Loyola University Chicago Law Journal

Volume 44
Issue 1 *2012 Fall*

Article 3

2012

The Impact of the Rise and Fall of *Chevron* on the Executive's Power to Make and Interpret Law

Linda D. Jellum
Mercer University School of Law

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Law Commons

Recommended Citation
Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 Loy. U. Chi. L. J. 141 (2012).
Available at: http://lawecommons.luc.edu/luclj/vol44/iss1/3

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The Impact of the Rise and Fall of *Chevron* on the Executive's Power to Make and Interpret Law

*Linda D. Jellum**

The Supreme Court's willingness to defer to agency interpretations of ambiguous statutes has vacillated over the past seventy years. The Court's vacillation has dramatically impacted the executive's power to make and interpret law. This Article examines how the Court augmented then constricted executive lawmaking power and ceded then reclaimed executive interpretive power with a single case and its legal progeny.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[1] *and its aftermath dramatically altered the executive's power to make and interpret law. Prior to* Chevron*, Congress had the primary responsibility for lawmaking, while agencies made policy choices primarily when Congress explicitly delegated that power to them. Also, prior to* Chevron*, the judiciary resolved questions of statutory interpretation of regulatory statutes with a bifurcated approach: agencies did not receive deference when they resolved issues involving pure questions of law, but did receive some level of deference when they resolved issues involving questions of law application. In short, prior to* Chevron*, the executive was an expert advisor, not a law-maker or law interpreter.*

With its holding in Chevron*, the Court dramatically, and likely*

* Professor of Law, Mercer University School of Law; Visiting Professor, Florida State College of Law (Fall 2011); and Associate Director Association of American Law Schools. I would like to thank the faculty at Florida State University College of Law and the University of Alabama Law School for allowing me to present this project when it was in draft form and for their insightful comments and suggestions. In addition, I am especially grateful to Professors Jack Beerman, Steve R. Johnson, Michael Dimino, Ron Krotoszynski, and Nancy Levit for their assistance on this and other projects. Both Florida State College of Law and Mercer University School of Law provided research assistance for this Article, for which I am grateful. Finally, I would like to thank Joe Orenstein, J.D., Mercer University School of Law (2012), and Kristen Franke, J.D., Florida State University College of Law (expected 2013), for their excellent research assistance. Any errors are mine alone.

1. 467 U.S. 837 (1984) (unanimous opinion). Justices Marshall, Rehnquist, and O'Connor took no part in the decision. *Id.* at 866.

unintentionally,[2] *altered executive lawmaking and interpretive power. Specifically, executive power burgeoned. The sphere of legitimate agency lawmaking expanded because of the adoption of implicit delegation as a legitimate legislative mandate. The sphere of legitimate agency interpretation also expanded because the Court replaced its bifurcated deference approach with its now familiar two-step approach, under which the Court retained interpretive power at step one, but ceded interpretive power at step two. In summary, with* Chevron *the executive moved from expert advisor to quasi-law maker and quasi-law interpreter.*

But this transition was short-lived. Today, the Court is reclaiming the power it both surrendered and transferred with Chevron*. With two important changes to* Chevron*'s application—restricting the types of agency interpretations entitled to deference and curbing the implied delegation rationale—the Court has begun to reclaim the interpretive power it ceded and the lawmaking power it shifted with the rise and fall of* Chevron*. Simply put, the Court has come full circle by expanding executive power and then dramatically contracting it.*

2. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) [hereinafter Merrill, *Judicial Deference*] ("Justice Stevens' opinion contained several features that can only be described as 'revolutionary,' even if no revolution was intended at the time." (citations omitted)).

TABLE OF CONTENTS

INTRODUCTION 144
I. *CHEVRON*'S RISE 151
A. Constitutional Delegation of Power... 151
1. Legislative Power Prior to *Chevron* 156
2. Interpretive Power Prior to *Chevron* 159
B. *Chevron*.. 162
1. A Summary of *Chevron*.. 162
2. Legislative Power as a Result of *Chevron*.......................... 167
3. Interpretive Power as a Result of *Chevron*......................... 169
II. *CHEVRON*'S FALL 171
A. *Chevron*'s Demise 172
1. Legislative Power as a Result of *Chevron*'s Demise.......... 175
2. Interpretive Power as a Result of *Chevron*'s Demise......... 178
B. Limiting *Chevron*'s Application.. 179
1. Legislative Power as a Result of Limiting *Chevron*'s Application 185
2. Interpretive Power as a Result of Limiting *Chevron*'s Application 186
CONCLUSION... 187

INTRODUCTION

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[3] has been critically dubbed a "[p]roblem,"[4] politically manipulated,[5] "our *Erie*,"[6] "syncopated,"[7] "a mistake,"[8] and "a multi-faceted flamenco."[9] In *Chevron*, the United States Supreme Court articulated a now familiar two-step approach for determining whether courts should defer to agency interpretations of ambiguous statutes.[10] Pursuant to this approach, courts must first determine "whether Congress has directly spoken to the precise question at issue," and if not, defer to any reasonable agency interpretation.[11] This two-step approach appeared straightforward in its time; indeed, legal academics hailed the allegedly simple direction it provided.[12] Yet, while the two-step approach—or is it a one-step,[13] a three-step,[14] or more[15] approach?—appeared

---

3. 467 U.S. 837 (1984).

4. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372 (1986).

5. *See* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 825–26 (2006) (detailing the results of an empirical study showing that the Justices of the Supreme Court and the judges of the courts of appeals apply *Chevron* based on their own politics).

6. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006) [hereinafter Sunstein, *Beyond* Marbury].

7. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87 (1994).

8. Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 553 (2009).

9. Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has it Mastered* Chevron*'s Step Zero?*, 3 VETERANS L. REV. 67, 68 (2011) [hereinafter Jellum, *Mastered* Chevron*'s Step Zero*].

10. According to Professor Mark Seidenfeld, "Judge Kenneth Starr coined the phrase '*Chevron* two-step.'" Seidenfeld, *supra* note 7, at 84 n.4. One might wonder if *Chevron* would have remained a two-step process had this term not been coined. *Compare* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597–99 (2009) (arguing that both steps raise the same question and, thus, "are mutually convertible"), *with* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 611–13 (2009) (arguing that the two steps allocate interpretive authority by separating those questions of "statutory implementation assigned to independent judicial judgment" from those questions regarding oversight of agency decisionmaking).

11. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

12. *See, e.g.*, Ann Graham, *Searching for* Chevron *in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN L. REV. 229, 232–33 (2008) (calling *Chevron* a "[s]imple [f]ramework for a [c]omplicated [q]uestion"); Sunstein, *Beyond* Marbury, *supra* note 6, at 2585 ("The law remained complex and confused until 1984, when the Court decided *Chevron*."); Richard J. Pierce, Jr., Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302 (1988) [hereinafter Pierce, *Aftermath*] ("The *Chevron* test established a simple approach to a traditionally complicated issue in administrative law.").

13. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 & n.4 (2009). Marianne Kunz Shanor, *Administrative Law: The Supreme Court's Impingement of* Chevron*'s Two-Step*, 10 WYO. L. REV. 537, 547 (2010) ("As a practical matter, the *Chevron* doctrine contains only one

straightforward and simple *in* its time, it has become complicated and convoluted *with* time.[16] The approach is increasingly ignored,[17] even by the Court that created it.[18] Criticisms of *Chevron* are growing,

step, not two."); Stephenson & Vermeule, *supra* note 10, at 597–99 (insisting that the two-steps of *Chevron* encompass a single inquiry).

14. *See infra* Part II.B.1 (discussing *Chevron*'s Step Zero).

15. Some of the D.C. circuit cases add arbitrary and capricious review as a fourth step. *See, e.g.*, Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC, 41 F.3d 721, 728 (D.C. Cir. 1994) ("The Commission has, in our view, acted unreasonably whether one considers the case as one involving a question of *Chevron* Step II statutory interpretation or a garden variety arbitrary and capricious review or, as we do, a case that overlaps both administrative law concepts."). *See also infra* Part II.B (discussing the limitation added to the *Chevron* analysis with the *Brown & Williamson* trilogy of cases).

16. *Chevron* addressed the degree of deference to be given to an agency's interpretation of a statute made during the rule-making process. But subsequent decisions have limited its application. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 234 (2001) (holding that Custom Service's informal interpretation of the Tariff Schedule was not entitled to *Chevron* deference); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (holding that the Department of Labor's interpretation contained in an opinion letter was not entitled to *Chevron* deference).

17. Additionally, the Supreme Court uses *Chevron* less. *See* Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 772–73 (2007) [hereinafter Jellum, Chevron*'s Demise*] (noting that, in Supreme Court terms from 2003–2006, the Court only cited *Chevron* three to five times compared to the ten to twenty cites per year seen during the early 1990s); Graham, *supra* note 12, at 231. The Court cites *Chevron* with less frequency every year, even in cases that invite the application of *Chevron*. For example, during Chief Justice Roberts's first two terms, the Court applied *Chevron* in only one of the eleven cases in which it was relevant. Graham, *supra* note 12, at 231. *See also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1120–29 (2008) ("[T]he Court does *not* apply the *Chevron* framework in nearly three-quarters of the cases where it would appear applicable [after] *Mead*."). Simply put, "[t]oday, *Chevron*'s stronghold appears to be weakening." Jellum, Chevron*'s Demise*, *supra*, at 781. As the Court has embraced a more textually focused first-step, it has simultaneously limited *Chevron*'s application. "Thus, the Court cites *Chevron* far less often today than in the past; it applies *Chevron* less frequently due to [S]tep [Z]ero, which limits the doctrine's applicability; and the Court has limited *Chevron*'s implicit delegation rationale." *Id.* I do not intend to suggest that the lower courts have followed suit at this point. *See* Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito,* Chevron*,* Auer*, and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 27–28 ("[I]f the number of citations to Chevron has any significance in determining the level of deference accorded to agencies, it should be noted that the number of citations is actually increasing. . . . Chevron was cited over two thousand times in the first five years of this century, which is almost as many times as it was cited in the first ten years after the Court issued the decision."). While the lower courts may be citing *Chevron* more regularly, the Supreme Court is not.

18. *See* Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1740–64 (2010) (examining 1014 post-*Chevron* Supreme Court cases and finding that the Court only used *Chevron* in a third of the cases where it should have applied); J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to* Chevron*: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 88 (2010) ("[A]fter four years, the Roberts Court has demonstrated its inability to reach a consensus."); Brian G. Slocum, *The Importance of Being Ambiguous*: *Substantive Canons, Stare*

including recent calls to jettison its two-step approach altogether.[19] Despite spending years studying *Chevron* and its jurisprudential and administrative impact, I find myself ready to jump on the jettison bandwagon as well. First, however, I believe it is important to consider how this landmark decision has affected separation of powers among the branches of government for almost three decades.

Much has been said about the merits, or lack thereof, of the *Chevron* decision.[20] Instead of considering those merits, this Article looks at the rise and fall of *Chevron* and its effects on lawmaking and interpretive power. To date, no one has examined how, with a single case, the Court augmented and then constricted executive lawmaking and interpretive power.[21] Put simply, *Chevron* and its ensuing reformulation dramatically altered the executive's power to create and interpret law.

This Article proceeds as follows. Part I describes the rise of *Chevron*, beginning with the distribution of lawmaking and interpretive power prior to *Chevron*.[22] Before *Chevron*, Congress had the primary responsibility for lawmaking, while agencies made policy choices primarily when Congress explicitly delegated that power to them. Before *Chevron*, lawmaking power belonged primarily to the

Decisis, and the Central Role of Ambiguity Determinations in the Administrative State, 69 MD. L. REV. 791, 794–98 (2010) (stating that *Chevron* "is routinely ignored by courts, and it does not constrain judicial discretion"); Graham, *supra* note 12, at 231–70 (finding that during its first two terms, the Roberts Court used *Chevron* in only one out of the eleven cases in which it should have applied); Eskridge & Baer, *supra* note 17, at 1120–29 ("Contrary to the conventional wisdom, Chevron is not the alpha and the omega of Supreme Court agency-deference jurisprudence."); Jellum, Chevron*'s Demise*, *supra* note 17, at 772–73 (noting the times the Court cited Chevron during its 2003–2004, 2004–2005, and 2005–2006 terms).

19. *See, e.g.*, 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, 794–98 (2010) (arguing for abandonment of the *Chevron* framework altogether); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977, 1003–09 (2008) (surveying the approach state courts have taken and concluding that the Supreme Court should abandon the two-step).

20. *Chevron* dramatically altered the landscape of administrative law, leading to an abundance of *Chevron*-related scholarship. *See generally* Beerman, *supra* note 19 (arguing that the *Chevron* doctrine has proven to be a failure because it has not significantly increased deference to agencies like intended); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327 (2000); Pappas, *supra* note 19; Pierce, *Aftermath*, *supra* note 12); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283 (1986); Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071 (1990).

21. More narrow articles in this area have been written. *See, e.g.*, Sunstein, *Beyond* Marbury, *supra* note 6, at 2582 ("My major goal in this Essay is to vindicate the law-interpreting authority of the executive branch.").

22. *See infra* Part I (providing the background for the rise of *Chevron* and explaining the distribution of power under the U.S. Constitution).

legislature.[23] Finally, before *Chevron*, the judiciary resolved questions of statutory interpretation of regulatory statutes pursuant to a bifurcated approach: agencies received little to no deference when they resolved issues involving pure questions of law, but did receive some level of deference when they resolved issues involving questions of law application.[24] Thus, pre-*Chevron*, the executive acted in an expert advisory role, but not in a legislative or interpretive capacity.

Part I then explains how *Chevron* changed that power distribution. Few scholars would dispute that the Supreme Court transferred interpretive power to agencies when it decided *Chevron*.[25] Prior to *Chevron*, agencies received limited deference on questions of law application.[26] After *Chevron*, the Court established the two-step approach—effectively an "all-or-none" approach.[27] Under this approach, the Court retained interpretive power under step one (the none), but the Court ceded interpretive power in this area under step two (the all).[28] Thus, *Chevron* expanded executive interpretative power.

However, *Chevron* did not just shift the Court's interpretive power to the executive—it simultaneously shifted lawmaking power to the executive as well. Before *Chevron*, agencies had power to make policy when Congress explicitly delegated that power to them; after *Chevron*, agencies had power to make policy when Congress either explicitly *or implicitly* delegated power. As a consequence, the sphere of legitimate agency lawmaking expanded exponentially. Thus, *Chevron* fundamentally expanded the executive's power to make and interpret law.[29] The executive changed from expert advisor to quasi-law maker

23. *See infra* Part I (explaining the approach to lawmaking power before and after *Chevron*).

24. *See infra* Part I.A.2 (explaining the bifurcated approach).

25. *See* Farina, *supra* note 20, at 456 (calling *Chevron* a "siren's song" that fundamentally reformulated the constitutional makeup of the administrative state); Pierce, *Aftermath*, *supra* note 12, at 303–04 (commending *Chevron* as an "exceedingly important development" since "agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power"); Seidenfeld, *supra* note 7, at 96–97.

26. *See infra* Part I.A (describing the amount of deference Courts gave to agency interpretations before *Chevron*).

27. *See infra* Part I.B (describing the Court's changed deference approach after *Chevron*).

