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Chevron's Domain

THOMAS W. MERRILL* AND KRISTIN E. HICKMAN**

INTRODUCTION

The Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*[1] dramatically expanded the circumstances in which courts must defer to agency interpretations of statutes. The idea that deference on questions of law is sometimes required was not new. Prior to *Chevron*, however, courts were said to have such a duty only when Congress expressly delegates authority to an agency "to define a statutory term or prescribe a method of executing a statutory provision."[2] Outside this narrow context, whether courts would defer to an agency's legal interpretation depended upon multiple factors that courts evaluated in light of the circumstances of each case. In other words, deference was not mandatory, but was grounded in the exercise of judicial discretion.[3]

Chevron expanded the sphere of mandatory deference through one simple shift in doctrine: It posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.[4] The Court in *Chevron* blandly referred to such gaps and ambiguities as "implied" delegations of interpretative authority and treated these implied delegations as equivalent to

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

2. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos. v. United States, 452 U.S. 247, 253 (1981); *see* Herweg v. Ray, 455 U.S. 265, 274-75 (1982); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979); Batterton v. Francis, 432 U.S. 416, 424-26 (1977). *See generally* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.8 (2d ed. 1979). Even when reviewing express exercises of delegated authority, of course, the Court would invalidate administrative interpretations contrary to the plain meaning of the statute. *See, e.g.*, Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944) (invalidating legislative regulation defining "area of production" in terms of number of employees).

3. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-75 (1992) (describing pre-*Chevron* practice); *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562-67 (1985) (listing factors relied upon by courts in pre-*Chevron* era).

4. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996) (noting that *Chevron* rests on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

express delegations.[5] *Chevron*'s equation of gaps and ambiguities with express delegations turned the doctrine of mandatory deference, formerly an isolated pocket of administrative law doctrine, into a ubiquitous formula governing court-agency relations. With this one small doctrinal shift, the Court effected a fundamental transformation in the relationship between courts and agencies under administrative law.

Much has been written about the *Chevron* doctrine. Scholars and judges alike have debated the wisdom of the *Chevron* transformation;[6] have considered what real-world effect the doctrine has had on the distribution of power in the administrative state;[7] and have explored different interpretations of *Chevron*'s famous "two-step" procedure, which first asks whether the statute has a gap or ambiguity, and if the answer is yes, asks second whether the agency's interpretation is reasonable.[8] This Article makes no effort to add to these bodies of literature. Instead, we accept for present purposes the *Chevron* revolution as an

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5. The Court wrote:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843-44 (citations omitted).

6. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187 (1992); Merrill, *supra* note 3, at 993-1003; Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000); Richard J. Pierce, Jr., Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Laurence H. Silberman, Chevron*—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990); 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).

7. *See, e.g.*, Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65 (1994); Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984; Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051 (1995).

8. *See, e.g.*, Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 (1996); Gary S. Lawson, Comment, *Reconceptualizing* Chevron *and Discretion: A Comment on Levin and Rubin*, 72 CHI.-KENT L. REV. 1377 (1997); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Thomas W. Merrill, Essay, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351 (1994).

established fact and ask: To what sorts of statutes and what sorts of agency interpretations should the mandatory deference doctrine of *Chevron* apply? In other words, what exactly is *Chevron*'s domain?

Throughout most of the post-*Chevron* period, the Supreme Court and the courts of appeals have paid little attention to the problem of defining the scope of the *Chevron* doctrine. The most the Supreme Court has had to say on the subject is that *Chevron* applies whenever an agency is "charged with administering" a federal statute.[9] Little effort has been made to spell out what Congress must do to charge an agency with a statute's administration, or what sorts of agency interpretations qualify for *Chevron* deference once an agency has been so charged. Academic commentators, with a few important exceptions,[10] have also had little to say on the subject.

Yet, as the *Chevron* doctrine has solidified, and as government lawyers have relentlessly pushed for *Chevron* deference in new contexts, disputes have inevitably erupted over what kinds of statutes and what kinds of agency action trigger this strong deference. It was only a matter of time before these disputes reached the Supreme Court. In the last two Terms, the Court has been confronted on no less than four separate occasions with questions about *Chevron*'s domain.[11] Additional cases presenting such issues are on the docket this Term.[12] Although the recent decisions have clarified some issues regarding when *Chevron* does and does not apply, the most important of these decisions, *Christensen v. Harris County*,[13] reveals deep divisions among the Justices about the basic principles that govern the scope of the *Chevron* doctrine. The time is therefore propitious for taking stock of when *Chevron* deference properly starts and stops within the scheme of administrative review.

In Part I, we review recurring questions that have arisen about the scope of the *Chevron* doctrine. We start with the Supreme Court's recent decisions, and

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9. *Smiley*, 517 U.S. at 739; *see* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992); *Chevron*, 467 U.S. at 865; *see also* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (denying *Chevron* deference to agency interpretation of the Administrative Procedure Act because the APA is not a statute the agency is "charged with administering").

10. The principal exception here is an article by Robert Anthony, which grew out of his work as reporter for the Administrative Conference of the United States. Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1 (1990); *see also* Duffy, *supra* note 6, at 199-203 (discussing scope of *Chevron* doctrine if understood as an exercise of legislative rulemaking authority); Sunstein, *supra* note 6, at 2093-104 (suggesting that *Chevron*'s scope is limited by competing canons of construction and separation of powers principles).

11. *See* Christensen v. Harris County, 529 U.S. 576 (2000) (discussed *infra* notes 59-82 and accompanying text); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (discussed *infra* notes 50-58 and accompanying text); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (discussed *infra* notes 37-49 and accompanying text); United States v. Haggar Apparel Co., 526 U.S. 380 (1999) (discussed *infra* notes 29-36 and accompanying text).

12. *See* Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 121 S. Ct. 675 (2001); Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001); United States v Mead Corp., 185 F.3d 1304 (Fed Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000) (discussed *infra* note 352 and accompanying text).

13. 529 U.S. 576 (2000).

then outline other questions that have divided the courts of appeals or have been expressly reserved by the Supreme Court. In all, we identify fourteen questions about the scope of the *Chevron* doctrine that remain unresolved.

We next address two background principles that are key in developing a coherent approach to *Chevron*'s domain. The first principle, which is the subject of Part II, concerns an issue that divided the Justices in *Christensen*: Is there one deference doctrine or two? As a matter of both precedent and policy, we argue that there are two deference doctrines: the two-step deference regime associated with *Chevron*, and the multi-factoral approach to deference embodied in the Court's venerable decision in *Skidmore v. Swift & Co.*[14] The recognition of two deference doctrines rescues courts from a stark choice between *Chevron* deference or no deference at all; *Skidmore* deference offers an intermediate option in which courts can assess the views of the agency under a more nuanced, context-sensitive rubric. The existence of this third option, we argue, counsels in favor of construing the scope of the *Chevron* doctrine relatively narrowly.

The second background principle, which is the subject of Part III, concerns the source of law that underlies the strong deference doctrine advanced by *Chevron*. Three candidates have been put forward in the legal literature: (1) the Constitution, in the form of the doctrine of separation of powers; (2) the courts, in the form of a common-law norm of self-governance; and (3) the Congress, in the form of a presumption about congressional intent.[15] The Supreme Court in recent years has endorsed the notion that *Chevron* rests on implied congressional intent.[16] For various reasons, including the need to reconcile the practice of mandatory deference with the language of the Administrative Procedure Act (APA), we agree. *Chevron* should be regarded as a legislatively mandated deference doctrine. *Skidmore*, in contrast, rests on a judicially developed norm, and hence can be called a common-law deference doctrine. The conclusion that *Chevron* rests on an implied delegation from Congress also has important implications for *Chevron*'s domain: It means that Congress has ultimate authority over the scope of the *Chevron* doctrine, and that the courts should attend carefully to the signals Congress sends about its interpretative wishes.

In Part IV, we build on these background principles by identifying three operating principles that courts should use in resolving questions about *Chevron*'s domain. Together, these principles comprise what might be called "step zero" in the *Chevron* doctrine: the inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all, as opposed to the *Skidmore* framework or deciding the interpretational issue de novo.

The first operating principle concerns the type of power Congress must bestow upon an agency in order impliedly to delegate interpretational authority

14. 323 U.S. 134, 140 (1944).

15. *See infra* notes 166-214 and accompanying text.

16. *See, e.g., Brown & Williamson*, 520 U.S. at 132; *Haggar Apparel*, 526 U.S. at 392-93; Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996).

to it—that is, to charge an agency with a statute's administration. Here, we adopt the position, evidently embraced in *Christensen*, that Congress impliedly delegates the power to interpret only when it grants the agency power to take action that binds the public with the force of law. Thus, Congress must give the agency the power to implement the statute either through the promulgation of legislative rules or the rendering of binding adjudications. If an agency has neither power—for example, if it performs only funding or investigatory or prosecutorial functions—it is not eligible for *Chevron* deference.

The second operating principle concerns the types of agency interpretations that are eligible for *Chevron* deference once the agency has been given the required interpretational authority. Here, we endorse the position that the scope of the delegation of interpretational authority extends only so far as Congress has given the agency the authority to bind persons outside the agency with the force of law, and no further. In practice, this means that interpretations entitled to *Chevron* deference must take the form either of legislative rulemaking or binding adjudication. There are compelling process reasons for limiting *Chevron* deference in this fashion. When agencies act through legislative rulemaking or binding adjudication, members of the public ordinarily will be afforded an opportunity to be heard before an interpretation is adopted. Extending *Chevron* deference to less formal interpretations would permit evasion of these procedural guarantees.

The third operating principle concerns the strength of the presumption of implied delegation of interpretational authority that comes from the grant and the exercise of agency power to act with the force of law. Presumptions, by their very nature, can be overcome by contrary evidence. We argue that the presumption in favor of *Chevron* deference should be subject to rebuttal based on the totality of the statutory circumstances. Thus, before courts employ the two-step *Chevron* doctrine, they may entertain evidence and argument that Congress clearly did not intend the agency to function as the primary interpreter with respect to the issue in dispute.

In Part V, we return to the fourteen questions about *Chevron*'s domain that remain unresolved, and indicate how those questions should be analyzed in light of the background principles and operating principles we identify in Parts II through IV. Many of these questions, such as whether *Chevron* deference should apply to interpretations announced in interpretative rules that are not legally binding, have easy answers: Such interpretations are not entitled to *Chevron* deference. Other questions, such as whether *Chevron* applies when multiple agencies have authority under a statute or whether there should be a scope-of-jurisdiction exception to *Chevron*, have answers that are more complex. In any event, however, we believe the framework established in this Article for answering such questions should result in a more uniform and consistent set of responses than have prevailed up to this point.

I. UNANSWERED QUESTIONS ABOUT *CHEVRON*'S DOMAIN

By and large, the history of the *Chevron* doctrine has been one of triumphal expansion. There is no evidence that the Court itself viewed *Chevron* as an especially notable decision when handing it down in 1984.[17] The decision first took on the status of a canonical statement about deference in the hands of Reagan-appointed judges on the D.C. Circuit.[18] It is difficult to pinpoint exactly when the decision came to be recognized as the leading case about deference by the Supreme Court, but it was almost certainly only after one of Reagan's D.C. Circuit judges, Antonin Scalia, was elevated to the Supreme Court in 1986 and made the promotion of *Chevron* one of his causes.[19] By 1990, it was clear that Justice Scalia's campaign had largely succeeded; all the Justices by that time had signed onto one or more cases applying *Chevron*'s two-step procedure.[20]

Since then, the story of *Chevron*'s domain has been one of steady expansion, at least insofar as fields of law are concerned. *Chevron* itself concerned an issue of environmental law: the meaning of the term "stationary source" under the Clean Air Act.[21] Not surprisingly, the decision took hold first in environmental law and related areas.[22] Over time, however, the *Chevron* doctrine has gradually displaced formulations about deference developed in other fields, including those with substantial bodies of precedent that preexisted *Chevron* and deviated from it in important respects, such as labor law[23] and tax

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17. *See* Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10,606, 10,613 (1993) (reporting, based on an analysis of Justice Thurgood Marshall's papers, that the Justices engaged in little discussion about the draft opinion in *Chevron* and concluding that no one on the Court appreciated the implications of the decision).

18. *See* Schuck & Elliott, *supra* note 7, at 1041-42.

19. *See* Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 377-83 (1988) (Scalia, J., concurring); NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring); INS v. Cardozo-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring).

20. *See, e.g.*, Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647-48 (1990); Dole v. United Steelworkers, 494 U.S. 26, 42 (1990); Sullivan v. Everhardt, 494 U.S. 83, 88-89 (1990); KMart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988).

21. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

22. *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985); Chem. Mfrs. Ass'n v. Natural Res. Def. Council, 470 U.S. 116, 125 (1985); Natural Res. Def. Council v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986).

23. Up through the early 1990s, the Court often cited pre-*Chevron* authority in describing the deference owed to the National Labor Relations Board (NLRB) with respect to questions of law. *See* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 200-01 (1991) (citing pre-*Chevron* NLRB cases for standard of review); NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990) (same); *cf.* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574 (1988) (indicating that *Chevron* ordinarily would apply to NLRB legal determinations). The Court's pre-*Chevron* labor law standard was highly deferential, but was not expressed, as is *Chevron*, in terms of mandatory deference to agency views. *See Curtin Matheson*, 494 U.S. at 786 (stating that the NLRB is entitled to "considerable deference"). More recently, the Court has again cited *Chevron* in an NLRB case and framed the inquiry in terms of *Chevron*'s two-step procedure, although the Court was still careful not to quote language from *Chevron* suggesting that deference is mandatory. *See* Holly Farms Corp. v. NLRB, 517 U.S. 392, 398-99 (1996). *See generally* Jonathan D. Hacker, Note, *Are Trojan*

law.[24] In terms of fields of law, *Chevron*'s two-step doctrine is as ubiquitous as if Congress had written it into the APA.

With respect to the types of legal issues eligible for *Chevron* deference, the doctrine's expansion has been more uneven. Although the Justice Department has urged *Chevron* deference at every possible turn, the Supreme Court has recognized some limitations. For example, the Court has held that *Chevron* does not apply to legal issues concerning the scope of judicial private rights of action because in these circumstances, it is the court, not the agency, that is charged with administration of the statute.[25] The Court has also refused to apply *Chevron* to agency interpretations that take the form of "*post-hoc* rationalizations of counsel"[26] (although recent decisions have sown some confusion about this).[27] Furthermore, the Court has, in a series of cases, insisted that *Chevron* does not trump prior interpretations of statutes adopted by the Court itself.[28]

Horse Union Organizers "Employees"?: A New Look at Deference to the NLRB's Interpretation of NLRA Section 2(3), 93 MICH. L. REV. 772, 775-76, 788-89 (1995) (citing pre-*Chevron* precedent as illustrating a "long history of Supreme Court deference to the Board's experience and expertise," but asserting that courts today assess NLRB interpretations under *Chevron*). We argue below that NLRB adjudications are not entitled to *Chevron* deference because NLRB orders are not self-executing. *See infra* notes 276-85 and accompanying text.

24. *See, e.g.*, Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382, 387 (1998) (applying *Chevron*'s two-step analysis in evaluating Treasury regulations interpreting the Internal Revenue Code). Although commentators generally view *Chevron* as the prevailing standard in tax cases, the extent and consistency with which the courts have applied *Chevron* deference to Treasury regulations remains a matter of some debate. *See, e.g.*, David A. Brennen, *Treasury Regulations and Judicial Deference in the Post-*Chevron *Era*, 13 GA. ST. U. L. REV. 387, 389 (1997) (comparing pre-*Chevron* and post-*Chevron* deference to Treasury regulations and suggesting that "every major Supreme Court case since 1984 involving the validity of a Treasury regulation is consistent with *Chevron*"); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 57-63 (1995) (recounting the slow progression of courts applying *Chevron* deference to Treasury regulations, and accusing the Supreme Court of ignoring *Chevron* in favor of pre-*Chevron* standards as late as 1991).

25. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990); *see also* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (arguing against deference to agencies' interpretations of a criminal law, which is administered by the courts).

26. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988); *see also* Gregory v. Ashcroft, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring) (denying deference to EEOC litigating position); Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 174-75 (1989) (giving no deference to interpretation of statute advanced in the government's brief but not reflected in a regulation).

27. *See* Auer v. Robbins, 519 U.S. 452, 462 (1997) (distinguishing *Georgetown* and affording *Seminole Rock* deference, discussed *infra* note 87, to an interpretation advanced in agency's amicus brief); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741-42 (1996) (distinguishing *Georgetown* and affording *Chevron* deference to proposed agency rule adopted in response to litigation); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992) (characterizing as a "difficult question" whether deference is ever appropriate to interpretations developed during litigation).

28. Neal v. United States, 516 U.S. 284, 295 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-37 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); *see also* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 111-12 (1989) (noting, outside the *Chevron* context, that "[a] rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute"). *See generally* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225 (1997); Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723 (1992).

The last two Terms have witnessed an acceleration the Court's consideration of questions about *Chevron*'s domain. The Court has rendered four important decisions about the scope of the *Chevron* doctrine. These decisions provide an appropriate introduction to the questions about *Chevron*'s domain that have come to the fore, and reveal the lack of a unifying perspective in the Court's approach to these questions. In this Part, we review these four recent decisions, and then briefly catalogue the fourteen questions about *Chevron*'s domain that have yet to be resolved by the Court.

A. FOUR RECENT DECISIONS

1. *United States v. Haggar Apparel Co.*[29]

The first of the four decisions required the Court to decide whether *Chevron* applies under a statutory scheme that calls for a court to exercise de novo review in considering a challenge to administrative action. More specifically, the question was whether regulations issued by the United States Customs Service are entitled to *Chevron* deference in a suit for refunds of customs duties filed in the Court of International Trade (CIT). The statute governing such suits had long been interpreted as requiring the CIT to conduct a trial de novo to determine how much duty was owed,[30] and the CIT had conducted such a trial in the proceeding under review.[31]

Notwithstanding the traditional understanding that de novo review is incompatible with deference,[32] the Supreme Court held that *Chevron* is fully applicable to interpretations of statutes contained in regulations issued by the Customs Service when such interpretations are drawn into question in refund suits. The Court discerned no incompatibility in a court conducting a trial de novo to determine the facts while simultaneously deferring to an agency's interpretation of law.[33] The Court was willing to assume that Congress has the power "to direct the court not to pay deference to the agency's views,"[34] that is, to spell

29. 526 U.S. 380 (1999).

30. *See* Haggar Apparel Co. v. United States, 127 F.3d 1460, 1462 (Fed. Cir. 1997) (citing cases), *vacated by* 526 U.S. 380 (1999).

31. *See id.* at 1462. Refund suits are technically not actions for judicial review of action by the Customs Service, but are original actions filed in court seeking a refund of duties unlawfully imposed. The importer in *Haggar Apparel* argued that Customs Service regulations were addressed only to customs officers, and were not binding on courts hearing original actions for refunds, but the Court rejected this contention. *Haggar Apparel*, 526 U.S. at 386-90.

32. *See* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989); United States v. First City Nat'l Bank, 386 U.S. 361, 369 (1967); *see also* Aronson v. IRS, 973 F.2d 962, 965 (1st Cir. 1992) (Breyer, C.J.) (noting that, where statute provides for de novo review, the court does not defer to agency's interpretation of that statute); Doe v. United States, 821 F.2d 694, 697-98 & n.9 (D.C. Cir. 1987) (en banc) (confirming that de novo review means that "the legal issue presented is to be reviewed nondeferentially").

33. As the Court put it, "Deference can be given to regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." *Haggar Apparel*, 526 U.S. at 391.

34. *Id.*

out unambiguously that questions of law as well as questions of fact were to be decided de novo. But, the Court did not find such a directive in the refund statute.

Haggar Apparel can be seen as seeking to specify the strength of the presumption in favor of deference announced in *Chevron* and what it takes to overcome it.[35] The decision suggests the presumption is quite strong. The direction to the CIT to conduct a trial de novo clearly suggests that Congress had little faith in fact-finding by the Customs Service, but the Court was unwilling to generalize from this expression of congressional preference for judicial decisionmaking. In effect, the Court seemed to say that Congress must speak explicitly if it wishes to turn off the *Chevron* doctrine; any doubts and ambiguities, at least as manifested in the statement of the standard of review, will be construed in favor of continued application of *Chevron*.[36]

It would be a mistake, however, to read *Haggar Apparel* as a definitive statement about the strength of the presumption in favor of *Chevron* deference in all circumstances. The Court's analysis hewed closely to the specifics of the statute applicable to refund suits in the CIT, and could be readily distinguished in other circumstances. Still, there is no question that the Court's attitude was extremely sympathetic to the application of *Chevron* deference.

2. *INS v. Aguirre-Aguirre*[37]

Less than two weeks later, the Court turned to another issue about the scope of the *Chevron* doctrine: whether *Chevron* applies to legal interpretations adopted by agencies in adjudication rather than rulemaking. The case involved a provision of the Immigration and Naturalization Act making aliens ineligible for withholding of deportation if they have "committed a serious nonpolitical crime" before entry into the United States.[38] The Board of Immigration Appeals (BIA) denied relief to the respondent under this provision, relying on an interpretation of "serious nonpolitical crime" adopted in the prior adjudication of another deportation case. On appeal, the Court of Appeals for the Ninth Circuit adopted a more lenient interpretation, and reversed.[39] The Supreme Court reversed in turn, holding that the BIA's interpretation was entitled to *Chevron* deference, and should have been upheld.[40]

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35. *Accord* Claire R. Kelly & Patrick C. Reed, *Once More unto the Breach: Reconciling* Chevron *Analysis and De Novo Judicial Review After* United States v. Haggar Apparel Company, 49 AM. U. L. REV. 1167 (2000).

36. This characterization is consistent with the Court's treatment of the contention that *Chevron* deference was "inconsistent with the historical practice in customs cases." *Haggar Apparel*, 526 U.S. at 393. The Court's response was that the history "is not so uniform and clear as to convince us that judicial deference would thwart congressional intent." *Id.*

37. 526 U.S. 415 (1999).

38. 8 U.S.C. § 1253(h)(2)(C) (1994 & Supp. III 1997).

39. *See* INS v. Aguirre-Aguirre, 121 F.3d 521, 524 (9th Cir. 1997).

40. *See Aguirre-Aguirre*, 526 U.S. at 424-25.

The extension of *Chevron* to interpretations rendered in adjudications is potentially a major clarification of the scope of the doctrine. *Chevron* itself involved an interpretation advanced in a regulation,[41] and the majority of cases following *Chevron* have involved regulations. Some commentators have argued that *Chevron*'s notion of an implied delegation of interpretative authority can be reconciled with other features of administrative law only if *Chevron* is limited to legislative rulemaking.[42] On the other hand, the Court on several occasions without comment has applied *Chevron* to agency interpretations set forth in adjudications or even more informal decisional contexts.[43] None of these decisions, however, addresses the question whether it is proper to extend *Chevron* deference to such interpretations; they offer at most *sub silentio* holdings. In the face of these conflicting signals, the lower courts understandably have exhibited considerable confusion about whether *Chevron* deference applies to agencies that lack rulemaking power[44] or to agency interpretations advanced in procedural formats other than notice-and-comment rulemaking.[45]

Yet, it would be a mistake to read *Aguirre-Aguirre* as having established that all interpretations adopted by agencies in adjudications are eligible for *Chevron* deference. Some features of the decision point toward such a broad holding. Most notably, the Court nowhere mentioned whether the Attorney General had the power to implement the withholding of the deportation remedy through legislative rulemaking.[46] This omission may suggest that the Court did not regard it as relevant whether Congress had delegated legislative rulemaking power to the agency. However, the Court also stressed language in the statute providing that "[t]he Attorney General shall be charged with the administration and enforcement" of the Act, and that the Attorney General's decision "shall be

41. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 858-59 (1984) (describing the promulgation of the regulation in question).

42. *See* Duffy, *supra* note 6, at 199-203; Herz, *supra* note 6, at 200-03.

43. *See* Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 452-53 (1999) (Medicare Provider Reimbursement Manual); Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (letter of Comptroller of Currency); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 413-14 (1992) (adjudication by Interstate Commerce Commission); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647-48 (1990) (informal adjudication); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574 (1988) (NLRB adjudication); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 978-79 (1986) (no-action decision of the Food and Drug Administration).

44. *See, e.g.*, Merck & Co., Inc. v. Kessler, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) (agency lacking rulemaking power not entitled to *Chevron* deference); Atchison, Topeka & S.F. Ry. Co. v. Pena, 44 F.3d 437, 441-43 (en banc) (same), *aff'd on other grounds*, 516 U.S. 152 (1996).

45. *See, e.g.*, Mead Corp. v. United States, 185 F.3d 1304, 1307-08 (Fed. Cir. 1999) (tariff classification ruling of Customs Service adopted without notice-and-comment rulemaking not entitled to *Chevron* deference), *cert. granted*, 120 S. Ct. 2193 (2000); *In re* Appletree Markets, Inc., 19 F.3d 969, 973 (5th Cir. 1994) ("Absent executive rulemaking, it remains the duty of courts to construe the statute in order to divine congressional intent.").

46. The Attorney General does have such power. *See* 8 U.S.C. § 1103(a)(3) (2000).

controlling" with respect to all issues of law.[47] These provisions, the latter in particular, would seem to qualify as *express* delegations of interpretational power to the Attorney General, eliminating any need to invoke a *Chevron*-like presumption of implied interpretational power at all. The Court also stressed that the decision implicated questions of foreign relations, where courts have traditionally deferred to the executive branch.[48] Given these context-specific factors, *Aguirre-Aguirre* does not necessarily resolve the question whether interpretations advanced in adjudications by other agencies, operating under different statutes, are similarly entitled to *Chevron* deference.[49]

3. *FDA v. Brown & Williamson Tobacco Corp.*[50]

Questions about *Chevron*'s domain were again on the Court's agenda in the 1999 Term, this time in a more controversial form. In one notable decision, the Court by a vote of five to four invalidated one of the Clinton Administration's major domestic policy initiatives: regulations promulgated by the Food and Drug Administration (FDA) to restrict the marketing and distribution of tobacco products to minors.

Acting through notice-and-comment rulemaking, the FDA had interpreted the jurisdictional provisions of the Food, Drug, and Cosmetic Act (FDCA), in particular the provisions authorizing the FDA to regulate "drugs" and "de-

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47. *Aguirre-Aguirre*, 526 U.S. at 424 (quoting 8 U.S.C. § 1103(a)(1) (1994 & Supp. III 1997)). Although the statute says that the determination of "the Attorney General" shall be controlling, 8 U.S.C. § 1103(a)(1) (2000), the Attorney General has delegated his authority under the Act to the Board of Immigration Appeals. *See Aguirre-Aguirre*, 526 U.S. at 425.

48. *See Aguirre-Aguirre*, 526 U.S. at 425 (citing INS v. Abudu, 485 U.S. 94, 110 (1988)). *See generally* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

49. The question of how far *Chevron* applies to adjudications by the INS was critical in the high-profile litigation involving Elian Gonzalez, the six-year-old Cuban boy who washed ashore in Florida after fleeing from Cuba with his mother, who died in the attempt. The key question was who had the legal authority to speak for Elian in determining whether he would seek asylum in the United States. The INS, in an informal adjudication, determined that Elian's Cuban father had such authority. Despite expressing some misgiving about this interpretation, a panel of the Eleventh Circuit held that the ruling was entitled *Chevron* deference and affirmed. *See* Gonzalez v. Reno, 212 F.3d 1338, 1349-54 (11th Cir. 2000). On petition for rehearing, the court was confronted with the argument that the Supreme Court's intervening decision in *Christensen v. Harris County*, 529 U.S. 576 (2000), established that *Chevron* was inapplicable. Gonzalez *ex rel.* Gonzalez, 215 F.3d 1243, 1245 (11th Cir. 2000); *see also infra* notes 59-82 and accompanying text (describing the *Christensen* decision). *Christensen* denied *Chevron* deference to an agency opinion letter and stated that *Chevron* applies only to agency actions having the "force of law," such as "*formal* adjudication or notice-and-comment rulemaking." *Christensen*, 529 U.S. at 587 (emphasis added). The Eleventh Circuit, however, concluded that the reference in *Christensen* to formal adjudication was only "illustrative," and "not to be an exhaustive or complete list of agency acts due deference." *Gonzalez*, 215 F.3d at 1245 n.3. Accordingly, the court of appeals declined to "extend" *Christensen* to informal adjudications, *see id.* at 1245, and adhered to its decision to give *Chevron* deference to the INS's legal determination regarding who had legal authority to speak for Elian. The Supreme Court refused to stay the Eleventh Circuit's decision and denied a petition for certiorari, *see* Gonzalez v. Reno, 120 S. Ct. 2737 (2000), resulting in Elian's return to Cuba with his father.

50. 529 U.S. 120 (2000).

vices,"[51] to be broad enough to support its regulation of tobacco products.[52] On review, the FDA urged that this interpretation was entitled to *Chevron* deference. The tobacco industry and its supporting amici offered a variety of arguments in opposition, including the contention that *Chevron* ought not to apply to interpretations that implicate the scope of an agency's regulatory jurisdiction.[53]

The Court has never resolved whether there should be a "scope of jurisdiction" exception to *Chevron* deference,[54] and it did not directly address this possibility in *Brown & Williamson* either. Instead, relying on arguments based on the structure of the Act, a long history of administrative disclaimers of authority over tobacco, and inferences from other tobacco-specific statutes, the majority concluded that Congress had a "clear intent" to preclude FDA jurisdiction over tobacco under the FDCA.[55] In other words, the Court assumed that *Chevron* applied, and resolved the case against the agency at step one. The dissenters also assumed that *Chevron* applied, but would have upheld the FDA's tobacco policy as consistent with both the plain language and general purposes of the FDCA.[56]

Notwithstanding the appearance of business-as-usual on the *Chevron* front in *Brown & Williamson*, the final section of the majority opinion suggested what could become a significant modification to *Chevron's* two-step approach. Observing that *Chevron* deference rests on the assumption that congressional ambiguity or silence is an implied delegation to the agency to "fill in the statutory gaps," the majority suggested that this assumption is not plausible where "extraordinary" issues about the scope of the agency's jurisdiction are concerned.[57] Congressional silence in this context, the majority suggested, is more

51. 21 U.S.C. §§ 321(g)-(h), 393 (2000).

