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STEP ZERO AFTER *CITY OF ARLINGTON*

Thomas W. Merrill*

INTRODUCTION

The thirty-year history of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ is a story of triumph in the courts and frustration on the part of administrative law scholars.² *Chevron*'s appeal for the courts rests in significant part on its ease of application as a decisional device. Questions about the validity of an agency's interpretation of a statute are reduced to two inquiries: whether the statute itself provides a clear answer and, if not, whether the agency's answer is a reasonable one. The framework can be applied to virtually any statutory interpretation question resolved by an agency, and its component elements—"clarity" and "reasonableness"—are sufficiently flexible to permit virtually any outcome in any particular case. *Chevron* also serves as the U.S. Supreme Court's most important admonition to lower courts not to substitute their judgment for agencies' on matters of policy, at least those matters that have not been resolved by Congress itself. Thus, *Chevron* can be invoked, when the circumstances warrant, as a symbol of judicial restraint.

The frustration of many administrative law scholars rests on *Chevron*'s awkwardness in discharging important functions of judicial review of agency action. Judicial review performs a variety of functions, including protecting individuals from arbitrary bureaucratic action and promoting accountability by requiring agencies to explain the reasons for their decisions. I will focus here on another important function of judicial review, which I will call boundary maintenance. Boundary maintenance includes, importantly, the principle of legislative supremacy—that agencies must respect the will of Congress. Congress is the institution best situated to allocate governmental authority among different institutions in a federal system, and when Congress has settled on a division of powers, it is critical

* Charles Evans Hughes Professor, Columbia Law School. I filed an amicus curiae brief in support of the petitioners in *City of Arlington v. FCC* on behalf of the National Governors Association and other state and local government associations. See Amicus Curiae Brief of the Nat'l Governors Ass'n, et al. in Support of Petitioners, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Nos. 11-1545, 11-1547), 2012 WL 5982593.

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

2. This Article is part of a larger symposium entitled *Chevron at 30: Looking Back and Looking Forward*. For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 *FORDHAM L. REV.* 475 (2014).

that courts respect and enforce it.³ But boundary maintenance also draws upon other important precepts, such as the requirements that agencies honor individuals' rights, abstain from interfering with authority given to other agencies, abide by relevant obligations contained in international law, and respect the traditional prerogatives of state and local governments.

Although Congress is the appropriate institution to establish the boundaries of agency authority *ex ante*, courts are well suited to resolve disputes over the scope of agency authority that arise *ex post*.⁴ One reason is that judges are relatively less biased about matters of government authority than other governmental institutions are likely to be.⁵ Federal judges, in particular, enjoy life tenure and secure compensation, and so are comparatively more insulated from the political passions of the day. This is not to say that judges are free from ideological predilections or intellectual fashions. But they are relatively more impartial than other, more politically responsive governmental institutions. They are not perfect umpires but are better than any of the alternatives. A second reason is that judges are poorly situated to seize significant political authority for themselves. They are largely limited to deciding cases brought by others, and, at the higher levels of the judicial hierarchy, can decide only a small fraction of contested cases in any given year. Moreover, because each judge exercises individual judgment in deciding the cases courts do hear, it is very difficult for courts to achieve the coordination that would be necessary to take control of policy on a sustained basis in any given area.⁶ In Alexander Hamilton's famous expression, the judiciary is the "least dangerous" branch,⁷ and hence the safest to task with resolving disputes over the boundaries of the power exercised by others.

Chevron is poorly designed to allow courts to perform this boundary maintenance function. The key problem is that the principles that inform the location of the various boundaries of agency authority are not ordinarily found in "clear" legislative texts. Sometimes they are, in which case courts can enforce these limitations at Step One of the *Chevron* framework. But more often, the relevant boundaries are found in constitutional doctrines, judicial precedents, and established practices that have evolved over time regarding the conduct of governmental affairs—custom or tradition or the "small c" constitution if you will.⁸ Step One of *Chevron*, which asks whether Congress has spoken clearly to the precise issue in controversy,

3. See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 474–75 (2010).

4. The following discussion can be regarded as a form of generalized institutional realism about courts, especially federal courts. See generally Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1.

5. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 124–28 (1994).

6. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 123–32 (2006).

7. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (Gideon ed., 2001).