28. Courts apparently are more willing to find the enabling statute to be clear at step one than to overturn an agency's interpretation of that statute. The Supreme Court rarely finds an agency's interpretation unreasonable at step two. *See* Merrill, *Judicial Deference*, *supra* note 2, at 980; *see also* AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 392 (1999) (finding an FCC regulation reasonable under step two). *See generally* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE PROBLEMS AND CASES 145–52 (4th ed. 2010) (describing the different approaches of step two by courts: deferring to the agency's statutory interpretation, using legislative history, or considering the goals or purposes of a statute).

29. Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 401 (Peter L. Strauss ed., 2006) [hereinafter Merrill, *The*

and quasi-law interpreter.

Part II describes the fall of *Chevron*, beginning with changes the Court made to narrow *Chevron*'s first step, and the impact of those changes on legislative and interpretive power.[30] First, I explore how "*Chevron*'s Demise"[31]—the reformulation of *Chevron*'s first step—further expanded executive lawmaking and interpretive powers.[32] Specifically, the Supreme Court altered *Chevron*'s first step from the intentionalist inquiry (that the Court originally envisioned) into a search for textual clarity.[33] To his credit (or blame), Justice Antonin Scalia set this change in motion. It is no secret that, when appointed to the Supreme Court in 1986, Justice Scalia ignited an ideological divide amongst the jurists by challenging the entrenched approach to statutory interpretation used by the Court.[34] Justice Scalia systematically challenged the intentionalist belief that legislative history and other non-textual information were indispensable to questions about statutory meaning.[35] As a consequence, and within the context of *Chevron*, Justice Scalia ultimately convinced many of his brethren to replace the intentionalist inquiry at step one with an approach closer to his beloved textualist approach.[36] Currently, "*Chevron*'s first step is routinely

Story of Chevron]. *See* Merrill, *Judicial Deference*, *supra* note 2, at 976 (stating that "[i]n time, however, lower courts, agencies, and commentators all came to regard the analysis of the deference question set forth in *Chevron* as fundamentally different from that of the previous era").

30. *See infra* Part II (describing how *Chevron*'s rise eventually came to an end and how that once again altered the landscape for legislative and interpretive powers).

31. This term comes from the title of my earlier Article, Chevron*'s Demise*, *supra* note 17.

32. *See infra* Part II.A (noting the circumstances that lead to *Chevron*'s downfall).

33. Jellum, Chevron*'s Demise*, *supra* note 17, at 748–53.

34. *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 206–12 (describing how Justice Scalia led textualists in efforts to get the Supreme Court to rely heavily on legislative history despite Justices Breyer and Stevens's assemblage of a then-majority that used legislative history limitedly); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKLEY J. EMP. & LAB. L. 117, 161 (2008) ("During his first three terms on the Court, Justice Scalia authored a series of separate opinions—including at least eight concurring in the Court's judgment—in which he expressly attacked or questioned the majority's reliance on legislative history."); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (stating that Justice Scalia's theory of "new textualism" is modeled after Justice Oliver Wendell Holmes's textualist ideas); Paul Killebrew, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1899–902 (2007) (explaining two ways in which Justice Scalia's insistence on clarity operates in statutory interpretation: intolerance for vagueness or a heightened ability to find clear meaning).

35. Jellum, Chevron*'s Demise*, *supra* note 17, at 748–53.

36. *Id.*; *accord* TODD GARVEY, CONG. RESEARCH SERV., THE JURISPRUDENCE OF JUSTICE JOHN PAUL STEVENS: THE *CHEVRON* DOCTRINE 6–7 (2010) ("[T]he majority of the Court now seems to generally support Scalia's textualist position."); Kathryn A. Watts, *From* Chevron *to* Massachusetts*: Justice Stevens's Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1032 n.47 (2010) ("Although Justice Stevens framed the question in *Chevron* in terms

described . . . as a search for . . . textual clarity."[37] The question of "whether Congress has directly spoken to the precise question at issue" is a different question than whether the text of the statute is clear.

Chevron's demise further expanded the executive's legislative and interpretive powers. Prior to *Chevron*'s demise, the legislature could draft statutes less than perfectly and still control lawmaking power. Even though *Chevron* expanded legitimate congressional delegation by adding ambiguous delegation, the full, searching inquiry that was originally part of *Chevron*'s first step allowed the legislature to be less precise when drafting statutory language: under *Chevron* step one, courts would consider legislative history, statutory purpose, and historical context. But with *Chevron*'s demise—the first step's transition to a search for textual clarity—Congress now had to draft precisely to maintain lawmaking power. If Congress drafted ambiguously, intentionally or not, the Court assumed that Congress delegated lawmaking power to the agency.

Chevron's demise not only expanded the executive's lawmaking power, it also further expanded the executive's interpretive power. As originally formulated, *Chevron*'s first step involved a full, searching inquiry for Congressional intent, using all the traditional tools of statutory interpretation.[38] As reformulated, step one shortens the judicial inquiry: when Congress is unclear, a court must adopt any reasonable agency interpretation pursuant to step two. Because Congress rarely drafts statutes perfectly, the executive should interpret unclear statutes more frequently. Thus, *Chevron*'s demise further expanded the executive's interpretive power.

After *Chevron*'s demise, the landscape shifted. Part II explores the Court's more recent retreat from a *Chevron*-dominated world and the implications for that retreat on the executive's legislative and interpretive powers.[39] *Chevron*'s domain is shrinking.[40] *Chevron* applies to fewer agencies' interpretations than when it was decided more than a quarter century ago.[41] Moreover, since *Chevron*, the Court has developed a pre-step to *Chevron*'s application, coined by Professor

---

of the clarity of Congress's intent, Justice Scalia, the Court's leading textualist, has framed the question in terms of whether the statute is clear rather than whether Congress's intent is clear.").

37. Jellum, Chevron*'s Demise*, *supra* note 17, at 761. This is not to suggest that the Justices wholeheartedly embraced Justice Scalia's new textualism, especially his rejection of legislative history.

38. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 827, 843 n.9 (1984).

39. *See infra* Part II (describing the landscape after *Chevron*'s fall).

40. *See, e.g.*, Shanor, *supra* note 13, at 542 (arguing that the *Chevron* doctrine "continues to evolve and erode as courts apply the doctrine").

41. *See* Graham, *supra* note 12, at 231–70 (collecting cases).

Cass Sunstein as *Chevron* Step Zero.[42] With Step Zero, only some agency interpretations are entitled to *Chevron* deference; other interpretations receive, at best, *Skidmore* deference.[43] Also, the Court has since limited the implicit delegation rationale to justify deferring to agency interpretations of ambiguous statutes.[44] The Court used this rationale to suggest that deference to agencies is appropriate because ambiguity signals Congress's implicit intent to delegate to the agency.[45] But in a series of cases, starting with *FDA v. Brown & Williamson Tobacco Corp.*,[46] the Court rejected, or at least limited, this rationale.[47]

---

42. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191, 207–31 (2006) [hereinafter Sunstein, *Step Zero*] (describing "the initial inquiry into whether the *Chevron* [two-step] framework applies at all"); Jellum, Chevron*'s Demise*, *supra* note 17, at 774–81.

43. *Skidmore* deference is a pragmatic deference. Jellum, Chevron*'s Demise*, *supra* note 17, at 738. An agency interpretation is given deference by a court based upon the "thoroughness evident in [the agency's] 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." Skidmore v. Swift, 323 U.S. 134, 140 (1944). *See generally* Eskridge & Baer, *supra* note 17, at 1098 (analyzing 1041 agency-interpretation cases from *Chevron* to *Hamdan* to depict the pattern of courts' use of deference over time); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007) (explaining the results from a five-year empirical study of the application of *Skidmore* review in the Federal Court of Appeals); Michael Herz, *Judicial Review of Statutory Issues Outside of the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 125 (John F. Duffy & Michael Herz eds., 2005) (discussing how courts handle an agency's interpretation of a statute when *Chevron* does not apply); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 750–56 (2002) (discussing the differing rationales for implied agency deference as stated in *Chevron* and expertise-based deference); Richard W. Murphy, *A "New" Counter-*Marbury*: Reconciling* Skidmore *Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 46–51 (2004) (suggesting a framework for deference that stops short of law-making through interpretation); Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 45 (2006) (arguing for an intermediate form of deference based upon policies within the IRS); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1137–46 (2001) (analyzing the Supreme Court ruling in *Christensen v. Harris Cnty.*, 529 U.S. 526 (2001), and arguing that it narrows the scope of *Chevron* deference); Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1896–905 (2006) (recommending that additional steps be added to *Chevron*'s two step analysis); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289, 323–33 (2002) (outlining the evolution of deference standards through the Supreme Court's jurisprudence post-*Skidmore*).

44. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000) (recognizing that *Chevron* deference is based, in part, on the rationale of implicit delegation and refusing to defer to the agency's interpretation on the grounds that Congress did not delegate, even impliedly, to the agency in this particular case).

45. See *infra* Part II.B.2 (noting that implicit delegation was one rationale for *Chevron*).

46. 529 U.S. 120 (2000).

47. *Id.* at 159–61. *See id.* at 159 ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an

Perhaps the Court feared it had ceded too much lawmaking and interpretive power, for—as Part II of this Article shows—the Court reclaimed some of the interpretive power it had yielded, and curbed some of the executive lawmaking power it had shifted, by limiting *Chevron*'s application in these two ways: by restricting the types of agency interpretations entitled to deference and by curbing the implied delegation rationale.

I. *CHEVRON*'S RISE

A. *Constitutional Delegation of Power*

The powers of the legislature, judiciary, and executive are identified in the United States Constitution. Article I vests in Congress "[a]ll legislative Powers herein granted."[48] Legislative power is the power "to promulgate generalized standards and requirements of citizen behavior or to dispense benefits—to achieve, maintain, or avoid particular social policy results."[49] It is the power to create law and the procedural rules for enforcing those laws.[50] Laws "alter[] the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[51] Congress alters legal rights through legislative action: enacting, amending, and repealing statutes.[52]

Because the Constitution expressly gives Congress the power to legislate, the United States Supreme Court has limited the other branches' ability to exercise such power.[53] Illustratively, in *Clinton v.*

implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (citation omitted)).

48. U.S. CONST. art. 1, § 1.

49. Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 479 (1991).

50. William D. Araiza, *The Trouble with* Robertson*: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1079 (1999).

51. INS v. Chadha, 462 U.S. 919, 952 (1983). The *Chadha* Court held that the legislative veto was "essentially legislative" in nature. *Id.*

52. *See* Aharon Barak, *Foreward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 133 (2002) ("The main role of the legislature is to enact statutes.").

53. *See, e.g.*, Clinton v. New York, 524 U.S. 417, 448–49 (1998) (invalidating the Line Item Veto Act because it effectively gave the President power to amend or repeal laws on which Congress had already voted); *Chadha*, 462 U.S. at 952 (noting that not every action taken by either House of Congress is "subject to the bicameralism and presentment requirements," but an action is limited if it "contain[s] matter which is properly to be regarded as legislative in its character and effect"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588–89 (1952) ("The Constitution did not subject this law-making power of Congress to presidential or military supervision or control."). *See also* Barak, *supra* note 52, at 141 (describing Congress' ability to

New York,[54] the Court held the line-item veto unconstitutional because the executive would be amending and repealing legislation.[55] Similarly, in *INS v. Chadha*,[56] the Court held that legislative veto provisions[57] violated the Constitution because they allowed one chamber of Congress to unilaterally amend legislation and avoid bicameral passage and presentment.[58] Additionally, in *Youngstown Sheet & Tube Co. v. Sawyer*,[59] the Court held that President Truman's executive order seizing private steel mills was unconstitutional because it altered private property rights, something only Congress could do.[60] Hence, because Congress has the constitutional power to legislate, lawmaking by the executive or judiciary is unconstitutional.[61]

The executive[62] does not have the constitutional power to make law. Rather, Article II of the Constitution vests "[t]he executive Power . . . in a President of the United States of America."[63] Executive acts are those in which an executive official exercises judgment about how to apply

restrict the executive's power and the need for the judiciary to respect the role of the legislature).

54. 524 U.S. 417 (1998).

55. *Id.* at 447–49. According to the Court, only Congress can legislate. *See id.* ("In both legal and practical effect, the President [by way of the line item veto] has amended two Acts of Congress by repealing a portion of each. . . . There is no provision in the Constitution that authorizes the President to [do so]."). Notably, the Line Item Veto Act of 1996 allowed the president to veto specific items in an appropriations bill. While the Court's reasoning in this case has since been criticized, the case remains good law. For a criticism of *Clinton v. New York*, see Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of* Clinton v. City of New York, 99 NW. U.L. REV. 77, 85 (2004) (arguing that the case actually raised a non-delegation issue, masquerading as a bicameral passage and presentment issue).

56. 462 U.S. 919 (1983).

57. The legislative veto involved a procedure whereby Congress delegated authority to the executive, but reserved—either to a single chamber or to a committee from a single chamber—the power to oversee and veto the executive's use of this delegated authority. *Id.* at 1003–13.

58. *Id.* at 954–55.

59. 343 U.S. 579 (1952).

60. *Id.* at 588–89. President Truman tried to seize the Nation's steel mills to prevent a possible steel shutdown during the Korean War. *Id.* at 582. The President's order was not based upon any specific statutory grant of authority; indeed, Congress had refused to act in the face of the President's specific request for that authority. *Id.* at 586. Therefore, the issue for the Court was whether the President had power to seize private property in the absence of specifically enumerated authority in the Constitution. *Id.* at 587–89. The President argued that he had inherent power as Commander-in-Chief to act in light of the Korean War and that he had to faithfully execute the laws. *Id.* at 587. The Court disagreed with both arguments. *Id.*

61. While this holds true for the formalistic separation of powers approach, it may not be as accurate when applying the functionalist separation of powers approach. *See generally* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 861 (2009) (detailing how "the functionalist approach posits that overlap beyond the core functions is practically necessary and even desirable").

62. By executive, I primarily mean agencies, not the president.

63. U.S. CONST. art. II, §1, cl. 1.

law to a given situation.[64] For the executive to execute the law there must be existing law to execute.[65] In other words, while the legislature enacts laws, the executive enforces those laws. Because the Constitution requires that the executive enforce the law, the Supreme Court has limited the other branches' ability to exercise executive power.[66] For instance, in *Bowsher v. Synar*,[67] the Court held that Congress could not keep removal power[68] over the comptroller general (an agency official within the Government Accountability Office) because the agency official exercised executive authority.[69]

64. Bowsher v. Synar, 478 U.S. 714, 732–33 (1986); Redish & Cisar, *supra* note 49, at 480 ("[T]he executive branch must be exercising that creativity, judgment, or discretion in an 'implementational' context. In other words, the executive branch must be interpreting or enforcing a legislative choice or judgment; its actions cannot amount to the exercise of free-standing legislative power.").

65. Redish & Cisar, *supra* note 49, at 480 ("[T]he executive branch is, in the exercise of its 'executive' power, confined to the development of means to enforce legislation already in existence."). For this reason, in *Medellín v. Texas*, the Court struck down a memorandum from President Bush requiring state courts to review the convictions and sentences of foreign nationals who had not been advised of their rights under the Vienna Convention. 552 U.S. 491, 498–99 (2008). The Supreme Court held that the President lacked the authority to preempt state law and require state courts to obey international treaties and decisions of an International Court of Justice. *Id.* at 498–99. Absent a grant of power—from the Constitution, from a statute, or from a self-executing treaty—there was simply no law for the President to execute. *Id.* at 526. Hence, the President acted legislatively, which he had no power to do. *Id.* The Court noted that "[t]he President's authority to act . . . 'must stem either from an act of Congress or from the Constitution itself.'" *Id.* at 524 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)). In this case, because there was neither, the President's act violated separation of powers. *Id*. at 523–32.