52. *See* Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619 (Aug. 28, 1996).

53. Brief of Respondent Brown & Williamson Tobacco Corp., *Brown & Williamson* (No. 98-1152), *available at* 1999 WL 712572, at *37-38; Brief of Amicus Curiae Product Liability Advisory Council, Inc., in Support of Respondents, *Brown & Williamson* (No. 98-1152), *available at* 1999 WL 712593, at *13-17.

54. *See* Dole v. United Steelworkers, 494 U.S. 26, 43 (1990) (White, J., dissenting) (arguing against recognition of such an exception); Miss. Power & Light Co. v. Mississippi *ex rel* Moore, 487 U.S. 354, 381-82 (1988) (Scalia, J., concurring in judgment) (arguing against jurisdictional question exception); *id.* at 386-87 (Brennan, J., dissenting) (urging recognition of jurisdictional question exception). The lower courts have divided over the question. *Compare* Air Courier v. United States Postal Serv., 959 F.2d 1213, 1225 (3d Cir. 1992) (Becker, J., concurring) (stating that *Chevron* deference to jurisdictional questions limited), *and* N.Y. Shipping Ass'n v. Fed. Mar. Comm'n, 854 F.2d 1338 (D.C. Cir. 1988) (indicating deference inappropriate to jurisdictional interpretation), *with* Ok. Nat'l Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (concluding that *Chevron* deference to jurisdictional questions is appropriate), *and* Transpacific Westbound Rate Agreement v. Fed. Mar. Comm'n, 951 F.2d 950, 952-54 (9th Cir. 1991) (giving deference to agency decision to regulate a new type of rate agreement).

55. *Brown & Williamson*, 529 U.S. at 126; *see id.* at 132, 143.

56. *See id.* at 170-71 (Breyer, J., dissenting).

57. *Id.* at 159.

likely to mean that Congress intended to reserve authority to itself to determine whether there should be future regulation.[58]

This reverse presumption regarding congressional silence, although appearing at the end of an elaborate analysis of statutory interpretation at step one, could turn out to be an important qualification to *Chevron*. One way of reading the majority opinion is that, as in *Haggar Apparel*, the Court was addressing what is required to overcome the presumption in favor of deference to an agency's interpretation of a statute that it is charged with administering. On this reading, the Court in effect said that the presumption of delegated interpretative power is overcome if the totality of the circumstances suggests Congress had a contrary intention. If the legal issue as to which Congress was silent is an "ordinary" one, the usual presumption that Congress intended the agency to resolve such issue prevails. However, if the legal question as to which Congress is silent is "extraordinary," then this congressional silence should be interpreted to mean that the agency is *not* entitled to mandatory deference. Under this reading, *Brown & Williamson* adopted the functional equivalent of an exception to *Chevron* deference in cases that involve ambiguities about the scope of an agency's jurisdiction.

An alternative reading, which is more in keeping with the majority's protestations that congressional intent to deny FDA jurisdiction over tobacco was clear, is that the majority's remarks about the inferences to be drawn from congressional silence were designed simply to reinforce the conclusion that the controversy was resolved properly at *Chevron* step one. Only time will tell which reading is correct. Meanwhile, the underlying question of whether there should be a "scope of jurisdiction" exception to *Chevron* remains unresolved.

4. *Christensen v. Harris County*[59]

The most important of the Court's recent engagements over the scope of the *Chevron* doctrine reveals most clearly the lack of consensus within the Court regarding the basic principles to be used in resolving questions about *Chevron*'s domain. *Christensen* involved a section of the Fair Labor Standards Act that permits state and local governments to fulfill overtime obligations to public

58. A somewhat similar argument was advanced a year earlier by the dissenting opinions in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 407 (1999) (Thomas, J., dissenting) (arguing that the long history recognizing that States have exclusive authority to regulate intrastate telecommunications means that Congress must expressly confer such authority on FCC before it can regulate intrastate service); *id.* at 413 (Breyer, J., dissenting) (same). *See also* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001) ("The implausibility of Congress's leaving a highly significant issue unaddressed (and thus delegating its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity" (quoting Christensen v. Harris County, 529 U.S. 576, 590 n.* (2000) (Scalia, J., concurring in part and concurring in judgment) (internal quotations omitted))); *cf.* NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 325-26 (1951) (refusing to defer to the Labor Board's determination whether the Congress of Industrial Organizations was required to disclaim affiliation with the communist party because the issue "goes to the heart of the validity of the proceedings on which the order is based").

59. 529 U.S. 576 (2000).

employees by giving them compensatory time off rather than additional money compensation.[60] The question was whether this provision applies only when there is an agreement between the governmental unit and its employees for payment in "comp-time," or whether a governmental unit can unilaterally impose such a requirement. The Department of Labor's Wage and Hour division, appearing as amicus curiae, took the position that an agreement is required.[61] The Department urged that this reading was entitled to *Chevron* deference, and pointed in support to an opinion letter signed by the Acting Administrator of the Wage and Hour Division adopting this position.[62]

Writing for a majority of five, Justice Thomas held that the Wage and Hour Division's interpretation was not entitled to *Chevron* deference.[63] The majority distinguished between interpretations set forth in agency actions that have the "force of law" and interpretations contained in agency actions that do not have the force of law. As examples of actions falling in the former category, the majority cited those adopted through notice-and-comment rulemaking and formal adjudication. As examples of actions falling in the latter category, the majority mentioned opinion letters, policy statements, agency manuals, and enforcement guidelines.[64] Only interpretations having the force of law, the majority indicated, are eligible for *Chevron* deference. Interpretations that lack this attribute, such as an opinion letter, should be assessed under the deference standard set forth in *Skidmore v. Swift & Co.*,[65] which asks whether the agency's interpretation has the "power to persuade."[66] The majority found the opinion letter unpersuasive, and hence, entitled to little weight under the *Skidmore* analysis.[67]

The Court's decision in *Christensen* represents a potentially significant contraction of the scope of *Chevron*. Unfortunately, the majority did not explain why having the force of law should mark the dividing line between interpretations entitled to *Chevron* deference and those entitled to *Skidmore* deference. The distinction was presented as a restatement of precedent, but was not linked in any way to the underlying premises of the *Chevron* doctrine.

Moreover, the majority decision's invocation of the force of law as the defining attribute for actions entitled to *Chevron* deference does not correspond exactly with its illustrations. Agencies sometimes issue regulations having the force of law without following notice-and-comment rulemaking procedures. For example, both procedural rules and interim rules promulgated pursuant to the

60. 29 U.S.C. § 207(o) (2000).

61. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *Christensen* (No. 98-1167), *available at* 1999 WL 1128266, at *10-21.

62. *See id.* at *15 (citing Opinion Letter from Wage & Hour Div., Dep't of Labor (Sept. 14, 1992), *available at* 1992 WL 845100).

63. *See Christensen*, 529 U.S. at 586-88.

64. *See id.* at 587.

65. 323 U.S. 134, 140 (1944).

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

67. *See id.*

APA's "good cause" exception are legally binding, and yet, are excused from notice-and-comment requirements.[68] *Christensen* is unclear about whether these sorts of rules are entitled to *Chevron* deference. And where do interpretative rules—not mentioned by the majority—fit within its categories? Interpretative rules are often said not to have the force of law,[69] and like procedural rules and interim rules issued under the good cause exception they are exempt from notice-and-comment requirements.[70] Yet, some agencies routinely use notice-and-comment in adopting interpretative rules.[71] *Christensen* leaves the door open to the possibility that *Chevron* would apply to interpretative rules if the agency voluntarily affords notice-and-comment before such rules are promulgated.

Justice Scalia, writing for only himself, disagreed sharply with the majority's analysis of applicability of the *Chevron* doctrine.[72] According to Justice Scalia, "*Skidmore* deference to authoritative agency views is an anachronism," brought to an end by *Chevron*.[73] In his view, the key question in determining whether *Chevron* applies is whether the agency interpretation is "authoritative."[74] Justice Scalia had no doubt that the Department of Labor had authoritatively interpreted the statute as requiring a voluntary agreement. The opinion letter might not have established this standing alone; however, the Solicitor General's amicus curiae brief on behalf of the Department of Labor had vouched for the position set forth in the opinion letter.[75] As far as Justice Scalia was concerned, the brief established that the interpretation was authoritative, and thus the Court should have evaluated the government's interpretation under *Chevron*.[76]

Justice Breyer, dissenting on behalf of himself and Justices Ginsburg and Stevens,[77] offered a third view of the relevance of *Chevron*.[78] Justice Breyer appeared to agree with Justice Scalia that the opinion letter was authoritative

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68. *See* 5 U.S.C. § 553(b)(3)(A)-(B) (2000).

69. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 552 (2000).

70. *See* 5 U.S.C. § 553(b)(3)(A).

71. *See infra* note 356 (noting the practice of the IRS of using notice and comment procedures in issuing interpretative rules).

72. *Christensen*, 529 U.S. at 589-91 (Scalia, J., concurring in part and concurring in the judgment). In extra-judicial writing, Justice Scalia has been a proponent of broad application of the *Chevron* doctrine. *See* Scalia, *supra* note 6.

73. *Christensen*, 529 U.S. at 589 (Scalia, J., concurring in part and concurring in the judgment).

74. *Id.* at 591 n.*. Justice Scalia in fact said that three factors are relevant: whether (1) the statute is ambiguous; (2) agency personnel responsible for administering the statute have interpreted it; and (3) the interpretation is authoritative. *See id.* Of these three factors, only the third has real bite. The first and second simply restate general conditions for deference under any standard.

75. *See id.*

76. *See id.*

77. Although Justice Stevens, the author of *Chevron*, did not formally join the Breyer dissent, he stated in a footnote to his own dissent "that I fully agree with Justice Breyer's comments on [*Chevron*]." *Id.* at 595 n.2.

78. *See id.* at 596-97 (Breyer, J., dissenting). Justice Breyer, in extra-judicial writing, has been critical of aspects of the *Chevron* doctrine. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-382 (1986).

and for this reason was entitled to *Chevron* deference.[79] However, he strongly disagreed with the notion that *Skidmore* deference is an anachronism. According to Justice Breyer, it was entirely appropriate for the majority to rely on *Skidmore*, because *Chevron* had made "no relevant change" in the deference doctrine articulated in *Skidmore*.[80] In his view, *Chevron* had simply offered "an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations."[81] Where such a specific delegation does not exist, however, courts should continue to look to the factors emphasized by *Skidmore*, such as the expertise of the agency, whether its views were thoroughly considered, and whether they were consistently observed. Justice Breyer thus suggested that both *Chevron* and *Skidmore* were applicable and that both supported affirmance of the agency interpretation.[82]

In short, two of the Court's recent decisions involve questions regarding what kinds of agency decisions are entitled to *Chevron* deference once an agency has been charged with administration of a statute: *Aguirre-Aguirre* holds that in some circumstances an interpretation rendered in an adjudication should be afforded *Chevron* deference, whereas *Christensen* holds that an interpretation in an opinion letter should not be. Two other decisions involve questions about the strength of *Chevron*'s presumption of delegated interpretational power and when this presumption can be overcome: *Haggar Apparel* holds that the specification of a de novo standard of review does not overcome the presumption, at least in the customs context, and *Brown & Williamson* raises, but does not resolve, the question of whether there should be a scope-of-jurisdiction exception to the presumption.

B. OTHER UNRESOLVED QUESTIONS

Numerous other questions about *Chevron*'s domain have arisen in the lower courts. In many instances, these issues have given rise to conflicts among the courts of appeals, or have been specifically reserved by the Supreme Court. We have identified fourteen questions that remain unresolved.

Several of the contested questions concern the threshold issue: when Congress can be said to charge an agency with administration of a statute in such a way that gives rise to the inference that Congress intends the agency to exercise primary interpretational authority.

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79. *See Christensen*, 529 U.S. at 596 (Breyer, J., dissenting) ("Justice Scalia may well be right that the position of the Department of Labor, set forth in both brief and letter, is an 'authoritative' agency view that warrants deference under [*Chevron*].").

80. *Id.*

81. *Id.*

82. *See id.* at 597.

1. Does *Chevron* apply to an agency that lacks legislative rulemaking authority? (An issue subject to conflict in the circuits.)[83]

2. Does *Chevron* apply to an agency that lacks both legislative rulemaking authority and the power to render adjudications having the force of law? (An unresolved issue.)[84]

3. Does *Chevron* apply to statutes that are enforced by multiple agencies? (An issue as to which the Supreme Court has reserved decision.)[85]

4. Does *Chevron* apply to cross-referenced statutes, as when a general statute cross-references a statute that an agency is charged with administering, or when a statute an agency is charged with administering cross-references a general statute or general principles of common law? (An issue that has caused multiple conflicts in the circuits.)[86]

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83. The Seventh Circuit and the Federal Circuit have held that agencies without rulemaking authority are ineligible for *Chevron* deference. *See* Merck & Co., Inc. v. Kessler, 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) (refusing to grant *Chevron* deference to Patent Office because it does not have legislative rulemaking authority); Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 441-43 (7th Cir. 1996) (en banc) (refusing to accord *Chevron* deference to Federal Railroad Administration because it lacks legislative rulemaking authority), *aff'd on other grounds*, 516 U.S. 152 (1996). On the other hand, the D.C. Circuit and the Fifth Circuit have indicated that they believe such authority is unnecessary for *Chevron* to apply. *See* OSG Bulk Ships, Inc. v. United States, 132 F.3d 808, 812 n.7 (D.C. Cir. 1998) ("But where, as here, Congress has not explicitly delegated rulemaking authority to the agency charged with administering the statute, the *Chevron* analysis is the appropriate means by which to evaluate the agency's interpretation of the statute."); Estiverne v. Sak's Fifth Ave., 9 F.3d 1171, 1173 (5th Cir. 1993) (applying *Chevron* to FTC commentary and interpretative readings under the Fair Credit Reporting Act despite the court's recognition that "commentaries and opinions of the FTC are not law"); *see also* Trans Union Corp. v. FTC, 81 F.3d 228, 230-31 (D.C. Cir. 1996) (discussing without resolving whether *Chevron* deference is owed to agencies without rulemaking authority).

84. The Supreme Court has consistently denied *Chevron* deference to the Equal Employment Opportunity Commission (EEOC), which insofar as it enforces the Civil Rights Act of 1964, lacks both legislative rulemaking authority and the power to render binding adjudications. *See infra* notes 133 and 286. But the Court has never generalized from this result, and has at times assumed that *Chevron* deference extends to the National Labor Relations Board (NLRB), which may be indistinguishable from the EEOC in this regard. *See infra* notes 282-85 and accompanying text.

85. Under pre-*Chevron* case law, the fact that a statute was administered by multiple agencies was a factor that courts occasionally cited for giving reduced deference to an agency's interpretation. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 n.12 (1982); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 144-45 (1977). But the Court has not resolved how this factor computes under *Chevron*. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Court flagged but left unresolved the question of whether enforcement by multiple agencies is incompatible with *Chevron* deference. *See id.* at 642 ("[W]e need not pause to inquire whether this causes us to withhold deference to agency interpretations under *Chevron*."). In *Sutton v. United Airlines*, 527 U.S. 471, 478-80 (1999), the Court noted that Congress gave three agencies the authority to issue regulations implementing different provisions of the Americans with Disabilities Act; but the Court concluded that it was unnecessary to determine if any agency was entitled to deference because all three agencies had adopted an interpretation that the Court found to be impermissible. *See id.* at 482.

86. For example, the Freedom of Information Act exempts from disclosure material "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (2000). The circuits split over whether *Chevron* applies to the Internal Revenue Service's conclusion that a provision of the Internal Revenue Code protecting the confidentiality of tax return information qualifies for this exemption. *Compare* Aronson v. IRS, 973 F.2d 962, 965-67 (1st Cir. 1992) (holding that the IRS is entitled to deference because the operative statute prohibiting disclosure is the Internal Revenue Code, which is administered

5. Does *Chevron* apply to an agency's interpretation of its own regulations? (An issue that has produced some uncertainty in the lower courts.)[87]

Other issues are more properly viewed as raising questions regarding what type of agency interpretations are entitled to *Chevron* deference once an agency is charged with a statute's administration.

6. Does *Chevron* apply when a *Chevron*-qualified agency renders an interpretation in an adjudication? (An issue resolved as to the INS in *Aguirre-Aguirre*,[88] but not more generally.)

7. Does *Chevron* apply when a *Chevron*-qualified agency renders an interpretation in an interpretative rule? (An issue left open in *Christensen* and subject to a conflict in the circuits.)[89]

8. Does *Chevron* apply when a *Chevron*-qualified agency renders an interpretation in a procedural rule exempt from the notice-and-comment requirements of APA section 553? (An unresolved issue.)[90]

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by the IRS), *with* Grasso v. IRS, 785 F.2d 70, 73-74 (3d Cir. 1986) (concluding that the IRS is not entitled to deference); De Salvo v. IRS, 861 F.2d 1217, 1220 (10th Cir. 1988) (same), *and* Church of Scientology v. IRS, 792 F.2d 146, 149 (D.C. Cir. 1986) (same). The Supreme Court eventually resolved the issue, but did so without mentioning the underlying disagreement over the application of *Chevron*. *See* Church of Scientology v. IRS, 484 U.S. 9, 18 (1987) (holding that I.R.C. § 6103 is included within FOIA's statutory exemption). For other examples of cross-referencing issues, see *infra* notes 301-20.

87. Most lower courts have distinguished between *Chevron* deference and *Seminole Rock* deference, so-named for *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), in which the Court held that an administrative agency's interpretation of its own regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. *See generally* Scott H. Angstreich, *Shoring Up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49 (2000); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). But lower courts have occasionally applied *Chevron* to agency interpretations of agency regulations. *See* Samsung Elecs. Am., Inc. v. United States, 106 F.3d 376, 378 (Fed. Cir. 1997) (relying on *Chevron* in deferring to Customs Service's interpretation of its own regulation); Malcomb v. Island Creek Coal Co., 15 F.3d 364, 369 (4th Cir. 1994) (applying *Chevron* deference to an agency's interpretation of its own regulations); *see also* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997) ("It would seem that there are few, if any, cases in which the standard applicable under *Chevron* would yield a different result that the 'plainly erroneous' or 'inconsistent' standard set forth in [*Seminole Rock*] . . . .").

88. *See supra* notes 37-49 and accompanying text.

89. Some courts of appeals have extended *Chevron* deference to interpretative rules. *See, e.g.*, Nat. Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997); Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 181-82 (3d Cir. 1995); Johnson City Med. Ctr. v. United States, 999 F.2d 973, 975-76 (6th Cir. 1993). Others have not. *See, e.g.*, S. Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 832-33 (10th Cir. 1997); Jacks v. Crabtree, 114 F.3d 983, 985 n.1 (9th Cir. 1997); Massachusetts v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996); Atchison, Topeka & Santa Fe Ry. v. Pena, 44 F.3d 437, 442 (7th Cir. 1996).

90. Courts to date have shown no reluctance about extending *Chevron* deference to procedural rules. *See, e.g.*, W. Coal Traffic League v. Surface Transp. Bd., 216 F.3d 1168, 1171, 1176 (D.C. Cir. 2000) (applying *Chevron* deference to order characterized by the agency as a procedural rule); Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n, 920 F.2d 50, 54 (D.C. Cir. 1990) (citing *Chevron* as supporting deference to a challenged agency procedural rule); *see also* Anthony, *supra* note 10, at 52-54 (listing and discussing other cases). This could conceivably change with the

9. Does *Chevron* apply when a *Chevron*-qualified agency renders an interpretation in a proposed or interim rule? (An unresolved issue.)[91]

10. Does *Chevron* apply when lower-level employees in a *Chevron*-qualified agency render an interpretation? (An unresolved issue.)[92]

Finally, there are issues that speak to when courts should deem the presumption of delegated authority to interpret to have been overcome by contrary evidence of congressional intent.

11. Does *Chevron* apply when a statute mandates a more rigorous standard of review than is otherwise required by the APA? (An issue resolved in *Haggar Apparel* as to the de novo standard applied in customs refund cases,[93] but not more generally.)

12. Does *Chevron* apply to interpretations that modify the scope of an agency's jurisdiction? (An issue subject to a conflict in the circuits and raised, but not resolved, in *Brown & Williamson*.)[94]

13. Does *Chevron* apply to interpretations that raise constitutional questions? (An issue as to which the Court has sent conflicting signals.)[95]

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decision in *Christensen*, however, where the Court described the rules entitled to *Chevron* deference as those that have been promulgated through notice-and-comment proceedings.. *Christensen*, 529 U.S. at 587. The APA exempts procedural rules from the notice-and-comment requirements. *See supra* note 68 and accompanying text.

91. The Supreme Court has applied *Chevron* to interim rules, but without remarking on the distinction between interim and final rules. *See* Pauley v. Bethenergy Mines, 501 U.S. 680, 697-98 (1991) (deferring to interim agency regulations); United States v. City of Fulton, 475 U.S. 657, 668-71 (1986) (affording *Chevron* deference to the Secretary of Energy's decision establishing interim rates for hydroelectric power). Lower courts, however, have occasionally declined to give *Chevron* deference to interim rules. *See* Orr v. Hawk, 156 F.3d 651, 654-55 (6th Cir. 1998) (declining to afford *Chevron* deference to interim rule because it was not subject to public participation through notice and comment); *see also* Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1341 (4th Cir. 1995) (analogizing interim rules to policy statements, to which the Fourth Circuit does not give *Chevron* deference).

92. Courts have sometimes granted *Chevron* deference to interpretations by lower level employees, and sometimes have not. The circumstances in which the issue arises have to date been too diverse to generate a square circuit conflict. *See, e.g.*, Elizabeth Blackwell Health Ctr. for Women v. Knoll, 61 F.3d 170, 181-82 (3d Cir. 1995) (granting *Chevron* deference to interpretation of the Hyde Amendment articulated in two letters from the Director of the Medicaid Bureau of the Health Care Financing Administration to all state Medicaid directors); Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 894 (9th Cir. 1995) (applying *Chevron* to a letter from the Assistant Secretary of Education to all chief state school officers clarifying United States Department of Education policy regarding the Individuals with Disabilities Education Act and the education of children with attention deficit disorder); Metro. Washington Airports Auth. Prof'l Fire Fighters Ass'n Local 3217 v. United States, 959 F.2d 297, 302 (D.C. Cir. 1992) (denying *Chevron* deference to a letter from an agency employee of unidentified status responding to an inquiry from the union president as to the meaning of a statutory provision); *see also* Anthony, *supra* note 10, at 51-52 (listing and discussing other cases).

93. *See supra* notes 29-36 and accompanying text.

94. *See supra* note 54 (noting conflict in the circuits). *See generally* notes 50-58 and accompanying text.

95. *Compare* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (stating that *Chevron* doctrine does not apply when agency interpretation

14. Does *Chevron* apply to interpretations that are inconsistent with judicial precedent? (An issue subject to a conflict in the circuits with respect to lower court precedent.)[96]

After reviewing the general principles that govern the determination of *Chevron*'s domain, and more specific operating principles that can be derived from these general principles, we return in Part V to indicate how each of the foregoing questions should be answered.

II. TWO DEFERENCE DOCTRINES

In this Part, we consider the first of two background principles that exert a pervasive influence over *Chevron*'s domain: whether there is one deference doctrine or two. The opinions in *Christensen v. Harris County* reveal a cleavage of views among the Justices on this issue. Five Justices (the five joining Justice Thomas's majority opinion) recognize two deference doctrines: *Chevron* deference, which requires judicial deference to any reasonable agency interpretation of statutory ambiguity, and *Skidmore* deference, which relies on a variety of contextual factors to determine whether an agency's interpretation has "power to persuade."[97] Four Justices, in contrast, appear to believe that there is only one deference doctrine. Justice Scalia, speaking only for himself, believes *Chevron* is the sole deference doctrine today and that *Skidmore* is an anachronism.[98] Justices Stevens, Ginsburg, and Breyer also appear to believe that there is only one deference doctrine, of which *Chevron* and *Skidmore* are simply separate manifestations.[99] On this understanding, the decision to defer always turns ultimately on whether the agency interpretation is persuasive; *Chevron* simply marks off one set of circumstances in which deference is strongly indicated.

We argue in this Part that the *Christensen* majority was correct both as a matter of precedent and of policy. The Court on numerous occasions in the post-*Chevron* era has recognized the continued viability of both *Chevron* defer-

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would raise serious constitutional question), *with* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) (applying *Chevron* after concluding that agency interpretation was not in fact unconstitutional).

96. Although the Supreme Court has consistently maintained that its own statutory interpretation precedents trump *Chevron*, *see* cases cited *supra* note 28, it has not addressed the question whether the same holds for circuit court statutory interpretation precedents. *See* Pierce, *supra* note 28, at 2253. The courts of appeals are divided on the question. *Compare* Satellite Broad. & Communications Ass'n of Am. v. Oman, 17 F.3d 344, 348 (11th Cir. 1994) (holding *Chevron* trumps circuit precedent), *and* Chem. Waste Mgmt. v. EPA, 873 F.2d 1477, 1480 (D.C. Cir. 1989) (same), *with* Bankers Trust N.Y. Corp. v. United States, 225 F.3d 1368, 1376 (Fed Cir. 2000) (concluding circuit precedent trumps *Chevron*), *and* Aguirre v. INS, 79 F.3d 315, 317 (2d Cir. 1996) (same), *and* EEOC v. Metro. Educ. Enters., Inc., 60 F.3d 1225, 1229-1230 (7th Cir. 1995) (same), *rev'd on other grounds*, 519 U.S. 202 (1997).

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

98. Christensen v. Harris County, 529 U.S. 576, 589 (2000).

99. *See id.* at 596-97 (Breyer, J., dissenting, joined by Ginsburg, J.). Although Justice Stevens also authored a dissent and did not formally join Justice Breyer's dissent, in a footnote he recorded his full agreement with Justice Breyer's comments about *Chevron*. *See id.* at 595 n.2.

ence and *Skidmore* deference. Moreover, having two deference doctrines rather than one makes sense. There is a case for a rule that makes deference mandatory in certain circumstances and a case for a more general standard indicating when deference is appropriate. The legal system probably works better if both doctrines are available than if courts are limited to either the one or the other.

A. *CHEVRON* VERSUS *SKIDMORE*

The background and reasoning of the *Chevron* decision are well known and have been rehearsed many times. The question before the Court was whether the EPA could define "stationary source" under the Clean Air Act[100] to mean an entire plant. Under this "bubble" definition, if the net effect of adding a new emitting device would not increase the aggregate pollution from the entire plant, the Act's rigorous new source pollution standards would not be triggered. The Court used the case to announce its now-famous two-step inquiry.[101] The first step is to determine whether Congress has addressed the precise issue in controversy. The Court found no evidence in either the text of the statute or its legislative history that Congress had considered whether the bubble definition of stationary source was permissible.[102] Turning to the second step—whether the agency interpretation represents a "reasonable" or "permissible" reading of the Act—the Court found that the agency's bubble policy was a reasonable effort to balance the competing policies of environmental protection and accommodation of further economic growth, and thus was a permissible reading of the Act.[103]

Skidmore v. Swift & Co.[104] is a somewhat less familiar precedent, at least to today's administrative lawyers. The question at issue was whether the time firefighters were on call in the evenings at a packing plant was "working time," and hence required overtime pay under the Fair Labor Standards Act.[105] Writing for the Court, Justice Robert Jackson conceded that Congress had not delegated to any administrative agency responsibility "to determine in the first instance

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100. 42 U.S.C. § 7411(a)(3) (1982).

101. The Court stated:

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

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

102. *See id.* at 848, 851, 861-63.

103. *Id.* at 863-64.

104. 323 U.S. 134 (1944).

105. *Id.* at 135-36.

whether particular cases fall within or without the Act."[106] Nevertheless, he noted that the Labor Department was charged with authority to investigate practices regarding overtime pay, and could bring actions for injunctions to restrain violations of the Act.[107] Pursuant to these functions, the Administrator of the Wage and Hour Division had issued an interpretative bulletin that addressed the problem of "waiting time."[108] The Labor Department had filed an amicus curiae brief with the Court outlining how it would apply the standards set forth in that bulletin to the case of the firefighters.[109]

Justice Jackson acknowledged that the views of the Administrator, as reflected in the bulletin and the brief, were not conclusive or binding on the courts.[110] Nevertheless, those views were the product of "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case."[111] Moreover, there were important considerations of uniformity at stake: "Good administration of the Act and good judicial administration alike require that the standards for public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."[112] Justice Jackson sought to reconcile these competing considerations with the following oft-quoted standard:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[113]

The Court accordingly reversed and remanded with instructions to the lower courts to reconsider the issue in light of the Administrator's interpretative bulletin, as elaborated in the government's amicus brief.

The *Chevron* doctrine and the deference invoked in *Skidmore* differ along a number of dimensions.[114] First and most obviously, the question whether the agency exercises delegated power plays radically different roles under the two

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106. *Id.* at 137.

107. *See id.*

108. *Id.* at 138.

109. *See id.* at 139.

