of the APA the Supreme Court engaged in deference to agency interpretations of law and the APA simply codified that practice); Lawrence B. Solum & Cass R. Sunstein, *Chevron as Construction*, CORNELL L. REV. 1465, 1484 n.87 (2020) (noting that there is a good textual argument to be made that *Chevron* is consistent with the APA); Barron & Kagan, *supra* note 36, at 218 n.63 (noting that "some scholars have suggested" that 5 U.S.C. § 706 "requires independent judicial review of interpretive judgments, thus precluding *Chevron* deference," but concluding that instead, the APA "may well leave the level of deference to the courts, presumably to be decided according to common law methods, in the event that an organic statute says nothing about the matter"). But see KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 507–26 (1989) (arguing that the APA requires courts to engage in a de novo review of agency interpretations of statutes); *Perez*, 575 U.S. at 109–10 (Scalia, J., concurring) ("Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies' interpretations of statutes and regulations. Never mentioning § 706's directive that the 'reviewing court ... interpret ... statutory provisions,' we have held that agencies may authoritatively resolve ambiguities in statutes.").

³⁰² The U.S. House of Representatives, in 2016 and again in 2017, passed the "Separation of Powers Restoration Act," intended to eliminate *Chevron* deference by amending 5 U.S.C. § 706 to require courts to "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." Separation of Powers Restoration Act, H.R. 5, 115th Cong. (2017); Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. (2016). The Separation of Powers Restoration Act has also been introduced in the 118th Congress. H.R. 288, 118th Cong. (2023). One of those bills, H.R. 5, added: "If the reviewing court determines that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such –gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law." Cf. Hickman & Bednar, *Chevron's Inevitability*, *supra* note 68, at 1448–49, (evaluating whether amending APA would eliminate *Chevron*). But see Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative State*, 10 N.Y.U. J.L. & LIBERTY 475, 497–507 (2016) (asserting that an attempt by Congress to enact *Chevron* by statute would raise "a serious constitutional question").

³⁰³ Cf. Barron & Kagan, *supra* note 36, at 212 ("Although Congress can control applications of *Chevron*, it almost never does so, expressly or otherwise; most notably, in enacting a standard delegation to an agency to make substantive law, Congress says nothing about the standard of judicial review.").

³⁰⁴ See 12 U.S.C. § 25b.

³⁰⁵ *Id.*; *Skidmore*, 323 U.S. at 140. Congress also stipulated in other provisions of the act that courts should recognize that only one agency is authorized to "apply, enforce, interpret, or administer the provisions" of a specified area of law. See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 33 (2015). This might influence a court's decision on which agency is entitled to *Chevron* deference in that area of law. See *id.*

statutes—it merely permits it based on the persuasiveness of the agency’s interpretation.³⁰⁶ As a result, *Skidmore* is considered less deferential to agencies than the *Chevron* framework of review,³⁰⁷ and courts so far have recognized this legislative choice as significant.³⁰⁸

As noted above, some judges and commentators have raised concerns that the *Chevron* framework is unconstitutional because it permits agencies to render final binding interpretations of federal law—a function that, these critics argue, the Constitution vests exclusively with the federal courts.³⁰⁹ Accordingly, Congress’s ability to legislate the application of the *Chevron* framework is still an open question. Congress’s ability to legislatively displace *Chevron*, however, may not raise the same constitutional concerns.

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³⁰⁶ See *supra* notes 44, 45,46 and accompanying text.

³⁰⁷ See Barnett, *Codifying Chevron*, *supra* note 305, at 28 (“The legislative history [of Dodd-Frank] reveals that Congress understood that codifying *Skidmore* would lead to less deference than under *Chevron*.”).

³⁰⁸ See, e.g., *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1192 (9th Cir. 2018) (finding Dodd-Frank “clarified that the OCC’s preemption determinations are entitled only to *Skidmore* deference”); *Bate v. Wells Fargo Bank (In re Bate)*, N.A., 454 B.R. 869, 877 n.46 (Bankr. M.D. Fla. 2011) (“While not controlling in this case, it is noteworthy that *Skidmore* level deference has been incorporated in [Dodd-Frank].”). *But cf.* *Powell v. Huntington Nat’l Bank*, 226 F. Supp. 3d 625, 637 (S.D.W. Va. 2016) (interpreting 12 U.S.C. § 25b(b)(5) as consistent with prior cases outlining non-*Chevron* standard for determining “when a relevant federal regulation, specifically an OCC regulation, conflicts with state law”).

³⁰⁹ See, *supra* notes 171-182 and accompanying text.

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