66. *E.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3153–55 (2010) (holding that a statute providing for two levels of good cause tenure removal violated Article II by limiting "the President's ability to ensure that laws are faithfully executed").

67. 478 U.S. 714 (1986).

68. The removal power is executive in nature. Myers v. United States, 272 U.S. 52, 175–76 (1926), *overruled by Free Enter. Fund*, 130 S. Ct. at 3165–66. *Cf.* Humphrey's Ex'r v. United States, 295 U.S. 602, 622–24 (1935) (holding that when Congress provides for the appointment of officers whose functions are both legislative and judicial and limits the grounds upon which the officers may be removed from office, the president has no constitutional power to remove them for reasons other than those so specified).

69. In *Bowsher*, the Court analyzed the constitutionality of the Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (codified at 2 U.S.C. §§ 901 *et seq.* (2006)). *Bowsher*, 478 U.S. at 717–18. That Act allowed the comptroller general (1) to determine whether the President and Congress were abiding by federal deficit caps, and (2) to implement cuts as necessary. *Id.* at 717–18. Although he was appointed by the President, the comptroller general was subject to removal by Congress. *Id.* at 720. Because the comptroller would be executing the law, the Court struck down the law. *Id.* at 733–34. The Court held that Congress could not vest any authority to execute the laws in the comptroller general because the removal arrangement would then give Congress a role in executing the laws. *Id.* at 726–27. The Court noted that "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 726. However, in *Morrison v. Olson*, the Court

Finally, Article III of the Constitution vests "[t]he judicial Power of the United States, . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[70] Judicial power is the power to interpret laws and resolve legal disputes.[71] "[T]o declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative."[72] In other words, while the legislature enacts laws, the judiciary interprets those laws.[73] "Legislatures prescribe the rights and duties of citizens, while interpreting laws setting forth those rights and duties is the province of the courts."[74] In contrast, the judiciary interprets laws in the course of adjudicating a case;[75] indeed, a court's "fundamental power is to decide cases according to [its] own legal interpretations and factual findings"[76] and "to render dispositive judgments."[77]

Because the Constitution gives the judiciary the power to interpret law and decide cases,[78] the Supreme Court has prevented the other

---

upheld Congress's decision to establish an independent counsel that was supervised by the judicial rather than the executive branch. 487 U.S. 654, 695, 696–97 (1988). The Court approved the arrangement despite *expressly* conceding that the independent counsel's function was executive. *Id.* at 671.

70. U.S. CONST. art. III, § 1.

71. *See* Marbury v. Madison, 5 U.S. 137, 177–78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

72. Koshkonong v. Burton, 104 U.S. 668, 678 (1881) (quoting Ogden v. Blackledge, 2 U.S. 272, 277 (1804)).

73. *See Marbury*, 5 U.S. at 177–78 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . . . This is of the very essence of judicial duty."). *See also* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction . . . .").

74. Bernard W. Bell, *Metademocratic Interpretation and Separation of Powers*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 18 (1998) (citing Plaut v. Spendthrift Farms, 514 U.S. 211, 222 (1995) (quoting THE FEDERALIST No. 78, at 523, 525 (Alexander Hamilton) (J. Cooke ed. 1961))).

75. "A fundamental precept of the federal constitutional structure . . . is the distinction between a legislature's power to enact laws and a court's authority to interpret them in the course of adjudicating a case." Araiza, *supra* note 50, at 1055 (criticizing the Court's holding in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), for failing to check legislative usurpation of judicial power).

76. Araiza, *supra* note 50, at 1073.

77. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990).

78. Indeed, only Article III courts have the power to interpret law and decide cases. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. §§ 157, 1334 (2006) (holding that the Bankruptcy Act of 1978 is an "unwarranted encroachment" on the judicial branch). In *Northern Pipeline*, the Court held that Congress could not grant Article III powers to non-Article III judges, who lacked lifetime tenure and salary protection and thus might not be politically independent. *Id.* at 84. In a plurality opinion, Justice Brennan explained that the Article III protections—life tenure and salary protection—helped the judiciary retain political independence from the Executive and Legislative branches. *Id.* at 59–60.

branches from interfering with federal court decisions.[79] For example, in *Stern v. Marshall*,[80] the Court held that a Bankruptcy Court—an Article I Court—lacked Constitutional power under Article III to resolve a counterclaim based on state law.[81] Similarly, in *Plaut v. Spendthrift Farm, Inc.*,[82] the Court held that Congress could not retroactively require federal courts to reopen final judgments.[83] Additionally, in *United States v. Klein*,[84] the Court invalidated a statute that "prescribe[d] rules of decision" for a specific type of case.[85] According to the Court, by prescribing a rule of decision—or an outcome—in a pending case, "Congress[] inadvertently passed the limit which separate[d] the legislative from the judicial power."[86] Congress may amend the underlying substantive law to accomplish policy objectives, but Congress should not "dictate results under existing

79. Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (holding that the judiciary could be compelled to hear veterans' disability pension claims, which were not judicial in nature); *accord* Bates v. Kimball, 2 D. Chip 77, 90 (Vt. 1824).

80. 131 S. Ct. 2594 (2011).

81. *See id.* at 2620 ("The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.").

82. 514 U.S. 211 (1995). Prior to *Plaut*, Congress had enacted section 27A(b) of the Securities Exchange Act of 1934 in response to two Supreme Court opinions with which it disagreed. First, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, the Court held that suits alleging fraud and deceit in the sale of stock in violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission had to be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. 501 U.S. 350, 364 (1991). Then, in *James B. Beam Distilling Co. v. Georgia*, the Court held that *Lampf* applied to all pending cases. 501 U.S. 529, 542–44 (1991), *superseded by statute*, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236. As a result of *Lampf* and *James B. Beam Distilling Co.*, a large number of pending and high profile cases, which had been considered timely when filed, were dismissed. Araiza, *supra* note 50, at 1075–76. With section 27A(b), Congress attempted to reinstate cases that had otherwise become final judgments and had been dismissed. *Plaut*, 514 U.S. at 219. When the constitutionality of the section was challenged, the Court held section 27A(b) unconstitutional, reasoning that Congress could not "retroactively command[] the federal courts to reopen final judgments" without violating separation of powers. *Id.* In doing so, the Court said that the judiciary's role is "not merely to rule on cases, but to *decide* them" conclusively. *Id.* at 218–19.

83. *Plaut*, 514 U.S. at 240.

84. 80 U.S. (13 Wall.) 128 (1872).

85. *Id.* at 146.

86. *Id.* at 147. The Court maintained that Congress exceeded the limits of legislative power by "withhold[ing] appellate jurisdiction [] as a means to an end." *Id.* at 145. As such, Congress invaded the province of the judicial branch. *Id*. at 147. The Court also held that Congress had impermissibly infringed the power of the executive branch by limiting the effect of a Presidential pardon. *Id*. *But see* Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438–441 (1992) (holding that the Northwest Timber Compromise, in which Congress enacted a law in reaction to two specifically named cases in litigation for the purpose of replacing legal standards affecting those two cases, did not violate the separation of powers doctrine).

law."[87] Thus, when Congress interferes with specific, pending cases in a manner that tells the judiciary what decision to reach, Congress impermissibly intrudes into the judicial arena.[88] Because the judicial role is to decide cases by interpreting and applying existing law to a specific, factual situation, separation of powers is violated when another branch attempts to decide cases, reopen final cases, or interfere with a court's decision-making process.[89]

1. Legislative Power Prior to *Chevron*

Agencies are part of the executive branch. To satisfy Articles I and II of the U.S. Constitution, agencies should enforce—not make—law. Yet, agencies promulgate regulations, which "alter[] the legal rights, duties and relations of persons . . . outside the [l]egislative [b]ranch"

87. Araiza, *supra* note 50, at 1060–61 (noting that *Klein* is not an easy decision for courts to apply or commentators to understand). Later cases support Professor Araiza's characterization. One might say that the Court, at times, bends over backwards to find Congress changed the law rather than dictated a specific result. For example, in *Miller v. French*, the Court rejected an argument that a statute that stayed injunctions in pending litigation reopened final decisions or interfered with judicial decision-making. 530 U.S. 327, 348 (2000). The Court rejected the separation of powers argument proffered by petitioners, reasoning that the Prison Litigation Reform Act did not suspend or reopen a decided case. *Miller*, 530 U.S. at 346. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified in scattered sections of 18, 28, & 42 U.S.C.). Rather, the Act "establish[ed] new standards for prospective relief," which is entirely within Congress's power. *Miller*, 530 U.S. at 348. Because Congress had not told "judges when, how, or what to do," but had simply changed the rules for the future, *id.*, Congress had acted entirely within its legislative authority. *Id.* at 347. Then, in *Robertson v. Seattle Audubon Society*, the Court reversed the Ninth Circuit and held that a statute that provided that the "management of areas according to [a specific statute] . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for [two existing lawsuits]" merely prescribed new law rather than compelled findings or results in the two pending cases under the existing law. 503 U.S. at 437.

88. *But see Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 510–14 (1869) (holding that Congress could eliminate the Court's appellate jurisdiction in a pending case without violating the Constitution). Subsequent commentators have criticized the Court's decision in *Ex parte McCardle*, suggesting that it was a result of the political atmosphere. *See, e.g.*, Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1593–615 (1986) (detailing *Ex parte McCardle* and the political climate surrounding the Court's decision). Despite the holding in *Klein*, Congress continues to create "rules of decision" for particular cases. *See, e.g.*, Araiza, *supra* note 50, at 1067 (arguing that Congress prescribed a rule of decision in section 318 of an appropriations bill for the Department of the Interior).

89. Separation of powers analysis is more nuanced than this short description suggests. For additional background, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (reprising functionalist and formalist interpretations of separation of powers doctrine in the Supreme Court context); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001) (identifying the traditional separation and balance of power among the three branches of government and arguing for the abandonment of this conceptualization due to functional inadequacy).

and, thus, look and act like legislation.[90] How can agencies enact law without flouting the Constitution?[91]

The short answer to this question is that the Supreme Court long ago held that Congress has the ability[92] to delegate such power to agencies pursuant to the necessary and proper clause,[93] so long as Congress provides intelligible principles, or standards, for agencies to use when exercising that power.[94] If Congress sufficiently and explicitly constrains an agency's policy-making choices, then the agency is not making law; rather, the agency is enforcing congressionally made law.

In reality, this is a convenient rationale to give legitimacy to an institution that raises constitutional concerns while being essential to a functioning government.[95] It is, perhaps, a fiction to say that agencies are enforcing congressionally made law. Indeed, some Justices of the Supreme Court have questioned whether Congress delegates legislative power or merely sets boundaries on nondelegated executive power.[96] Justice Scalia, a formalist, identifies the delegated power as executive because to do otherwise would raise constitutional questions he would rather avoid.[97] In contrast, Justice Stevens, a functionalist, has

---

90. INS v. Chadha, 462 U.S. 919, 952 (1983) (holding that the legislative veto was "essentially legislative" in nature).

91. Formalist scholars would argue that the entire Administrative State is unconstitutional. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 49–50 (5th ed. 2009). This argument has been ignored by the Court, however, and therefore, from a practical basis, the Administrative State is here to stay.

92. Indeed, for decades that ability has been a necessity. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (noting that the jurisprudence in the delegation area "has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives"). *Mistretta* cites to *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928), for Chief Justice Taft's approach for inter-branch coordination, which was grounded in "common sense" and "inherent necessity."

93. *See* U.S. CONST. art. I, § 8 (giving Congress the power "[t]o make all Laws which shall be necessary and proper" to carry out its legislative function).

94. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–76 (2001).

95. *See generally* Manning, *supra* note 89, at 1939 (discussing the formalist and functional approach to separation of powers).

96. *Whitman*, 531 U.S. at 472, 488–90 (Stevens, J., concurring).

97. Illustratively, Justice Scalia labels the delegated power as executive in *Whitman*. *Id*. at 472–76 (majority opinion). In that case, the Court reviewed the constitutionality of section 109(b)(1) of the Clean Air Act, 42 U.S.C. § 7409 (2006), which directed the EPA "to set primary ambient air quality standards 'the attainment and maintenance of which . . . are requisite to protect the public health' . . . ." *Whitman*, 531 U.S. at 465 (quoting 42 U.S.C. § 7409(b)(1)). The issue for the Court was whether the Act contained intelligible standards or impermissibly delegated legislative authority. *Id.* at 472–73. Writing for the majority, Justice Scalia framed the issue as "whether the statute . . . delegated legislative power to the agency." *Id.* at 472. Noting that the Constitution "permits no delegation of those powers," Justice Scalia articulated his view

suggested that the Court should "frankly acknowledge[]" that the power being delegated is legislative, but is adequately restrained by the intelligible principles in the statute.[98] He has said, "I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'"[99] Whether the legislature is delegating legislative power or constraining nondelegated executive power, there can be little doubt today that agencies have the power to enact regulations with the force and effect of law.

While interesting, whether the legislature delegates legislative power or constrains nondelegated executive power is largely irrelevant for purposes of this Article. What is relevant is that, prior to *Chevron*, Congress could legitimately constrain agency lawmaking power by including *explicit* intelligible principles to bind agency authority.[100] Pursuant to this explicit-delegation rationale, the power to administer congressionally created programs included the power to formulate policy and make rules to further Congress's goals within express parameters.[101] When Congress explicitly delegated power to an agency to draft regulations, the agency's choice controlled, unless it was arbitrary, capricious, or manifestly contrary to the statute.[102]

---

that when agencies act pursuant to statutes containing intelligible principles, agencies are not exercising delegated legislative power, but are instead exercising nondelegated executive power. *Id.* at 472–73. A statute with no intelligible principles places no boundaries on the exercise of executive power; hence, it would violate the Constitution. *Id.* at 472–74.

98. *Id.* at 488 (Stevens, J., concurring).

99. *Id.* Justice Stevens concurred separately, joined by Justice Souter, specifically to disagree with Justice Scalia's characterization of the delegated power. *Id.* at 487–88. He suggested that the majority's continued desire to label the delegation as executive was simply pretense. *Id. See also* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power . . . ."); Loving v. United States, 517 U.S. 748, 758 (1996) (stating that the nondelegation doctrine does not mean that only Congress has authority to make rules with prospective application).

100. While some scholars have suggested that the nondelegation doctrine is dead, others have suggested that it is alive and well. *Compare* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 & nn.1–3 (2000) (citing several academic publications signifying that the nondelegation doctrine is dead), *with* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1299 (2003) (suggesting that the nondelegation doctrine is "alive and kicking").

101. For example, to implement the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C. (2006)), the EPA promulgated several hundred new regulations. Steven Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511, 1512 (1995).

102. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). For an understanding of how express delegation review under the arbitrary and capricious standard differs from implied delegation review under *Chevron*, see Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (explaining that *Chevron* review is rooted in "statutory analysis," and

2. Interpretive Power Prior to *Chevron*

To satisfy Articles II and III of the U.S. Constitution, agencies should execute, not interpret, laws. When a statute is ambiguous, it is generally a court's job to resolve that ambiguity, assuming the case is justiciable.[103] There are two fundamental reasons for this division of power. First, ambiguity often becomes apparent only when a statute is applied to a set of facts. Second, it "is emphatically the province and duty of the judicial department to say what the law is."[104] When a statute is ambiguous, a court must decide what it means—if the court does not decide, no one will unless an agency is involved. Before a case reaches a court, an agency may already have interpreted the language in the statute, whether the agency is promulgating regulations, issuing policy statements or interpretive rules, or resolving an adjudication. Moreover, when an agency has already interpreted a statute, the question for a court is whether to defer to that interpretation.

Agencies have long received some level of judicial deference for their interpretations of ambiguous statutes and regulations.[105] The precise level of deference has morphed over the years from no deference, to limited deference, to great deference.[106] While the level of deference has changed, the rationale for affording deference has remained relatively consistent: agency expertise and intended congressional delegation. This Section will explore the Court's approach to deference prior to *Chevron*.

In the 1940s and early 1950s, the Supreme Court primarily used two different deference standards: "no deference" and "limited deference." While the deference world was never black and white,[107] which standard the Court used seemed to depend on the type of interpretive issue presented. When an agency interpretation involved a "pure" question of law,[108] the Court preferred a "no deference"

arbitrary, and arbitrary and capricious review is rooted in questioning the "reasonableness" of the agency regulation).

103. For those situations that are non-justiciable, the agency must, by necessity, interpret law.

104. Marbury v. Madison, 5 U.S. 137, 177 (1803).

105. LAWSON, *supra* note 91, at 411.

106. *See infra* Part II.B.2 (explaining how *Chevron* changed the judicial deference approach).

107. Indeed, Jack Beerman described the pre-*Chevron* deference world slightly differently. *See* Beerman, *supra* note 19, at 791 ("[L]egal doctrine on the distribution of interpretive authority between courts and agencies was unclear and it often caused controversy.").

108. Generally, pure questions of law involve those questions that can be resolved without considering the policy implications. The line, however, between pure questions of law and questions of law application is not precise; rather, pure questions of law generally impact policy choices. For example, whether the term "employee" in the Wagner Act included common law understandings of that term would be considered a pure question of law. *See* NLRB v. Hearst Publ'n, Inc., 322 U.S. 111, 120 (1944) (determining whether the term "employee" in the Wagner

standard.[109] However, when the agency interpretation involved a question of law as applied to a set of facts,[110] the Court preferred a "limited deference" standard.[111] The Court applied the limited deference standard to agency interpretations involving the application of law to fact because "Congress . . . found it more efficient to delegate [these issues] to those whose experience in a particular field gave promise of a better informed, more equitable" resolution of the issues.[112] Deference was due because of agency expertise and express congressional delegation.[113] When the issue involved law application, the agency's expertise, and the likelihood that Congress intended to delegate these choices to the agency justified courts giving the agency's interpretations some level of deference.[114] However, when the agency interpretation involved a pure question of law, the Court did not defer because judges were as competent, if not more so, than agencies to determine the intended meaning of ambiguous statutory language.[115] Further, leaving questions of law for judicial resolution was consistent with the Administrative Procedure Act,[116] which provides that "the

Act included common law understandings of that term), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324–25 (1992). But the resolution of that question impacts policy.

109. *See, e.g.*, Gray v. Powell, 314 U.S. 402, 414–17 (1941) (determining whether coal that had been transferred from one entity to another without any transfer of title was "sold or otherwise disposed of" within the meaning of the Bituminous Coal Act of 1937); *Hearst*, 322 U.S. at 124–29 (determining if the position of news boy was included in the term employee); O'Leary v. Brown-Pac.-Maxon, Inc., 340 U.S. 504, 506–09 (1951) (determining whether the term "course of employment" in the Longshoremen's and Harbor Workers' Compensation Act included the common law understanding of that term, but mischaracterizing it as a question of fact).

110. For example, the issue of whether the term "employee" in the Wagner Act, if it were not limited by common law understanding of that term, applied to newsboys bringing the legal challenge involves a question of law as applied to specific facts. *Hearst*, 322 U.S. at 120.

111. *See, e.g.*, *Gray*, 314 U.S. at 410–413 (testing the validity of the agency's finding that the plaintiff was a coal producer and holding that an agency's determination should be upheld when congressionally guided and constitutional).

112. *Id.* at 412.

113. *Hearst*, 322 U.S. at 120.

114. *See* LAWSON, *supra* note 91, at 433 (attributing this bifurcation of judicial review to *Gray*, *Hearst*, and *O'Leary*).

115. *Id.* This two-tracked approach to the issue of judicial review of agency interpretations made sense because it was consistent with the judicial review approach in civil litigation. In civil cases, appellate judges determine questions of law de novo because these judges are experts at interpreting law; thus, no deference is due to trial courts' findings of law. *See generally* Randall H. Warner, *All Mixed Up about Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 105 (2005) (explaining standards of review generally in the context of mixed questions of law and fact). *Accord* Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991) ("Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy.").

116. 5 U.S.C. §§ 701–706 (2006).

reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[117]

Pursuant to this bifurcated deference approach, courts held the primary responsibility for interpreting statutes. Courts reviewed pure questions of law de novo, giving the agency's interpretation no deference at all.[118] Courts gave questions of law application more deference, giving the agency's interpretation limited deference.[119] The level of limited deference varied depending on the circumstances surrounding the agency's interpretation.[120] In effect, agencies faced a balancing test: the more consistent, thorough, and considered their interpretations were, the more deference they earned.[121] As noted, deference was appropriate because of agency expertise and experience. Essentially, agencies served as judicial experts: when agency interpretations had "the power to persuade,"[122] courts deferred to them.[123] When the interpretations did not, courts were free to ignore

117. *Id.* at § 706.

118. LAWSON, *supra* note 91, at 431–33.

119. While courts deferred to agency interpretations involving law application, how much they deferred was uncertain. According to the Supreme Court, limited deference in this context meant that judges were to defer to agency interpretations that had "'warrant in the record' and a reasonable basis in law." NLRB v. Hearst Publ'n, Inc., 322 U.S. 111, 131 (1944); O'Leary v. Brown-Pac.-Maxon, Inc., 340 U.S. 504, 506–07 (1951). In 1944, the Court explained that agency interpretations had "warrant in the record" when they were persuasive, meaning they had "all those factors which give [the agency interpretation] power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Those factors included the following: (1) the consistency of the agency's interpretation, (2) the thoroughness of the agency's consideration, and (3) the soundness of the agency's reasoning. *Id.* In other words, the more thoroughly considered, consistent, and reasoned an agency interpretation was, the more deference would be due. Under *Skidmore*'s power to persuade test, "deference was earned, not automatic." LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 214 (2008) [hereinafter JELLUM, STATUTORY INTERPRETATION]. Importantly, however, agency interpretations involving the application of law to fact were "not controlling." Christensen v. Harris Cnty., 529 U.S. 576, 596 (2000) (Breyer, J., dissenting) (citing *Skidmore*, 323 U.S. at 140).

120. *See generally* Merrill, *Judicial Deference*, *supra* note 2, at 972–75 (lacking a "unified theory" for determining the deference standard in a particular case, the Court utilized a "pragmatic and contextual approach"); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 (1985) (recounting as "judicial orthodoxy" the three factors considered in *Federal Election Commission v. Democratic Senatorial Campaign Commission*, 454 U.S. 27 (1981), as determinative of the level of deference afforded administrative agencies).

121. *See* Merrill, *Judicial Deference*, *supra* note 2, at 972–75 (stating that an agency's interpretation received deference based on the agency's skill as a "specialist" and the thoughtfulness of the analysis).

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

123. *See* Merrill, *Judicial Deference*, *supra* note 2, 974–75 (arguing that when a court viewed an agency as a knowledgeable specialist, the agency's interpretations received greater deference).

them.[124] Thus, prior to the Court's decision in *Chevron*, the judiciary held most, if not all, interpretive power.

In sum, before *Chevron*, the legislature held the majority of legislative power, the judiciary held the majority of interpretive power, and the executive played little more than a supporting role in both processes. The executive had the power to fill in the interstices of the law and offer its expertise regarding what statutes meant, but it could do little more.[125]

B. Chevron

The bifurcated-deference approach remained untouched for forty years. But in 1984, with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[126] it disappeared completely.[127] By ignoring its bifurcated approach, the Supreme Court altered power among the branches in two important ways. First, the Court shifted legislative power from the legislature to the executive by expanding the way Congress could delegate lawmaking power. Second, the Court shifted interpretive power from the judiciary to the executive by creating an "all-or-none" deference approach. Whereas the executive had to earn interpretive power under *Skidmore*, after *Chevron*, deference became automatic. After briefly explaining *Chevron* and its rationales, this Section will explore *Chevron*'s effect on executive power.

1. A Summary of *Chevron*

The issue in *Chevron* was whether the Environmental Protection Agency's (EPA) interpretation of "stationary source" in the Clean Air Act was valid.[128] The section of the Act at issue required permits when industrial plants wished to modify or build a "stationary source" of pollution.[129] But the Act did not define "stationary source."[130] Thus, the EPA had to interpret that term, which it did by way of two

124. *See, e.g.*, SEC v. Sloan, 436 U.S. 103, 117–19 (1978) (holding that where there was no power to persuade under *Skidmore*, the Court has a "clear duty . . . to reject the administrative interpretation of the statute").

125. *See infra* Part I.A (discussing the general powers of the executive).

126. 467 U.S. 837 (1984).

127. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), was cited in *Chevron*, 467 U.S. at 844, and is still cited today. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 529 (2009) (Stevens, J., concurring in part and dissenting in part) ("We accordingly acknowledged that a complete interpretation of a statutory provision might demand both judicial construction and administrative explication.").

128. *Chevron*, 467 U.S. at 840 (citing the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 111, 91 Stat. 685).

129. *Id.*

130. *Id.* at 841.

contradictory notice and comment regulations.[131] The first regulation defined "stationary source" as the construction or installation of any new or modified equipment that emitted air pollutants.[132] The following year, the EPA repealed that regulation and promulgated a new regulation that expanded the definition to cover a plant-wide or bubble-concept definition.[133] The bubble-concept definition allowed a plant to offset increased air pollutant emissions at one part of its physical facilities so long as the plant reduced emissions at another part of the facility.[134] Under this definition, as long as total emissions at the facility remained constant, no permit was required.[135]

This question—the meaning of the term "stationary source"—was a pure question of law.[136] Under the Court's pre-*Chevron* bifurcated-deference approach, the EPA's interpretation should have been reviewed de novo.[137] Indeed, the D.C. Circuit applied the de novo review standard, appropriate for reviewing agency interpretations involving pure questions of law.[138] The D.C. Circuit reviewed the statutory language and legislative history of the Act, finding both inconclusive.[139] Stating that the court "[did] not write on a clean slate," it then reviewed two earlier opinions, which had resolved this issue inconsistently.[140] Reconciling these two inconsistent opinions, the

131. *Id.* at 840, 857–59.

132. *Id.* at 840, 840 n.2.

133. *Id.* at 855.

134. *Id.* at 855–57.

135. *Id.* at 852–53.

136. Not all agree that the question in *Chevron* was so clearly a pure question of law. One could argue, for example, that the question might be phrased as the application of that statutory term to certain kinds of industrial plants or to the bubble concept. However, the Court prior to *Chevron* would have treated this question as one involving only law interpretation not law application. *See supra* note 108 and accompanying text (discussing the distinction between a pure question of law and a question of the application of law). Nevertheless, resolution of that question would certainly have policy implications.

137. *See supra* Part I.A.2 (analyzing the Court's pre-*Chevron* deference approach).

138. Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982), *rev'd sub nom*, *Chevron*, 467 U.S. 837 (1984). *See* Farina, *supra* note 20, at 459 ("Quite clearly . . . the court reached its own independent [interpretation].").

139. *Gorsuch*, 685 F.2d at 723.

140. *Id.* at 720. Prior to this case, the agency's "bubble concept" had been challenged twice in the D.C. Circuit Court of Appeals. In one case, the "bubble concept" was allowed. ASARCO, Inc. v. EPA, 578 F.2d 319, 325 (D.C. Cir. 1978). In the other case, it was not. Ala. Power Co. v. Costle, 636 F.2d 323, 401–03 (D.C. Cir. 1979). In both cases, the D.C. Circuit focused on the purpose of the act at issue because the two different acts being challenged had different purposes—one to maintain current air quality and the other to enhance it. Consequently, the court justified the different results. *ASARCO*, 578 F.2d at 325; *Ala. Power*, 636 F.2d at 401–03. *See generally* Merrill, *Story of Chevron*, *supra* note 29, at 408 (discussing the *Alabama Power* holding and how the *Alabama Power* court distinguished the *ASARCO* holding).

court concluded that the bubble-concept approach was permissible when Congress intended to *preserve* existing air quality, but impermissible when Congress intended to *improve* existing air quality.[141] Because the purpose of the particular program at issue in *Chevron* was to improve existing air quality by reducing emissions, the court held that the EPA's interpretation, which allowed emissions to remain constant, was unreasonable.[142] On appeal, neither party challenged the lower court's use of the de novo standard, presumably because it was consistent with Supreme Court precedent.[143]

Even though no party challenged the lower court's use of the de novo standard, the Supreme Court addressed the issue on appeal and fundamentally changed the standard.[144] In so doing, the Court accused the D.C. Circuit of "misconceiv[ing] the nature of its [interpretive] role."[145] The Supreme Court then, for the first time, developed the two-step—and now boiler-plate—framework used to evaluate agency interpretations.[146] Pursuant to this framework, step one requires a court to determine "whether Congress has directly spoken to the precise question at issue."[147] In applying step one, a court should not defer to agencies at all. Rather, "[t]he judiciary is the final authority on issues of statutory construction."[148] If Congress's intent is unclear, step two requires a court to accept any "permissible," or "reasonable," agency interpretation, even if the court believed that a different choice would

141. *Gorsuch*, 685 F.2d at 720.

142. *Id.*

143. Merrill, *Story of* Chevron, *supra* note 29, at 413.

144. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 845 (1984) ("Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether in its view the concept is 'inappropriate' in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context to this particular program is a reasonable one.").

145. *Id.*

146. *Id.* at 842–43.

147. *Id.* at 842. In other words, is Congress's intent clear—however clarity may be discerned—or is there a gap or ambiguity to be resolved? According to the Court, clarity was to be determined by "employing traditional tools of statutory construction." *Id.* at 843 n.9. According to Professors Bamberger and Strauss, *Chevron*'s first step requires courts to define the boundaries of possible interpretations an agency might reach on a particular issue. Bamberger & Strauss, *supra* note 10, at 624–25. At this step, courts should determine whether Congress has clearly required or precluded the specific choice that the agency made. Interpretations that are not within these boundaries are impermissible. Assuming that the agency's interpretation is within these boundaries, a court turns to step two, the oversight step. At this step, courts should ask simply whether the agency's choice is reasonable pursuant to section 706(2) of the Administrative Procedures Act. *Id.* at 621–22. Bamberger and Strauss call this step the decision-making step. *See id.* at 621–22.