110. There was no statutory provision "as to what, if any, deference courts should pay to the Administrator's conclusions." *Id.*

111. *Id.*

112. *Id.* at 140.

113. *Id.*

114. The contrast between *Chevron* and *Skidmore* parallels different justifications for courts deferring to constitutional interpretations by politically accountable branches of government. *See* Robert A. Schapiro, *Judicial Deference and Interpretative Coordinacy in State and Federal Constitutional Law*,

regimes. A finding that there has been an appropriate congressional delegation of power to the agency is critical under *Chevron*.[115] Under *Skidmore*, however, it does not matter whether Congress has delegated authority to an agency to administer the statute as long as the agency has relevant expertise.[116] Indeed, the *Skidmore* Court acknowledged that the courts, not the agency, exercised the relevant delegated power under the Fair Labor Standards Act.[117]

Second, deference under *Chevron* is an all-or-nothing proposition. Either the court finds that the statute is ambiguous—in which case the agency's interpretation controls if it is reasonable—or the court finds that the answer is clear at step one, and hence must be resolved by the court de novo.[118] *Skidmore*, on the other hand, appears to view deference to agency interpretations along a sliding scale.[119] *Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation—the court must assess that interpretation against multiple factors and determine what weight they should be given. After undertaking this analysis, however, agency interpretations receive various degrees of deference, ranging from none, to slight, to great, depending on the court's assessment of the strength of the agency interpretation under consideration.

Third, the contextual factors mentioned by *Skidmore*, such as the thoroughness of the agency's decision, its logic, its consistency with prior interpretations, and the degree of expertise the agency brings to the issue,[120] play little—if any—role under *Chevron*. Under *Chevron*'s step one—where the inquiry focuses on whether Congress has directly spoken to the issue in question—the *Skidmore* factors play little or no role.[121] *Skidmore*'s persuasion factors are more relevant at step two of *Chevron*, but even here they appear to play a greatly diminished role.[122] For example, the Court on several occasions has reaffirmed

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85 CORNELL L. REV. 656, 696-701 (2000) (noting contrast between "textualist" and "institutional competence" theories of deference in constitutional law).

115. *See, e.g.*, Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (instructing that deference rests on either express or implied delegation of power to agency).

116. *Skidmore*, 323 U.S. at 139-40.

117. *Id.* at 137.

118. *See Chevron*, 467 U.S. at 842-43.

119. *See, e.g.*, Anthony, *supra* note 10, at 14; Merrill, *supra* note 3, at 977.

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

121. *See Chevron*, 467 U.S. at 842-43. A possible exception would be the understanding that agency interpretations contemporaneous with the adoption of the statute are entitled to deference. This understanding has been justified in part on the ground that such interpretations are more likely to reflect the intentions of the Congress that enacted the statute. *See, e.g.*, Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

122. *See, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 416-20 (1993) (recognizing that agency had adopted "a variety of approaches" to the question over the years, and suggesting that the lack of consistency was relevant but not dispositive to the reasonableness of the interpretation); Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992) (noting that agency interpretation had been "consistently held" in finding that it was reasonable).

that the *Chevron* framework permits agencies to change their interpretations of statutes, provided they give adequate explanations for their revised views.[123] This is in tension with the *Skidmore* factors, which give longstanding and consistent agency interpretations greater weight than recent and fluctuating views.[124]

Fourth, *Chevron* makes judicial deference to agency interpretations mandatory in any case in which the court concludes the matter should be resolved at step two and the agency interpretation is "reasonable" or "permissible."[125] The agency is entitled to deference as a matter of right. *Skidmore*, in contrast, makes clear that the weight given to the agency interpretation is always ultimately up to the court. The agency's interpretation is not binding on the court, as "an authoritative pronouncement of a higher court" might be.[126] Rather, the agency is entitled to deference only if it earns it.[127]

B. THE REAFFIRMATION OF *SKIDMORE*

Especially in the period immediately after the triumph of the *Chevron* doctrine, courts and commentators tended to assume that *Chevron* had wiped out *Skidmore* deference—and all other pre-existing approaches to deference as well.[128] Some of the Supreme Court's post-*Chevron* decisions also seem to

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123. *See, e.g.*, Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996) (dictum); Rust v. Sullivan, 500 U.S. 173, 186-87 (1991); *Chevron*, 467 U.S. at 863-64. *See generally* David M. Gossett, Comment, Chevron, *Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681 (1997) (reviewing Supreme Court and select lower court practice regarding changed agency interpretations under *Chevron*).

124. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 142-43 (1976) (calling for reduced deference under *Skidmore* when the interpretation in question conflicts with earlier agency pronouncements); Morton v. Ruiz, 415 U.S. 199, 237 (1974) (emphasizing importance of consistency under *Skidmore* deference); Atchison, Topeka & Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 446 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring) ("[C]onsistency ought to matter only when the agency is seeking to persuade . . . ."), *aff'd sub nom.* Bd. of Locomotive Eng'rs v. Atchinson, Topeka & Sante Fe Ry. Co., 516 U.S. 152 (1996).

125. *See Chevron*, 467 U.S. at 843-44 (instructing that reasonable interpretation is to be given "controlling weight").

126. Skidmore v. Swift & Co., 323 U.S. 134, 139, 140 (1940).

127. *See* Nicholas S. Zeppos, Comment, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractability, and the Proper Incentives*, 44 DUKE L.J. 1133, 1153 (1995) (noting that the traditional deference factors make the agency "earn" deference); *see also* Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1539-40 (1999) (applying the "earns" characterization to *Skidmore* deference).

128. *See, e.g.*, Farina, *supra* note 6, at 456 (suggesting that *Chevron* "declare[d] the victor in a forty-year war between advocates of the deferential model and defenders of independent judgment"); Schuck & Elliot, *supra* note 7, at 1024 (stating that *Chevron* "swept aside" the *Skidmore* criteria); Sunstein, *supra* note 6, at 2075-76 (suggesting that future debate will be between "broad" and "narrow" readings of *Chevron*). *See generally* Scalia, *supra* note 6 (arguing that *Chevron* renders traditional deference factors obsolete).

reflect this understanding.[129] As more recent decisions make clear, however, *Skidmore* lives on as a viable deference doctrine, serving a supplementary or backstopping role to *Chevron*.[130]

The first decision that unmistakably suggests a continued role for *Skidmore* in the post-*Chevron* world is *EEOC v. Arabian American Oil Co. (ARAMCO)*[131] At issue was whether Title VII of the Civil Rights Act protects U.S. citizens who work for U.S. companies outside the territorial limits of the United States. The Equal Employment Opportunity Commission (EEOC) had issued an interpretative guideline indicating that Title VII applies in these circumstances, and sought deference for its view in the Supreme Court. Pre-*Chevron* case law had afforded the EEOC only *Skidmore* deference for its interpretative guidelines.[132] The Court had reasoned that, because the EEOC lacks authority to issue substantive regulations,[133] its guidelines have roughly the same status as the interpretative bulletin in *Skidmore*.[134] Over the objections of Justice Scalia,[135] *ARAMCO* followed this pre-*Chevron* precedent rather than *Chevron*, and evaluated the EEOC's claim for deference under the *Skidmore* factors.[136]

Subsequently, in *Bragdon v. Abbott*,[137] the Court again signaled its understanding that *Chevron* and *Skidmore* are distinct, and that both are viable doctrines. The case involved the question whether HIV-infected individuals who do not have AIDS are "disabled" within the meaning of the Americans with Disabilities Act (ADA). In answering in the affirmative, the Court relied in part upon interpretations of the Rehabilitation Act, from which the ADA's definition of disability had been drawn.[138] Because the Rehabilitation Act is enforced by all

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129. *See, e.g.*, Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990) (rejecting *Chevron* deference because Congress did not delegate authority to the agency to implement the statutory provision in question; not addressing whether *Skidmore* deference should nevertheless apply).

130. The principles underlying *Skidmore* deference have a long historical pedigree. The *Skidmore* factors pre-date the case itself, as Chief Justice Marshall and other nineteenth century justices recognized the importance of respecting certain longstanding and consistent executive branch interpretations of statutes. *See* United States v. Haggar Apparel Co., 526 U.S. 380, 393 (1999) ("As early as 1809, Chief Justice Marshall noted in a customs case that '[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions.' " (quoting United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1809))); *see also* Merrill, *supra* note 3, at 975 (citing examples from the 1800s of judicial deference to executive interpretations based on longstanding and contemporaneous construction).

131. 499 U.S. 244 (1991).

132. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 140-46 (1976). For an overview of the courts' general reluctance to afford the EEOC significant deference, see generally Wern, *supra* note 127.

133. The EEOC is authorized only to issue "procedural regulations" under the Civil Rights Act. 42 U.S.C. § 2000e-12(a) (2000). In contrast, the EEOC does have substantive rulemaking authority under the Americans with Disabilities Act. *See infra* note 292.

134. *See Gen. Elec.*, 429 U.S. at 141.

135. *See ARAMCO*, 499 U.S. at 259-60 (Scalia, J., concurring).

136. *See id.* at 257-58.

137. 524 U.S. 624 (1998).

138. *See id.* at 641-42. The Court also relied in part on regulations issued by the Department of Justice, which the Court indicated were entitled to *Chevron* deference: as the agency "directed by

agencies,[139] the Court reserved judgment as to whether *Chevron* was applicable in these circumstances. Quoting *Skidmore*, the majority stated: "It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' "[140] As in *ARAMCO*, the decision in *Bragdon* unmistakably implies that there are two deference doctrines, and that when *Chevron* does not apply, it is appropriate to turn to *Skidmore* for guidance.

Christensen v. Harris County is the most recent decision reaffirming that there are two deference doctrines and that *Skidmore* deference applies in default of *Chevron*. Yet *Christensen* is hardly a bolt out of the blue. In addition to *ARAMCO* and *Bragdon*, other post-*Chevron* decisions also indicate that *Skidmore* remains a viable legal doctrine.[141] Even if this view was not completely settled before *Christensen*, there can be no dispute that it now represents the considered view of a majority of the Court.

C. WHY TWO DOCTRINES ARE BETTER THAN ONE

Of course, there is no point in having two doctrines if one will do. As we have seen, however, *Chevron* and *Skidmore* are distinctly different doctrines and appear to operate in different circumstances. Moreover, having a doctrine like *Skidmore* available as a fallback to the mandatory deference doctrine of *Chevron* serves a number of valuable functions.

The virtue of having two doctrines can be seen most clearly if one assumes (as *Christensen* appears to hold) that *Chevron* is confined to situations in which an agency is exercising delegated power to bind persons with the force of law. If *Chevron* deference is limited in this fashion, and no other deference doctrine exists, then there would be no basis for courts to draw upon the accumulated experience of agencies in resolving interpretational questions where the agency has not spoken with the force of law. It would be mandatory deference or nothing. This makes little sense. Interpreters in a variety of contexts draw upon the views of other interpretative bodies, especially when these views are well

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Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference. *See Chevron . . .*" *Id.* at 646 (citations omitted).

139. Section 504 of the Rehabilitation Act of 1973 authorizes the head of any Executive Branch agency, regardless of the agency's mission or expertise, to promulgate regulations to carry out that statute. *See* 29 U.S.C. § 794(a) (2000).

140. *Bragdon*, 524 U.S. at 642 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).

141. *See, e.g.*, Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 135-36, 137 n.9 (1997) (applying *Skidmore* deference to an interpretation of the Longshore and Harbor Workers' Compensation Act advanced by the Director of the Office of Workers' Compensation Programs, and suggesting that the Director's opinions might not be entitled to *Chevron* deference); Reno v. Koray, 515 U.S. 50, 61 (1995) (stating that Bureau of Prisons guidelines are akin to interpretative rules and are entitled to "some deference"); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (stating that the Secretary of Labor's interpretative rules and informal guidelines should not be given *Chevron* deference because they are not exercises of her delegated lawmaking authority, but are entitled to "some weight" under *Skidmore*).

reasoned, reflect some type of comparative advantage (such as technical expertise or greater familiarity with the legal background), have been relied upon, or have been implicitly ratified by the legislature.[142] These are precisely the types of factors that *Skidmore* indicated are relevant to whether courts should defer to agency interpretations.[143] Declaring *Chevron* the exclusive basis for deference would impoverish the process of statutory interpretation by preventing courts from considering these sources of authority, with no good justification.

A more subtle danger of having just one doctrine is that this would lead to over-application and hence dilution of the idea of mandatory deference. Much of the debate over the scope of the *Chevron* doctrine has been framed as a choice between *Chevron* deference and de novo review. If this were indeed the choice, then defining *Chevron*'s scope broadly would make sense for all the normative reasons articulated not only in *Chevron*, but *Skidmore* as well. But expanding the *Chevron* doctrine to cover most or all of the universe of situations in which deference is possible would constitute an over-application of the notion of mandatory deference, and as a byproduct of over-application, would likely lead to dilution of the practice of deferring to agency interpretations of law.

This danger arises because *Chevron* is strong medicine. The *Chevron* decision requires courts to accept any agency interpretation that is reasonable, even if it is not the interpretation that the court finds most plausible.[144] If, in an effort to draw upon the benefits of deference, the courts extend *Chevron* deference to every type of agency or to every agency interpretation no matter how informal, the courts would perceive themselves as forced to accept agency interpretations in inappropriate circumstances—such as where the interpretation is rendered without public input or after insufficient agency deliberation. This perception, in turn, would create pressure to develop escape valves, most likely in the form of an expanded conception of the judicial role at step one. Thus, if *Chevron* were the only basis for deference, the doctrine would tend to become very broad, but very riddled with exceptions.

Evidence of these transformative pressures can be found in Justice Scalia's judicial and extra-judicial writings on *Chevron*. Justice Scalia has consistently argued for the broadest possible conception of the scope of the *Chevron* doctrine, urging, for example, that it applies to agencies that lack the power to

142. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1312-13 (1994) (suggesting that judicial deference to agency interpretations should turn on an assessment of the "specialized competence" of the agency in resolving the particular question at issue); Merrill, *supra* note 3, at 1003-12 (discussing rationale for following precedent of other interpretative bodies).

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

144. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

render binding legal rulings[145] and to interpretations by agencies issued in opinion letters or in briefs.[146] This advocacy has helped cement his reputation as being "a fierce, sometimes strident defender of *Chevron*."[147] Yet, at the same time, he has adopted an extremely aggressive conception of the judicial role at step one,[148] and, to a lesser extent, step two.[149] Most strikingly, Justice Scalia has taken the position that it is appropriate for courts to take policy considerations into account as part of the ordinary tools of statutory construction deployed at step one.[150] The upshot of this position is that Justice Scalia invokes *Chevron* more consistently than other Justices, but also ends up deferring to agency views *less* than other Justices. In Justice Scalia's hands, *Chevron* has the paradoxical result of diluting, rather than strengthening, the practice of deference to executive understandings of law.[151]

Recognizing two deference doctrines significantly removes the pressure to expand and then to evade mandatory deference under *Chevron*. With two doctrines, the scope of *Chevron* deference can remain relatively narrow, because many of the benefits of deference can also be obtained under the *Skidmore* fallback deference doctrine. In addition, if the domain of *Chevron* remains compact and centered on those circumstances in which deference is most clearly appropriate, there will be significantly less pressure to devise escape valves from *Chevron* deference.

The more difficult question is whether *Skidmore* should be the sole rubric for deferring to agency interpretations, as Justice Breyer may have been suggesting

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145. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244, 259-60 (1991) (Scalia, J., concurring) (urging the EEOC is entitled to *Chevron* deference, even though it lacks legislative rulemaking power).

146. *See* Christensen v. Harris County, 529 U.S. 576, 589-91 (2000) (Scalia, J., concurring in part and concurring in judgment) (supporting *Chevron* deference for agency opinion letter).

147. Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1663 (1991).

148. *See, e.g.*, Regions Hosp. v. Shalala, 522 U.S. 448, 464-69 (1998) (Scalia, J., dissenting); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994); United States v. Burke, 504 U.S. 229, 242-46 (1992) (Scalia, J., concurring); Maislin Indus., U.S., v. Primary Steel, Inc., 497 U.S. 116, 136-38 (1990) (Scalia, J., concurring); *see also* Scalia, *supra* note 6, at 520-21 (arguing that the range of reasonable interpretations available to agency necessarily turns on how narrowly the statutory ambiguity is defined).

149. *See* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 918-919 (2001) (Scalia, J.) (reversing EPA interpretation of nonattainment provisions of the Clean Air Act under a *Chevron* step-two analysis); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 386-92 (1999) (Scalia, J.) (reversing, in part, FCC interpretation of the Telecommunications Act of 1996 under *Chevron* by relying on what appears to be a step-two analysis).

150. *See* Scalia, *supra* note 6, at 515.

151. *See* Merrill, *supra* note 8, at 366-73 (warning that textualist method favored by Justice Scalia may lead to less deference under *Chevron*); 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, 776 (1995) (arguing that Justice Scalia's textualist method of interpretation increases frequency of a court substituting its judgment for an agency's); Schapiro, *supra* note 114, at 681-82 (noting that Justice Scalia finds ambiguity less often at step one); *cf.* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 395 (1996) (arguing that Justice Scalia defers to agency interpretations about as often as other Justices).

in his *Christensen* dissent. One of us has argued in previous writing that in a head-to-head comparison between *Chevron*-style deference and *Skidmore*-style deference, the latter has many appealing characteristics.[152] But the *Skidmore* approach also has its drawbacks, especially if we take a systemic view of the problem of achieving legal coherence in the modern administrative state. There are a variety of functional reasons for preferring agencies to courts as front-line interpreters today, and these reasons are all advanced more effectively by a doctrine of mandatory deference than by a doctrine such as *Skidmore*.

One reason for preferring agency interpretations, which is alluded to by *Chevron* itself,[153] is that agencies are more politically accountable than are courts. Choosing between two or more permissible interpretations of a statute is a political act, involving the exercise of discretion in channeling the coercive powers of the state in one direction rather than another.[154] A robust deference doctrine therefore helps minimize the occasions in which courts are tempted to employ statutory interpretation to impose their policy preferences on a public to which they are not accountable.

A second reason for preferring agency interpretation, emphasized by Peter Strauss, is that this may be the only practical way today to achieve uniformity in federal law.[155] The problem is that federal statutory programs continue to proliferate, while the Supreme Court's capacity to resolve conflicts among the circuits about the meaning of federal law is limited and fixed.[156] Thus, if we insist that courts always have the final say about the meaning of federal statutes, the increasingly common result will be that federal law will come to mean different things in different circuits. Other than the Supreme Court, the only entities with the power to adopt nationally uniform interpretations are the federal administrative agencies. Consequently, if uniformity cannot be achieved by pushing interpretational conflicts up to the Supreme Court, it may be necessary to resolve these conflicts by pushing them down to the agency level.

A final problem, which has received less attention but may be of increasing importance, is that federal statutory programs have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them. The environmental laws are a primary illustration of this phenomenon,[157] but they

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152. *See* Merrill, *supra* note 3, at 1025-31.

153. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 864-65 (1984).

154. *See, e.g.*, Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985).

155. *See* Peter L. Strauss, *One-Hundred-Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-29 (1987).

156. The problem has grown considerably more acute since Strauss wrote his article. The Court in recent years has been deciding only about 75 argued cases per year as opposed to the 150 per year it was deciding in the mid-1980s.

157. *See, e.g.*, Sydney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 824-40.

are by no means unique. The extraordinary complexity of much of federal statutory law may mean that the goal of resolving statutory ambiguities in such a way as to further the purposes of the statute[158] is increasingly becoming a task beyond the grasp of generalist judges. The point is not just that these statutes have multiple or conflicting purposes, as emphasized by some public choice scholars.[159] There is the further problem that these purposes are often locked in a Byzantine web of interlocking provisions that can be fully comprehended only by a full-time legal expert. A strong practice of deference to agency interpretations may thus be necessary if we are to persist in seeking to make law internally coherent.

Each of these reasons for deferring to agency interpretations would be advanced to a degree by *Skidmore*-type deference; they would certainly be advanced further under a regime of *Skidmore* deference than under a regime of de novo judicial review of all questions of law. But there can be no doubt that these rationales would be furthered to an even greater degree by some kind of mandatory deference doctrine. *Skidmore*'s multi-factored standard clearly entails more judicial discretion than does *Chevron*'s two-step approach. The discretionary nature of the inquiry means that application of the *Skidmore* factors would largely be confined to the courts of appeals, rather than the Supreme Court. This would make it more difficult for the Supreme Court to reign in the courts of appeals, if they (or some of them) exhibit a tendency to interfere unduly with agency policymaking through aggressive statutory interpretation.[160] Application of the *Skidmore* factors would also make it more difficult to secure national uniformity in federal regulatory law. Furthermore, because *Skidmore* makes "persuasiveness" the ultimate touchstone for deference, it presupposes that judges can understand and assess the agency's reasons for adopting particular interpretations of complex regulatory statutes, which may be an increasingly questionable premise.

It is thus plausible that a regime that deploys a significant measure of *Chevron*-style deference is preferable to a regime confined solely to *Skidmore*-style deference. *Chevron* deference, especially if identified by relatively bright-line triggering conditions, can help insulate federal courts from political controversies, promote uniformity, and secure a greater measure of internal coherence in the interpretation of complex statutory regimes. If the sphere of mandatory deference is closely congruent with the set of circumstances in

158. This conception of statutory interpretation has been associated most prominently with the Legal Process School. *See, e.g.*, HART & SACKS, *supra* note 142, at 1124-25 ("The first task in the interpretation of any statute (or of any provision of a statute) is to determine what purpose ought to be attributed to it." (emphasis omitted)).

159. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). For an overview and criticism, see generally JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

160. *See* Anthony, *supra* note 10, at 14 ("[A] process of weighing multiple and perhaps incommensurable factors can yield unpredictable results and unsure doctrine.").

which such deference is clearly appropriate—a very big if—then mixing a rule of *Chevron* deference together with a residual standard of *Skidmore* deference may well be superior to a regime of pure *Skidmore* deference. The argument is similar to the case for having both per se rules and a rule of reason in antitrust law,[161] or having categorical rules and balancing tests under the First Amendment,[162] or indeed for having a mix of rules and standards in law more generally.[163] If courts have a high level of confidence that they have identified a set of circumstances in which certain outcomes are nearly always justified, then a rule is better than a standard, provided the rule identifies the appropriate circumstances in a consistent and predictable fashion.

In any event, with its decision in *Christensen*, the Court appears to have firmly embraced the notion that there are two deference doctrines, as defined by *Chevron* and *Skidmore*. This background principle has important implications for *Chevron*'s domain. Recognizing *Skidmore* as the default alternative to *Chevron* gives courts three choices rather than two in reviewing agency interpretations of statutes. Instead of *Chevron* deference and no deference, we have *Chevron* deference, *Skidmore* deference, and no deference. This larger menu of options allows *Chevron* to be given a relatively narrow domain, one that hopefully captures those circumstances where deference is most appropriate. *Skidmore* then steps into the breach and allows courts to give appropriate weight to agency interpretations outside the core area where *Chevron* holds sway. In those areas where independent judicial interpretation of the law is thought to be desirable—for example in interpreting statutes like the APA designed to constrain agency discretion—then obviously neither *Chevron* nor *Skidmore* would apply.

III. THE LEGAL FOUNDATION OF THE *CHEVRON* DOCTRINE

The second background principle concerns the source of law that gives rise to the *Chevron* doctrine. Three possibilities have been identified in the legal literature: (1) the Constitution; (2) federal common law; and (3) the Congress, in the form of a background presumption about congressional intent. Academic writers have argued for each of these three possibilities.[164] The Court, in recent descriptions of the *Chevron* doctrine, has rather consistently opted for the congressional intent theory.[165] Although the matter is not entirely conclusive, we agree that on balance this is the best rationalization for the doctrine. What this means is that *Chevron* has roughly the same status in law as a federal statute. *Skidmore*, in contrast, is grounded in federal common law; it has

161. *See* 7 PHILLIP E. AREEDA, ANTITRUST LAW 361-64 (1986).

162. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

163. *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 66-79 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989).

164. *See infra* notes 166-214 and accompanying text.

165. *See supra* note 16 and accompanying text.

roughly the same status in law as a judicially developed canon of interpretation. The recognition that *Chevron* is grounded in congressional intent rather than in some other source of law also has important and hitherto unappreciated implications for *Chevron*'s domain.

A. *CHEVRON* AND THE CONSTITUTION

Commentators have occasionally suggested that the *Chevron* doctrine rests on the constitutional principle of separation of powers. Indeed, Richard Pierce, the leading proponent of this view, has pronounced *Chevron* "one of the most important constitutional law decisions in history."[166]

The argument, as articulated by Pierce and Douglas Kmiec,[167] another proponent, is that *Chevron* represents a kind of second-best solution to the nondelegation doctrine. The first-best solution would be to require Congress to resolve all contested policy issues;[168] however, the courts have been unable to develop workable standards to enforce this understanding.[169] The second-best solution is to have executive agencies resolve contested policy issues that Congress does not itself resolve.

Pierce and Kmiec have offered slightly varying accounts to explain why having agencies rather than courts fill policy gaps indirectly promotes the principle of legislative supremacy. Pierce notes that if the judiciary swears off all involvement in policymaking, this will enhance the power of the executive, traditionally the legislature's principal rival. Recognizing that the failure to resolve policy disputes serves only to enhance its rival, Congress will have a strong incentive to resolve such disputes itself. As Pierce cleverly puts it, the nondelegation doctrine is a command-and-control regime that failed; *Chevron*

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166. Pierce, *supra* note 28, at 2227; *see also* Pierce, *supra* note 154, at 523-54 (advancing a similar argument).

167. *See* Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); *see also* Starr, *supra* note 6, at 308 (suggesting that *Chevron* advances separation-of-powers principles).

168. There have been recurring calls for greater judicial enforcement of the understanding that only Congress has the power to exercise discretionary legislative authority. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999); *cf.* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring). The Court has been unmoved by these arguments; indeed, it recently and unanimously overturned a decision of the D.C. Circuit that relied on the nondelegation doctrine to invalidate rules promulgated by the EPA modifying ambient air quality standards under the Clean Air Act. *See* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 911-14 (2001).

169. Other than two cases decided during the period of judicial resistance to the early New Deal, *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935), the Court has never struck down a federal statute on the ground that it impermissibly delegates powers that only Congress can exercise, *see* Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 913 (2001); Mistretta v. United States, 488 U.S. 361, 371-79 (1989) (rejecting nondelegation challenge to Federal Sentencing Commission); *id.* at 416 (Scalia, J., dissenting) (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be [delegated]"). *See generally* Clinton v. New York, 524 U.S. 417, 484-86 (1998) (Breyer, J., dissenting) (summarizing history of nondelegation doctrine).

serves as a market mechanism that puts a price on delegation, thereby deterring Congress from departing from the constitutional structure.[170]

Kmiec offers a different analysis, focusing on the fact that Congress has mechanisms for overseeing policymaking by executive agencies, but does not regularly engage in oversight of courts.[171] In addition, he suggests that Congress is more likely to overturn agency decisions it does not like than to overrule judicial decisions it finds objectionable.[172] For both reasons, a doctrine that steers contested policy disputes from courts to agencies will magnify congressional influence over policy, because Congress has more influence over agencies than courts.

Regardless of the precise mechanism through which the transfer of policymaking authority from courts to agencies enhances congressional control over policy, Pierce and Kmiec draw a similar conclusion: *Chevron* should be understood as a constitutionally based command to courts to abstain from making any decisions that turn on the resolution of policy disputes.[173] Courts of course should enforce clear expressions of congressional intent because doing so directly preserves the principle of legislative supremacy. But when the issue at hand turns on policy rather than law, the agency should have the final word. Such a rule serves indirectly to preserve the principle of legislative supremacy.

The thesis that the *Chevron* doctrine is grounded in the Constitution is ingenious. There is no question that the doctrine implicates extremely important questions about the allocation of power in the administrative state, and that the Court in *Chevron* "justified its commitment to deference in terms resonant with revealed constitutional truth."[174] Moreover, the thesis can explain two of the central mysteries surrounding the *Chevron* doctrine. The first is why *Chevron* deference is mandatory, whereas the traditional deference doctrine (which lives on in the form of *Skidmore* deference) is discretionary; obviously, if the Constitution compels deference, then courts have no choice but to defer. The second is how to square a doctrine of mandatory deference with the APA. The APA directs reviewing courts to decide "all relevant questions of law,"[175] and almost certainly was understood at the time of its enactment as requiring that courts decide questions of law de novo.[176] The theory that the Constitution compels *Chevron* thus also explains why the doctrine supersedes the APA, a mere statute.

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170. *See* Pierce, *supra* note 28, at 2232.

171. *See* Kmiec, *supra* note 167, at 282.

172. *See id.* at 281-82. Whether this generalization is accurate is open to question. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (presenting evidence that Congress monitors judicial statutory interpretation decisions closely and often overrides such decisions).

173. *See* Kmiec, *supra* note 167, at 277-78; Pierce, *supra* note 28, at 2236-37.

174. Farina, *supra* note 6, at 457.

175. 5 U.S.C. § 706 (2000).

176. *See* Duffy, *supra* note 6, at 193-96.

A number of difficulties with the constitutional argument render it less than persuasive, however. One problem, as Pierce acknowledges, is that although the *Chevron* doctrine may implicate important separation of powers concerns, the opinion "does not cite any provision of the Constitution."[177] The decision echoes Pierce and Kmiec in emphasizing that it is better to have contested policy disputes decided by executive agencies than by courts.[178] But *Chevron* does not suggest that the nondelegation doctrine or any other principle of separation of powers compels this outcome. The opinion instead argues that agencies typically have greater expertise about technical and specialized subjects than do courts,[179] and that agencies are indirectly accountable to the public through the elected President, whereas federal courts are not.[180] The former is a general policy argument. The latter contention has constitutional overtones, and certainly could be presented as a constitutional argument if, *pace* John Ely, we regard the Constitution as incorporating a meta-principle of promoting democratic decisionmaking.[181] But *Chevron* does not present the promotion of democratic accountability as a constitutional argument, nor do Pierce and Kmiec rely on any democratic meta-principle as the constitutional underpinning of *Chevron*.[182]

Second, it is debatable that the *Chevron* doctrine is designed to promote the principle of legislative supremacy. It may be equally plausible to claim that *Chevron* "drive[s] the last nail in the sporadically reopened casket of the nondelegation doctrine."[183] In a key passage, *Chevron* notes that delegation of legislative power is ubiquitous, and says "it matters not" whether such delegation comes about because of a deliberate decision by Congress to utilize agency expertise; because Congress failed to anticipate a problem; or because "Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency."[184] Thus, the Court appeared to renounce any effort to police attempts by Congress to shirk its constitutional responsibilities.[185]

Third, not only is it debatable whether *Chevron* was intended to promote nondelegation objectives, it is also doubtful that it does so in practice. As a number of commentators have argued, *Chevron* reduces the ability of the courts

177. Pierce, *supra* note 28, at 2227.

178. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 864-66 (1984).

179. *See id.* at 865. Kmiec puts little weight on the traditional expertise rationale. *See* Kmiec, *supra* note 167, at 283.

180. *See Chevron*, 467 U.S. at 865-66.

181. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

182. Whether the Constitution does in fact incorporate a pervasive principle favoring democratic decisionmaking is, of course, hotly disputed. *See, e.g.*, Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMMENT. 481 (1997).

183. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 834 (1991).

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

185. For the understanding that the nondelegation doctrine prohibits congressional "shirking" of political responsibility, see SCHOENBROD, *supra* note 168, at 9-12.

to monitor deviations by agencies from their legislative mandates, whether in the form of agency aggrandizement or agency abrogation.[186] If Congress describes the agency's mandate in a way that contains gaps or ambiguities (which is inevitable), and *Chevron* requires courts to defer to any reasonable interpretation of these gaps and ambiguities, then *Chevron* seems to offer an opening for agency aggrandizement (or abrogation), without any effective judicial check.[187] This feature of *Chevron* might be cured, in part, by recognizing an exception to *Chevron* for decisions that implicate the scope of an agency's jurisdiction. So far, however, the Court has not recognized such an exception, and *Chevron*'s chief judicial champion, Justice Scalia, argues adamantly that no such exception should exist.[188]

Fourth, the notion that it is constitutionally problematic (as opposed to simply undesirable) for courts to exercise discretion in resolving contested policy issues finds little support in our history and traditions. Courts are often forced to make policy, for example in rendering common-law decisions and in interpreting open-ended clauses of the Constitution. Moreover, as Justice Scalia has noted, policy analysis also plays a role in statutory interpretation.[189] Certainly, in areas of the law where courts serve as the primary enforcement agents, antitrust for example, courts draw upon notions of policy in resolving questions of statutory meaning and application.[190] This judicial role may be unfortunate, but it is well entrenched, and it is doubtful that the Court would ever say it is unconstitutional.

B. *CHEVRON* AS FEDERAL COMMON LAW

At the other extreme, one can argue that *Chevron* should be understood as a norm of judicial self-governance adopted by the Supreme Court in its supervi-

186. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757 (1991); Farina, *supra* note 6, at 487-88, 498; Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 990 (1999); Herz, *supra* note 6, at 189; Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1522-29 (2000); Sunstein, *supra* note 6, at 2097-2100.

187. Indeed, it was at one time suggested that the Constitution requires de novo judicial review of all questions of law in cases affecting private rights. *See* Crowell v. Benson, 285 U.S. 22, 45-46 (1932). If this conclusion is correct, then far from being compelled by the Constitution, *Chevron*'s mandatory deference doctrine would be unconstitutional.

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

189. *See* Scalia, *supra* note 6, at 515.

190. *See* State Oil Co. v. Khan, 522 U.S. 3, 20-21 (1997) (recognizing the "common law" nature of antitrust); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (same); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50-62 (1911) (same); N. Sec. Co. v. United States, 193 U.S. 197, 404 (1904) (Holmes, J., dissenting) (same). *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 44-45 (1985) (discussing antitrust laws as an example of "delegated lawmaking" by courts).

sory capacity over the lower courts. Under this view, *Chevron* is a rule of federal common law developed by courts based on their own authority.[191]

The common-law conception of *Chevron* has greater difficulty than the constitutional theory in explaining some of the features of the *Chevron* doctrine. If *Chevron* is a judicially developed norm, it is particularly difficult to explain why the doctrine supercedes the instruction in the APA that courts are to "decide all relevant questions of law."[192] It is generally assumed that common-law rules are subordinate to rules of positive legislation.[193] The only way to maneuver around this objection, consistent with the characterization of *Chevron* as a judge-made rule, is by analogizing *Chevron* to a canon of interpretation. Courts use canons in interpreting statutes all the time, and application of these canons can thus be said to be a constituent feature of what it means for courts to "decide questions of law."[194] If *Chevron* is just another canon of interpretation, then application of the *Chevron* doctrine is no more inconsistent with the exercise of independent judicial judgment than it is for courts to refer to rules of grammar or canons like the doctrine of lenity.

But the canon analogy runs into difficulties of its own. Most canons of interpretation are merely weak presumptions, and are not followed when some other canon seems more appropriate or other contextual evidence suggests that the canon yields an improper result.[195] Thus, if *Chevron* is just a canon, this makes it difficult to explain why *Chevron* deference is described as being mandatory. The canon analogy also raises a host of problems regarding how the doctrine relates to other canons. As Professor Sunstein has recounted, canons perform a variety of functions: some are syntactic, others offer generalizations about congressional intent, and still others reflect constitutional or other substan-

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191. *See* Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for* Chevron U.S.A. v. Natural Resources Defense Council, 1991 WIS. L. REV. 1275; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618-19 (1992); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative* Rules, 17 YALE J. ON REG. 327, 357-362 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) [hereinafter Sunstein, *Nondelegation Canons*]; White, *supra* note 28, at 746-49. Although Cass Sunstein has recognized that *Chevron* itself appears to rest on a presumption of congressional intent, *see* Sunstein, *supra* note 6, at 2084, he has consistently situated *Chevron* within a universe of canons of construction, and has argued that in many circumstances these canons trump *Chevron*. *See, e.g.*, CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 142-44 (1990) [hereinafter SUNSTEIN, AFTER THE RIGHTS REVOLUTION]; Sunstein, *supra* note 6, at 2105-19; Sunstein, *Nondelegation Canons*, *supra*, at 330-35. This perspective in effect treats *Chevron* as but one of many canons.

192. 5 U.S.C. § 706 (2000).

193. For a recent (and extreme) example of such an argument, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

194. Diver, *supra* note 3, at 569; *see* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21 (1985); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27-28 (1983).

195. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPETATION 283 (1994); SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 191, at 150-57.

tive values.[196] Determining how the "*Chevron* canon" fits into this mélange of canons would be a daunting task.[197]

These objections carry force, but are not necessarily fatal. Some judicially developed norms approach the level of mandatory duties. An example is the norm that lower courts are obliged strictly to follow Supreme Court precedents unless and until the Supreme Court overrules them.[198] This norm does not derive from the Constitution or any statute; the Court has developed the norm as part of its general supervisory authority over lower courts. Conceivably, *Chevron* could be regarded similarly as a norm grounded in the Court's supervisory authority that instructs lower courts to defer to reasonable agency interpretations of statutory ambiguities (although this would still leave unanswered why the Court speaks as if it too is bound by *Chevron*).

Still, there are additional problems with the conception of *Chevron* as a common-law norm. One is that the Court rarely speaks of *Chevron* if it were a judge-made norm. There are some exceptions. In one case, for example, the Court spoke of "*our practice* to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering,"[199] suggesting perhaps that *Chevron* is grounded in judicial practice rather than in some external source of law. But this sort of locution is rare. *Chevron* itself[200] and most post-*Chevron* decisions[201] describe the doctrine as flowing from the implicit instructions of Congress.

Second, conceiving of *Chevron* as a judge-made norm robs it of much of its normative force. Most strong canons have some constitutional underpinning (like the doctrine of lenity[202] or the federalism canons[203]), or reflect institutional

196. *See* Sunstein, AFTER THE RIGHTS REVOLUTION, *supra* note 191, at 150–57.

197. *Chevron* does not function the same way other canons do. Canons are judge-made rules of thumb designed to assist courts in determining the meaning of statutes. *Chevron* does not perform this task. Rather, its role is to assist the court in deciding *who* gets to attribute meaning to the statute once the court concludes that the meaning is not clear. *See* Duffy, *supra* note 6, at 197 (stating it is "impossible to consider *Chevron* a traditional canon of statutory construction, because the doctrine is not a rule to help the court determine a meaning"). Indeed, *Chevron* appears largely agnostic about how a court should go about ascertaining whether a statute has a clear or unambiguous meaning at step one, stating only that this inquiry will proceed using "traditional tools of statutory construction." Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.9 (1984); *see also* INS v. Cardozo-Fonseca, 480 U.S. 421, 446 (1987).

198. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997); Am. Trucking Ass'n v. Smith, 496 U.S. 167, 180 (1990); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam); Hutto v. Davis, 454 U.S. 370, 375 (1982).

199. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739 (1996) (emphasis added).

200. *See Chevron*, 467 U.S. at 843-44.

201. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 479 n.14 (1997); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991); INS v. Cardoza-Fonseca, 480 U.S. 421, 447-48 (1987).

202. *See, e.g.*, Huddleston v. United States, 415 U.S. 814, 830-31 (1974); United States v. Bass, 404 U.S. 336, 347-49 (1971); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

203. *See, e.g.*, Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 209-10 (1991) (O'Connor, J., dissenting); Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

imperatives (like the judge-made norm requiring lower courts to follow Supreme Court precedents until overruled).[204] *Chevron* lacks these sorts of justifications. Thus, rationalizing *Chevron* on the ground that it is a common-law norm regarding how courts should treat administrative interpretations undermines its status as a cornerstone of modern administrative law.

Third, the Court has already developed one common-law deference doctrine: the *Skidmore* doctrine. *Skidmore* is relatively easy to explain and justify in terms of norms of judicial self-governance. The factors that *Skidmore* holds as relevant in determining the persuasiveness of an administrative interpretation—the thoroughness of the agency's reasoning, the consistency with which the interpretation has been maintained, the degree of specialized expertise involved, and whether the interpretation has engendered reliance or has been ratified by Congress—are the same sorts of factors that courts point to when determining whether to follow a nonbinding precedent of a coordinate judicial system.[205] In contrast, as we have seen, *Chevron* is more difficult to situate within the traditions associated with judge-made norms of self-governance. It would be anomalous to have two common-law deference doctrines, particularly when it is difficult to explain one of these doctrines in such terms.

C. *CHEVRON* AS PRESUMED CONGRESSIONAL INTENT

The third possibility—and the one that finds the most support in the Court's own language—is that *Chevron* deference "arises out of background presumptions of congressional intent."[206] The *Chevron* decision itself rests on a finding of an "implicit" delegation from Congress.[207] Subsequent decisions have affirmed that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority."[208] Many commentators, including Justice Scalia writing in a law review article about the *Chevron* doctrine, have argued that the doctrine rests on a presumption about congressional intent.[209]

The congressional-intent theory can solve the puzzles about why *Chevron* deference is mandatory, and why it supersedes the APA—and it does so as well as the constitutional theory, and even more effectively than the common-law theory. Deference is mandatory because Congress has commanded it. The command is only implicit—presumed rather than express—but it is a command all the same. Courts must obey Congress when it speaks in a matter permitted by the Constitution. Hence, courts must follow the *Chevron* doctrine when

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204. *See supra* note 198 and accompanying text.

205. *See* Merrill, *supra* note 3, at 1007-10.

206. *Dunn*, 519 U.S. at 479 n.14.

207. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

208. Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990).

209. *See, e.g.*, Anthony, *supra* note 10, at 4; Herz, *supra* note 147, at 1666; Manning, *supra* note 87, at 623-27; Scalia, *supra* note 6, at 516-17; Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 DUKE L.J. 986, 993-96 (1987).

viewed as an implied command arising from the delegation of certain powers to administrative agencies.

Grounding *Chevron* in implied congressional intent also solves the conflict with the APA. *Chevron* deference is consistent with the APA's direction to courts to decide all relevant questions of law because virtually all the statutes that reflect an implicit delegation of interpretational authority either postdate the APA or have been reenacted since its passage. Congress's presumed intentions, as reflected in these later-in-time statutes, thus supersede the directive in the previously enacted APA.[210] In effect, every time Congress has made an implied delegation to an administrative agency, it has silently amended section 706 of the APA.

As with the constitutional theory and the common-law theory, the understanding that *Chevron* rests on congressional intent is not without its difficulties. The principal problem is the evidence supporting the presumption that Congress generally intends agencies to be the primary interpreters of statutory ambiguities is weak.[211] At the time *Chevron* was decided, there was no established background understanding that a decision by Congress to confer general rulemaking or adjudicatory authority on an agency would be deemed a decision to transfer primary interpretational authority to the agency. If anything, the understanding was to the contrary.[212] In addition, Congress has never acted to signal general disapproval of courts exercising independent review in matters of statutory interpretation.[213] Thus, *Chevron*'s attribution of a general intention to

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210. *See* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L. REV. 1, 23-26 (1996).

211. *See* Farina, *supra* note 6, at 470-76 (arguing that Congress just as plausibly intends that courts exercise independent judgment when it confers authority on agencies subject to APA-style judicial review); Strauss, *supra* note 155, at 1120 ("*Chevron* appears to reach this conclusion [that mandatory deference is required] as a general imperative of judicial behavior, unconnected to congressional wishes reflected in any given law."); Sunstein, *supra* note 6, at 2090-91 ("Congress's fear of agency bias or even abdication makes it most doubtful that the legislature has sought deference to the agency under all circumstances.").

212. This was true in at least two respects. First, pre-*Chevron* case law generally provided that agency interpretations embodied in an exercise of a general rulemaking power were entitled to less deference than interpretations rendered pursuant to a specific grant of rulemaking power. *See, e.g.*, United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos. v. United States, 452 U.S. 247, 253 (1981); Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979). Second, the pre-*Chevron* understanding was that general grants of rulemaking power in organic statutes generally conferred only power to issue procedural or interpretative rules, not legislative rules. *See* Anthony, *supra* note 10, at 45 & n.209; Frederic P. Lee, *Legislative and Interpretative Regulations*, 29 GEO. L.J. 1, 3 (1940). *Chevron*, in contrast, implicitly adopts the presumption that a general grant of rulemaking power is a delegation of substantive rulemaking power covering all gaps and ambiguities in the statute. *See also infra* note 222 (discussing judicial revisionism in the understanding of the FTC's general grant of rulemaking authority).

213. The principal legislative initiative prior to *Chevron* regarding the general practice of judicial deference to agency interpretations of law was the Bumpers Amendment, which sought to compel de novo judicial review of questions of law in all cases. *See* Farina, *supra* note 6, at 473-74. Although the effort failed, it drew strong bipartisan support, "hardly suggesting that Congress is in fact strongly committed to the deference doctrine." Merrill, *supra* note 3, at 995 n.111.

Congress that agencies be the front-line interpreters of regulatory statutes has been described by even its strongest defender as "fictional."[214]

In the end, however, we think that the congressional-intent theory is the best of the three explanations for the legal foundation of *Chevron* deference. Regardless of the plausibility of this theory as an original matter, it finds support in the *Chevron* decision itself, in the Court's subsequent decisions explaining *Chevron*, and in Justice Scalia's article. It is the most common view among commentators. Most importantly, as we explain in the next Part, the proposition that Congress intends to make agencies the primary interpreters of administrative statutes has a certain logical force, provided we conceive of the type of legislation that gives rise to *Chevron* deference in the correct manner. Thus, although the congressional-intent theory has its difficulties, these difficulties are on the whole probably less severe than those surrounding the other two theories.

The presumed-intent theory has another hidden virtue that other conceptions about *Chevron*'s underlying rationale (or mixed conceptions of its rationale) lack—it can generate relatively determinant answers to the many questions about the scope of the *Chevron* doctrine that have proliferated in recent years. This alone may provide a sufficient justification for regarding *Chevron* as resting on congressional command, rather than a constitutional or a common-law deference doctrine.

D. IMPLICATIONS FOR *CHEVRON*'S DOMAIN

The conclusion that the *Chevron* doctrine rests upon background presumptions of congressional intent has a number of highly significant implications for *Chevron*'s domain. We will highlight three major ramifications here, and consider others in subsequent parts of the Article.

First, if *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.[215] This suggests that *Chevron*'s domain should be relatively narrow, rather than broad, corresponding to delegations of power that single out agencies that have been given especially significant types of responsibility.

Second, if *Chevron* depends upon a presumption about congressional intent, then Congress has the power to turn off the *Chevron* doctrine when it wants. A presumption of congressional intent is obviously just that—a presumption—and

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214. Scalia, *supra* note 6, at 517.

215. *See* Anthony, *supra* note 10, at 4 (emphasizing that "[t]he threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts?"); Sunstein, *supra* note 6, at 2084 (describing *Chevron*'s "central point" to be that courts "*must defer to agency interpretations if and when Congress has told them to do so*" (emphasis added)).

must give way to evidence that Congress harbored a different intent. Thus, courts should consider evidence from the context of particular statutes that Congress has produced a different set of directions than those that follow from application of the *Chevron* doctrine. This implication too points toward a narrow rather than a broad domain for *Chevron*.

Third, if *Chevron* rests upon a presumption about congressional intent, then the *Chevron* doctrine has the full force and effect of a federal statute. All norms and canons grounded in common law must give way to the *Chevron* doctrine. *Chevron*'s roots in congressional intent may mean that *Chevron* has a relatively narrow domain. But within that domain it is a powerful and, of course, mandatory deference doctrine.

IV. THREE OPERATING PRINCIPLES

With these background principles in mind, we are now in a position to describe three operating principles that courts should follow in resolving questions about *Chevron*'s domain. These operating principles can be thought of as collectively comprising the threshold inquiry that courts should undertake in deciding whether to apply the *Chevron* doctrine or the *Skidmore* doctrine (or to answer statutory interpretation questions de novo). Somewhat fancifully, our operating principles can be described as the elements of "step zero" in the *Chevron* doctrine: the inquiry that courts should undertake before moving on to step one of *Chevron*, or turning instead to *Skidmore* (or resolving the issue de novo).

The three principles emerge as answers to three questions about *Chevron*, understood to be a doctrine of mandatory deference based on an implied delegation of interpretational power from Congress. First, what type of power must Congress confer upon an agency in order to trigger the presumption that Congress has impliedly delegated interpretational authority to the agency—that is, what must Congress do to "charge" an agency with administration of a statute? Second, what is the scope of the implied delegation once granted—that is, what kinds of agency interpretations are entitled to *Chevron* deference once an agency is appropriately charged? Lastly, what sorts of evidence will defeat the presumption of implied delegation of interpretational authority to an agency, and suggest instead that Congress has directed the court to apply *Skidmore* deference or to interpret the statute de novo?

The reason for distinguishing sharply between these three questions is to promote analytical clarity. Both the case law[216] and the commentary[217] tend to merge these questions into a single, undifferentiated inquiry. In most circum-

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216. *See* Christensen v. Harris County, 529 U.S. 576, 586-88 (2000); Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997).

217. Professor Anthony merges the first two inquiries into one. *See* Anthony, *supra* note 10, at 36-40. As he puts it, "[T]he key question in each case is whether Congress delegated the authority to issue interpretations with the force of law *in this format*." *Id.* at 42.

stances, doing so is probably harmless enough. Nevertheless, the analytical division between these three questions makes it easier to see where the points of disagreement lie in the more problematic cases, and allows us more readily to identify sensible answers.

A. IMPLIED DELEGATIONS OF INTERPRETATIONAL POWER

Although the Supreme Court has stated on multiple occasions that *Chevron* deference applies when an agency has been charged with administration of a statute by Congress,[218] no significant precedent exists at the Supreme Court level as to what this means. The lower court authority that exists suggests that the concept is opaque, and, if applied as a rule of decision, would produce as many disagreements as it resolves.[219] Analytically speaking, however, this is the place to start. We need to know what sort of powers Congress must confer on an agency to render it eligible for *Chevron* deference before we can proceed to consider what sorts of interpretations are entitled to *Chevron* deference and when the presumption of delegated interpretational power is overcome.

One thing is clear. We know that a decision by Congress to give an agency authority to promulgate legislative rules implementing a statute is enough to charge the agency with administration of the statute.[220] This is the conventional view of what happened in *Chevron* itself: the EPA adopted an interpretation of the statutory term "stationary source" in notice-and-comment rulemaking conducted pursuant to the agency's general grant of rulemaking power under the

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218. *See supra* note 9 and accompanying text.

219. Consider, for example, the provision in the Superfund Act authorizing the EPA to grant certain petitions for reimbursement by parties who engage in voluntary cleanups and authorizing parties who are denied reimbursement by the agency to bring a private right of action in federal district court seeking reimbursement. *See* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 106(b)(2), 42 U.S.C. § 9606(b)(2) (2000). The EPA probably can be said to "administer" CERLCA as a general matter, and would appear to "administer" the reimbursement provision, at least insofar as the statute delegates to EPA case-by-case adjudication authority to pass initially on petitions for reimbursement. *See* 42 U.S.C. § 9606(b)(2)(A). However, the EPA probably cannot be said to "administer" the private right of action. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("Congress established an enforcement scheme independent of the Executive and provided . . . direct recourse to federal court where . . . rights under the statute are violated."). The circuits have split over the question of whether in these circumstances the EPA is entitled to *Chevron* deference for legal interpretations made in the course of denying petitions for reimbursement at the agency level. *Compare* Dico, Inc. v. Diamond, 35 F.3d 348, 351-52 & n.4 (8th Cir. 1994) (declining to defer to EPA's decision), *with* Wagner Seed Co. v. Bush, 946 F.2d 918, 920-23 (D.C. Cir. 1991) (reaching opposite conclusion).

220. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 673 (1997) (stating that agency given authority "to prescribe legislative rules" is entitled to *Chevron* deference); Sykes v. Columbus & Greenville Ry., 117 F.3d 287, 294 (5th Cir. 1997) (citing statutory provision granting general rulemaking authority for the proposition that the named agency was charged with administering the statute in question); Williams v. Babbitt, 115 F.3d 657, 660 n.3 (9th Cir. 1997) (same); Visiting Nurse Ass'n of N. Shore v. Bullen, 93 F.3d 997, 999 n.1, 1002 (1st Cir. 1996) (same); Warren v. N.C. Dep't of Human Res., 65 F.3d 385, 391 (4th Cir. 1995) (same); *cf.* EEOC v. Arabian American Oil Co., 499 U.S. 244, 256-57 (1991) (concluding that an agency that lacks substantive rulemaking authority is not entitled to *Chevron* deference).

Clean Air Act.[221] The controversy over what it means for Congress to charge an agency with administration of a statute therefore centers on what other sorts of delegated powers, short of legislative rulemaking, also qualify as implied delegations of interpretational authority to agencies. For example, is an agency given the power to adjudicate complaints, but not to promulgate legislative rules (such as the Federal Trade Commission before 1973),[222] entitled to *Chevron* deference?[223] Or, is an agency that investigates and prosecutes offenses, but has neither rulemaking nor adjudicative power (such as the U.S. Attorneys' offices)[224] entitled to *Chevron* deference?

Given *Chevron*'s foundation in the concept of delegation of powers, we believe *Christensen* correctly identified the power to bind persons outside the agency with the "force of law" as the defining characteristic of agencies entitled

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221. *See* 42 U.S.C. § 7601(a)(1) (2000) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter . . . ."). Curiously, the Court in *Chevron* did not cite this authority. *See* Duffy, *supra* note 6, at 199-200. This general-rulemaking clause dates from the 1963 version of the Act. *See* Clean Air Act of 1963, Pub. L. No. 88-206 § 8(a), 77 Stat. 392, 400. The 1963 Act was rather toothless, and in fact the legislative history casts doubt on whether Congress intended the general rulemaking provision to be a grant of substantive rulemaking power, as opposed to a grant to make only procedural and interpretative rules. *See* Conference Rep. No. 88-1003 (1963), *reprinted in* 1963 U.S.C.C.A.N. 1285 (noting that conference committee dropped the modifier "procedural" before "regulations" because this was thought to be "too restrictive," but not stating that substantive as opposed to interpretative rules were contemplated). By the time *Chevron* was decided in 1984, however, the understanding was that general rulemaking provisions are presumed to confer authority to issue substantive rules. *See* Nat'l Ass'n of Pharm. Mfrs. v. FDA, 637 F.2d 877, 880 (2d Cir. 1981) (general rulemaking clause in Food and Drug Act authorizes substantive rules); Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 678 (D.C. Cir. 1973) (general rulemaking clause in Federal Trade Commission Act authorizes substantive rules). The *Chevron* Court appeared to assume without inquiry that the stationary source rule was a valid substantive rule.

222. Section 6(g) of the Federal Trade Commission Act of 1914 conferred power on the Federal Trade Commission (FTC) "to make rules and regulations for the purpose of carrying out the provisions of this subchapter." Federal Trade Commission Act § 6(g), 15 U.S.C. § 46(g) (2000). For decades, this was understood to mean that the FTC had only the power to issue procedural and interpretative rules. Indeed, in 1964, a thorough analysis of the FTC sponsored by the Administrative Conference of the United States concluded without qualification that section 6(g) did not give the FTC the power to promulgate legislative rules. *See* Carl A. Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 457 (1964). Several years later, however, in an opinion by Judge Skelly Wright, the D.C. Circuit ruled that everyone had been wrong about this and that the FTC in fact did have the authority under section 6(g) to promulgate substantive legislative rules. *See* Nat'l Petroleum Refiners Ass'n, 482 F.2d at 678. Congress ratified this decision, after a fashion, by adopting legislation in 1975 conferring explicit legislative rulemaking power on the FTC subject to certain substantive and procedural limitations. *See* 15 U.S.C. § 57a (2000).

223. *See* City of Boston v. United States Dep't of Hous. & Urban Dev., 898 F.2d 828, 831 & n.5 (1st Cir. 1990) (concluding that an agency is charged with administering a statute if Congress has conferred the authority to enforce statutory provisions through case-by-case adjudication); *see also* Wagner Seed Co. v. Bush, 946 F.2d 918, 920 (D.C. Cir. 1991) (concluding that agency vested with authority to evaluate petitions for reimbursement under CERCLA was "the administering agency for purposes of *Chevron*").

224. *Cf.* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489-92 (1996) (urging the extension of *Chevron* to interpretations of federal criminal law by federal prosecutors, but acknowledging that this is contrary to existing judicial authority).

to *Chevron* deference.[225] There are several mutually reinforcing reasons for selecting the power to act with the force of law as the key variable in determining which agencies are entitled to statutory deference.

First, asking whether the agency has authority to act with the force of law focuses on a question that will always have a yes-or-no answer and serves as a meaningful basis for distinguishing the agencies charged with administration of a statute from run-of-the-mill executive units. All administrative agencies have certain powers inherent in their status as units of the executive branch; all executive officers have inherent authority to interpret the law,[226] and all executive units have authority to bind subordinate employees to instructions issued by the head of the office (and perhaps by the President as well).[227] Given these inherent powers, virtually all units in the executive branch will at least occasionally render official interpretations of statutes, whether by issuing interpretative rules, agency manuals, or other informal guidelines.[228] Thus, focusing on authority to render these sorts of interpretations, which bind subordinate employees but not persons outside the agency, does not distinguish agencies "charged with administration" of a statute from virtually any other administrative entity.

In contrast, Congress must always explicitly confer the authority to bind actors outside the agency with the force of law.[229] Congress only gives a subset

225. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *see also* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (stating that an interpretation is not entitled to *Chevron* deference when it "does not appear to be embodied in any regulation or similar *binding policy pronouncement* to which such deference would apply" (emphasis added)).

226. *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905 (1990); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1262, 1279-88 (1996); Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993).

227. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593-99 (1994). This understanding is reflected in the "housekeeping statute," originally enacted in 1789, which provides that "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301 (2000). *See* Chrysler Corp. v. Brown, 441 U.S. 281, 308-12 (1979) (describing history of "housekeeping statute" and holding that it does not authorize legislative regulations).

228. *See* United States v. Haggar Apparel Co., 526 U.S. 380, 388 (1999) ("It is of course possible, even common, for agencies to give instructions or legal opinions to their officers and employees in one form or another, without intending to bind the public.").

229. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) ("The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes."); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983) ("[T]he universe of each agency is limited by the legislative specifications contained in its organic act."); Noah, *supra* note 186, at 1498 ("As creatures of statutes lacking any independent constitutional pedigree, agencies cannot invoke some kind of inherent authority to justify

of agencies such power and usually does so only with respect to a limited set of issues. Moreover, in every case, the source of authority to make legally binding decisions must be a duly enacted statute of Congress. The understanding that agencies can bind persons with the force of law only pursuant to an express delegation of authority from Congress has its roots, of course, in the nondelegation doctrine.[230] Any doubt about the matter is resolved by section 558(b) of the APA, which provides, "A sanction may not be imposed or a substantive rule or order issued *except within jurisdiction delegated to the agency and as authorized by law.*"[231] Thus, by inquiring whether Congress has conferred power on an agency to act with the force of law, we ask a question that readily differentiates some agencies (and some issues resolved by agencies) from other agencies.