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

have been better.[149] "The pure question of law/law application distinction quickly and quietly disappeared."[150] Applying this new standard, the Court held that the EPA's interpretation of the Clean Air Act was a permissible interpretation of the statute, which should have been adopted in full.[151] The opinion was unanimous; despite the fact that the Court fundamentally changed the deference approach, not a single Justice dissented.[152]

The Court justified this fundamental shift with three rationales: (1) agency expertise,[153] (2) political accountability,[154] and (3) implicit

149. *Id.* at 843–44 & n.11. Deference to the agency under *Chevron*'s second step is much higher than under its first step. Indeed, if a litigant challenges an agency interpretation and loses at step one—meaning the court finds ambiguity—that litigant will likely lose the case. According to one empirical study from 1995–96, agencies prevail at step one 42% of the time and at step two 89% of the time. 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, 31 (1998). Recently, some have argued that step two is simply arbitrary and capricious review. Ronald Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1292–94 (1997) (noting that reversal at step two is rare and that step two should be akin to arbitrary and capricious review); Mark Seidenfeld, *supra* note 7, at 128–30 (suggesting that courts apply hard look analysis at step two); *accord* Judulang v. Holder, 132 S. Ct. 476, 483 n.7 (2011) (finding that the policy of the Board of Immigration Appeals is not an interpretation of statute that would fall within *Chevron*'s ambit, but noting in dicta that *Chevron*'s second step would correspond with "standard 'arbitrary and capricious' review under the [Administrative Procedure Act]" anyway); Mayo Found. for Med. Ed. & Research v. United States, 131 S. Ct. 704, 711 (2011); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004). For a description of the difference between *Chevron* and arbitrary and capricious review, see Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (describing the difference, but noting that "in some respects, *Chevron* review and arbitrary and capricious review overlap at the margins").

150. Merrill, *Story of* Chevron, *supra* note 29, at 425 n.92 (citing Merrill, *Judicial Deference*, *supra* note 2, at 986 n.74). *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1985) (rejecting the notion that the judiciary should decide questions of law).

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

152. Six of the nine judges participated. *Id.* at 866. Two years later, in *Young v. Community Nutrition Institute*, the other three judges signed onto an opinion that endorsed and strengthened *Chevron*. 476 U.S. 974, 975–80 (1986).

153. Pursuant to the agency-expertise rationale, the Court reasoned that agencies deserve deference because they are experts in these technical areas. *Chevron*, 467 U.S. at 865. The modern administrative state is vastly complex. Agencies have expertise in their area of responsibility. Consider the U.S. Department of Veterans' Affairs ("VA"), the Department of Transportation ("DOT"), or the Food and Drug Administration ("FDA"). Each of these agencies has policy analysts and specialists trained in their relevant field. Generalist judges are experts in the law, not in veterans' affairs, road or bridge design, or food safety. Therefore, it makes sense, for example, for medical personnel within the VA to determine disability benefits for veterans; for scientists within the DOT to determine safety standards for road construction; and for nutritionists within the FDA to determine the composition of public school lunches. For this reason, regardless of whether Congress actually explicitly delegated to the agency, deference should be the default so that the most informed policies are adopted. *See id.* (explaining the intricacies and technicalities involved in the EPA's promulgation of regulations and Congress' inability to properly engage in such policy-making for lack of expertise).

delegation.[155] The agency expertise rationale was familiar,[156] while the

154. Pursuant to the political-accountability rationale, the Court reasoned that agency interpretation was preferable to judicial interpretation because agency personnel were politically accountable to the electorate, while the judges were not. Merrill, *Judicial Deference*, *supra* note 2, at 978–79; Merrill, *Story of* Chevron, *supra* note 29, at 401–02. National goals and policies change as society evolves. *Cf.* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449 (2005) (reasoning that "by placing the interpretive role in administrative rather than judicial hands, it allows agency interpretations to evolve as presidential administrations and executive priorities change"). Because administrators are more accountable to the public than judges, administrators will be more likely to conform policy to match populist expectations. Since federal judges are elected for life under Article III of the Constitution, they are insulated from political backlash and reelection fears. Thus, agencies should receive some deference when they interpret statutes within their area of expertise. Even Chief Justice John Marshall suggested that courts should respect an agency's "uniform construction" of "doubtful" statutes. United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1810). Thus, it is more appropriate for this political branch of the government to resolve conflicting policies in light of "everyday realities." *See Chevron*, 467 U.S. at 865–66 ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

155. *See infra* Part I.B.2 (discussing the methodology of implicit delegation).

156. Both *Hearst* and *Skidmore* referred to this rationale. *See* NLRB v. Hearst Publ'n, Inc., 322 U.S. 111, 130–31 (1944) (commenting that administrators had the benefit of "[e]veryday experience in the administration of the statute" which "gives it familiarity with the circumstances and backgrounds of employment relationships"); Skidmore v. Swift, 323 U.S. 134, 137–38 (1944) (opining that the agency administrator had "accumulated a considerable experience in the problems" that the agency faced). The Court in *Chevron* reasoned that "judges are not experts," at least not in these technical areas. *Chevron*, 467 U.S. at 865. In contrast, agency personnel are highly qualified to make technical determinations and are charged with making such determinations. *Id.* Thus, it simply makes sense to defer to such expertise. *Id.*; *accord* Krotoszynski, Jr., *supra* note 43, at 741 ("*Skidmore*, *Chenery*, and *Cement Institute* all invoke[d] enhanced agency expertise as the rationale for affording agency work product deference on judicial review."). While the agency-expertise rationale has intuitive appeal, it has been criticized in literature. No doubt it makes sense for agencies to make policy choices due to their expertise, but it makes no sense for agencies to interpret statutes. Interpretive law is not within their expertise; it requires legal expertise. Thus, the pre-law deference model took into account the agency-expert theory. Agencies received deference when deciding issues that required them to use their expertise. In contrast, when agencies interpreted statutes and simply applied the traditional tools of statutory interpretation—such as reviewing the text, the legislative history, the statutory purpose, and the historical context—agencies received no deference. Moreover, while the Court's agency expertise rationale was specifically meant to explain why agencies *rather than judges* should have the power to fill the interstices of the law, the rationale applies with equal force to explain why agencies *rather than legislators* should have this power. For example, Food and Drug Administration (FDA) scientists and analysts are more knowledgeable about food safety and drug effectiveness than are judges. According to the Court, because these FDA personnel have such expertise, they are in a better position to implement effective public policy about food and drug safety. But if that reasoning is carried to its logical outcome, it applies with equal force to legislators: FDA scientists and analysts are more knowledgeable about food safety and drug effectiveness than are *legislators*. Because these FDA personnel have such expertise, they are in a better position to draft laws about food and drug safety. To be sure, no court has yet applied the expertise rationale in this way. The Court's rationale fails to support its holding and political accountability remains a central issue. Certainly, administrators are more politically accountable than judges. That fact may support deference to agency policy choices; however, it does not support deference to agency legal interpretations.

political accountability rationale was new.[157] However, it is the augmented, implicit Congressional delegation rationale[158] that is critical here; with it, the Court vastly expanded the sphere of legitimate agency lawmaking.[159]

2. Legislative Power as a Result of *Chevron*

Before *Chevron*, agencies could legitimately make law when Congress explicitly delegated; after *Chevron*, power shifted, as agencies could legitimately make law when a statute was ambiguous regardless of whether Congress explicitly delegated. Prior to *Chevron*, the power to administer a congressionally created program included the power to formulate policy and make rules to fill *explicit* gaps left by Congress.[160] When Congress left a gap and expressed its intent that the agency fill that gap, the agency's choice controlled, so long as it was not arbitrary, capricious, or manifestly contrary to the statute.[161] Thus, prior to *Chevron*, *explicit* delegation was the only valid basis for Congress to

157. *See Chevron*, 467 U.S. at 865–66 (explaining how an agency is ultimately accountable to a constituency through the Executive Branch, while the Judiciary is not).

158. The implicit-delegation rationale has been soundly criticized in academia. *See, e.g.*, Sunstein, *Beyond* Marbury, *supra* note 6, at 2590 (calling the implicit-delegation rationale "a legal fiction"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198 (1998) (commenting that "the implicit delegation theory lacks any solid basis in actual congressional intent"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway. . . . [A]ny rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."). It is likely, at times, Congress intends for agencies, rather than courts, to interpret ambiguous statutes. When that is true, Congress should explicitly delegate that power. However, it seems more likely that Congress drafts ambiguous statutes, not because it implicitly intends to delegate power to the agency to resolve those gaps, but rather because it is well-nigh impossible to draft comprehensive laws without ambiguities.

159. *See Chevron*, 467 U.S. at 843; Merrill, *Story of* Chevron, *supra* note 29, at 401. Consider, however, that the basis for deference, a judicial presumption of implied Congressional delegation, is troubling. If the delegation is considered final, precluding the court from any interpretative review, it likely violates section 706 of the Administrative Procedure Act, the Constitution, and *Marbury*'s edict that "final interpretive authority rests with the courts." David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 339–40 (2000). Hasen persuasively argues that *Chevron* can better be understood as a prudential "[d]octrine of [i]ndependent [j]udicial [d]eference to [a]gencies." *Id.* at 357. Under this theory, courts would defer to agencies because of their expertise in the area. *Id.* at 357–62. Hasen notes that "a court's deference is purely substantive and has nothing to do with a judgment about who has the authority to decide." *Id.* at 361.

160. *Chevron*, 467 U.S. at 843–44. For example, the EPA promulgated more than several hundred new regulations to implement the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C. (2006)). Croley, *supra* note 101, at 1512 (citing CORNELIUS KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 2 (1994)).

161. *Chevron*, 467 U.S. at 843–44.

delegate lawmaking authority. In *Chevron*, however, the Court augmented lawmaking delegation by reasoning that "delegations of rule-making power implicitly include[d] the power to interpret ambiguities."[162] In other words, ambiguity meant that Congress implicitly intended to delegate to an agency the power to fill those gaps.[163] Thus, after *Chevron*, Congress could delegate lawmaking powers through either explicit or implicit delegation. When the delegation was explicit, the arbitrary and capricious standard applied; when the delegation was implicit, *Chevron* deference applied.

With the implicit delegation rationale, the power to administer a congressionally created program included the power to formulate policy and make rules to fill gaps left by Congress implicitly. This change increased the executive's lawmaking power and imposed a new judicial review standard. Pursuant to *Chevron*'s second step, as long as an agency makes a reasonable policy choice in the face of ambiguity[164]—reasonable being undefined—a court must uphold that policy choice regardless of whether it comports with legislative intent or statutory purpose. For example, in *Chevron*, the lower court reasoned that the purpose of the particular section of the Clean Air Act at issue was to clean up the nation's air.[165] Because the purpose of the ambiguous provision was to clean up the air, the EPA's interpretation, which allowed industrial plants to continue to pollute the air to the same degree as before, arguably was contrary to congressional intent and the statute's purpose.[166] Under this reasoning, the EPA's interpretation would be unreasonable. Yet, the Supreme Court rejected this reasoning, stating that lower courts could not ignore an agency's interpretation simply because the court would prefer a different interpretation.[167] But the lower court did not simply prefer a different interpretation; rather, the lower court believed that Congress would have preferred a different interpretation and ruled accordingly.

In sum, *Chevron*'s implicit delegation rationale enlarged the sphere

162. Sunstein, *Beyond* Marbury, *supra* note 6, at 2590.

163. *Chevron*, 467 U.S. at 843–44.

164. While legislative intent and statutory purpose would be relevant under *Chevron*'s step one as originally envisioned, neither would be controlling unless it removed all ambiguity. If any ambiguity remained after a court reviewed all the traditional tools of interpretation, then the court must defer to the agency's policy choice so long as it was reasonable. *See infra* Part II.A (explaining how the Court did not explain how to resolve ambiguity under step one of the *Chevron* analysis).

165. Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 721 (D.C. Cir. 1982), *rev'd sub nom.*, *Chevron*, 467 U.S. 837 (1984).

166. *Id.* at 726–28.

167. *Chevron*, 467 U.S. at 845.

of legitimate agency lawmaking.[168] Prior to *Chevron*, agencies could legitimately make policy choices when Congress explicitly delegated such power to them. After *Chevron*, agencies could legitimately make policy choices regardless of whether Congress explicitly delegated, so long as Congress was unclear or ambiguous. Therefore, the sphere of legitimate agency lawmaking expanded because it is difficult for Congress to be clear all the time.

3. Interpretive Power as a Result of *Chevron*

Today, few would dispute that the *Chevron* Court transferred interpretive power from the judiciary to the executive.[169] While the Court had afforded limited to no deference to agency interpretations prior to *Chevron*, after the decision, deference became all-or-nothing.[170] "Judicial deference" no longer meant deference to an agency's interpretation, but rather adoption or rejection of that interpretation in full. Agencies went from being expert advisors in the interpretive process to competitors for interpretative power. At step two, a court either adopts an agency's interpretation in full or rejects it in full; there is no partial adoption. Thus, *Chevron* flipped the pre-existing default rule: prior to *Chevron*, agencies earned deference based on their thoughtfulness in resolving the issue; following *Chevron*, agencies earned deference based on the legislature's inability to draft clearly.[171]

When the Court dramatically changed its deference framework, the Court neither acknowledged that it was doing so nor explained its decision. Perhaps the Court was unaware that it was altering existing standards so fundamentally.[172] Indeed, Justice Stevens, who authored *Chevron*, later claimed that the case merely "restate[d] . . . the law, nothing more or less."[173] And three years later, he tried to return the

168. Merrill, *Story of* Chevron, *supra* note 29, at 401.

169. *See* Sunstein, *Beyond* Marbury, *supra* note 6, at 2582 ("My major goal in this Essay is to vindicate the law-interpreting authority of the executive branch."); Farina, *supra* note 20, at 456 (arguing that *Chevron* fundamentally altered "our constitutional conception of the administrative state"); Pierce, *Aftermath*, *supra* note 12, at 303 (stating "agencies are the best equipped institutions to resolve policy questions in the statutes that grant the agency its legal power").

170. Merrill, *Story of* Chevron, *supra* note 29, at 401.

171. Merrill, *Judicial Deference*, *supra* note 2, at 977.

172. Farina, *supra* note 20, at 460 (stating *Chevron* so narrowly confined judicial review of agency interpretations that "it was difficult, at first, to believe Justice Stevens's opinion could be taken literally").

173. Merrill, *Story of* Chevron, *supra* note 29, at 420. *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (holding that pure questions of law are for the courts to resolve); Beerman, *supra* note 19, at 782 n.4 ("Regardless of Justice Stevens intent, the language of the opinion appears to create a radically more deferential standard of review for agency interpretations."). In *Cardoza-Fonseca*, Justice Scalia wrote separately to note that the majority opinion was wrong to suggest that "courts may substitute their interpretation of a statute for that of an agency whenever

Court to its pre-*Chevron* deference standards in *INS v. Cardozo-Fonseca*.[174] In that case, he suggested that *Chevron* applied only to questions of law application and not to pure questions of law: "pure question[s] of statutory construction [are] for the courts to decide."[175] Indeed, his suggestion has support in *Chevron* likely because this statement was true prior to *Chevron*.[176] But *Chevron* changed the Court's approach to deference. The issue in *Chevron* was a pure question of law and, thus, should have been decided de novo.[177] It was not. Thus, *Chevron* did not simply restate the law as Justice Stevens suggested; rather, it made two important changes. First, the Court vastly expanded the types of interpretations for which an agency received deference. Prior to *Chevron*, courts deferred only to agency interpretations involving questions of law application.[178] After *Chevron*, courts deferred to interpretations involving pure questions of law, as well as interpretations involving questions of law application. As more interpretations were entitled to deference, agency interpretive power increased.