Second, there is a certain logic to making the power to act with the force of law the linchpin in determining whether an agency has been delegated implied authority to act as the primary interpreter of law. John Duffy has recently advanced one version of the logical argument. According to Duffy, if Congress delegates power to an agency to bind persons outside the agency with the force of law (say through legislative rulemaking) and simultaneously leaves a gap or ambiguity in the very statute that confers this delegated power, then the agency in effect has been delegated authority to fill the gap or resolve the ambiguity by rule.[232] If the agency fills the gap with such a rule, then under the APA, the only questions for the court are whether the rule violates the statute, and if not, whether it is arbitrary, capricious, or an abuse of discretion.[233] These two

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actions that find no warrant in their enabling legislation."). For example, it was common ground among the Justices in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), that it was necessary to identify a specific source of delegated authority for the FCC's rules implementing the local competition provisions of the Telecommunications Act of 1996. *See id.* at 377-78 (Scalia, J.); *id.* at 407-08 (Thomas, J., concurring in part and dissenting in part).

230. As an original matter, it was thought that only Congress had the power to make binding legislative rules and only Article III courts had the power to render binding adjudications. *See* Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 275 (1856) (judicial power may be exercised only by Article III courts); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825) (stating that Congress may not delegate "powers which are strictly and exclusively legislative"). These understandings have been compromised in the face of necessity, *see, e.g.*, Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 222-24 (1989) (pipeline-safety user fees); Mistretta v. United States, 488 U.S. 361, 371-74 (1989) (sentencing guidelines), but the understanding remains that the power to make legislative rules or binding adjudications may be exercised by units outside the legislative or judicial branch only pursuant to an express delegation from Congress. This understanding also undergirds the Court's decisions refusing to permit Congress to delegate legislative authority to a single House of Congress, a committee of Congress, or a legislative agency. *See, e.g.*, Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991); INS v. Chadha, 462 U.S. 919 (1983). Such self-delegations would permit units or agents of Congress to bind the public with the force of law without complying with the constitutional requirements for the enactment of statutes. *See* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1992 SUP. CT. REV. 225, 235-36, 252.

231. 5 U.S.C. § 558(b) (2000) (emphasis added); *see* Duffy, *supra* note 6, at 198.

232. *See* Duffy, *supra* note 6, at 199-202.

233. *See* 5 U.S.C. § 706 (2000).

inquiries closely track *Chevron*'s step one and step two. Hence, the *Chevron* doctrine can be derived deductively from the nature of legislative rulemaking and the judicial review provisions of the APA.

The problem with this argument is that it can be countered by an opposite and equally logical contention: If Congress enacts a law like the APA that instructs courts to resolve all questions of law, and Congress subsequently confers power on courts to review agency action under a particular statute, then Congress has in effect delegated power *to the courts* to fill gaps and ambiguities under the statute. Thus, the opposite of the *Chevron* doctrine—de novo review of all questions of law—can also be derived deductively from the judicial review provisions of the APA and other statutes. As a matter of *a priori* argumentation from the structure of the APA and particular grants of authority to agencies, it is not clear that this syllogism is any less compelling than the first.

A more nuanced version of the argument linking *Chevron* and the power to bind persons outside that agency with the force of law may, however, overcome this objection. This version adds to the mix the further observation that Congress cannot expect that all agency action, or even most of it, actually will be subject to judicial review in any particular instance.[234] Thus, if Congress enacts a statute that contains a gap or ambiguity, and simultaneously confers power on an agency to implement the statute in a way that is legally binding, then Congress should expect that the agency view as to the meaning of the gap or ambiguity will often become the law of the land. One cannot attribute the same expectation to Congress when it provides that the agency's rules will be subject to judicial review under the APA. It may be that no court will ever be asked to review one of the agency's rules or, if asked, will ever reach the merits.

Thus, the combination of enacting an ambiguous statute and conferring powers on an agency to make legally binding decisions under that statute represents a choice to give the agency the primary power of interpretation, at least in many if not most cases. Because the agency will necessarily become the primary interpreter by default if no judicial review takes place, it probably makes sense, if only in terms of preserving uniformity, to make the agency the primary interpreter in all cases.

Third, asking whether the agency has authority to act with the force of law appears to generate outcomes that largely coincide with judicial intuitions about what sorts of agencies are entitled to *Chevron* deference. All courts agree that agencies with grants of legislative rulemaking authority are entitled to *Chevron* deference,[235] and most courts have concluded that agencies that have authority to render binding adjudications are entitled to *Chevron* deference.[236] On the

234. For example, less than one percent of Social Security disability cases that are eligible for judicial review are in fact appealed to a court. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE 186 (1983).

235. *See supra* note 220 and accompanying text.

236. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (discussed *supra* at notes 37-49 and accompanying text); Nat. R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 419 (1992) (interpretation reflected in order of Interstate Commerce Commission entitled to *Chevron* deference);

other hand, courts have shown no inclination to extend *Chevron* deference to interpretations of law implicit in the decisions of prosecutors to indict or to bring an enforcement action.[237] This intuition seems to make little sense when we look to the policy justifications for strong deference, such as drawing upon agency expertise and assuring uniformity in interpretation of law.[238] But once it is recognized that *Chevron* deference is based on a congressional delegation of authority to act with the force of law, the exclusion of prosecutorial agencies is readily explainable. Prosecutors interpret the law, but their interpretations lack binding force on persons outside the agency. Thus, prosecutors do not satisfy the basic precondition for the exercise of *Chevron* deference.

One possible objection to making a congressional delegation to act with the force of law the sine qua non for *Chevron* deference is that this is formalistic and overbroad. What we are really looking for, the objection might run, is evidence that Congress has bestowed discretionary authority on an agency *to make policy*. The power to act with the force of law is not necessarily coterminous with the exercise of discretionary policymaking authority. This is especially true with respect to agencies given the power to enter legally binding orders through adjudication.[239] Sometimes agencies use adjudication to make

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Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 322 (2d Cir. 2000) ("An agency's interpretation of an ambiguous statute it is charged with administering is entitled to *Chevron* deference not only when the agency interprets through rule-making, but also when it interprets through adjudication."); Ward v. Booker, 202 F.3d 1249, 1254 (10th Cir. 2000) ("An agency's interpretation of a statute by formal regulation or adjudication is entitled to [*Chevron*] deference . . . ."); Mid-Am. Care Found. v. NLRB, 148 F.3d 638, 642 (6th Cir. 1998) ("[W]hen an agency adopts a particular interpretation of a statute through an adjudication . . ., that interpretation normally would be entitled to *Chevron* deference."); Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044, 1047 (5th Cir. 1998) ("Even the adjudicative interpretations of policy-making agencies are entitled to *Chevron* deference."); Massachusetts v. FDIC, 102 F.3d 615, 621 (1st Cir. 1996) ("An agency's formal interpretation, through a rulemaking or adjudication, of a statute it administers, is accorded what has come to be known as *Chevron* deference."); U.S. Mosaic Tile Co. v. NLRB, 935 F.2d 1249, 1255 n.6 (11th Cir. 1991) ("Although the agency action in *Chevron* involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications . . . ."); Midtec Paper Corp. v. United States, 857 F.2d 1487, 1497 (D.C. Cir. 1988) (holding that *Chevron* applies to agency adjudications, and explicitly rejecting the contrary argument). *But see* Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1016-20 (7th Cir. 1998) (suggesting *Chevron* applies to agency adjudications only where the adjudication entails the exercise of policymaking discretion).

237. *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."); United States v. McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Statutes That Create Criminal Liability*, 58 U. PITT L. REV. 1 (1996); *cf.* Kahan, *supra* note 224, at 490. In contrast, the Court has deferred to an interpretation implicit in enforcement action in the context of *Seminole Rock* deference. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 156-67 (1991).

238. *See* Kahan, *supra* note 224, at 493-506 (arguing that the policies underlying *Chevron* support giving deference to prosecutor's legal interpretations).

239. Requiring that courts give mandatory deference to interpretations announced in adjudications is also open to objection on the ground that it inverts the position of the courts in a system of separation of powers. The Supreme Court does not defer to legal interpretations of courts of appeals, at least in the strong *Chevron* sense, nor do courts of appeals defer to legal interpretations by district courts. Yet, if we extend *Chevron* to legal interpretations announced by agencies in adjudications, in effect a judicial

policy, but sometimes adjudication simply entails finding the facts and applying them to settled principles of law, with the agency acting in effect as a "neutral arbiter," rather than as a policymaker.[240] Thus, the objection might continue, we should not select a single on-off criterion like the power to act with the force of law as the signpost that *Chevron* deference is appropriate; instead, we should seek to determine on a case-by-case basis whether the agency has in fact been charged by Congress "to play a policymaking role."[241]

This objection, however, identifies a problem that has its own built-in correction mechanism. If an agency with the power to make binding adjudications declines to use that power to implement discretionary policy choices, then its adjudications will provide no occasion for aggrieved parties to seek judicial review of the agency's interpretation of law. The adjudicating agency that acts only as a "neutral arbiter" (if there is such an entity) will presumably have its orders challenged only on the grounds that it erred in finding the facts or in applying the law to the facts. It will not be challenged for its interpretation of law if it does not do any interpreting. Hence, the fact that such an agency is theoretically entitled to *Chevron* deference even though it does not engage in discretionary policymaking is not a problem.

Moreover, seeking to determine on a case-by-case basis (or even on an agency-by-agency basis) whether an agency is using adjudication to make discretionary policy would be cumbersome and unworkable. *Chevron*'s two-step process is itself designed to distinguish between interpretational questions that have only one possible answer (which are resolved at step one because the agency has no discretion) and interpretational questions that entail choice and hence implicate discretionary policy (which are resolved at step two). Thus, it would seem more parsimonious to apply *Chevron* to all agency interpretations rendered in adjudications that carry the force of law and let the *Chevron* test itself identify the policy-laden interpretations, rather than to apply some independent screen that seeks to sort cases (or agencies) into policymaking and non-policymaking in deciding whether to apply *Chevron* at all. Further, it is unclear how such a distinction would be implemented. The central insight of *Chevron* is

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tribunal that has been given the power to review an agency tribunal is required to defer to reasonable interpretations adopted by the tribunal subject to review. Notwithstanding this oddity, however, it is well established that agencies can make policy through adjudication, *see generally* SEC v. Chenery Corp., 332 U.S. 194 (1947), and the Court has held in at least one context that interpretations adopted in adjudication are entitled to *Chevron* deference, *see* INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (discussed *supra* notes 37-49). We thus accept that when agencies are empowered to act with the force of law through adjudication, the interpretations they adopt are eligible for *Chevron* deference. As we emphasize later, only self-executing adjudications are legally binding in the sense required to bestow *Chevron* defererence. *See infra* notes 275-85 and accompanying text.

240. *Martin*, 499 U.S. at 155 (internal quotation marks omitted) (quoting Cuyahoga Valley Ry. Co. v. United Transp. Union, 474 U.S. 3, 7 (1985)).

241. *Id.* at 154; *see* Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1018-20 (7th Cir. 1998) (suggesting that whether an interpretation adopted in an adjudication is entitled to *Chevron* deference should be determined through a case-by-case inquiry into whether the agency is seeking to make policy).

that any question of statutory interpretation where the answer is not compelled by traditional tools of interpretation entails the exercise of discretionary policy. If this perception is accepted, then it is unclear where would we drawn the line between interpretations that entail only "minor" policy choices as opposed to those that entail "major" policy choices, or however the distinction is to be drawn.[242] All cases that cannot be resolved at step one entail policy choices, large or small, and *Chevron* instructs that the agency is the preferred interpreter in resolving all such questions.

Another possible objection to the force-of-law criterion is that it is circular. Agency action has the force of law, the objection would run, only if it is given mandatory deference by the courts. Thus, one cannot identify those agencies entitled to mandatory deference by asking which agencies have authority to bind with the force of law.[243]

This objection, however, confuses two things that are different: whether the agency action has the force of law, and what standard of review courts apply in determining whether the agency has acted in accordance with law. Agency action has the force of law when, of its own force and effect, it commands certain behavior and subjects parties to penalties or sanctions if they violate this command.[244] Agency action either will or will not have such an effect independent of whether it is subject to judicial review, or if it is subject to review, independent of what standard of review applies.

The independence of legal effect and the standard of review can be seen most clearly in the case of a party who fails to file a timely petition for review challenging an agency directive and then violates the directive. In these circumstances, if the directive has the force of law, the party who violates it can be

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242. For example, in *Bob Evans Farms, Inc.*, the court concluded that *Chevron* did not apply to the question whether the method used by employees in protesting an employer's action should be considered in determining whether their dismissal was an unfair labor practice, because this question did not implicate policymaking authority. 163 F.3d at 1019-20. But it is hard to see why this does not entail a policy choice: Disregarding the method of protest will dramatically increase the number of incidents that are characterized as unfair labor practices relative to an interpretation that factors into the inquiry the method of protest. The real hangup in *Bob Evans Farms* was that the NLRB's interpretation was contrary to circuit precedent. *See* 163 F.3d at 1020. The court should have resolved the matter by applying the transition rules for pre-*Chevron* precedent, *see infra* notes 394-411 and accompanying text, rather than by crafting an exception for interpretations that do not sufficiently implicate discretionary policy.

243. Professor Anthony's article on the scope of *Chevron* can be read as advancing this criticism. *See* Anthony, *supra* note 10, at 39. He says that to speak of an agency having been given the authority to act with the force of law

> means simply that the courts may not subject the interpretations to independent judicial review, but rather must accept them subject only to limited review for reasonableness and consistency with the statute. Thus, an interpretation carrying the force of law gets only limited review because by definition it is covered by delegation that contemplates only limited review.

Id.

244. *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974); William T. Mayton, *A Concept of a Rule and the "Substantial Impact" Test in Rulemaking*, 33 EMORY L. REV. 889, 904-05 & n.42 (1984).

subject to immediate legal sanctions. The only issue on judicial review from the imposition of the sanctions will be whether the directive was violated; the time for petitioning for review of the directive having passed, the legal foundation of the directive will be immune from challenge by the party. The directive thus has a direct coercive impact, without regard to whether it has been reviewed with deference by a court (or indeed whether it has been reviewed at all).

The independence of binding legal effect and the standard of review can also be seen by considering that the standard of review does not alter the legal consequences of agency action that survives the process of judicial review. Judicial review acts as a sieve or screen that negates some agency action. The standard of review affects the odds that any particular agency decision will be declared unlawful by a reviewing court. Whatever the standard of review, however, agency action that does not survive the review process is not legally binding—it is unlawful. Conversely, agency action that survives the review process may be legally binding or may not be legally binding, depending upon whether Congress has delegated power to the agency to issue directives that result in the imposition of legal sanctions if they are violated. The standard of review determines how much agency action survives the review process, but is irrelevant to whether the action that does survive is legally binding. There is thus no circularity in making the standard of review turn in part on whether the agency action under review is legally binding.

What then are the powers that Congress must confer upon an agency in order to make it eligible for *Chevron* deference? Basically, Congress must give an agency the power either to promulgate legally binding rules or to render legally binding adjudications. In both contexts, Congress has charged the agency with the authority to act with the force of law on persons outside the agency. Moreover, in determining whether Congress has delegated power to issue legally binding rules or orders, the key question is whether the statute provides that a violation of the agency directive can result in the immediate imposition of sanctions unless the rule or order is set aside on review or stayed pending review.

If Congress has not given an agency the power to act with the force of law, either through the issuance of binding rules or adjudicatory orders, but has given the agency something less (like the authority to investigate or institute enforcement actions), then no presumption should arise that Congress intended the agency to have the primary authority to interpret law. Such an agency should never be eligible for *Chevron* deference, but should be at most entitled to *Skidmore* deference.

B. THE SCOPE OF DELEGATED INTERPRETATIVE POWER

Having determined what sorts of powers Congress must delegate to an agency in order to give rise to a presumption that Congress has assigned primary interpretational authority to the agency, the next step is to establish the scope of this impliedly delegated power. Justice Scalia argued in *Christensen*

that the relevant inquiry should be whether the agency has rendered an "authoritative" interpretation of the statute.[245] He suggested that an authoritative interpretation is one that "represent[s] the official position of the expert agency."[246]

Requiring no more than an authoritative interpretation, however, decouples the scope of *Chevron* deference from the act of Congress that gives rise to the implication of delegated interpretative authority in the first place. Under the authoritative interpretation test, once the court determines that an agency is entitled to *Chevron* deference (for example, because it has been given the power to promulgate legislative rules), then it does not matter whether the agency issues its interpretation in a legislative rule. The agency can just as easily announce the interpretation in an interpretative rule, a policy manual, a press conference held by the agency head, or a brief filed in court. As long as the interpretation represents the agency's official view, it gets the same *Chevron* deference as if rendered in a legislative rule.

This sweeping conception of the scope of *Chevron* authority, however, is not faithful to the logic of implied delegation on which *Chevron* rests. Delegations of power to bind persons outside the agency with the force of law are strictly limited in accordance with their terms: "The grant of such a power is never to be implied."[247] This understanding follows both from the nondelegation doctrine, as well as from the APA's prohibition against agencies exercising governmental power "except within jurisdiction delegated to the agency and as authorized by law."[248]

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245. Christensen v. Harris County, 529 U.S. 576, 590 (2000) (Scalia, J., concurring in part and concurring in the judgment) ("[W]e have accorded *Chevron* deference not only to agency regulations, but to authoritative agency positions set forth in a variety of other formats."). Other courts have used similar phraseology, but without suggesting that "authoritative" constitutes any kind of legal standard or term of art. For example, in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), in reiterating its refusal to defer to agency views expressed for the first time in litigation, the Court questioned "[t]he deliberateness of such positions, if not indeed their authoritativeness." *Id.* at 741; *see also* Strickland v. Comm'r, Me. Dep't of Human Servs., 96 F.3d 542, 547 (1st Cir. 1996) ("During the second stage of a *Chevron* analysis, an inquiring court accords substantial respect to authoritative agency interpretations."); *In re* Appletree Mkts., Inc., 19 F.3d 969, 973 (5th Cir. 1994) ("[I]f there is no authoritative statement from the Executive, the courts 'fill the [statutory] gap' by attempting to divine congressional intent."); Batanic v. INS, 12 F.3d 662, 665 (7th Cir. 1993) ("[A]ccording to *Chevron*, it is an agency's exercise of its expert judgment—in a sufficiently authoritative manner—that warrants our deference."); *cf.* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997) ("A speech of a mid-level official of an agency, however, is not the sort of 'fair and considered judgment' that can be thought of as an authoritative departmental position." (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)); Fed. Labor Relations Auth. v. United States Dep't of the Treasury, 884 F.2d 1446, 1455-56 (D.C. Cir. 1989) (concluding that the agency head's explicit adoption, in a letter to an Assistant Attorney General, of the interpretation advanced in an amicus brief rendered the brief "an authoritative expression of the agency's views," and applying *Chevron* deference).

246. *Christensen*, 529 U.S. at 591 n.* (Scalia, J., concurring in part and concurring in the judgment).

247. ICC v. Cincinatti, New Orleans, & Tex. Pac. Ry. Co., 167 U.S. 479, 494 (1897) (holding that an agency cannot be given the power to promulgate legislative rules—that is, legally binding rules of future effect—by implication); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 302-08 (1979) (holding that authority to promulgate legislative rules cannot be derived by implication).

248. 5 U.S.C. § 558(b) (2000).

Given that the primary grant of power to bind persons with the force of law cannot be expanded beyond its express terms, it follows that the derivative grant, the implied power to exercise interpretational authority, should also not be subject to expansion beyond the same boundary. Consequently, unless Congress has expressly directed to the contrary, *Chevron* deference should be limited to legislative rules and adjudications that result in binding and self-executing orders.[249]

This is admittedly a more restrictive view of the scope of *Chevron* deference than some of the Court's decisions reflect. The Court has in a handful of cases suggested that agency action more informal than legislative rulemaking or binding adjudication may be entitled to *Chevron* deference.[250] However, the Court has not explained in any of these decisions why, consistent with the underlying logic of delegation, an agency should be entitled to mandatory deference when it interprets a statute in a procedural format that does not otherwise have the force of law. If *Chevron* deference rests on an implied delegation of interpretational power, then this deference should not extend beyond agency action undertaken pursuant to the underlying grant of governmental power that gives rise to the implied delegation.[251]

Confining the scope of *Chevron* deference to legislative rules and binding adjudications is also supported by powerful process considerations. Perhaps

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249. This is essentially the position adopted by the Administrative Conference of the United States in 1989. *See* ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS, RECOMMENDATIONS AND REPORTS 31-33 (1989). We would note, however, that the final recommendation adopted by the Administrative Conference speaks in terms of the procedures followed by the agency, as opposed to whether the agency action has the force of law. *See id.* at 33. Professor Anthony's report that gave rise to the recommendation, in contrast, was framed in terms of whether the agency acted in a format that is legally binding. *See* Anthony, *supra* note 10. As should be clear from our discussion, we believe that Professor Anthony's formulation is the better one.

250. *See* Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 452, 453 (1999) (Medicare Provider Reimbursement Manual); Nationsbank (N.C.), N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (letter of Comptroller of Currency); Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647-48 (1990) (informal adjudication); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (NLRB adjudication); Young v. Cmty. Nutrition Inst., 476 U.S. 974, 978-79 (1986) (no-action decision of Food and Drug Administration).

251. We do not agree with the claim that *Chevron* deference should be limited to legislative rulemaking because interpretations given mandatory deference by courts are functionally equivalent to legislative rules. *See* Duffy, *supra* note 6, at 199-203. For the reasons set forth *supra* Part IV.A, whether agency action has the force of law and whether courts give such action mandatory deference are different questions. The difference is parallel to the distinction in constitutional law between whether the legislature has passed a statute and whether the courts should defer to the legislature's judgment that a statute it has passed is constitutional. The constitutional law analogue of *Chevron* is the doctrine articulated over a century ago by James Bradley Thayer: that Congress, when it legislates, also is given primary authority to determine whether its legislation is constitutional. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); *see also* Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296 (1993) (drawing an analogy between Thayer's standard of constitutional review and *Chevron*'s standard of administrative review). The fact that Thayer's thesis is highly controversial confirms that there can be no simple equation between the power to act with the force of law and the standard of review that courts apply in reviewing such legal enactments.

most importantly, such a limitation generally preserves the right of public participation in the development of administrative interpretations of statutes. Both legislative rulemaking and binding adjudication are subject to procedural rules that ensure a significant degree of public participation before an agency may take final action. Less formal modes of interpretation lack these protections.[252]

With respect to legislative rules, agencies must, subject to certain exceptions,[253] comply with the notice-and-comment provisions of section 553 of the APA.[254] As interpreted by the courts, these provisions require public notice of a proposed agency interpretation, an opportunity to file written comments on the interpretation, and a reasoned response by the agency to any comments that raise material concerns.[255] Public input is thus ensured, and the agency must be responsive to that input to avoid a judicial remand.

Similarly, formal adjudications must comply with the hearing requirements of sections 556 and 557 of the APA,[256] and all adjudications that affect liberty or property interests must comport with the requirements of due process.[257] These procedural requirements mean that the parties immediately affected have an opportunity to submit some kind of brief addressing a proposed agency interpretation before it becomes final. Judicially developed norms of reasoned decisionmaking will compel the decisionmaker to provide an explanation for the agency's resolution of the issue.[258] Again, public input is ensured, and the agency has a substantial incentive to be responsive to that input.

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252. *Christensen* alludes to this process concern. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (quoting Reno v. Koray, 515 U.S. 50, 61 (1995), for the proposition that informal agency interpretations are "not 'subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment,' " and hence are "entitled only to 'some deference' "). Indeed, by describing the two types of agency action entitled to *Chevron* deference as "*notice and comment* rulemaking" and "*formal* adjudication," *id.* (emphasis added), *Christensen* can be read as incorporating procedural limitations on the types of action that trigger *Chevron* deference that this Article rejects as unduly restrictive. *See infra* notes 331-37 (discussing informal adjudication); *infra* notes 357-60 (discussing procedural rules); *infra* notes 361-66 (discussing interim rules).

253. Procedural rules are exempt from the notice-and-comment requirements, as are substantive rules if the agency finds for good cause that notice and comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A)-(B) (2000).

254. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) ("Certainly regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act."); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (Fortas, J.); *id.* at 775-76 (Douglas, J., dissenting); *id.* at 780-81 (Harlan, J., dissenting) (holding NLRB lacked authority to promulgate a legislative rule using adjudicatory procedures).

255. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 48-49, 56-57 (1983). *See generally* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 51-63 (1984) (reviewing judicial interpretation of rulemaking procedures); 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 298-399 (3d ed. 1994) (same).

256. *See* 5 U.S.C. §§ 556-557 (2000) (providing, among other things, for presentation of oral and documentary evidence, cross examination, a transcript of testimony, findings of fact and conclusions of law, and a general prohibition on ex parte communications).

257. *See* Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972).

258. *See, e.g.*, Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 35 (1st Cir. 1989).

To be sure, in the case of adjudication, participation by the general public is not guaranteed as it is in the case of notice-and-comment rulemaking. The APA does not require Federal Register notice of impending adjudications and the issues they present,[259] nor do third parties possess any general right of intervention.[260] Nevertheless, informal sources of information often alert interested persons to the existence of cases that raise important legal issues, and such persons may be able to voice their concerns through permissive intervention or by filing amicus briefs. At a minimum, at least one interested party will exist to act as the virtual representative of other similarly situated persons.

In contrast, other modes of announcing agency interpretations do not offer equivalent opportunities for public participation. Interpretative rules and policy statements are specifically exempt from the notice-and-comment requirements of section 553.[261] Policy manuals and enforcement guidelines are similarly assumed to fall within these exemptions.[262] Opinion letters, no-action letters, and the like do not provide the same structured opportunities for participation that formal adjudication does. Similarly, agency press conferences, speeches by agency executives, and appellate or amicus briefs filed in the agency's name typically offer no established forum for public input before they are released.

Confining the scope of *Chevron* deference to legislative rulemaking and binding adjudication thus provides important assurance that interpretations entitled to mandatory deference will be open to public criticism before they are rendered, and agencies will have incentives to be responsive to these criticisms. This correspondence between the delegation to act with the force of law and the existence of rights of public participation is not accidental. General norms of democratic governance and traditions of due process both stress the importance of affording affected persons the right to be heard before they are subjected to the coercive power of the state.[263] Hence, it is not surprising that the provisions of the APA, supplemented by due process decisions, afford rights of public participation when agencies are given the power to bind persons with the force of law. Limiting the scope of *Chevron* deference to interpretations rendered in legislative rules and in binding adjudications preserves this strong connection

259. *Compare* 5 U.S.C. § 553(b) (2000) (governing notice-and-comment rulemaking and requiring publication of advance notice of such proceedings in the Federal Register), *with* 5 U.S.C. §§ 556-557 (2000) (governing adjudications, yet lacking similar notice requirements).

260. *See* Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 77 (D.C. Cir. 1999); AMAN & MAYTON, *supra* note 255, at 215-19.

261. *See* 5 U.S.C. § 553(b), (d) (2000).

262. *See, e.g.*, Pelissero v. Thompson, 170 F.3d 442, 447 (4th Cir. 1999) (Bureau of Prisons program statement); Truckers United for Safety v. Fed. Highway Admin., 139 F.3d 934, 939 (D.C. Cir. 1998) (regulatory guidance); Creighton Omaha Reg'l Health Care Corp. v. Bowen, 822 F.2d 785 (8th Cir. 1997) (Medicare provider reimbursement manuals).

263. *See generally* Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 127-29 (1994); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-90 (1975).

between the exercise of coercive governmental power and the right to be heard.[264]

A related process concern is the danger of evasion of the procedural protections of the APA if *Chevron* deference is extended beyond legislative rules and binding adjudications. Agencies are often frustrated by the time and resources required to comply with notice-and-comment hearing procedures and the rules of binding adjudication.[265] Yet the APA and due process law demand compliance with these procedures before agencies can take action that binds the public with the force of law.

Expansion of the scope of the *Chevron* doctrine to include interpretations rendered in informal formats creates an avenue for evasion of these requirements. *Chevron*'s doctrine of mandatory deference represents a powerful transfer of authority from courts to agencies. The question is whether the agency should be able to exercise this authority without going through the cumbersome procedures associated with legislative rulemaking (or binding adjudication). One can, of course, question whether the costs associated with legislative rulemaking and binding adjudication are too high given limited agency resources.[266] But sanctioning an evasion of section 553 or of adjudicatory hearing requirements via an expanded *Chevron* doctrine is not the proper solution. If the current procedural matrix is too elaborate, then it should be relaxed across the board, or modified in accordance with some criterion that more sensibly rations scarce agency resources. The strategy of evading these requirements via an expanded *Chevron* results in complete elimination of procedural protections on a hit-or-miss basis, corresponding to no coherent design.

Indeed, limiting agency interpretations entitled to *Chevron* deference to those rendered in an agency action that has the force of law would lend a salutary quid pro quo feature to the *Chevron* doctrine. If an agency is willing to treat an interpretation as legally binding, and in so doing to subject itself to the procedural requirements associated with action that is legally binding, then the agency would be "rewarded" by having its interpretation given mandatory deference by the courts. In contrast, if an agency is unwilling to be bound by an interpretation, or is unwilling to subject itself to rulemaking or adjudication procedures in promulgating an interpretation, then the agency would not receive the mandatory deference reward. Instead, the agency would be required to "earn" deference for its interpretation under the *Skidmore* doctrine.[267] This quid

264. Indeed, the legislative history of the APA reveals the understanding that " 'interpretative' rules—as merely interpretations of statutory provisions—are subject to plenary judicial review." S. DOC. No. 79-248, at 18 (1946). As Justice Scalia has observed, the assumption that interpretative rules would be subject to de novo review presumably explains why the APA exempts interpretative rules from the notice-and-comment provisions of section 553. *See* Scalia, *supra* note 6, at 514.

265. *See generally* Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

266. *See, e.g.*, Richard J. Pierce, Jr., *Seven Ways to Deossify the Agency Rulemaking Process*, 47 ADMIN. L. REV. 59, 65-66 (1995).

267. *See supra* note 127 and accompanying text.

pro quo feature would provide a significant incentive for agencies to use rulemaking and binding adjudication as vehicles for promulgating important interpretations of law, and conversely a disincentive to making policy in more informal ways.[268]

C. OVERCOMING THE PRESUMPTION OF DELEGATION

Because the delegation of interpretational authority recognized in *Chevron* is only an implied delegation, it can be overcome by evidence that Congress in fact intends a different allocation of interpretational authority. The question then becomes, how strong is the presumption of implied delegation of interpretational authority reflected in the *Chevron* doctrine and when can it be overcome? Presumptions come in a variety of gradations. A presumption that reflects a "super-strong" clear statement rule can be overcome only by "unambiguous statutory text targeted at the specific problem."[269] A presumption that reflects an ordinary clear statement rule, in contrast, requires only a finding that Congress clearly intended to disaffirm the presumption based on the totality of the statutory materials.[270] At their weakest, presumptions are nothing more than tie breakers, and can be overcome by the slightest preponderance of the evidence to the contrary.[271]

In trying to position the *Chevron* doctrine within this range of presumptions, we would emphasize two general points developed in Parts II and III. First, as developed in Part III, the *Chevron* doctrine is best understood as a rule of presumed congressional intent. Thus, Congress should have the final say in determining whether *Chevron* deference applies in any given context. This points toward the desirability of conceiving of *Chevron* as a relatively weak presumption. Strong presumptions usually reflect extraneous values (such as constitutional considerations) that often distort legislative intent. Weaker presumptions function as off-the-rack approximations of legislative intent, and give way more readily when there is evidence specific to the case at hand that legislative intent is to the contrary.

Second, as emphasized in Part II, the *Skidmore* doctrine is always available as a fallback to the *Chevron* doctrine, and *Skidmore* partially accommodates many

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268. *See* Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 563 (7th Cir. 1999) (declining to extend *Chevron* deference to interpretation set forth in agency amicus brief where agency had declined to exercise rulemaking power "to address a fundamental issue on which the brief takes a radical stance").

269. Eskridge & Frickey, *supra* note 191, at 612.

270. *See* Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991) (judicial presumption that Congress intends ordinary rules of preclusion to apply under federal statute can be overcome "when a statutory purpose to the contrary is evident"); *cf.* Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (stating that judicial review is presumed to be available, which means that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review").

271. *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 890-91 (1992) (noting that default standard for proof of propositions of law is whether an interpretation is better than any available alternative).

of the policy reasons for wanting courts to defer to agency interpretations of law, such as drawing upon agency expertise and assuring uniformity in the law. This too suggests that *Chevron* should operate as a relatively weak presumption.

Cutting against these considerations are the systemic reasons outlined earlier in support of having a rule of mandatory deference such as *Chevron* as opposed to relying solely on common-law deference of the *Skidmore* variety:[272] the desirability of insulating courts from political disputes, the need for a strong rule of deference to assure national uniformity in the interpretation of federal statutory programs, and the wisdom of relying on agency interpretations when the law gets to be too complex for judges to understand it. A broad doctrine of mandatory deference is necessary to realize these objectives.

There is no clearly correct way to resolve these incommensurate considerations. We suggest that *Chevron* be regarded as a middle range presumption, a presumption in the nature of an ordinary clear-statement rule. Such a presumption can be overcome if, based on the totality of the statutory materials, a court finds that Congress clearly intended a contrary allocation of interpretational authority. In practice, therefore, any decision by Congress to give an agency power to act with the force of law would give rise to the presumption that the agency is to exercise primary interpretational authority when it takes such action. However, this presumption would be subject to rebuttal in particular circumstances based upon showing, considering the overall text, structure, and history of the statutory enactment, that Congress clearly intended the courts to perform this role.

V. ANSWERING THE FOURTEEN UNRESOLVED QUESTIONS

Once we unpack the logic that underlies *Chevron*'s doctrine of implied delegation of interpretational authority, answering the fourteen unresolved questions about *Chevron*'s domain identified in Part I.B. becomes, in most instances, relatively easy. With respect to many questions, the answer in principle is self-evident, although of course issues will always exist at the margins about how the principle should be applied. With respect to other questions, some further elaboration of *Chevron*'s implicit logic of delegation is required. In all instances, however, the path the inquiry should follow is much more clearly illuminated.

A. WHEN DOES CONGRESS DELEGATE PRIMARY INTERPRETATIONAL POWER TO AN AGENCY?

We have identified five unresolved questions that concern the threshold question of what it means for an agency to be charged with administering a statute by Congress.

272. *See supra* notes 153-59 and accompanying text.

1. Does *Chevron* Apply to an Agency That Lacks Legislative Rulemaking Authority?

The Supreme Court has never ruled that *Chevron* deference applies when Congress has not delegated to an agency the power to implement a statute through legislative rulemaking.[273] Under the operating principles outlined in Part IV, an agency is charged with administering a statute only if it has been given delegated power to bind persons outside the agency with the force of law. The primary type of delegation that satisfies this criterion is, of course, a grant of legislative rulemaking authority, but agencies can also act with the force of law on persons outside the agency by rendering binding adjudications. Thus, the answer to the first question is that an agency need not have the power to issue legislative rules to be eligible for *Chevron* deference, provided it has been given the power to render binding adjudications.[274]

While this answer is clear in principle, further consideration must be given to what it means to have the power to render a binding adjudication. Historically, some agencies, most prominently the Federal Trade Commission (FTC)[275] and

273. The lower courts are divided on the question of whether agencies lacking legislative rulemaking authority are entitled to *Chevron* deference. *See supra* note 83. The Court's own decisions send conflicting signals. In *INS v. Aguirre-Aguirre*, the Court held that interpretations adopted in adjudications by the Attorney General's delegatee are entitled to *Chevron* deference, and made no inquiry into whether the Attorney General has legislative rulemaking power. *See* 526 U.S. 415, 424-25 (1999); *see also supra* notes 37-49 and accompanying text. Although the Attorney General does have such power, *see supra* note 46, the Court's indifference to this fact may suggest that it does not perceive such a grant of authority to be a necessary condition of *Chevron* deference. On the other hand, in *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991), the Court considered the implications of a split-enforcement administrative regime for the question of which agency gets deference for its interpretation of agency regulations—so-called *Seminole Rock* deference. *See supra* note 87. One agency (the Secretary of Labor) was given the power to promulgate legislative rules. Another agency (the Occupational Safety and Health Review Commission) was given the power to resolve adjudications arising under the statute and rules. The Court held that, in these circumstances, the agency given the rulemaking power was impliedly given the authority to interpret the rules, and the agency given only the power to adjudicate had no such implied authority. *See Martin*, 499 U.S. at 154-55. This analysis might suggest that an agency that enjoys only the power to adjudicate is not eligible for *Chevron* deference. The more recent decision in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) (discussed *supra* notes 29-36), in which the Court held that assignment of the power to a court to determine facts de novo is not inconsistent with giving the primary power of interpretation to the agency with rulemaking authority, might also support this inference.

274. *But see* discussion *supra* note 239 (noting the tension between this understanding and the established understanding of the position of courts under a system of separation of powers).

275. Under the original Federal Trade Commission Act of 1914, the FTC was authorized to issue orders requiring companies to cease and desist using unfair methods of competition. *See* FTC Act, Pub. L. No. 63-203, § 5, 38 Stat. 717 (1914). The Act provided no civil or criminal penalties for violation of a FTC order. *See id.* If voluntary compliance did not result, the FTC was authorized to apply to a federal circuit court of appeals for the enforcement of the order. *See id.* "Thus, if the order was affirmed, any punishment was for contempt of the court's order, and not strictly for violation of the Commission's order." 5 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 3707 (Earl W. Kintner ed. 1982). In 1973, Congress amended the Act to give the FTC the power to impose penalties for the violation of its orders that have become final. *See* Pub. L. No. 93-153 § 408(c)-(d), 87 Stat. 576, 591-92 (1973) (codified as amended at 15 U.S.C. § 45(*l*)-(m) (2000)). With this change, FTC orders became self-enforcing.

the National Labor Relations Board (NLRB),[276] have been empowered to hear complaints and issue cease-and-desist orders, but their orders are not immediately binding upon the parties. Rather, the agency must file an action in court seeking judicial enforcement of the order before a party can be subject to sanction or held in contempt for violation of the agency's order.[277] Because the order is not legally binding of its own force, the factual and legal basis of the order is subject to judicial review if and when the agency brings an enforcement action, even if the party subject to the order has not otherwise filed a petition for review of the order.[278]

Other agencies, however, are given the authority to issue orders that are self-executing.[279] Violation of a final self-executing agency order, in contrast to an FTC- or NLRB-type order, can result in immediate imposition of sanctions or can form the basis of a judicial enforcement action.[280] Moreover, if an agency brings an action to enforce a self-executing order, and the time for judicial review has passed, the legal and factual basis for the agency's decision is *not* subject to collateral attack in the enforcement action.[281]

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276. *See* 29 U.S.C. § 160(c), (e) (2000). The National Labor Relations Act was in this respect patterned after the original Federal Trade Commission Act. *See* STAFF OF SENATE COMM. ON EDUC. AND LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONGRESS) AND S. 1958 (74TH CONGRESS) 34 (Comm. Print 1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1361 (1949).

277. Patrick Hardin and his co-authors have written:

> An order by the National Labor Relations Board is not self-executing. Although phrased primarily in the form of a "cease-and-desist" order, it merely prescribes what action is necessary to redress and remedy conduct found to be unlawful. If the party or parties against whom a Board order has been issued refuse to obey, the Board has no inherent authority to enforce the order. To secure enforcement, it must apply to an appropriate U.S. court of appeals. Until the order is enforced by the appeals court, the respondent does not incur any penalty for continued disobedience.

2 PATRICK HARDIN ET AL., THE DEVELOPING LABOR LAW 1877 (3d ed. 1992) (citations omitted).

278. *See* 29 U.S.C. § 160(e) (2000) (NLRB order subject to judicial review when Board brings enforcement action).

279. For example, orders of the Social Security Administration, the federal agency that renders the largest number of adjudications, are self-executing. *See* 42 U.S.C. § 405(h) (2000) ("The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing."); *see also* 20 C.F.R. § 404.955 (2000) (determination of administrative law judge is binding on all parties to a hearing unless appealed to Appeals Council); *id.* § 404.981 (decision of Appeals Council is binding on all parties unless appealed to federal district court).

280. *See, e.g.*, 15 U.S.C. § 717s(a) (2000) (authorizing FERC to seek judicial enforcement of orders issued pursuant to the Natural Gas Act that it believes a party has failed to follow); 47 U.S.C. § 401(b) (2000) (authorizing Federal Communications Commission, acting through the Attorney General, to obtain judicial order enforcing any final order of the Commission that any party has failed or refused to obey).

281. *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991) (principles of collateral estoppel and res judicata presumptively apply "to those determinations of administrative bodies that have attained finality"); United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose."); *see also* ICC v. Locomotive Eng'rs, 482 U.S.

The basic criterion for identifying agencies entitled to *Chevron* deference—whether an agency can act with the force of law—suggests that only agencies with the power to render self-executing orders should be eligible for *Chevron* deference. Agency orders that must be brought to courts for enforcement are by their very nature not legally binding on parties outside the agency. Indeed, it is likely that one reason Congress denies certain agencies the power to issue self-executing orders is that it does not trust such agencies to wield coercive governmental power against private parties in the absence of judicial oversight. In other words, the decision by Congress to require agencies to seek judicial enforcement of their orders is a legitimate basis for drawing the conclusion that Congress did not intend to delegate primary interpretational authority to such an agency.

This conclusion means that the NRLB is not eligible for *Chevron* deference for the legal positions it adopts through adjudication, because NLRB orders are not self-executing.[282] This result is somewhat counterintuitive, in that the Court has often stressed that the NLRB exercises significant policy discretion,[283] and has said that the interpretations the NLRB adopts through adjudication are entitled to significant deference.[284] Thus, it appears that the force-of-law criterion is arguably underinclusive in this particular instance. But any formal test will be either over- or under-inclusive or both. Amending the force-of-law criterion to permit the extension of *Chevron* deference to the NLRB adjudications would undermine the capacity of the test to act in other contexts as a clear signaling device for congressional intent. In any event, there is no doubt that NLRB adjudications are entitled to common-law deference of the *Skidmore* variety, which is arguably a more appropriate standard in any event, given that the Board has often been criticized for inconsistency in its policymaking through adjudication.[285]

270, 278 (1987) (decision of ICC not to reopen a decision is not subject to judicial review absent new evidence or changed circumstances once time for appeal of underlying order has passed); Califano v. Sanders, 430 U.S. 99, 111 (1977) (APA does not permit review of decision declining to reopen final benefits determination that was not appealed within the time limits for direct appeal).

282. Although the Court has occasionally spoken as if *Chevron* applies to NLRB adjudications, it has never squarely so held. *See supra* note 23.

283. *See, e.g.*, NLRB v. Gullett Ginn Co., 340 U.S. 361 (1951); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

284. *See, e.g.*, NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786-87 (1990); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 499 (1978); NLRB v. Hearst Publ'ns, 322 U.S. 111, 131 (1944). *See generally* Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53 (reviewing rationale for judicial deference to NLRB decisions).

285. The Supreme Court has indicated that the Board is entitled to *Chevron* deference when it proceeds by rulemaking. *See* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 614 (1991) (*Chevron* applies to NLRB substantive rule); NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123 (1987) (applying *Chevron* to NLRB procedural rule). It appears, however, that the Board has rarely engaged in substantive rulemaking. *See* HARDIN ET AL., *supra* note 277, at 738 (Supp. 1999) (reporting that NLRB has issued only one substantive rule in its history). In the Board's early days, this reluctance no doubt stemmed from doubts as to whether the Board's general grant of rulemaking authority, *see* 29 U.S.C. § 156 (2000), included the power to adopt substantive rules.

2. Does *Chevron* Apply to an Agency That Lacks Both Legislative Rulemaking Authority and the Power to Render Binding Adjudications?

The answer is again clear in principle: An agency that lacks both rulemaking power and the power to render binding adjudications is not entitled to *Chevron* deference.[286] Of course, *Chevron* is a doctrine about when it is appropriate to recognize an *implied* delegation of primary interpretation authority. Congress is always free expressly to delegate authority to an agency to interpret in other formats, for example through the issuance of interpretative rules. However, we are aware of only one reported decision involving a statute in which an agency arguably has been given power to make binding interpretations of law through less formal means than rulemaking or adjudication.[287] Thus, this circumstance is rare.

3. Does *Chevron* Apply to Statutes That Are Enforced by Multiple Agencies?

Chevron issues usually arise where a single agency is responsible for developing and enforcing policy under a statute.[288] In this context, only one agency can be said to be "charged with administering" the statute. On the other hand, several important statutes apply to all or virtually all administrative agencies, including the APA, the Freedom of Information Act (FOIA), and the National Environmental Policy Act (NEPA). It is universally agreed that no single agency with enforcement power has been charged with administration of these statutes, and hence that *Chevron* does not apply.[289]

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286. The Court has thus correctly concluded that the EEOC is not entitled to *Chevron* deference, at least with respect to issues arising under the Civil Rights Act, because it lacks both substantive rulemaking authority, *see supra* note 133 and accompanying text, and the power to render self-executing adjudicatory orders. The EEOC can attempt to resolve complaints by encouraging conciliation. *See* 42 U.S.C. § 2000e-5(b) (2000). However, the EEOC has no authority to enter orders adjudicating such complaints; rather, its only authority if conciliation fails is either to file a civil action in its own name, to refer the matter to the Attorney General for the filing of a civil action, or to issue a "right to sue" letter permitting the aggrieved party to file a civil action. *See id.* § 2000e-5(f).

287. The Truth in Lending Act, as amended, includes a defense to liability where a party has acted in "conformity with any interpretation or approval by an official or employee of the Federal Reserve System duty authorized by the [Federal Reserve] Board to issue such interpretations or approvals." 15 U.S.C. § 1640(f) (2000). Although not formally expressed as a delegation, as the Supreme Court has observed, the creation of the defense "signals an unmistakable congressional decision to treat administrative rulemaking *and interpretation* under TILA as authoritative." Ford Credit Co. v. Mulhollin, 444 U.S. 555, 567-68 (1980) (emphasis added).

288. *See* Martin v. Occupational Health & Safety Review Comm'n, 499 U.S. 144, 151 (1991) (describing the typical unitary agency).

289. *See* Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (stating that *Chevron* does not apply to agency interpretations of the APA); DuBois v. United States Dep't of Agric., 102 F.3d 1273, 1285 n.15 (1st Cir. 1996) (noting that *Chevron* does not apply to an agency's interpretation of NEPA because "we are not reviewing agency interpretations of the statute that it was directed to enforce"); Prof'l Reactor Operator Soc'y v. NRC, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (stating that *Chevron* does not apply to agency interpretations of the APA); Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730 (D.C. Cir. 1987) (holding that agency not entitled to deference when it interprets FOIA). One executive unit—the Council on Environmental Quality (CEQ)—is charged with overseeing compliance with NEPA, and has issued regulations spelling out the

Occasionally, however, more unusual schemes are encountered, in which Congress gives more than one agency responsibility for implementation of a statute. The Occupational Safety and Health Act calls upon one agency to promulgate regulations, and another agency to resolve adjudications. At least two other statutes have similar schemes: the Mine Safety and Health Act and the Longshore and Harbor Workers' Compensation Act.[290] Under other statutes, including the antitrust laws,[291] the Americans with Disabilities Act,[292] and the Rehabilitation Act,[293] enforcement responsibility is shared by more than one agency.

Lower courts have held that divided enforcement is inconsistent with *Chevron* deference, because the contrary would mean that "either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all."[294] Under the criteria articulated in Part IV, however, there is no necessary reason why more than one agency cannot qualify for *Chevron* deference under a statute. Conceivably, Congress could give two or more agencies the power to issue binding regulations or adjudications. If so, then each of the agencies given the appropriate powers should be entitled to mandatory deference.

This conclusion does not undermine the settled understanding that *Chevron* does not apply to agency interpretations of general statutes such as the APA, FOIA, and NEPA.[295] No agency has been delegated authority to implement

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procedures for agencies to follow in complying with the statute. *See* 40 C.F.R. §§ 1500-1508 (2000). As to whether these regulations are entitled to *Chevron* deference, see *infra* note 296.

290. *See* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (discussing Mine Safety Act). Similarly, Congress has given rulemaking power under the Longshore and Harbor Workers' Compensation Act (LHWCA) to the Secretary of Labor (who has delegated it to the Director of the Office of Workmen's Compensation Programs (OWCP)), and has conferred responsibility for adjudications on the Department of Labor's Benefits Review Board. *See* Director, OWCP v. O'Keefe, 545 F.2d 337, 342-43 (3d Cir. 1976) (detailing the administrative scheme of the LHWCA).

291. For example, the Department of Justice and the Federal Trade Commission share enforcement authority under section 7 of the Clayton Act. *See* 15 U.S.C. § 18 (2000). Similarly, the same two agencies both have the power to investigate possible antitrust violations, the Department of Justice under 15 U.S.C. §§ 1311-1314 (2000), and the Federal Trade Commission under 15 U.S.C. §§ 46(a)-(b), 49 (2000).

292. The Americans with Disabilities Act delegates to the Equal Opportunity Employment Commission responsibility for issuing regulations to implement Title I of that statute (governing private sector discrimination), *see* 42 U.S.C. § 12,116 (2000); it authorizes the Attorney General to issue regulations under Title II of the statute (which applies to public sector employment), *see id.* § 12,134(a); and it authorizes the Secretary of Transportation to issue regulations pertaining to the transportation provisions of Title II and III, *see id.* § 12,149(a).

293. *See supra* note 139.

294. Rapaport v. Office of Thrift Supervision, 59 F.3d 212, 216-17 (D.C. Cir. 1995); *see* Wachtel v. Office of Thrift Supervision, 982 F.2d 581, 585 (D.C. Cir. 1993). Suggestions have been made that perhaps a different result is appropriate if the affected agencies have agreed on an allocation of lead agency status or if all agencies agree upon the applicable meaning. *See Rapaport*, 59 F.3d at 221-22 (Rogers, J., concurring in part and concurring in the judgment). *See generally* Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35 (1991).

295. *See supra* note 289 and accompanying text.

these statutes through binding rulemaking or adjudication; hence, the precondition for *Chevron* deference has not been established.[296]

Moreover, making the power to act with the force of law the triggering condition for *Chevron* deference is not a recipe for chaos. With any statutory scheme in which uniformity is truly important, Congress is unlikely to delegate legislative authority to two or more agencies, at least not without also specifying some formula for apportionment of that authority among the affected agencies. For example, one agency may be given authority to adopt regulations implementing some sections of a statute, while another agency is given authority to adopt regulations implementing other sections.[297] In other circumstances, two or more agencies with enforcement authority may reach an internal agreement over the appropriate division of their responsibilities for different types of issues.[298]

With respect to split enforcement regimes such as that under the Occupational Safety and Health Act, the situation is somewhat more complex. Here, one agency (the Secretary of Labor) is given the power to promulgate rules, and another agency (the Occupational Safety and Health Review Commission) is given the power to render binding adjudications.[299] Under the suggested analysis, *both* agencies are entitled to *Chevron* deference when they render interpretations of the statute. This will not necessarily produce internal inconsistency or conflict, however. When the Secretary of Labor promulgates a regulation, the regulation is binding on the Commission. Thus, the Secretary's regulations, to the extent they fill statutory gaps, will prevail over any contrary interpretation of the statute by the Commission.[300] The Commission's interpretations will be entitled to mandatory deference only insofar as they address issues that fall into statutory gaps not covered by any regulation. As to such issues, there will be no conflict between the Secretary and the Commission.

Of course, any system of multiple or split enforcement will create some positive risk of conflict in statutory interpretation between the affected agencies. In these circumstances (which should be rare), a reviewing court should shift to

296. The CEQ regulations implementing NEPA were not adopted pursuant to any delegated authority from Congress. *See supra* note 289 and accompanying text. There is no provision of NEPA (or any other statute) that authorizes the CEQ to engage in rulemaking. Instead, the regulations appear to rest on the inherent authority of the President to assure that the laws are faithfully executed. *See* National Environmental Policy Act—Regulations, 43 Fed. Reg. 55,978 (Nov. 28, 1978). Such rules are necessarily nonlegislative, and hence are entitled to *Skidmore* deference rather than *Chevron* deference. In a pre-*Chevron* decision, the Supreme Court indicated that the CEQ regulations are entitled to "substantial deference," *see* Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); it has not revisited the issue since *Chevron*.

297. This is the approach taken under the Americans with Disabilities Act. *See supra* note 292.

298. *See supra* note 291.

299. *See supra* note 290 and accompanying text.

300. Recall that in *Martin v. Occupational Safety and Health Review Commission*, the Court held that the Secretary's interpretation of the regulations prevails over the Commission's interpretation of the regulations. *See* 499 U.S. 144, 154-55 (1991).

common-law deference of the *Skidmore* variety, and enforce the interpretation that has the greatest power to persuade.

4. Does *Chevron* Apply to Cross-Referenced Statutes?

Issues have arisen in a number of contexts as to whether or to what extent *Chevron* applies when a general statute cross-references a statute that an agency is charged with administering, or when a statute an agency is charged with administering cross-references a general statute or general principles of common law. An illustration of the former is provided by the APA provision that requires the use of formal adjudication procedures "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."[301] Most courts have exercised de novo review in determining whether any particular statute can be said to require a hearing "on the record" and hence, formal adjudication procedures.[302] However, the D.C. Circuit has held that when the underlying statute is ambiguous, courts should give *Chevron* deference to the agency's reasonable interpretation of what kind of hearing the statute requires.[303]

The logic of implied delegation provides substantial guidance in sorting out this sort of issue, as can be seen by considering the D.C. Circuit decision in closer detail. The Resource Conservation and Recovery Act (RCRA) requires a "public hearing" before the Environmental Protection Agency (EPA) issues corrective action orders.[304] EPA had interpreted this to mean that only an informal hearing rather than a trial-type hearing was required. The D.C. Circuit was correct in concluding that this interpretation of RCRA was entitled to *Chevron* deference. Congress had delegated authority to the agency to issue binding regulations,[305] and EPA's interpretation was embodied in procedural regulations issued under that authority.[306] Thus, the preconditions for *Chevron* deference were satisfied as to this issue.

It does not follow, however, that EPA was entitled to *Chevron* deference with respect to the separate and distinct issue whether such a hearing falls within the definition of a hearing "on the record" within the meaning of the APA.[307] EPA has not been delegated any authority to interpret the APA with binding authority. Hence, as to the question whether EPA's procedural regulations were subject

301. 5 U.S.C. § 554(a) (2000). Another illustration is provided by the provision of FOIA which exempts from disclosure information that is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (2000); *see supra* note 86.

302. *See, e.g.*, City of W. Chicago v. NRC, 701 F.2d 632, 641 (7th Cir. 1983); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978).

303. *See* Chem. Waste Mgmt. of N. Am., Inc. v. EPA, 873 F.2d 1477, 1480 (D.C. Cir. 1989).

304. 42 U.S.C. § 6928(b) (2000).

305. *See* 42 U.S.C. § 6912(a)(1) (2000) (EPA Administrator authorized to prescribe "such regulations as are necessary to carry out his functions under this chapter").

306. *See Chem. Waste Mgmt.*, 873 F.2d at 1478-80 (summarizing history of regulations).

307. *See* 5 U.S.C. § 554(a) (2000).

to the formal adjudication requirements of the APA, the court should have exercised de novo review.[308]

An example of an agency statute that cross-references general law is provided by decisions by the Federal Energy Regulatory Commission (FERC) that turn on the interpretation of contracts that have been entered into by regulated parties.[309] FERC's authority to regulate is established by the Natural Gas Act and other federal statutes that FERC administers, but the interpretation of contracts involves the application of general common law contract principles. The circuits have split over whether FERC's interpretation of a contract entered into by regulated parties is entitled to *Chevron* deference.[310]

The key question, as always, is whether Congress has delegated authority to the agency to issue binding orders interpreting the contract in question. The most straightforward version of the problem arises when an agency like FERC is asked to interpret a tariff. Tariffs are services contracts that are filed with the agency.[311] Duly filed tariffs have the force and effect of law unless set aside by

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308. It appears from the reported opinion that the petitioner did not raise the APA argument. The EPA's procedural regulations were challenged on the grounds that (a) they violated congressional intent as manifested in RCRA as amended, and (b) they violated due process. *See Chem. Waste Mgmt.*, 873 F.2d at 1480, 1483. In our opinion, the court resolved both issues correctly. If the petitioner had raised the APA issue, then it would have been entitled to the court's independent judgment as to whether the procedures adopted by EPA—which included the submission of written evidence and argument, oral presentations, an independent adjudicator, and questioning of the parties by the independent adjudicator but not cross examination, *see id.* at 1479—constituted an "on the record" hearing subject to the requirements of APA sections 556 and 557.

309. A statutory example is provided by cases considering whether to afford *Chevron* deference to decisions of the Federal Labor Relations Authority (FLRA) interpreting a provision of the statute it administers, the Federal Service Labor Management Relations Act (FSLMRA), which requires federal agencies to furnish requested information about government employees to a union "to the extent not prohibited by law." 5 U.S.C. § 7114(b)(4) (2000). The provisions of "law" that bear on this inquiry include the FOIA and the Privacy Act, both general statutes that apply to all agencies. Most courts declined to afford *Chevron* deference to FLRA decisions under this provision, reasoning that the FLRA is not charged with the duty of administering either FOIA or the Privacy Act. *See, e.g.*, FLRA v. United States Dep't of Def., 984 F.2d 370, 373-74 (10th Cir. 1993); United States Dep't of the Navy v. FLRA, 975 F.2d 348, 351 (7th Cir. 1992); FLRA v. United States Dep't of Def., 977 F.2d 545, 547 n.2 (11th Cir. 1992); FLRA v. United States Dep't of the Navy, 941 F.2d 49, 55 (1st Cir. 1991); FLRA v. United States Dep't of the Treasury, Fin. Mgmt. Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989); United States Dep't of the Navy v. FLRA, 840 F.2d 1131, 1134 (3d Cir. 1988). At least the Fourth Circuit disagreed, however, noting that union requests are filed under the FSLMRA and that the Act intended the FLRA to develop and apply special expertise in the field of labor relations. *See* United States Dep't of Health & Human Servs. v. FLRA, 833 F.2d 1129, 1133 (4th Cir. 1987); *see also* United States Dep't of Agric. v. FLRA, 836 F.2d 1139, 1142 (8th Cir. 1988) (indicating its concurrence with the Fourth Circuit position on this issue), *vacated on other grounds*, 488 U.S. 1025 (1989). The Supreme Court eventually resolved this dispute, without mentioning the disagreement over the applicability of the *Chevron* doctrine. *See* United States Dep't of Def. v. FLRA, 510 U.S. 487, 489 (1994) (holding that Privacy Act forbids disclosure of employee addresses to union representatives through FSLMRA requests).

310. *See* Koch Gateway Pipeline Co. v. FERC, 136 F.3d 810, 815 n.10 (D.C. Cir. 1998) (citing decisions and acknowledging circuit conflict).