Second, the Court established a higher level of deference than ever before: courts were to defer to *any* reasonable agency interpretation, regardless of how carefully considered and reasoned the interpretation was, and regardless of whether it comported with legislative intent or statutory purpose.[179] Deference—which had been earned by agencies through reasoned decision-making under *Skidmore*—became essentially an all-or-nothing grant of power from Congress under *Chevron*.[180] As a result, if Congress was clear when it drafted a statute, the judiciary was

they face 'a pure question of statutory construction' . . . rather than a 'question of [law application].'" 480 U.S. at 454–55 (Scalia, J., concurring).

174. 480 U.S. at 446.

175. *Id.*

176. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction, and must reject administrative constructions which are contrary to clear congressional intent.").

177. This issue was the meaning of the term "stationary sources." *Chevron*, 467 U.S. at 840. *See* Merrill, *Story of* Chevron, *supra* note 29, at 421 (discussing a subsequent opinion by Justice Stevens which reiterates that pure questions of law are "reserved for independent judicial determination"); Merrill, *Judicial Deference*, *supra* note 2, at 975–76.

178. *See supra* Part I.A.2 (describing agency deference before *Chevron*).

179. However, an interpretation that is contrary to legislative intent and statutory purpose may be "unreasonable." *But see* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 726–28 (D.C. Cir. 1982) (reasoning that the goal of the Clean Air Act nonattainment program was "undoubtedly to improve air quality," and that the bubble concept was inconsistent with that objective), *rev'd sub nom.*, *Chevron*, 467 U.S. 837 (1984).

180. Jellum, Chevron*'s Demise*, *supra* note 17, at 739 (stating that deference after *Chevron* was "an all-or-nothing grant of power from Congress . . . either the court adopted or rejected the agency's reasonable interpretation in full").

not supposed to defer to the agency at all; if Congress was unclear when it drafted a statute, then the judiciary was to defer completely to the agency (so long as the agency's interpretation was reasonable). Thus, after *Chevron*, not only were more agency interpretations subject to deference, but the level of deference increased.

In summary, *Chevron* shifted interpretive power from the judiciary to the executive in two ways. Prior to *Chevron*, courts looked to agency opinions as merely one source for determining meaning: the better reasoned the agency's interpretation, the more likely the court would defer to it. While the courts and agencies acted in partnership, ultimately judges, not agencies, held interpretive power on questions of law. *Chevron* changed that balance by reducing the judiciary's role to that of a junior partner, or "mouthpiece," for unequivocal congressional directives and for reasonable agency interpretations of equivocal congressional directives.[181] *Chevron* required courts to defer first to the clear intent of Congress and then to the agency interpretation, so long as that interpretation would not have "flunk[ed] the laugh test at the Kennedy School of Public Policy."[182] Thus, before *Chevron*, the judiciary determined what an ambiguous statute meant with an agency's input. After *Chevron*, pursuant to step two, agencies determined what an ambiguous statute meant without input from the judiciary.[183] Prior to *Chevron*, agency interpretations were either persuasive or ignored; after *Chevron*, agency interpretations were either controlling or ignored. Agency deference morphed into agency power to interpret. In short, this new deference standard radically—and perhaps unintentionally—shifted interpretive power from the judiciary to the executive.

II. *CHEVRON*'S FALL

Shortly after the Supreme Court rendered its *Chevron* decision, the Court altered the decision in three important ways: (1) the Court reformulated the nature of the search at step one; (2) the Court limited the types of agency decisions entitled to *Chevron* deference; and (3) the Court narrowed one of the justifications for *Chevron* deference, the implied-delegation rationale. With these changes, *Chevron* became less

181. Farina, *supra* note 20, at 462.

182. Seidenfeld, *supra* note 7, at 96 (quoting Erika Jones et al., *Developments in Judicial Review with Emphasis on the Concepts of Standing and Deference to Agency*, 4 ADMIN. L.J. 113, 124 (1990) (comments of Judge Stephen Williams)) (internal quotation marks omitted).

183. See *supra* Part I.B.2 (discussing both the implicit and explicit delegation of interpretative authority to agencies and how the responsibility to interpret ambiguous statutes shifted from the judiciary to agencies post-*Chevron*).

relevant, less applicable, and less used.[184] More importantly, these changes again altered executive, legislative, and interpretive power. This Section explores those effects.

A. Chevron*'s Demise*

Soon after *Chevron*, the Court reformulated the nature of the search at step one. *Chevron* directed that at step one, a court must determine "whether Congress has directly spoken to the precise question at issue."[185] This step ignores the agency's interpretation entirely and, instead, focuses on Congress and the statute: if Congress was clear about what it wanted, then an agency's interpretation would be irrelevant unless it coincided with this intent. But shortly after the case was decided, debate arose regarding the nature of the inquiry at the first step. The debate centered around two questions. First, was step one a search for congressional intent or textual clarity? Second, was the search at step one to be broad and include a review of legislative history, statutory purpose, and other sources of statutory meaning or was it to be narrow and focus primarily on the text?[186]

Even *Chevron* was indecisive on this question. When the Court created its two-step approach, the Court failed to fully clarify how ambiguity should be resolved during step one. Justice Stevens described this step as search for congressional intent that "employ[s] traditional tools of statutory construction,"[187] but he did not explain which tools of statutory construction were appropriate and "traditional."[188] Throughout history, the appropriate tools and approaches have changed as different theories of statutory interpretation

184. Jellum, Chevron*'s Demise*, *supra* note 17, at 781.

185. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

186. INS v. Cardoza-Fonseca, 480 U.S. 421, 423–25 (1987) (analyzing Congress's intent in using broad language to classify individuals included within the Immigration and Nationality Act through use of the term "refugee," and discussing a decision by the Ninth Circuit that relied on both the text and the structure of the Act); Jellum, Chevron*'s Demise*, *supra* note 17, at 781 (arguing that *Chevron*'s legacy remains unclear as disagreement persists amongst judges and scholars and that by turning the first step of a *Chevron* analysis into a textualist inquiry, and thereby limiting its application, the Court seems to be reclaiming the interpretative power that it lost with the *Chevron* decision).

187. *Chevron*, 467 U.S. at 843 n.9. Justice Stevens noted that "[t]he judiciary . . . must reject administrative constructions which are contrary to clear congressional *intent*. If a court, employing traditional tools of statutory construction, ascertains that Congress had an *intention* on the precise question at issue, that *intention* is the law and must be given effect." *Id.* (emphasis added) (internal citations omitted).

188. Moreover, the opinion talked in textualist terms: "[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." *Id.* at 843.

have held favor.[189] Because Justice Stevens used an intentionalist approach in *Chevron*,[190] and because he referenced the traditional tools of statutory construction, it seemed that he anticipated step one to be intentionalist. Indeed, many of the justices on the bench when *Chevron* was decided were intentionalists, or at least were willing to look at legislative history and purpose to find meaning.[191] Thus, Justice Stevens began his analysis in *Chevron* by pursuing the legislative history and only turned to the text after finding this history inconclusive.[192]

In the years immediately following *Chevron*, the Court remained true to the intentionalist direction set forth by Justice Stevens.[193] But with time and a change in the Court's composition, *Chevron*'s first step narrowed: step one transformed from a search for congressional intent

189. Currently, some justices, such as Justices Scalia and Thomas, use a textualist approach—that focuses primarily on the text and linguistic canons—while others, such as Justice Breyer and former Justice Stevens, use an intentionalist or purposivist approach—that focuses more broadly on sources of meaning including, but not limited to, the text. While many textualists refuse to look beyond the text absent a compelling reason, intentionalists and purposivists are more willing to do so. Moreover, once textualists move beyond the text, strict textualists are unwilling at any point in the interpretive process to consider legislative history. In contrast, intentionalists and purposivists usually consider legislative history important to the statutory interpretation process.

190. Justice Stevens analyzed the enactment history, the legislative history, and the statutory text, all of which he found "un-illuminating*.*" *Id.* at 845–53, 859–64. Justice Stevens further stated that "[w]e are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress," *id.* at 862, and that "[b]ased on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating . . . [and] silent on the precise issue before us." *Id.* at 862. Indeed, the Court did not immediately turn to the text at all, but rather reviewed legislative history first. *Id*. at 851. Only after perusing all sources, did the Court finally determine that Congress had no specific intent on the bubble-concept issue. *Id*. at 859–64. At this point, the Court turned to the agency's interpretation and found that it was a "permissible construction of the statute . . . ." *Id*. at 866. Thus, the Court's application of its framework was unequivocal: the Court searched broadly for legislative intent rather than narrowly for textual clarity. *See* Merrill, *Judicial Deference*, *supra* note 2, at 976 ("If the court concluded that Congress had a 'specific intention' with respect to the issue at hand, it would adopt and enforce that answer.").

191. Before the Court decided *Chevron*, the Court routinely looked to legislative history and other sources to resolve statutory meaning. Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994) [hereinafter Merrill, *Textualism*] (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983)) (finding no cases in the 1981 term in which the Court did not cite to legislative history when interpreting a statute). Textualism was not the preferred method of statutory interpretation at that time. *See generally id.* at 355–56 (noting that Justice Scalia's initial campaign for textualism was not received well, if at all, by the other Justices). By the 1992 Term, however, the preference had changed. In less than a decade, the Court "moved from a position in which legislative history was routinely considered in all cases, to a situation in which it [was] considered by the controlling opinion in only a small minority of decisions. And in most cases, it [was] not mentioned at all." *Id*. at 356.

192. *Chevron*, 467 U.S. at 851.

193. *See* Jellum*,* Chevron*'s Demise*, *supra* note 17, at 745–48 (collecting cases).

to a search for textual clarity.[194] This change started in 1986, when President Reagan appointed Justice Antonin Scalia to the Supreme Court.[195] As a committed textualist, Justice Scalia must have felt compelled to "reformulate the two-step inquiry to purge it of these intentionalist elements."[196] While others have explored Justice Scalia's resurrection of textualism more generally,[197] Chevron*'s Demise*[198] explained how he influenced the other justices to alter *Chevron*'s first step from an intentionalist-based to a textualist-based inquiry.[199] By 2006, *Chevron*'s first step was routinely described and applied as a search to resolve ambiguity, using textualists methods.[200] A search to

194. *Id.* at 761. The purpose of this Article is not to prove that the reformulation occurred, but rather to explain the effect the reformulation had on executive power. For a fuller explanation of whether this reformulation occurred, see *id.*

195. *Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, http://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 2, 2012) [hereinafter "Supreme Court Biographies"].

196. Merrill, *Textualism*, *supra* note 191, at 353.

197. *See, e.g.*, Tiefer, *supra* note 34, at 206 (describing the rise of "institutional legislative history" after Scalia's new textualism gained influence).

198. Jellum, Chevron*'s Demise*, *supra* note 17, at 748–71 (outlining the path the Supreme Court Justices, and particularly Justice Scalia, took in applying *Chevron* to statutory interpretation, from *Chevron*'s "Terrible Twos" when Justice Scalia came on the bench; to *Chevron*'s "Tween Years" when several new justices joined the bench; to *Chevron*'s "Senescence," when Justice Scalia finally won his campaign for a text-focused approach).

199. *Id.* at 748–49. According to Professors Eskridge and Baer, the Court does not completely ignore legislative history in *Chevron* cases. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1135 (2008) (finding that the Court mentioned legislative history in 62.3% of *Chevron* cases and relied on it in 44.7% of *Chevron* cases).

200. Jellum, Chevron*'s Demise*, *supra* note 17, at 761. *See, e.g.*, Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017–21 (2012) (considering the history, context, and purpose of the statute at issue); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); Clark v. Martinez*,* 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) ("Just as we exhaust the aid of the 'traditional tools of statutory construction,' before deferring to an agency's interpretation of a statute, so too should we exhaust those tools before deciding that a statute is ambiguous and that an alternative plausible construction of the statute should be adopted. Application of those traditional tools begins and ends with the text of [the statute at issue]." (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984))); Barnhart v. Thomas, 540 U.S. 20, 26 (2003) ("[W]hen a statute speaks clearly to the issue at hand we 'must give effect to the unambiguously expressed intent of Congress,' but when the statute 'is silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation." (quoting *Chevron*, 467 U.S. at 843)). While some cases do remain true to the intentionalist approach, it is less common. *See, e.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of *congressional intent*." (emphasis added)).

find and resolve ambiguity is not the same as a search to determine whether Congress has directly spoken to the precise issue before the court.[201] The depth of the inquiry at *Chevron*'s first step is not merely of academic interest. This shift in approach further affected the executive's lawmaking and interpretative power balance.

1. Legislative Power as a Result of *Chevron*'s Demise

With this reformulation, the justices continued to shift lawmaking and interpretive power to the executive. By short-circuiting step one, the Court increased the likelihood that courts would reach step two. Under an intentionalist approach, what Congress intended is the relevant inquiry at step one. To find congressional intent, courts look broadly at all sources of meaning, including legislative history and statutory purpose, express or unexpressed. With this approach, courts turn to step two only when all sources of meaning fail to identify congressional intent. When a court looks for intent broadly, it is less likely that the court will find that intent missing at step one and thus reach step two.[202]

In contrast, under a textualist approach, Congress' intent is not relevant; what is relevant is whether the statute's text is clear.[203] If the

201. Admittedly, more recently, the Justices appear to be using a softer form of textualism, the plain meaning approach, which allows them to consider legislative history to resolve textual ambiguity at step one. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89. v. Dep't of Educ., 550 U.S. 81, 89–91 (2007) (reversing traditional *Chevron* analysis to consider the purpose of the statute in the context of step two prior to considering step one); Global Crossing Telecomms., Inc., v. Metrophones Telecomms., Inc., 550 U.S. 45, 48–49 (2007) (examining the regulatory history associated with the statute to reach the conclusion that there was a statutory gap for the agency to fill).

202. "One who finds more often (as I do) that the meaning of a statue is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists." Scalia, *supra* note 158, at 521 (emphasis omitted).

203. Moreover, even when judges use ambiguity to refer to words with more than one dictionary or common definition, problems remain. "Ambiguous is a word not itself free from the quality which it purports to ascribe." R v. Sec'y of State for the Env't, Transp. & the Regions, [2001] 2 A.C. 349 (H.L.) 400. Commonly, courts state that statutes are ambiguous when two or more reasonable people disagree as to its meaning. *See*, *e.g.*, State *ex rel.* Kalal v. Circuit Court for Dane Cnty., 681 N.W.2d 110, 124 (Wis. 2004) (explaining that it is not enough that there be a disagreement about the statutory meaning—rather, ambiguity exists if a "well-informed" person should have become confused). Others come to the contrary conclusion that simply because two litigants or two judges disagree over the meaning of a statute does not render it ambiguous. Mayor of Lansing v. Mich. Pub. Serv. Comm'n., 680 N.W.2d 840, 847 (Mich. 2004), *superseded by statute*, MICH. COMP. LAWS. ANN. § 247.183 (West 2012), *as recognized in* City of Lansing v. State, 737 N.W.2d 818 (2007). The Michigan State Supreme Court explained why the "reasonable minds can differ" standard should not be the test for "ambiguity:"

> The law is not ambiguous whenever a dissenting (and presumably reasonable) justice would interpret such law in a manner contrary to a majority. Where a majority finds the law to mean one thing and a dissenter finds it to mean another, neither may have

text is not clear, rather than examine all other sources of meaning, a court will more readily turn to the agency's interpretation pursuant to step two. Under this approach, a court will more commonly reach step two because texts of statutes are rarely clear. Congress cannot draft flawlessly, as public choice theory has shown.[204] Neither can Congress anticipate every possible situation to which a statute might apply.[205] Indeed, the future brings unanticipated situations, new technology, and changed mores. Even if life were static, language is inherently ambiguous,[206] whether from lexical[207] or structural[208] ambiguity. It is

> concluded that the law is "ambiguous," and their disagreement by itself does not transform that which is unambiguous into that which is ambiguous. Rather, a provision of the law is ambiguous only if it "irreconcilably conflicts" with another provision, or when it is *equally* susceptible to more than a single meaning.