311. For further background, see Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1330-40 (1998).

FERC,[312] and Congress has specifically authorized FERC to adjudicate complaints challenging the lawfulness of filed tariffs.[313] Given that Congress has specifically authorized the agency to hear such actions, it is reasonable to conclude that Congress has implicitly delegated authority to the agency to interpret tariffs when questions arise in such proceedings about their meaning.[314] Thus, under general *Chevron* principles, FERC interpretations of tariffs rendered in proceedings challenging the lawfulness of tariffs should be entitled to mandatory deference.[315]

Slightly more complicated are cases in which a regulated entity seeks a rate increase, and a customer argues that FERC should deny the request because the increase violates a settlement agreement previously entered into between the regulated entity and the customer. Assuming that the settlement agreement was filed with FERC,[316] this situation is ultimately no different from the tariff adjudication case. A settlement that is filed with and approved by the agency has the same force as a tariff, and so in effect, the customer is asking the agency to determine that a proposed rate increase violates an existing tariff requirement. Again, *Chevron* deference seems appropriate insofar as adjudicating the rate reasonableness claim requires interpretation of the settlement.[317]

It does not follow, of course, that *Chevron* deference should always extend to agency interpretations of contracts. Deference depends on whether Congress has delegated authority to the agency to adjudicate the meaning of the contract.[318] For example, if a customer brings an action seeking direct enforcement of an existing tariff requirement, the Natural Gas Act says that federal district

312. *See* Ark. La. Gas Co. v. Hall, 453 U.S. 571, 576-84 (1981) (discussing the requirements of the filed rate doctrine in the context of the Natural Gas Act).

313. *See* 15 U.S.C. § 717c(e) (2000).

314. *But see supra* note 239 (questioning on separation of powers grounds the appropriateness of requiring courts to give mandatory deference to agency adjudications).

315. Most courts have so held. *See Koch Gateway Pipeline Co.*, 136 F.3d at 814; N.W. Pipeline Corp. v. FERC, 61 F.3d 1479, 1486 (10th Cir. 1995); *cf.* Dayton Power & Light Co. v. FERC, 843 F.2d 947, 953 & n.12 (6th Cir. 1988) (declining to apply *Chevron* deference in this context).

316. The Natural Gas Act requires that contracts for the delivery of gas in interstate commerce be filed with the agency just as tariffs must be filed. *See* 15 U.S.C. § 717c(c) (2000). Settlement agreements between pipelines and their customers are commonly filed as contracts under this authority. If a settlement agreement is not filed with FERC, but is drawn into question only indirectly in determining the level of costs that a pipeline should be allowed to pass on to customers, then it would seem that FERC has not been delegated authority in any direct sense to interpret the contract. *Skidmore* deference is more appropriate in such circumstances. *But see* Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1549-51 (D.C. Cir. 1993) (extending *Chevron* deference to contract interpretation in these circumstances).

317. The Court so held (on slightly different reasoning) in Nat. Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1569-72 (D.C. Cir. 1987); *cf.* Mid La. Gas Co. v. FERC, 780 F.2d 1238, 1243 (5th Cir. 1986) (declining to apply *Chevron* deference in these circumstances).

318. *See* Litton Fin. Printing v. NLRB, 501 U.S. 190, 202-03 (1991) (holding that NLRB interpretations of collective bargaining agreements are not entitled to deference because enforcement of such agreements has been delegated to the courts, not the NLRB).

courts have "exclusive jurisdiction" to hear the complaint.[319] Here, the delegation of authority runs to the court, not the agency, making *Chevron* deference to the agency's interpretation of the contract inappropriate in this context.[320]

5. Does *Chevron* Apply to an Agency's Interpretation of Its Own Regulations?

The Supreme Court has long recognized that an agency's construction of its own regulations is entitled to "substantial deference."[321] This proposition is grounded in a separate line of cases that predates *Chevron* and has its own name: *Seminole Rock* deference.[322] The Supreme Court has consistently viewed agency interpretations of statutes and agency interpretations of regulations as governed by distinct deference doctrines. When we examine these doctrines more closely, however, we can see a substantial parallel between the *Chevron* doctrine and the *Seminole Rock* doctrine. Both impose a form of mandatory deference[323] in that both provide that the agency interpretation is "controlling" as long as it is "permissible," or to use the *Seminole Rock* phrase, so long as not "plainly erroneous or inconsistent with the regulation."[324] Moreover, although the traditional justifications for deference to agency interpretations of regulations focus on such factors as the agency's greater familiarity with its own regulatory text,[325] in one prominent decision the Court noted that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[326] This statement appears to ground *Seminole Rock* deference in the same type of implied delegation that underlies the *Chevron* doctrine.

It is beyond the scope of this Article to consider in any comprehensive fashion the rationale and proper formulation of *Seminole Rock* deference.[327]

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319. 15 U.S.C. § 717u (2000). *See* Pan Am. Petrol. Corp. v. Superior Court of Del., 366 U.S. 656, 662 (1961) (stating in dictum that suit to enforce a filed rate should be brought under § 717u).

320. A difficult intermediate case is presented by the Federal Communications Act, where parties claiming to be damaged by a common carrier may elect either to file a complaint with the agency or sue in federal court. *See* 47 U.S.C. § 207 (2000). Suits filed in court are often stayed and referred to the agency under the primary jurisdiction doctrine. *Cf.* United States v. W. Pac. R.R. Co., 352 U.S. 59, 62-63 (1956) (question of tariff interpretation arising in judicial action brought under the Interstate Commerce Act referred to agency under primary jurisdiction doctrine). Still, the fact that Congress has provided for concurrent jurisdiction may negate any inference that it has implicitly delegated primary interpretational authority to the agency with respect to tariff interpretation issues.

321. *See* Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 94-95 (1995); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991); Lyng v. Payne, 476 U.S. 926, 939 (1986).

322. *See supra* note 87.

323. *See* Manning, *supra* note 87, at 627.

324. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

325. *See* Manning, *supra* note 87, at 629-30.

326. *Martin*, 499 U.S. at 151.

327. John Manning, in an insightful article, argues that agency interpretations of their own regulations should generally be entitled to *Skidmore* deference rather than *Chevron* deference. *See* Manning, *supra* note 87, at 686-90. His argument, however, relies primarily on separation of functions concerns

Nevertheless, the understanding of the limits of the *Chevron* doctrine set forth herein has important implications for the scope of the *Seminole Rock* doctrine.

Chevron deference, we have argued, should be limited to interpretations rendered in legislative rules and binding adjudications. Note, however, that if we tack *Seminole Rock* deference on top of *Chevron* deference, this limitation on the scope of the *Chevron* doctrine could be readily evaded. For example, an agency could implement an ambiguous statute with an ambiguous regulation, and then "clarify" the ambiguous regulation with an interpretative rule. *Seminole Rock* would seem to suggest that the interpretation contained in the interpretative rule is entitled to mandatory deference. This has the effect of extending the sphere of mandatory deference to an agency interpretation of a statute embodied in a mere interpretative rule that lacks the qualities of delegated authority and public participation associated with legislative rules. If this is permitted, the agency can easily evade the limitations on the scope of *Chevron* deference and the procedural requirements of the APA.

To prevent this potential erosion of the limits on *Chevron* deference, *Seminole Rock* deference should at a minimum be subject to the same limitations that apply to the scope of *Chevron* deference.[328] In other words, interpretations of regulations interpreting statutes should be entitled to mandatory deference only if the interpretations are themselves embodied in legislative rules or binding adjudications. Interpretations of regulations interpreting statutes that appear in more informal formats, such as interpretative rules, policy statements, agency manuals, or opinion letters, should be assessed under the standard articulated in *Skidmore*.

B. WHAT SORTS OF INTERPRETATIONS BY A *CHEVRON*-QUALIFIED AGENCY ARE ENTITLED TO *CHEVRON* DEFERENCE?

The logic of implied delegation, as elaborated in Part IV, also yields a straightforward set of propositions regarding what kinds of interpretations are entitled to *Chevron* deference once an agency has been appropriately charged with primary interpretational authority. First, an agency that has been given the power to promulgate legislative rules is entitled to *Chevron* deference with respect to interpretations advanced in legislative rules. Second, an agency that has been given the power to render binding adjudications is entitled to *Chevron* deference with respect to interpretations advanced in a final adjudication. Third, an agency that has been given both the power to engage in legislative rulemak-

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and their resonance with separation of powers traditions, rather than on the scope-of-delegation analysis emphasized here. *Id.*

328. *See* Caruso v. Blockbuster-Sony Music Entm't Ctr., 193 F.3d 730, 737 (3d Cir. 1999) (declining to accept agency interpretation of rule that would be tantamount to adopting a new substantive regulation); *cf.* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

ing and the power to render binding adjudications can choose to advance interpretations entitled to *Chevron* deference either through rulemaking or adjudication.[329]

Before *Christensen*, there were numerous unresolved questions about what kinds of agency decisions are entitled to *Chevron* deference. *Christensen* holds that an opinion letter is not entitled to *Chevron* deference, and the Court's rationale for so holding clearly precludes giving *Chevron* deference to interpretations found in policy statements, enforcement manuals, no-action letters, press releases, and post-hoc rationalizations of agency counsel such as agency briefs.[330] These conclusions, of course, are fully consistent with the principles endorsed herein.

After *Christensen*, five questions appear to remain unanswered regarding what kinds of agency interpretations are entitled to *Chevron* deference once we conclude that an agency has been properly charged with administering a statute by Congress.

6. Does *Chevron* Apply When a *Chevron*-Qualified Agency Renders an Interpretation in an Adjudication?

The answer is clear in principle: A *Chevron*-qualified agency is entitled to *Chevron* deference for interpretations rendered in adjudications, provided the agency has been delegated the power to render binding adjudications. As previously discussed, a binding adjudication means a self-executing adjudication.[331] Thus, an agency is eligible for *Chevron* deference for interpretations rendered in adjudications only if the adjudication results in a final, self-executing order—one that is binding without resort to a judicial enforcement action.

On the other hand, *Chevron* deference need not be limited to "formal" adjudications reached in accordance with the procedures of sections 556 and 557 of the APA.[332] The dictum in *Christensen* arguably to this effect should be

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329. This qualification on an agency's ability to chose between rulemaking and adjudication and still receive *Chevron* deference—that the agency must have the power to act with the force of law in both modes—is not at odds with the so-called *Chenery* doctrine. *See* SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947). *Chenery* in fact presupposes that the agency has been delegated authority to make binding policy through either type of action. *See id.* at 200-01; *see also Martin,* 499 U.S at 154. Where such a dual delegation has been made, then obviously agency interpretations rendered either through legislative rules or binding adjudications should be given *Chevron* deference. If the agency has not been delegated authority to make policy in both of these modes, however, then *Chevron* should not be used to expand the agency's powers beyond the scope of the delegation.

330. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) (listing nonbinding actions). Note as well the presence in *Christensen* of an amicus brief filed by the United States supporting the interpretation at issue. *See id.* at 582. *Cf.* Auer v. Robbins, 519 U.S. 452, 462-63 (1997) (granting *Seminole Rock* deference to an interpretation advanced in an amicus brief).

331. *See supra* notes 275-85 and accompanying text.

332. *See supra* note 256 (describing formal adjudication procedures).

disapproved.[333] The touchstone is not the formality of the procedures used, but whether Congress has delegated power to the agency to act with the force of law. If in a particular context Congress has authorized an agency to resolve controversies in a legally binding fashion, but with less formality than the APA requires for formal adjudication, *Chevron* should still apply. Of course, due process will impose a floor on what kinds of procedures Congress can direct an agency to employ in resolving individual controversies that implicate liberty and property interests.[334] We assume that this floor will be sufficiently protective that adversely affected parties will always be afforded an opportunity to be heard before the agency adopts any contested interpretation.

A more difficult question is whether individualized proceedings that are not fully adversarial may qualify as adjudications for purposes of conferring *Chevron* deference. Many agencies permit individuals to file internal protests of initial decisions by agency staff—for example, decisions denying benefits or imposing taxes.[335] These protests often are not fully adversarial, in that the private party is permitted to argue but the agency staff does not respond before the protest is resolved. In a recent post-*Christensen* decision, the D.C. Circuit framed the adjudication inquiry, at least in part, in terms of whether the agency staff and the regulated party take opposing positions in the proceeding.[336] At first blush, this may appear to be an appropriate limitation on the type of agency decision entitled to mandatory deference, because nonadversarial adjudication reduces the likelihood that any significant measure of public participation will be allowed before the agency interpretation is adopted. But this falls into the trap of making the procedures employed by the agency in any particular case the test for *Chevron* deference, rather than asking whether the agency's decision has the force of law. The force-of-law criterion should be relatively easy to administer;[337] superimposing an adversarial process requirement would lead to a morass. Bearing in mind that due process will always impose a floor on the procedures employed when an agency enters an order having the force of law, we would counsel against grafting additional procedural preconditions to *Chevron* deference beyond those suggested by the logic of implied delegation.

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333. *See Christensen*, 529 U.S. at 587 (stating that interpretations advanced in "*formal* adjudication" are entitled to *Chevron* deference (emphasis added)).

334. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (reviewing federal adjudication procedures for constitutionality under Due Process Clause). *See generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 916-41, 960-68 (2000) (reviewing the prerequisites for application of due process hearing requirements).

335. *See, e.g.*, 19 U.S.C. § 1515(a) (2000) (protest of initial determination of duties by Customs Service).

336. *See In re* Sealed Case, 223 F.3d 775, 779-80 (D.C. Cir. 2000) (finding by Federal Election Commission of no probable cause that conduct violated Federal Election Campaign Act entitled to *Chevron* deference).

337. It is still necessary, of course, to have some conception of what an "adjudication" means. For a good start, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978) (defining adjudication as "a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments").

7. Does *Chevron* Apply When a *Chevron*-Qualified Agency Renders an Interpretation in an Interpretive Rule?

The APA recognizes a distinction between legislative rules and interpretative rules.[338] The distinction is one of the most confusing in all of administrative law because legislative rules and interpretative rules differ along three different dimensions: the purpose of the rule, its legal effect, and the procedures used in promulgating the rule.[339] In terms of purpose, a legislative rule can be defined as one that articulates a new norm or modifies an existing norm, whereas an interpretative rule interprets or clarifies an existing norm.[340] In terms of legal effect, a legislative rule is said to be legally binding on the regulated community the same way a statute is, while an interpretative rule may bind agency personnel,[341] but does not bind the regulated community.[342] In terms of procedure, legislative rules generally must be promulgated in accordance with public notice-and-comment procedures, whereas the APA exempts interpretative rules from these procedures.[343] It is easy to see how the distinction between legislative and interpretative rules has led to confusion—different courts have distinguished between these rules on any and all of these three bases.[344]

Before *Chevron*, the Supreme Court afforded mandatory deference to legislative rules promulgated pursuant to explicit congressional delegations of rulemak-

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338. *See* 5 U.S.C. § 553 (2000). Legislative rules are not mentioned by name, but are recognized as a residual category after excluding procedural rules, interpretative rules, and policy statements.

339. Exactly what constitutes a legislative as opposed to an interpretative rule has been a matter of considerable controversy in the lower courts. *See generally* Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1 (1994); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381; Mayton, *supra* note 244; Pierce, *supra* note 69; Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992).

340. *See* Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 93-95 (D.C. Cir. 1997) (reviewing the D.C. Circuit case law distinguishing legislative and interpretative rules and emphasizing that norm interpretation is the distinctive feature of interpretative rules).

341. See Strauss, *supra* note 339, at 1475-87, for an instructive discussion of how interpretative rules serve to bind agency personnel even though they do not have general legislative effect.

342. *See* Am. Mining Cong. v. Mine Safety & Health Admin, 995 F.2d 1106, 1108-12 (D.C. Cir. 1993); Pac. Gas & Elec. Co. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974); Asimow, *supra* note 339, at 383; Pierce, *supra* note 69, at 555-58.

343. *See* 5 U.S.C. § 553(b)(A) (2000).

344. During the late 1960s and 1970s a number of courts adopted yet another test for distinguishing between legislative rules and interpretative rules—the substantial impact test. *See, e.g.*, Lewis-Mota v. Sec'y of Labor, 469 F.2d 478, 482 (2d Cir. 1972); Texaco, Inc. v. FPC, 412 F.2d 740, 743-44 (3d Cir. 1969). Under this approach, rules that were especially important were legislative; rules of lesser impact were interpretative. The substantial impact test sought to further the purposes of the APA's imposition of mandatory rulemaking procedures, *see* Mayton, *supra* note 244, at 910-11, but was extremely subjective in its application, and created uncertainty because agencies and parties could not know in advance what the courts would regard as sufficiently important to warrant rulemaking procedures. By the mid-1980s, this test was generally abandoned. *See, e.g.*, Cabais v. Egger, 690 F.2d 234, 237 (D.C. Cir. 1982); *see also* Asimow, *supra* note 339, at 397-98. For a discussion of the tendencies of courts to be especially inventive in matters of administrative procedure in the late 1960s and 1970s, see Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997).

ing authority,[345] but gave at most *Skidmore* deference to interpretative rules.[346] *Christensen v. Harris County*,[347] ruling that *Chevron* deference applies only to agency interpretations advanced in a format that has the "force of law,"[348] might be read as foreclosing *Chevron* deference to interpretative rules. As noted, one of the grounds for distinguishing between legislative and interpretative rules is whether the rule is legally binding—that is, whether it has the force of law. Nevertheless, *Christensen* did not list "interpretative rules" among its examples of agency action not entitled *Chevron* deference.[349] Moreover, Justice Scalia in his concurring opinion went out of his way to declare that *Chevron* "in fact involved an interpretative regulation."[350] *Chevron* involved an interpretative regulation, however, only in the first sense of the distinction between legislative rules and interpretative rules; the regulation at issue in *Chevron* offered an interpretation of an existing norm, the Clean Air Act's term "stationary source." However, the agency clearly intended that the regulation would be legally binding, and it was promulgated in accordance with notice-and-comment rulemaking.[351] Under two out of the three meanings of legislative rule, therefore, the rule in *Chevron* was legislative. *Christensen* thus leaves the question whether interpretative rules are entitled to *Chevron* deference in a state of some confusion.[352]

The operating principles set forth in Part IV make clear that *Chevron* deference extends only to interpretations rendered in decisional formats that bind parties outside the agency with the force of law. With respect to rules, therefore,

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345. *See, e.g.*, Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 425-26 (1977).

346. *See, e.g.*, Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 & n.15 (1980); United States v. Stapf, 375 U.S. 118, 127 n.11 (1964).

347. 529 U.S. 576 (2000).

348. *See id.* 587.

349. The Court mentioned opinion letters, policy statements, agency manuals, and enforcement guidelines. *See id.*

350. *Id.* at 589-90 (Scalia, J., concurring in part and concurring in the judgment).

351. *See* Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementations Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981) (summarizing and responding to eighty-one comments received on proposed rule adopting bubble definition).

352. The ink was hardly dry on the decision when the Court granted certiorari in another case that could settle the question whether *Chevron* applies to interpretative rules. *See* Mead Corp. v. United States, 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 120 S. Ct. 2193 (2000). *Mead Corp.* presents the question whether *Chevron* applies to atypical orders issued by the Customs Service called tariff classification rulings. 185 F.3d at 1306. These rulings, like "revenue rulings" issued by the Internal Revenue Service, should probably be categorized as interpretative rules because they do not bind persons outside the agency and they are not promulgated through notice-and-comment procedures. *See* Davis v. United States, 495 U.S. 472, 484 (1990) (revenue rulings "do not have the force and effect of regulations"). However, tariff classification rulings are atypical of interpretative rules in two respects: They are expressly authorized by a statute that delegates authority to the Customs Service to adopt regulations providing for "binding rulings," 19 U.S.C. § 1502(a) (2000), and they are expressly said to be "binding" on Customs personnel, 19 C.F.R. § 177.9(a) (2000). It is possible to argue, therefore, that tariff classification rulings, unlike most interpretative rules, have the "force of law," *Christensen*, 529 U.S. at 587, and hence are entitled to *Chevron* deference.

Chevron deference extends only to rules that conform to the classical definition of a legislative rule. As Michael Asimow has written:

> A legislative rule is essentially an administrative statute—an exercise of previously delegated power, new law that completes an incomplete legislative design. Legislative rules frequently prescribe, modify, or abolish duties, rights, or exemptions. In contrast, nonlegislative rules do not exercise delegated lawmaking power and thus are not administrative statutes. Instead, they provide guidance to the public and to agency staff and decisionmakers. They are not legally binding on members of the public.[353]

As we have seen, there are several different ways of defining interpretative rules,[354] and there is no need to be dogmatic in insisting on a single definition. Insofar as interpretative rules are understood to mean what Asimow calls "nonlegislative rules"—that is, rules that do not legally bind the public—they are not entitled to *Chevron* deference. If interpretative rules are defined in some other way—for example as rules that clarify the meaning of a preexisting norm, rather than rules that articulate a new norm[355]—then interpretative rules may or may not be entitled to *Chevron* deference depending on whether they are legally binding on the public. The principle is clear, even if the labeling is subject to fluctuation.[356]

8. Does *Chevron* Apply When a *Chevron*-Qualified Agency Renders an Interpretation in a Procedural Rule Exempt from the Notice-and-Comment Provisions of APA Section 553?

Legislative rules come in two varieties: substantive and procedural. As in the law of civil procedure, the dividing line between the two is somewhat elusive.[357] The principal significance of the distinction is that procedural rules, like interpretative rules and policy statements, are exempt from the notice-and-comment provisions of section 553.[358]

Under the operating principles set forth in Part IV, it is clear that legal interpretations reflected in procedural rules are entitled to *Chevron* deference, provided those rules are legally binding. If the procedural rules are adopted pursuant to a grant of delegated power, ordinarily they will be binding, even if

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353. Asimow, *supra* note 339, at 383 (footnote omitted).

354. *See supra* notes 338-44 and accompanying text.

355. *See Christensen*, 529 U.S. at 589-90 (Scalia, J., concurring in part and concurring in the judgment) (characterizing the rule in *Chevron* as interpretative).

356. Occasionally agencies will employ notice-and-comment procedures in adopting interpretative regulations. For example, this is the practice of the Treasury Department with respect to interpretative tax regulations. *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[3] (2d ed. 1991). Under the analysis urged here, if such regulations do not have the force of law they are not entitled to *Chevron* deference. Thus, if the Treasury wants to secure *Chevron* deference from the courts for its regulations, it must explicitly make them legislative rather than interpretative.

357. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 273-74 (1998).

358. *See* 5 U.S.C. § 553(b)(A) (2000).

they are promulgated under the APA's exception from notice-and-comment requirements. Again, the dictum in *Christensen* arguably to the contrary should be disregarded.[359]

Application of *Chevron* in this context represents an exception to the generalization noted in Part IV.B. that the force-of-law criterion permits public participation before interpretations entitled to mandatory deference are adopted. If a procedural rule is of a technical nature, this will be of little consequence, because there will be little interest in commenting on such rules. On the other hand, if a procedural rule affects substantive rights, then the agency may decide to follow the notice-and-comment procedure out of an abundance of caution, given the vague line that divides procedural rules from substantive rules and the risk of invalidation if the agency guesses wrong.[360] Still, under the current structure of the APA, there will be some procedural rules that will be binding and hence entitled to *Chevron* deference, notwithstanding that some members of the public would like to comment on them before they are adopted but have been denied any such opportunity. The correspondence between the force-of-law criterion and public participation is strong, but it is not perfect.

9. Does *Chevron* Apply When a *Chevron*-Qualified Agency Renders an Interpretation in a Proposed or Interim Rule?

In *Commodity Futures Trading Commission v. Schor*,[361] the Supreme Court recognized in dicta that "a proposed regulation does not represent an agency's considered interpretation of its statute."[362] Nevertheless, on several other occasions, the Court has given *Chevron* deference to proposed or interim regulations issued by various agencies.[363] The lower courts have generally paid heed to what the Court said in *Schor* rather than what the Court has done.[364] Still, the divergence in the Court's practice here has created yet another potential source of confusion.

The answer to the question whether *Chevron* extends to interpretations in proposed or interim rules follows in a straightforward fashion from the logic of

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359. *See Christensen*, 529 U.S. at 587. (describing rules entitled to *Chevron* deference as those adopted in notice-and-comment proceedings).

360. The D.C. Circuit, for example, has held that the procedural rule exception "does not apply where the agency 'encodes a substantive value judgment.' " Reeder v. FCC, 865 F.2d 1298, 1305 (D.C. Cir. 1989).

361. 478 U.S. 833 (1986).

362. *Id.* at 845 (dismissing significance of proposed regulation alleged to be inconsistent with final regulation).

363. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996) (applying *Chevron* deference to proposed regulation developed from position taken by the agency in the course of the same litigation); Pauley v. Bethenergy Mines, 501 U.S. 680, 697-98 (1991) (deferring to interim agency regulations); United States v. City of Fulton, 475 U.S. 657, 668-71 (1986) (affording *Chevron* deference to the Secretary of Energy's decision establishing interim rates for hydroelectric power).

364. *See* Orr v. Hawk, 156 F.3d 651, 654-55 (6th Cir. 1998); *see also* Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995) (analogizing interim rules to policy statements, to which the Fourth Circuit does not give *Chevron* deference).

implied delegation. If a rule is legally binding, then it is eligible for *Chevron* deference. If it is not legally binding, then it is not so entitled. Because proposed rules are virtually never legally binding, *Chevron* deference will not extend to these kinds of rules. Of course, even if *Chevron* does not apply, preliminary or tentative agency expressions of view should be entitled to whatever weight they deserve under the *Skidmore* standard.

Interim rules, in contrast, may be legally binding if they are adopted pursuant to delegated rulemaking power and the agency properly establishes that the rule falls within section 553's "good cause" exception.[365] For example, sometimes it is imperative that there be a legislative rule in place, but because of an unanticipated development (such as judicial invalidation of a prior rule) there is not enough time to complete the full gauntlet of notice-and-comment before publishing the rule.[366] In these circumstances, the agency can generally show that there is good cause to promulgate a binding interim rule, to be followed in due course by a final rule promulgated after notice-and-comment. Such interim rules should be entitled to *Chevron* deference.

Here again, we see an instance where *Chevron* deference applies under the force-of-law criterion and yet public participation is denied. In the case of interim rules that qualify for the good cause exception, the sacrifice in public input is probably less serious than it may be in other contexts, because this lack of input usually will be only temporary. In most cases, full notice-and-comment will be permitted before a final rule is adopted by the agency.

10. Does *Chevron* Apply When Lower-Level Employees in a *Chevron*-Qualified Agency Render an Interpretation?

The Supreme Court has not focused on the question whether interpretations by lower-level agency employees are entitled to *Chevron* deference, and the circumstances in which the issue arises have to date been too diverse to generate a square circuit conflict.[367] The question does not arise where agency rules are concerned, because rules are almost always issued in the name of the agency itself, or in the name of a division of the agency which has been expressly delegated authority to issue such regulations.[368] Rather, it comes up almost exclusively in the context of interpretations rendered in adjudications, including both informal adjudications, such as result in the issuance of an opinion letter, and formal adjudications where initial decisions are rendered by administrative law judges (ALJs).

After *Christensen*, opinion letters issued by lower-level employees, assuming they are not legally binding, are clearly not entitled to *Chevron* deference. The

365. 5 U.S.C. § 553(b)(B) (2000).

366. *Cf.* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 206-07 (1998) (striking down attempt by agency to respond to invalidated rule with new rule that was made retroactive).

367. *See supra* note 92.

368. *See* Strauss, *supra* note 339, at 1467.

question whether interpretations reflected in other types of adjudications rendered by lower-level employees are entitled to mandatory deference should be, as always, resolved under the force-of-law criterion; if the employee's decision has the force of law then it is entitled to *Chevron* deference, and if the decision does not have the force of law, it should be assessed under *Skidmore*.

An adjudicatory order should be understood to have the "force of law" in this context only if it is legally binding both inside the agency (that is, binding on other agency personnel) and outside the agency (that is, binding on the parties to the adjudication). In some contexts, initial decisions are merely recommendations to a higher body within the agency, in which case the decision clearly is not binding in either sense, and thus, is not entitled to *Chevron* deference. In other circumstances, initial decisions by ALJs are legally binding on the parties to the adjudication unless an internal appeal is taken.[369] Even here, however, such decisions often are not treated as binding precedent by the agency itself. In other words, they are *not* regarded as legally binding inside the agency in future proceedings raising the same issue. Such decisions also do not qualify for *Chevron* deference. Indeed, it would be extremely odd to give ALJ decisions greater legal force in court than they have within the agency itself.

Adhering to the force-of-law criterion thus appears to generate clear and predictable answers to questions regarding when interpretations by lower-level employees are entitled to *Chevron* deference. In contrast, the answers will often be unclear under Justice Scalia's suggestion that lower-level employee interpretations should be subject to *Chevron* deference if they are "authoritative."[370] Would an opinion letter by a division chief be authoritative if not vouched for in an amicus brief? What if it was merely shown to the agency head and not disapproved? What if the recipient had a right to appeal to the agency head, but did not take an appeal? The permutations are endless, and there are no established criteria or guidelines for fleshing out the meaning of "authoritative" in this context. One virtue of the force-of-law criterion is that it generates reasonably clear answers to questions about *Chevron*'s domain that will otherwise prove quite vexing.

C. WHEN IS THE PRESUMPTION OF DELEGATED INTERPRETATIONAL AUTHORITY OVERCOME?

Our last set of issues concern the area of greatest uncertainty: What does it take to overcome the presumption of mandatory deference that flows from the delegation of power to an agency to bind with the force of law? We have identified four issues that fall within this area, each of which presents different considerations.