Id. at 847 (citations omitted). Justice Thomas recently agreed that ambiguity means that there is more than one equally plausible meaning. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 41 (2008) ("Congress could have used more precise language . . . and thus removed all ambiguity. But the two readings . . . are not equally plausible . . . ."). Simply stated, there is no uniform definition of "ambiguity."

204. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546 (1983); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35–44 (1991). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (examining public choice theory and its implications on American law); William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276–79 (1988) (outlining the negative consequences of public choice theory and the criticisms that the theory is indeterminate and that it "undermines political community" by resulting in statutory interpretations that primarily serve private, rather than public, interests); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (arguing that public choice theory is compatible with legislative intent); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (providing an explanation regarding how public choice theory is consistent with flexible and pragmatic statutory construction, which takes into account legislative history and intent); Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013 (1988) (outlining the argument that public choice theory is too limited); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991) (outlining the limitations of public choice theory and advocating for an alternative approach to statutory interpretation and construction: comprehensive rationality).

205. For example, the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–68 (2006), was originally enacted to combat organized crime. It included a private civil remedy, rewarding the successful RICO plaintiff with treble damages and attorney's fees. 18 U.S.C. § 1964(c). This provision has enabled civil RICO to become a federal anti-fraud statute, routinely brought against "legitimate" citizens and businesses. *See, e.g.*, Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 523–24 (1985) (Powell, J., dissenting) ("[T]he Court today reads the civil RICO statute in a way that validates uses of the statute that were never intended by Congress. . . . I write separately to emphasize my disagreement with the Court's conclusion that the statute must be applied to authorize the types of private civil actions now being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases.").

206. Indeed, in *Miss. Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293 (5th Cir. 1994), the en banc majority rejected the agency's argument that whenever language has more than one definition in the dictionary, the language is inherently ambiguous and subject to agency interpretation. *Id.* at

impossible to eliminate ambiguity with a language that uses the same word for multiple meanings. Further, ambiguity means different things to different people: it might mean that a word has more than one dictionary or common meaning; it might mean that a word is vague; it might mean that a word is broad; or it might simply mean that there is no commonly understood meaning for a word.[209] Judges do not use the term consistently. Simply stated, the word "ambiguous" is ambiguous! For these reasons, text alone cannot eliminate ambiguity.

Certainly, textual context helps inform meaning. Justice Scalia famously proved this point with his classic example: "If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else."[210] In his example, Justice Scalia used *textual* context, surrounding words, to identify for his listener which of two meanings he intended. As this example proves, textual context surely helps courts discern meaning. But context can include more than just surrounding text. For example, if one wanted to understand the meaning of words in the Patriot Act,[211] the Affordable Care Act,[212] or the Civil Rights Act,[213] it might be useful to understand the political compromises that allowed these acts to be passed. For example, Congress enacted the

---

307. The majority correctly noted that such an approach would radically shift the balance of power from Congress to the agencies because language is inherently indeterminate. *Id.* at 307–08. There will always be multiple dictionary definitions. *Id.*

207. Lexical ambiguity is by far the more common. Everyday examples include nouns like "bay," "pen," and "suit," verbs like "dust," "draw," and "run," and adjectives like "hard." For an example of lexical ambiguity—specifically, analyzing whether the word "labor" included physical labor or physical and mental labor—see *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

208. Structural ambiguity occurs when a phrase or sentence has more than one underlying structure, such as the phrases "Spanish history teacher" and "short men and women," and the sentences "The girl hit the boy with a book" and "Visiting relatives can be boring." These ambiguities are said to be structural because each such phrase can be represented in two structurally different ways, for example, "[Spanish history] teacher" and "Spanish [history teacher]," and "The girl hit [the boy] with the book," and "The girl hit [the boy with the book]." For an example of structural ambiguity, compare *In Re* Forfeiture of 1982 Ford Bronco, 673 P.2d 1310, 1312 (N.M. 1983) (holding that the absence of a comma between two phrases in a statute was determinative), *superseded by statute*, N.M. STAT. ANN. § 30-31-34 (West 2012), *as stated in* State v. One 1990 Chevrolet Pickup, 857 P.2d 44 (N.M. Ct. App. 1993), with *One 1990 Chevrolet Pickup*, 857 P.2d at 46 (holding that the absence of a comma between the same two phrases in the same statute was irrelevant).

209. *See generally* JELLUM, MASTERING STATUTORY INTERPRETATION, *supra* note 119, at 68–70 (discussing cases in which ambiguity was defined in different ways).

210. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 26 (1997). Scalia's "bay" example demonstrates lexical ambiguity.

211. Pub. L. No. 107–56, 115 Stat. 272 (2001).

212. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

213. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964).

Patriot Act[214] less than ninety days after the events of 9/11.[215] Fear of future terrorist attacks lead Congress to pass this bill much more quickly than is typical, perhaps increasing the potential for statutory ambiguity. Knowing that members of Congress acted in the shadow of 9/11 might suggest to someone interpreting the Patriot Act that Congress intended its provisions to be broadly, rather than narrowly construed.[216] Thus, enactment context, social context, and historical context can all inform meaning. If *Chevron*'s first step involves a comprehensive search of all relevant information, including context, then courts, the legislature, and even the executive can work together to ensure that the interpretation conforms to congressional intent, statutory purpose, and statutory text.[217]

In sum, under a reformulated step one, agency interpretations should control more often than under the original formulation because it is impossible for Congress to draft without some textual ambiguity. Thus, with the reformation of step one, the Court continued shifting legislative power from Congress to the executive.

2. Interpretive Power as a Result of *Chevron*'s Demise

Similarly, with the reformulation of *Chevron*'s first step, the Court further ceded interpretive power to the executive. If under step one a court turns to sources of meaning other than the agency's interpretation whenever the statute's text is ambiguous, the judiciary retains greater interpretative power and the legislature greater power to influence that interpretation. Under such an approach, when Congress fails to draft a perfectly clear statute, a court would have many sources other than text at which to look to discern intent, including expressed and unexpressed purpose, legislative history, and social and historical context. If these sources fail to illuminate meaning, then the court would turn to the agency's interpretation. As courts examine less information at step one,

214. Pub. L. No. 107–56, 115 Stat. 272 (2001). The Act was intended to reduce restrictions on law enforcement's ability to search telephone, e-mail communications, medical, financial, and other records; ease restrictions on foreign intelligence gathering within the United States; expand the federal government's authority to regulate financial transactions, particularly those involving foreign individuals and entities; and broaden the ability of law enforcement and immigration authorities to detain and deport immigrants involved in terrorist activities. *Id.*

215. *Id.*

216. *See, e.g.*, *In re* Search Warrant, No. 6:05-MC-168-Orl-31JGG, 2005 WL 3844032, at *5 (M.D. Fla. Feb. 13, 2006) (reading the Patriot Act broadly so as to allow courts to issue search warrants for email anywhere in the United States, even in non-terrorism cases).

217. *Accord* Merrill, *Judicial Deference*, *supra* note 2, at 1002 (predicting that if courts perform the gap-filling at step one by using dictionary definitions, rules of grammar, and canons of construction, then courts will be determining the content of national policy without considering the substantive values that Congress or a particular agency considered).

the likelihood of the court reaching the second step—adopting the agency's reasonable interpretation—should increase.[218] Simply stated, the more information a court uses to interpret a statute, the less likely an agency's interpretation will control. Hence, more interpretive power remains with the judiciary under *Chevron* as originally formulated.

If, instead, *Chevron*'s first step becomes a search for textual clarity using textualists methods, interpretive power shifts to the executive.[219] If a court must adopt an agency's interpretation whenever the statute's text is ambiguous, then a court will do so often. As noted above, language is inherently ambiguous. It is difficult for Congress to draft well, let alone with perfect clarity. When Congress drafts ambiguously, a court will have one source for meaning: the agency's interpretation. Only if that interpretation is unreasonable can a judge ignore it. "[I]f the court's independent role ends whenever ambiguity is discovered . . . , then the agency's judgment will virtually always control the interpretive outcome."[220] Thus, under a text-focused first step, power to interpret ambiguous statutes shifts to the executive.

B. Limiting Chevron*'s Application*

"[T]he Court's transition from intentionalism to textualism initially increased *Chevron* deference. However, as that transition has moved into subsequent phases, it is now having the opposite effect."[221] In

218. *Accord* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine*: *In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 394 (1996) ("Some writers fault the textualist approach for . . . ced[ing] too much authority to federal agencies under *Chevron*.").

219. Justice Scalia disagrees.

> In my experience, there is a fairly close correlation between the degree to which a person is . . . a "strict constructionist" . . . and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.

Scalia, *supra* note 158, at 521.

220. Farina, *supra* note 20, at 461.

221. Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 751 (1995) (averring that a hypertextualist method of statutory construction will lead to incoherence in the administrative state). Jack Beerman claims: "The Court decides so many *Chevron* cases in Step One that it is more accurate to characterize *Chevron* in many cases as a doctrine of judicial

other words, *Chevron*'s reformulation initially increased the number of agency interpretations that earned deference; that effect, however, has weakened as the Court has narrowed *Chevron*'s application.[222] This narrowing again shifted legislative and interpretive power. This Section will explain how the Court narrowed *Chevron*'s application and will explore the effects of that narrowing on executive lawmaking and interpretive power.

Not long after *Chevron* was decided, the Court back-tracked from its executive-dominated paradigm in two important ways. First, the Court limited the types of agency interpretations entitled to *Chevron* deference to those agency interpretations arrived at by "force of law," or deliberative procedures.[223] In *Chevron*, the Court did not distinguish between deliberative and nondeliberative agency decision-making. Moreover, the Court said nothing about the types of agency interpretations entitled to its new deference standard.[224] Indeed, immediately after the Court decided *Chevron*, the Court applied its two-step approach to all agency interpretations of ambiguous statutes regardless of which procedures the agency used to interpret the statute.[225] During this time, how an agency arrived at its interpretation was simply one factor for a court to consider when applying a *Skidmore* analysis.[226] Conceivably, judges were more often persuaded by agency interpretations made through a more deliberative process, such as rulemaking, than by those interpretations made through a less deliberative process, such as policy and interpretative statements.[227]

supremacy in administrative law." Beerman, *supra* note 19, at 803.

222. *See* Merrill, *Judicial Deference*, *supra* note 2, at 982 (finding that the Supreme Court applied *Chevron* in only one-third of the cases involving agency interpretations from 1984 to 1990); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1029–41.

223. United States v. Mead, 533 U.S. 218, 226–27 (2001) ("We hold 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.").

224. *Id.* at 252 (Scalia, J., dissenting) ("*Chevron*, the case that the opinion purportedly explicates, made no mention of the 'relatively formal administrative procedure[s]' that the Court today finds the best indication of an affirmative intent by Congress to have ambiguities resolved by the administering agency." (citation omitted)).

225. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 448–49 (1987) (applying *Chevron* to find the agency regulation reasonable at step two).

226. *See, e.g.*, Theodus v. McLaughlin, 852 F.2d 1380, 1386–87 (D.C. Cir 1988) (noting the amount of agency consideration in determining the reasonableness of an interpretive statement in *Skidmore* analysis); Barnett v. Weinberger, 818 F.2d 953, 962–63 (D.C. Cir. 1987) (noting that "the regulations were issued without any public notice and without benefit of any comment thereon," and affording no deference to that regulation under *Skidmore*).

227. *See, e.g.*, La.-Pac. Corp. v. Block, 694 F.2d 1205, 1212–13 (9th Cir. 1982) (observing the

Nonetheless, process was just one factor on the persuasiveness meter.

However, at the turn of this century, in a trio of cases—*Christensen v. Harris County*,[228] *United States v. Mead Corp.*,[229] and *Barnhart v. Walton*[230]—the Court substantially curtailed *Chevron*'s applicability based, in part, upon the formality of the procedure an agency used to reach the interpretation being challenged.[231] In these three cases, the Court limited *Chevron*'s application to those agency interpretations issued with force of law.[232] While the exact definition of "force of law" remains shrouded in mystery,[233] the Court seemed to be suggesting that only those interpretations that go through a full, deliberate process will automatically be entitled to *Chevron* deference.[234] Other interpretations might also receive *Chevron* deference; however, they might receive *Skidmore* deference or no deference at all. This process limitation is colloquially called "*Chevron* Step Zero"[235] and "the *Mead* Mess."[236] When courts defer pursuant to *Skidmore* rather than *Chevron*, deference

amount of consideration given by the agency to its interpretive rule, including consistency with other policies and reasoning in the context of agency programs); Pennzoil Co. v. U.S. Dep't of Energy, 680 F.2d 156, 171 (Temp. Emer. Ct. App. 1982) (noting that, under *Skidmore*, informal statements by administrative agencies are given little weight).

228. 529 U.S. 576 (2000).

229. 533 U.S. 218 (2001).

230. 535 U.S. 212 (2002).

231. Certainly, the decisions are more nuanced than this simple pronouncement. For several more detailed and academic discussions of these cases and their effect on the *Chevron* analysis, see generally Bressman, *supra* note 154, at 1451–91; Wildermuth, *supra* note 43, at 1878–88, 1890–95; and Womack, *supra* note 43, at 304–37.

232. Skidmore v. Swift, 323 U.S. 134, 140 (1944).

233. The exact parameters of *Chevron* Step Zero are well beyond the scope of this Article but have been examined extensively elsewhere. *See generally* Sunstein, *Step Zero*, *supra* note 42 (detailing the foundations and nature of the Step Zero dilemma); Jellum, *Mastered* Chevron*'s Step Zero*, *supra* note 9, at 83–109 (examining the law before *Chevron*, the law of *Chevron*, and the law after *Chevron* in connection with the development of Step Zero).

234. While the Court has said *Chevron* might apply to decisions arrived at using less formal procedures, in reality, the Court has not yet applied *Chevron* in any situations involving non-legislative rulemaking or informal adjudication since these cases were decided. *But see Mead Corp.*, 533 U.S. at 231 (citing to *NationsBank of N.C., N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 256–57 (1995), a case decided before the *Mead* trilogy in which the Court applied *Chevron* to an agency's decision to grant a bank's application to sell annuities).

Some lower courts, however, have applied *Chevron* in such cases. *Compare* Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1011–13 (9th Cir. 2002) (holding that *Chevron* did apply to an HUD Statement of Policy), *and* Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 61 (2d Cir. 2004) (same), *with* Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (holding that *Chevron* did not apply to an HUD Statement of Policy).

235. *See generally* Sunstein, *Step Zero*, *supra* note 42 (discussing Step Zero, in which courts determine whether *Chevron* analysis applies at all, as the first step before engaging in the two-step *Chevron* analysis).