369. This is true, for example, in the Social Security Administration. *See supra* note 279.

370. Christensen v. Harris County, 529 U.S. 576, 591 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment).

11. Does *Chevron* Apply When a Statute Mandates a More Rigorous Standard of Review Than Is Otherwise Required by the APA?

The Supreme Court's decision in *Haggar Apparel* raises the question whether Congress can turn off the *Chevron* doctrine by imposing a more demanding standard of review than that prescribed by the APA. As argued in Part IV.C., Congress should not have to conform to any specific formula (such as prescribing "de novo review" or "independent judicial determination of questions of law") before the *Chevron* presumption is overcome. Rather, courts should ask whether the totality of the circumstances indicates a clear congressional intent that courts not give mandatory deference to agency interpretations of law.

In this light, *Haggar Apparel* is questionable precedent. The decision is perhaps most readily explainable by the fact that the application of de novo standard of review in customs refund suits long pre-dated *Chevron* and reflects a world in which legislative rulemaking was less common. Hence, Congress's adoption of the de novo standard here cannot be said to reflect any judgment about the degree of deference owed to Customs Service regulations. Should a case arise in which Congress adopts a de novo standard that more clearly applies to questions of law, or indeed in which Congress adopts any kind of de novo review standard post-*Chevron*, there will be a much stronger basis for concluding that Congress intended to displace *Chevron* deference.[371] Because *Chevron* is only a presumption about congressional intent, and nothing more, such context-specific evidence of a contrary intention should be given full effect.

12. Does *Chevron* Apply to Interpretations That Modify the Scope of an Agency's Jurisdiction?

The most important—and vexing—question involving *Chevron*'s domain is whether there should be an exception for interpretations that implicate the scope of the agency's jurisdiction. *Chevron*'s most serious failing may be its disregard for the courts' role in keeping agencies within the scope of their delegated authority. By stripping courts of primary interpretational authority where Congress has charged an agency with administration of a statute, *Chevron* simultaneously disarmed courts from being able to act in a consistently vigilant manner in policing the boundaries of agency power.[372]

The Supreme Court has not advanced very far in deliberating about whether it is appropriate to give *Chevron* deference to agency interpretations that affect the scope of their delegated power. The most complete debate occurred in separate concurring and dissenting opinions filed by Justice Brennan and Justice

371. For an interesting argument that *Chevron* should not apply on direct review of decisions of the Patent Office, given that the overall scheme of the patent law indicates that the Patent Office has not been delegated regulatory authority, see Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 164-67 (2000).

372. *See supra* notes 186-88 and accompanying text.

Scalia respectively in *Mississippi Power & Light v. Mississippi ex rel. Moore.*[373] Justice Brennan noted that *Chevron* rests on the understanding that an agency has been "entrusted to administer" a statute. He argued that "[a]gencies do not 'administer' statutes confining the scope of their jurisdiction, and such statutes are not 'entrusted' to agencies."[374] Justice Scalia responded primarily by asserting the impossibility of drawing the line Justice Brennan was proposing.[375] He noted the difficulty of distinguishing "between an agency's exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either one or the other, depending upon how generally one wishes to describe the 'authority.' "[376]

The understanding that *Chevron* rests on an implied delegation of legislative power helps us to see that Justice Brennan was surely right in principle: Congress cannot be presumed to intend that courts defer to agency judgments about the scope of their jurisdiction.[377] Courts have never deferred to agencies with respect to questions such as whether Congress has delegated to an agency the power to act with the force of law through either legislative rules or binding adjudications.[378] Similarly, it has never been maintained that Congress would want courts to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference, or should give *Chevron* deference to an agency's determination of what types of interpretations are entitled to *Chevron* deference. It is assumed that the court must determine whether power has been delegated

373. 487 U.S. 354 (1988). The majority opinion, authored by Justice Stevens, did not address the possibility that FERC's decision allocating high-cost electric power within a multi-state power pool was entitled to deference.

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

375. Justice Scalia also purported to deny Justice Brennan's premise that Congress does not intend that agencies be given authority to determine the scope of their jurisdiction. However, he offered no evidence or argument that would support the contrary presumption. *See id.* at 381-82 (Scalia, J., concurring in judgment).

376. *Id.* at 381 (Scalia, J., concurring in judgment); *see* Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 676-77 (D.C. Cir. 1994) (en banc) (Williams, J., dissenting) ("[A]ny issue may readily be characterized as jurisdictional merely by manipulating the level of generality at which it is framed."); Quincy M. Crawford, Comment, Chevron *Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction*, 61 U. CHI. L. REV. 957 (1994).

377. *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' " (quoting Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973))); ACLU v. FCC, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) ("[I]t seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power."); Gellhorn & Verkuil, *supra* note 186, at 1011.

378. *See* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) ("[An] agency may not finally decide the limits of its statutory power. That is a judicial function."); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 616 (1944) ("Determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 191, at 224 ("A cardinal principle of American constitutionalism is that those who are limited by law should not be empowered to decide on the meaning of the limitation: foxes should not guard henhouses.").

to an agency before the court can be charged with deferring to the agency's exercise of that power.[379]

If Justice Brennan was right in principle, Justice Scalia's critique based on the practical difficulties of defining agency action in excess of authority has been sufficiently persuasive that it has discouraged the Court from developing any scope-of-jurisdiction exception. The Court appears to be aware of the need to police against agency aggrandizement (and abrogation). But it has done so primarily by exercising especially vigorous statutory interpretation at *Chevron*'s step one when agencies press the limits of their authority, not by creating an exception to *Chevron* deference.[380] Unfortunately, there are serious drawbacks with using step-one analysis as the means for policing agency deviations from their assigned mandates.

One problem with using step one in this fashion is that it distorts the inquiry ordinarily mandated at step one. The Court has never disavowed the understanding that the inquiry at step one is whether the statute has only one possible meaning.[381] Yet, in its jurisdiction-policing mode, the Court has insisted on interpretations that, while arguably correct as reconstructions of the best understanding of congressional intent, are by no means the only possible interpretation of the relevant language. In order to preserve the general structure of the

379. It may be argued that the scope-of-jurisdiction question does not concern whether Congress has given the agency the power to act with the force of law, but rather how far that power extends, in the sense of what subject matter is covered. This is more closely analogous to the question of whether a delegation of power has been cabined by an "intelligible principle," something the Court has found notoriously hard to enforce. However, even in its most lenient interpretations of the intelligible principle, the Court has exercised independent judgment. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425-26 (1944); Nat'l. Broad. Co. v. United States, 319 U.S. 190, 216-17 (1943). The intelligible principle standard may not be very constraining, but there is no doubt that the question whether this standard is satisfied is one the court must decide independently, rather than by deferring to the agency. For example, prior to the Court's recent decision in *Whitman v. American Trucking Ass'ns*, 121 S. Ct. 903 (2001), it had been suggested occasionally that the agency can help solve the intelligible principle problem by articulating standards that constrain its own exercise of discretion. *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 758-59 (1971) (three-judge court); Lisa Schultz Bressman, Schechter Poultry *at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1415-31 (2000). Although the Court in *American Trucking* rejected this suggestion, *see* 121 S. Ct. at 912, it is noteworthy that even those that endorsed agency-developed standards as a partial substitute for congressional standards nevertheless always admitted that the ultimate judgment as to whether the standards are constitutionally sufficient is for the court to make.

380. *See, e.g.*, MCI Telecomm. Corp. v. AT&T, 512 U.S. 218 (1994) (striking down FCC's regulation that would eliminate tariff filings for most interexchange telephones as going beyond statutory authority allowing the agency to "modify" tariff filing requirements); Dole v. United Steelworkers, 494 U.S. 26 (1990) (invalidating the Office of Management and Budget's assertion of jurisdiction over agency information disclosure policies as contrary to the structure and general purposes of the Paperwork Reduction Act).

381. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.' "); Nat'l Bank & Trust Co., 522 U.S. 479, 487 (1998) (same); Nationsbank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) ("Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.' ").

Chevron framework, however, the Court has been forced to dissemble, characterizing these readings as resting on the "clear," "plain," or "unambiguous" meaning of the statute.[382] This dissembling threatens to contaminate the step-one inquiry in other cases in which the agency is concededly acting within the scope of its authority, sending confusing signals to the lower courts.

Using step one to police agency jurisdiction also eliminates any requirement that the Court confront the agency's reasons for expanding (or contracting) its mandate. Often agencies will want to add to or subtract from their portfolio of responsibilities based on unforeseen changes in technology or market conditions.[383] These new developments may or may not justify the agency's proposed departure from past regulatory practices, but it would be desirable for courts at least to confront the agency's stated motivations. Instead, the inquiry at step one proceeds only in terms of the original text, history, and judicial understanding of the relevant statutory language, as if the practical problem and the agency's reasoning for reformulating the scope of its authority in light of this problem did not exist.

Rather than seeking to identify the precise boundaries of agency authority at step one, a better solution would be to ask at "step zero" whether Congress would want the particular question about the scope of agency authority to be resolved as a matter of mandatory deference (*Chevron*) or common-law deference (*Skidmore*). As the Court recognized in *Brown & Williamson*, whether an agency is entitled to *Chevron* deference turns ultimately on congressional intent. With respect to "ordinary" gaps in a statutory scheme, *Chevron* represents a presumption that Congress intends the agency to be primary interpreter.[384] It does not follow, however, that Congress harbors the same intent with respect to "extraordinary" gaps that implicate the scope of an agency's authority.[385] As to what constitutes an extraordinary gap, the *Brown & Williamson* Court did not suggest any fixed criteria. At least implicitly, however, Justice O'Connor's opinion recognizes that the distinction between ordinary and extraordinary is a function of history and context. To put it another way, extraordinary questions are those as to which one can say, based on the totality of the statutory

382. *See, e.g., MCI Telecomm. Corp.*, 512 U.S. at 225-29 (finding agency interpretation contracting its jurisdiction to be foreclosed by old dictionary definitions and the purposes of the statute); Dole v. United Steelworkers, 494 U.S. at 42-43 & n.10 (finding agency interpretation expanding its jurisdiction to be foreclosed by "clear congressional intent" as revealed by examination of general purposes and the overall structure of the Paperwork Reduction Act).

383. *See, e.g.*, Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (refusing to allow ICC to relax filed rate doctrine notwithstanding widespread disregard of filing requirements and surge in bankruptcies among trucking companies); United States v. S.W. Cable Co., 392 U.S. 157 (1968) (permitting FCC to regulate cable television—a new technology unknown when the Communications Act of 1934 was enacted).

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

385. *Id.*

circumstances, that Congress clearly would not want the courts to give mandatory deference to agency interpretations of law.

Note that treating the problem of agency jurisdiction at step zero in this fashion does not require that the court identify a clear congressional intent regarding whether the agency has jurisdiction. It requires only that the court identify a clear congressional intent about the identity of the *primary interpreter* of the agency's jurisdiction. Thus, if the court concludes that Congress would not want the agency to be the primary interpreter, the court need not insist that the statute has only one right answer in order to reject the agency's interpretation.

Treating the scope of jurisdiction problem at step zero also significantly blunts Justice Scalia's criticism based on the practical difficulty of defining when an agency is proposing an interpretation "in excess" of its authority. The step zero approach does not modify the presumption that *Chevron* deference is the rule whenever Congress delegates power to act with the force of law. This presumption can only be overcome by a finding, based on all relevant evidence, that Congress clearly would not want a court to give mandatory deference to the agency's interpretation. The need to overcome the presumption should prevent the scope-of-jurisdiction exception from swallowing the rule.

Note too that the inquiry at step zero would not turn on an exercise in abstract characterization—asking whether the question is "jurisdictional" or not. Instead, it would turn on an effort to uncover Congress's intent regarding the most appropriate interpreter. As *Brown & Williamson* illustrates, this inquiry necessarily encompasses not just the statute under review, but also related statutes that bear on the division of authority as between different agencies and different levels of government. Thus, resolution of the step-zero question will require, among other things, a consideration of the historical evolution of the agency's mandate and the implications to be drawn from related post-enactment legislation. This type of inquiry is far removed from the exercise in abstract characterization Justice Scalia assumed would prevail.[386]

Finally, if the court concludes that *Skidmore* deference is more appropriate, the court will necessarily confront a wide range of considerations bearing on the evolution of agency authority and the congressional response, and this likely will require the court to engage in a more pragmatic assessment of the issue than is required under *Chevron*'s step one. Specifically, the court must expressly confront such factors as the cogency and thoroughness of the agency's reasoning, the extent to which the agency is departing from past practice, and whether

386. Also, when we recognize that the default rule in the absence of *Chevron* deference is *Skidmore* deference, the stakes in making the step-zero determination go down. The question at step zero is whether Congress would want *Chevron* or *Skidmore* to apply in deciding whether the agency is acting in excess of statutory authority. Posing the question this way reduces the payoff to manipulation of abstract concepts, and hence makes it somewhat less likely that it will occur.

the issue implicates the agency's unique expertise.[387] In other words, the court must engage the agency's reasoning for departing from its historical mandate. The agency may not convince the court that its departure is justified, but at least the court will grapple with the underlying problems that have impelled the agency in a different direction.

13. Does *Chevron* Apply to Interpretations That Raise Constitutional Questions?

Another difficult issue involves the interaction of *Chevron* and questions of constitutional law, a point at which two policymaking regimes clash. The agency is supposed to be responsible for making policy under the statute, consistent with the terms and conditions laid down by Congress, but the Court has anointed itself the chief policymaker under the Constitution. Because the Constitution is a form of law superior to a mere statute, it is clear that in any direct clash between the Court's policy derived from its status as constitutional interpreter and the agency's policy derived from its authority under a statute, the Court's policy must win.[388] Thus, there can be no doubt that *Chevron* deference must give way when the agency's policy, although consistent with the statute and otherwise permissible in light of the statutory language and purpose, impinges upon principles that the Court has discerned in the Constitution.

Two separate canons of avoidance can be invoked in mediating the conflict between agency policy and constitutional policy: avoidance of unconstitutional questions and avoidance of unconstitutionality.[389] The *avoidance of unconstitutionality* canon says that when faced with a choice between two interpretations of a statute, one constitutional and the other unconstitutional, the court should chose the interpretation that is constitutional. The *avoidance of questions* canon says that when faced with a choice between two interpretations of a statute, one that does not raise a serious constitutional question and one that does, the court should chose the interpretation that does not raise any serious constitutional question. On some occasions (including one just this Term), the Court has squarely endorsed the avoidance of questions canon, and held that this canon displaces the *Chevron* doctrine.[390] Under this version of the canon, an agency interpretation that would otherwise be sustained under *Chevron* will be rejected if it raises a serious constitutional question. On at least one occasion, however, the Court has adopted a position more consistent with the avoidance of unconsti-

387. *See* Skidmore v. Swift, 323 U.S. 134, 140 (1944).

388. *See* Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326, 2332 (2000) (stating that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution").

389. *See* Adrian Vermeule, *Savings Constructions*, 85 GEO. L.J. 1945, 1948-49 (1997) (collecting authorities recognizing two versions of the canon).

390. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 121 S. Ct. 675, 683 (2001); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988).

tutionality canon.[391] Under this version of the canon, an agency interpretation that would otherwise be sustained under *Chevron* will be rejected in favor of another interpretation only if it would actually be unconstitutional. The Court's decisions thus send conflicting signals on this question.

We think the avoidance of unconstitutionality canon comports better with the underlying rationale of the *Chevron* doctrine than does the avoidance of questions canon. *Chevron* rests in part on the understanding that Congress prefers discretionary policy choices to be made, to the extent possible, by Congress itself and by accountable agencies rather than by the courts. The avoidance of questions canon has the opposite effect of enlarging the scope of policymaking by courts at the expense of Congress and the agencies. As Judge Posner has written, the effect of this version of the canon is

> to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretations of the Constitution—to create a judge-made "penumbra" that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself—and in doing so to sharpen the tensions between the legislative and judicial branches.[392]

When an agency's interpretation poses an actual conflict with the Constitution, the court should displace the *Chevron* doctrine and adopt the interpretation that avoids this result. However, short of an actual conflict with the Constitution, *Chevron* instructs that courts should seek to preserve the discretion of agencies to resolve questions of policy. Thus, whatever the fate of the avoidance of questions canon in other contexts,[393] it should be abandoned in cases that arise under the *Chevron* doctrine.

14. Does *Chevron* Apply to Interpretations That Are Inconsistent with Judicial Precedent?

The Supreme Court has consistently ruled that agency interpretations of statutes that deviate from the Court's own precedents are not entitled to *Chevron* deference.[394] According to the Court, "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[395] Such blanket statements have the appearance of creating an exception to the *Chevron* doctrine—that is, a

391. *See* Rust v. Sullivan, 500 U.S. 173, 190-91 (1991).

392. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985).

393. Commentators have suggested that the canon should be abolished altogether. *See, e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71.

394. *See* Neal v. United States, 516 U.S. 284 (1996); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990); *see also* Pierce, *supra* note 28, at 2251 (synthesizing cases).

395. *Maislin Indus.*, 497 U.S. at 131.

circumstance in which courts should find that the presumption of delegated interpretational authority has been overcome. Indeed, the Court's understanding appears at first blush to violate the logic of delegated lawmaking that underlies *Chevron*. If Congress has indeed delegated the primary power of interpretation to the agency rather than the courts, then it cannot be true that every judicial interpretation takes precedence over contrary agency interpretations. At least if the issue is one as to which the statute admits of more than one meaning, then the agency interpretation logically should take precedence over the judicial interpretation.[396]

More accurately considered, however, the question of what to do about judicial precedent does not present an exception to *Chevron*, but illustrates the need for a transitional rule—a special rule of adjustment that mediates between the pre-*Chevron* and the post-*Chevron* worlds. This can be seen by considering, first, what role judicial precedent should play in a world in which all relevant decisions have been made in full awareness of *Chevron* and its two-step procedure. In such a world, all judicial precedent should be self-consciously rendered as either a "step-one precedent" or a "step-two precedent." If step one, then the previous court will have determined that the statute had an unambiguous meaning that forecloses the exercise of any interpretational discretion on the part of the agency; the statute either compelled or forbade the previous agency view. Such a precedent would obviously be entitled to full stare decisis effect in a later case presenting the same interpretational issue. Such a decision, in effect, tells us that the statute has only one possible meaning, which precludes any exercise of agency discretion.[397]

In contrast, if the previous judicial decision was a step-two precedent, then the court found that the statute admits of the exercise of agency discretion in its interpretation. If the court upheld the agency interpretation at step two, then we know that the previous agency interpretation was reasonable. This does not, however, foreclose the possibility that a different agency interpretation would also be reasonable. If the court struck down the previous agency interpretation at step two, then we know the previous interpretation was unreasonable. But this too does not mean that a different agency interpretation would not be reasonable. In either event, the previous judicial decision should not be given full stare decisis effect in fixing the meaning of the statute. Instead, it should be given stare decisis effect only for the proposition that the statute admits of multiple interpretations—in other words, for the proposition that the case should be resolved at step two—and that at least one interpretation (the agency's previous interpretation) was either reasonable or unreasonable. The fact that the court upheld (or invalidated) the agency's prior construction of the statute

396. One of the authors of this Article has previously commented on this issue in a manner that reflects this perspective. *See* Merrill, *supra* note 3, at 989-90.

397. *See* White, *supra* note 28, at 745-46, 759.

would not, however, be determinative in deciding whether the current interpretation is permissible.[398] Thus, in a post-*Chevron* world in which all relevant decisions are taken in full awareness of *Chevron*'s two-step procedure, judicial precedent should be categorized as being either step-one precedent or step-two precedent, and should be given the stare decisis effect appropriate to its status.

The analysis becomes more complicated, however, when we introduce the possibility that one or more of the relevant judicial decisions were *not* rendered in full awareness of the *Chevron* framework. The most obvious circumstance is where the judicial precedent predates 1984. We also know, however, that for many years after *Chevron*, courts irregularly, but often, ignored or disregarded the *Chevron* doctrine.[399] The difficult question is how to treat such pre-*Chevron* precedent.

There are really only two options for such decisions. One is to examine each pre-*Chevron* precedent on a case-by-case basis, in an attempt to determine as best as is possible whether the precedent would have been a step-one precedent or a step-two precedent if, counterfactually, the court had applied the *Chevron* doctrine.[400] The other is to adopt a blanket presumption that all pre-*Chevron* precedent is step-one precedent.[401] Neither option can be fairly described as an exception to the *Chevron* doctrine. Rather, courts must elect one option or the other as a transition rule in order to make sense of pre-*Chevron* precedent in a post-*Chevron* world. Competing arguments can be advanced in support of either rule, and the logic of *Chevron* does not clearly demand one approach rather than the other. The Supreme Court's treatment of its own precedent is best understood as adopting the second option—the blanket presumption that all past Supreme Court precedents are step-one precedents. This choice is a justifiable one, for several reasons.

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398. Professor Pierce appears to advocate a more grudging approach to step-two precedent. He would relax the strong presumption against overruling statutory interpretation precedent in this context, but apparently would continue to treat the judicial precedent as presumptively correct, in deference to reliance interests associated with judicial precedent. *See* Pierce, *supra* note 28, at 2259-62. At least in the context of judicial precedent rendered with full awareness of *Chevron*, we think this gives insufficient credence to the notion that Congress has impliedly delegated interpretational authority to the agency, not the court. Once the *Chevron* message is fully assimilated, parties affected by judicial decisions affirming agency interpretations at step two should understand that the decision they are relying upon is the agency's, not the court's.

399. *See* Merrill, *supra* note 3, at 982-84.

400. This appears to be the approach advocated both by Pierce, *supra* note 28, at 2260-61, and by White, *supra* note 28, at 761.

401. Logically, of course, one could also adopt the presumption that all pre-*Chevron* precedent is step-two precedent. This would make little sense, however, given that courts prior to *Chevron* frequently paid little heed to agency interpretations. There is no empirical basis for presuming that all pre-*Chevron* statutory interpretation precedent involved ambiguous statutes or that they involved agency interpretations that were either reasonable (if upheld) or unreasonable (if struck down).

First, in the era before *Chevron*, courts commonly took the view that they should engage in independent judgment in matters of statutory interpretation.[402] This was not always the case; there has always been a significant strand of deference.[403] But independent judgment was the rule often enough that, as an empirical matter, a substantial percentage of pre-*Chevron* decisions would on a fair re-examination be found to be step-one precedents. Adopting the blanket presumption is thus not a large distortion of reality.

Second, there was no understanding before *Chevron* that agencies were free to change judicial interpretations of ambiguous statutes. Thus, once the meaning of a statute was fixed by a Supreme Court decision, it almost always became a fixed point of reference in understanding the regulatory scheme. Any methodology that would require the systematic reevaluation of pre-*Chevron* precedent would "unsettle a vast cluster of public and private expectations"[404] and would thus be destabilizing.[405] The truism that it is often more important that rules be settled than that they be settled correctly[406] would appear to be fully applicable here.

Third, the process of case-by-case reclassification would be fraught with difficulties. An example is provided by the confident assertion of commentators that the Supreme Court precedent enforced in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.* "merely upheld a prior agency construction of the [Interstate Commerce Act],"[407] in other words, held that the precedent was what we would now call step-two precedent. Although one might gain this impression by reading *Maislin*, the precedent followed by the Court came from original judicial actions seeking to enforce rates different from the ones contained in the filed tariffs.[408] The doctrine was initially articulated by courts, not by the agency, based on the courts' own understanding of the requirements of the policies underlying the Interstate Commerce Act.[409] The precedent reaffirmed in *Maislin* thus does not correspond to either step one or step two of *Chevron*.

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402. *See* Russell L. Weaver, Chevron: Martin, *Anthony, and Format Requirements*, 40 KAN. L. REV. 587, 587-88 (1992) (stating that before *Chevron*, courts usually exercised independent judgment in determining statutory meaning).

403. *See* Merrill, *supra* note 3, at 975; *see also* Diver, *supra* note 3, at 551-52.

404. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1367 (1988).

405. *See generally* Payne v. Tennessee, 501 U.S. 808, 827-28 (1991) ("*Stare decisis* is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Walton v. Arizona, 497 U.S. 639, 673 (1990) (Scalia, J., concurring) ("The doctrine [of stare decisis] exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules.").

406. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

407. Pierce, *supra* note 28, at 2260; *see* White, *supra* note 28, at 744.

408. *See, e.g.*, Tex. & Pac. Ry. Co. v. Mugg, 202 U.S. 242 (1906) (filed rate supersedes rate stated in bill of lading); Gulf, Colo. & Santa Fe Ry. Co. v. Hefley, 158 U.S. 98 (1895) (filed rate supersedes state statute making rate in bill of lading controlling).

409. It appears that the relevant agency (the Interstate Commerce Commission) was mildly supportive of the filed rate doctrine, but purely after-the-fact. *See* INTERSTATE COMMERCE COMM'N, NINTH

As this example suggests, the Supreme Court does not have the institutional capacity to engage in wholesale reexamination of each of its pre-*Chevron* interpretations of regulatory statutes, and classify them as step one or step two. The task of case-by-case reexamination would have to be undertaken largely by the lower courts. This would magnify the uncertainty of the reexamination process, and would increase the likelihood of conflict among the circuits. In addition, even if the Court did have the capacity to undertake these inquiries, there is something misplaced about committing significant judicial resources to "litigation over litigation."[410] Requiring that all statutory interpretation precedents be reexamined and re-categorized in order to calibrate their stare decisis effect probably represents a poor return on investment in both private and public litigation resources.

Finally, the affirmative case for the alternative option, individualized reexamination of past precedents to categorize them as step one or step two, largely rests upon the desirability of giving maximal effect to the allocation of interpretational authority adopted in *Chevron*. As we have seen, however, allocation of authority established in *Chevron* is a revisionist one, and rests on a questionable assumption about presumed congressional intent.[411] Thus, not much is lost by limiting its effect to future controversies. Decisions that change the ground rules are usually given prospective application, and it is fitting that *Chevron* be given prospective application, at least as regards the treatment of judicial precedent.

Some of these considerations, most prominently the limited institutional capacity to engage in case-by-case reexamination, apply most forcefully to the Supreme Court, and less so to the lower courts. However, the general thrust of the analysis points toward a similar conclusion throughout the judicial hierarchy. Pre-*Chevron* precedent at all levels is highly likely to reflect independent judicial judgment; past judicial interpretations at all levels have undoubtedly elicited significant reliance; and case-by-case reconsideration at all levels would be fraught with uncertainty and draining of resources. Thus, there is little basis for adopting a different approach to Supreme Court and lower court precedent in determining the relative claims of *Chevron* and stare decisis.

In sum, judicial precedent should be factored into the *Chevron* framework by first asking whether the precedent was rendered before or after *Chevron* came to be recognized as a universal standard for determining when courts must defer to agency interpretations of law. Post-*Chevron* precedent should

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ANNUAL REPORT 76-77 (1896) (commenting on the *Hefley* decision, and indicating no prior ICC position on the question); *supra* note 402 and accompanying text.

410. *Cf.* Pierce v. Underwood, 487 U.S. 552, 560-61 (1988) (cautioning against overuse of litigation-over-litigation because this "investment of appellate energy will either fail to produce the normal norm-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process").

411. *See* notes 211-14 and accompanying text.

be given whatever stare decisis effect is appropriate to either a step-one decision or a step-two decision. Pre-*Chevron* precedent should be conclusively presumed to be step-one precedent, and should be given the full stare decisis effect appropriate to such status.

CONCLUSION

For a doctrine that enunciates a simple two-step inquiry, *Chevron* has generated an extraordinary amount of confusion about when it does and does not apply. The root of the problem is not the idea of implied delegation—that interpretational authority should be allocated between agencies and courts in accordance with the intentions of Congress. Rather, the root of the problem would appear to be *Chevron*'s suggestion that the critical act of delegation occurs when Congress enacts a statute that contains a gap or ambiguity.[412] This cannot be correct. Any statute that entails executive branch functions can (and almost inevitably does) contain gaps and ambiguities. The presence of a gap or ambiguity therefore does not differentiate agencies entitled to exercise primary interpretational authority from any unit of the executive branch.[413]

Gaps and ambiguities are relevant to the scope of *Chevron* only because every delegation of authority to an agency is subject to the constraint that it must be exercised in accordance with law. Thus, whether an agency is acting pursuant to a delegation to spend money, prosecute crimes, or develop standards for controlling air pollution, its action must conform to law. The existence of a silence or ambiguity in the statute that delegates such power widens the potential discretion of the agency to act, but does not confer authority to act in the first place. We must look elsewhere to identify the critical congressional action that impliedly delegates interpretational authority to an agency.

The critical source of delegated authority that gives rise to mandatory deference is not found in *Chevron*'s language about silences and ambiguities, but rather in its offhand reference to the fact that certain agencies are charged with administration of a statute. Although *Chevron* and most of its many progeny have left this phrase undefined, the Court's recent decision in *Christensen v. Harris County* points toward a more precise understanding of what it takes to charge an agency, which comports with the logic of implied delegation: The relevant source of delegation is a statute that charges an agency with taking action that binds persons outside the agency with the force of law.

Armed with this insight, understood in light of background principles that tell us *Chevron* is but one of two deference doctrines and that congressional intent is always paramount in discerning when *Chevron* should apply, most of the

412. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984).

413. *Accord* Anthony, *supra* note 10, at 34-35.

issues about *Chevron*'s domain that have bedeviled the courts turn out to have fairly easy answers. Agencies are entitled to mandatory deference when they act with the force of law in promulgating rules or adjudicating a dispute that falls within their legislative mandate, and not otherwise. *Chevron*'s domain is not as large as some, most notably Justice Scalia, may have imagined, but it is by no means insignificant. Within its proper domain, *Chevron* serves as a powerful command to which all courts owe a duty of obedience.