236. Bressman, *supra* note 154, at 1486.

to agencies decreases.[237] "While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference means just the opposite."[238] Thus, today, agency process is somewhat determinative of the level of deference. Because process is determinative, fewer agency interpretations receive *Chevron* deference.

These cases also limited the Court's implied-delegation rationale. Within a few years of deciding *Christensen*, *Mead*, and *Barnhart*, the Court further limited *Chevron*'s applicability with another trilogy of cases: *FDA v. Brown & Williamson Tobacco Corp.*,[239] *Gonzales v. Oregon*,[240] and *Hamdan v. Rumsfeld*.[241] In this trilogy, the Court added a new step to *Chevron* that required courts to determine whether Congress had intended to delegate interpretive authority in the first place. In these cases, the Court concluded that Congress's intent not to delegate was extraordinarily clear.

In *Brown & Williamson*, the Court concluded that, despite an ambiguous statute,[242] Congress had not impliedly intended to delegate the power to regulate tobacco products to the FDA because Congress had: (1) created a distinct regulatory scheme for tobacco products; (2) squarely rejected proposals to give the FDA jurisdiction over tobacco; and (3) acted repeatedly to preclude other agencies from exercising authority in this area.[243] The majority held that while Congress may not have spoken to the precise issue, it had spoken broadly enough on related issues to prevent the agency from acting at all.[244] The Court accorded no deference whatsoever (neither *Skidmore* nor *Chevron*) to the agency's interpretation, even though the agency used force of law procedures.[245]

237. Wildermuth, *supra* note 43, at 1898–99 (citing Womack, *supra* note 43, at 327–28).

238. Bressman, *supra* note 154, at 1446.

239. *See* 529 U.S. 120 (2000) (granting no deference to the FDA's interpretation of the words "drug" and "combination device" in the Food Drug and Cosmetic Act).

240. *See* 546 U.S. 243 (2006) (applying *Skidmore* rather than *Chevron* deference to the Attorney General's interpretation of the Controlled Substances Act of 1970).

241. *See* 548 U.S. 557 (2006) (invalidating President Bush's order creating military commissions for "illegal enemy combatants"), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2006, *as stated in* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2011).

242. The FDA was authorized to regulate "drugs," "devices," and "combination products." *Brown & Williamson*, 529 U.S. at 126 (citing 21 U.S.C. § 321(g)–(h) (1994 and Supp. III)). The statute defined these terms as "articles . . . intended to affect the structure or any function of the body." *Id*. (quoting 21 U.S.C. § 321 (g)(1)(C) (2006)). Considering nicotine to be a drug, the FDA concluded that it had authority to regulate. *Id.* at 125. Thus, the FDA interpreted this broad language as allowing it to regulate tobacco and cigarettes. *Id.*

243. *Id.* at 155–56.

244. *Id.* at 165.

245. *Id.*

In *Gonzales*, the issue was "whether the Controlled Substances Act allow[ed] the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[246] Importantly, *Gonzales* differed from *Brown & Williamson* in that the Attorney General's interpretation derived from informal, rather than formal, procedures.[247] The Court concluded that this issue was simply too important for Congress to have impliedly delegated: "The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable."[248] Although the agency acted informally in this case, and therefore would not have been entitled to *Chevron* deference under the *Mead* trilogy, the Court's reasoning directly addressed and limited the implied-delegation rationale.

Finally, in *Hamdan*, the Court rejected President George W. Bush's executive order that created military commissions to try illegal enemy combatants.[249] The relevant issue was whether, and to what extent, the Uniform Code of Military Justice ("UCMJ")[250] authorized the president to establish procedures for military commissions that were different from the procedures for traditional courts-martial.[251] The UCMJ explicitly provided that the procedures for the two proceedings should be the same "insofar as practicable."[252] This ambiguous language should have given the president broad flexibility to determine what procedures were appropriate; however, the Court concluded that the

246. Gonzales v. Oregon, 546 U.S. 243, 248–49 (2006).

247. *Id.* at 250–51.

248. *Id.* at 267. Note that the Attorney General arrived at the interpretation through informal procedures. *Id*. at 250–51. Hence, *Skidmore*, rather than *Chevron*, deference was appropriate. *Id.* at 268.

249. Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006). The commissions were established after the tragic events of 9/11. First, Congress adopted a joint resolution, granting the President the power to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." *Id.* at 568 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006))). Second, acting pursuant to this resolution, President Bush issued the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" order, which provided that any noncitizens determined to be members of al Qaeda or terrorists would be tried by military commission. *Id*. (citing 66 Fed. Reg. 57,833 (Nov. 13, 2001)).

250. Pub. L. No. 81-506, 64 Stat. 109 (codified as amended in scattered sections of 10 U.S.C. (2006)).

251. *See Hamdan*, 548 U.S. at 567 (ultimately holding that the military commission lacked authority to try Hamdan because it violated the UCMJ and Geneva Conventions).

252. *Id*. at 640 (Kennedy, J., concurring in part) (quoting 10 U.S.C. § 836 (2006)) (internal quotations omitted).

procedures violated the UCMJ.[253] In so doing, the majority failed to mention either *Chevron* or *Skidmore*, noting only that "the jettisoning of [the right to be present] cannot lightly be excused as 'practicable.'"[254]

In this latter trilogy, the Court significantly limited the implied-delegation rationale. In all, the Court held that Congress did not implicitly delegate interpretive power to an agency despite statutory ambiguity.[255] Importantly, in none of the applicable statutes did Congress expressly say that it was not delegating to the agency. Rather, the Court implied it based on other factors, including the existence of other legislation (*Brown & Williamson*), the importance of the issue (*Gonzales*), and the failure to explain a choice that affected "a fundamental protection" (*Hamdan*).[256] Perhaps these cases are simply extraordinary. Surely, their holdings are at odds with the implicit-delegation rationale, which states that "[d]eference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[257] In *Brown & Williamson*, the Court articulated for the first time that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[258] In other words, there may be situations when Congress does not intend to delegate interpretive authority to an agency at all, despite statutory ambiguity.[259] When Congress does not intend to delegate, then no deference, or only limited or *Skidmore* deference, is due. Thus, with these three cases, the Court curbed the implied-delegation rationale, thereby further limiting the number of cases in which *Chevron* would apply. Prior to these cases, courts could assume that, whenever Congress left a gap or drafted ambiguously, Congress implicitly

253. *Id.* at 622–23 (majority opinion); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (similarly failing to apply *Chevron* or *Skidmore* in evaluating the President's interpretation of Congress's joint resolution, Authorization for the Use of Military Force).

254. *Hamdan*, 548 U.S. at 624. *See* Deborah N. Pearlstein, *A Measure of Deference: Justice Stevens from* Chevron *to* Hamdan, 43 U.C. DAVIS L. REV. 1063, 1070 (2010) (arguing that the "mere assertion of authority without a clear indication of process, without a clear reliance on actual expertise, [and] without a contextual factual record simply wasn't enough" for either deference standard).

255. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000); *Hamdan*, 548 U.S. at 578.

256. *Brown & Williamson*, 529 U.S. at 165; Gonzales v. Oregon, 546 U.S. 243, 267 (2006); *Hamdan*, 548 U.S. at 623.

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

258. *Id.*

259. *See Gonzales,* 546 U.S. at 281 (Scalia, J., dissenting) (criticizing the majority for ignoring "the implicit delegation inherent in Congress's use of the undefined term 'prescription'" in the Controlled Substances Act).

intended to delegate the power to interpret the ambiguity to the agency. After these cases, courts must first ensure that Congress intended, implicitly or explicitly, to delegate interpretive power—gaps and ambiguities alone are no longer enough.

In sum, the Court limited *Chevron*'s application by restricting the types of agency interpretations entitled to deference and by narrowing the implied-delegation rationale. Together, these two changes reduced the overall number of agency interpretations entitled to *Chevron* deference. With fewer agency interpretations entitled to *Chevron* deference, *Chevron* applies less often today than in the past. Indeed, the debate about *Chevron* today is whether to apply it at all, rather than how to apply it.[260]

1. Legislative Power as a Result of Limiting *Chevron*'s Application

When the Court limited *Chevron*'s application in these two ways, it shifted lawmaking power back to Congress. Because courts will now apply *Chevron* less frequently, courts will likely apply *Chevron*'s second step—adopting reasonable agency interpretations—even less frequently. Because courts will reach *Chevron*'s second step less frequently, agencies will have the power to interpret ambiguous statutes less often.

When the Court created *Chevron* Step Zero, it returned some legislative power to the legislature. At the time *Chevron* was first decided, the procedure an agency used to arrive at an interpretation was largely irrelevant. Agencies could make policy choices formally or informally and receive *Chevron* deference while doing so. But with *Chevron* Step Zero, automatic deference faded. Pursuant to the *Mead* trilogy, agencies had to both be given and actually use force of law procedures to earn *Chevron* deference. Otherwise, agencies were entitled to *Skidmore* deference, at best. Agencies prefer to act less formally; they can do so more readily and quickly, and they can reverse their course of action more easily.[261] Because agencies often act

260. *See supra* Part II.B (explaining how *Chevron*'s application has been limited).

261. *See* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 284 (2010) ("[A]gencies have sometimes improperly used guidance documents as a backdoor way to bypass the statutory notice-and-comment requirements for agency rulemaking and establish new policy requirements." (quoting Comm. on Gov't Reform, 106th Cong., Non-Binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009, at 9 (2000)); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) ("Because it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations."); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 166 (2000) (asserting that agencies are "avoiding 'ossification' . . . by increased use of 'interpretative rules' and 'policy statements'").

informally and then receive *Skidmore* or no deference, *Chevron* deference to agency interpretations has diminished. Hence, some lawmaking power in these situations reverted back to the legislature.

Similarly, when the Court limited the implied-delegation rationale, the Court returned some lawmaking power to the legislature. In *Chevron*, the Court had expanded the breadth of statutes entitled to agency resolution. Prior to *Chevron*, delegation was appropriate only when explicit; after it, delegation was appropriate whenever Congress expressly or implicitly delegated. However, following the *Brown & Williamson* trilogy, implicit delegation rests on a shaky foundation. After these cases, it is not enough that Congress is ambiguous. There may be situations in which, even though Congress was ambiguous, Congress actually had no intent to delegate at all. According to the cases, Congress can manifest its intent not to delegate explicitly or even implicitly, as when an area of law is just too important for delegation. Query whether this makes any sense: How can Congress implicitly not delegate the power to interpret an ambiguous statute when ambiguity is understood to be a mode of implicit delegation? Perhaps the answer is that ambiguity creates a presumption in favor of implicit delegation, but that presumption may be rebutted by other contextual indications of congressional intent (including other laws and common understandings, as were involved in the *Brown & Williamson* trilogy).

In any event, while the Court has not completely returned to the pre-*Chevron* days when agencies could legitimately make policy only when Congress explicitly delegated to them, the Court has begun its return journey by limiting *Chevron*'s application.

2. Interpretive Power as a Result of Limiting *Chevron*'s Application

Similarly, by limiting *Chevron*'s application, the Court also regained some of the interpretive power it had ceded. Because courts will now apply *Chevron* less frequently, courts will likely apply *Chevron*'s second step—adopting reasonable agency interpretations—even less frequently. Therefore, agencies' interpretations of ambiguous statutes will not control as often.

When the Court created *Chevron* Step Zero and limited the implied-delegation rationale, the Court reclaimed some of the interpretive power it had relinquished. Procedure was largely irrelevant when *Chevron* was decided. But with the *Mead* trilogy, agencies had to earn *Chevron* deference by acting more formally. And, after the *Brown & Williamson* trilogy, ambiguity alone is no longer sufficient grounds for deference. Congress must now intend, implicitly or explicitly, to delegate. For both reasons, *Chevron* deference will now apply less often.

Specifically, *Chevron*'s second step will apply less often, *Skidmore* deference will apply more often, and, under *Skidmore*, courts retain interpretive power. Hence, in at least this subset of cases, the Court reclaimed some of the interpretive power it had relinquished when it decided *Chevron*.

CONCLUSION

With a single case, the Supreme Court dramatically—and likely unintentionally—shifted lawmaking and interpretive power among the three branches. Prior to *Chevron*, the legislature made law, the judiciary interpreted law, and the executive executed the law. Admittedly, that formulation is too simplistic, especially as the executive acted in ways that mirrored those reserved for other branches. Yet, agency powers were constrained; agencies could make policy choices generally only when Congress explicitly delegated power to them and provided boundaries, or intelligible principles.[262] Additionally, agencies could interpret statutes, but their interpretations were not controlling.[263] Prior to *Chevron*, the legislature held lawmaking authority and the judiciary retained interpretive authority.

Chevron changed that power distribution. With *Chevron*, agencies gained lawmaking power because the Court concluded that when Congress drafts an ambiguous statute, Congress intends, albeit unintentionally, to defer to the agency.[264] Agencies also gained interpretive power because the Court concluded that the judiciary should defer to agencies whenever statutes were ambiguous, even though courts had traditionally held the power to interpret ambiguous statutes.[265] With this one case, the Court exponentially expanded the executive's role in these two areas.

Yet, the power shift did not stop the day *Chevron* was decided. Rather, the Court continued to transfer legislative and interpretive power to the executive when the Court changed the nature of the inquiry at *Chevron*'s first step from a search for legislative intent to a search for textual clarity.[266] When *Chevron*'s first step is a search for

262. *See supra* notes 90–94 and accompanying text (defining what an intelligible principle is and explaining how the doctrine operated).

263. *See supra* note 112 and accompanying text (stating that courts could defer to agency interpretations, but how much deference would be afforded to that interpretation was uncertain).

264. *See supra* Part I.B.2 (noting how *Chevron* drastically increased agency lawmaking power).

265. *See supra* Part I.B.3 (discussing the evolution of interpretive power as a result of *Chevron*); *see also supra* Part II.B.2 (discussing how the judiciary has reclaimed some interpretive power due to limitations placed on *Chevron*).

266. *See supra* Part I.B.3 (explaining how *Chevron* greatly enhanced the interpretive power of

congressional intent, courts will less often move to *Chevron*'s second step. In contrast, when *Chevron*'s first step is a search for statutory clarity, then courts will more often move to *Chevron*'s second step due to the inherent indefiniteness of language. At step two, an agency's interpretation controls more often that it does not. Thus, under this latter approach, legislative and interpretive power shifted to the executive.[267]

Likely this power shift was unintended. As the Court simultaneously embraced a more text-focused approach to *Chevron*'s first step, the Court narrowed *Chevron*'s application and limited the implied-delegation rationale. With these two changes—changes that have turned *Chevron* on its head and made legal commentators scream in frustration—the Court has reclaimed some of the interpretive power it ceded and returned some of the lawmaking power it transferred from the legislature.[268] With two important changes to *Chevron*'s application—restricting the types of agency interpretations entitled to deference and curbing the implied-delegation rationale—the Court has begun to reclaim the interpretive power it ceded and the lawmaking power it shifted with the rise and fall of *Chevron*. Simply put, the Court has come full circle by first expanding executive power and then dramatically contracting it.

---

the executive).

267. *See supra* Part I.B.3 (explaining how *Chevron* greatly expanded the interpretive power of the executive).

268. *See supra* Part II.B (noting how the Court has limited *Chevron* since its inception).