8. See generally WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (developing the idea that certain important statutes and their evolved interpretation represent a "small c" constitution).

provides no obvious way of enforcing these understandings.⁹ Conceivably, they could come into play at Step Two, which asks whether the agency's interpretation is reasonable.¹⁰ But the dominant understanding of Step Two has been that the courts ask whether the agency has adopted a reasonable interpretation of the statutory text, not whether it has acted reasonably in light of broader traditions about the division of authority among governmental institutions and between government and individual.¹¹

There are, in principle, three ways to reconcile the traditional judicial function of boundary maintenance with *Chevron's* reductionist two-step framework. One would be to overrule *Chevron*, or at least to cabin it as a special doctrine that applies only when Congress has expressly delegated authority to an agency to engage in the interpretation of a particular statutory term. This would have been feasible in the early years after *Chevron* was decided. There is no evidence that the Justices who joined the opinion regarded it as a significant revision of administrative law,¹² and even its author, Justice Stevens, tried in later decisions to limit *Chevron* to questions of statutory application.¹³ But *Chevron* has now been invoked in far too many decisions to make overruling it a feasible option for the Court. And cabining *Chevron* to cases of express delegation of authority to interpret particular statutory provisions also has been explicitly or implicitly rejected by the Court,¹⁴ and this too would seem to be too unsettling to be feasible.

Another accommodation would be to transform *Chevron's* Step One, or conceivably Step Two, into a wide-ranging inquiry that includes boundary maintenance as well as ordinary statutory interpretation. This is a path the Court has occasionally taken. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,¹⁵ the Court concluded after an examination of the lengthy history of interaction between Congress and the Food and Drug Administration (FDA) that Congress had "clearly" denied the FDA jurisdiction over tobacco products. The decision was ostensibly rendered under *Chevron's* Step One but was indistinguishable from an exercise in de novo review—looking to a vast array of contextual evidence to resolve an important question of boundary maintenance. More recently, in *Utility Air Regulatory Group v. EPA*,¹⁶ the Court concluded that the Environmental

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

10. *Id.*

11. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 853 (2001).

12. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 275–77 (2014).

13. See *Negusie v. Holder*, 555 U.S. 511, 529–30 (2013) (Stevens, J., concurring in part and dissenting in part); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

14. For explicit rejection, see *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704, 713–14 (2011) (declining, in the tax context, to follow precedent limiting *Chevron*-style deference to agency interpretations authorized by express delegations of interpretative authority).

15. 529 U.S. 120 (2000).

16. 134 S. Ct. 2427, 2442 (2014).

Protection Agency (EPA) had acted unreasonably in interpreting “any air pollutant” to include greenhouse gases for purposes of certain stationary source provisions of the Clean Air Act. Although the decision was ostensibly based on *Chevron*’s Step Two, the Court concluded that the agency’s interpretation was unreasonable in part because it “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”¹⁷ In other words, the Court was engaging in boundary maintenance through an aggressive application of Step Two. The problem with blowing up Step One or Step Two in this fashion is that it transforms *Chevron* from a deference doctrine into a form of de novo review, yet it does so episodically and without any announced basis for the circumstances that trigger such a transformation in the doctrine.

The third accommodation would be to develop a set of threshold conditions that would have to be satisfied before the *Chevron* doctrine, in its original two-step formulation, would apply. The Court took a major step in this direction in *United States v. Mead Corp.*,¹⁸ in which it set forth (in a rather muddled fashion) the threshold conditions that must be satisfied before a court can conclude that Congress has delegated the type of authority to an agency that will trigger *Chevron* review. This has come to be known as *Chevron* “Step Zero.”¹⁹ Recently, in *City of Arlington v. FCC*,²⁰ the petitioners asked the Court to adopt an additional threshold condition—a determination that the interpretational question at issue falls within the scope of the agency’s jurisdiction—before *Chevron* applies. Their proposal, in effect, was to expand Step Zero to allow courts to resolve this important question of boundary maintenance before turning to *Chevron*.²¹ In an opinion by Justice Scalia, writing for the Court’s two most conservative and three most liberal members, the Court rejected the invitation to cabin *Chevron* in this fashion.²² The unifying impulse behind this odd coalition seemed to be the perception that a “jurisdictional”

17. *Id.* at 2444. In sharp contrast, in *Massachusetts v. EPA*, the Court concluded that the plain meaning of “air pollutant” included greenhouse gases, this decision being an exercise of *Chevron* Step One. 549 U.S. 497, 527–29 (2007). Both decisions reveal shifting majorities of the Court manipulating *Chevron* Step One and Step Two to overturn agency policy judgments.

18. 533 U.S. 218 (2001).

19. See Merrill & Hickman, *supra* note 11, at 873. In this symposium, a number of other contributors also focus extensively on *Mead* and *Chevron* Step Zero. See Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 741–43 (2014); Kristin E. Hickman, *The Three Phases of Mead*, 83 FORDHAM L. REV. 527, 528–30 (2014); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789, 792–93 (2014). Another contribution relies on a dataset of 730 pre- and post-*Chevron* Supreme Court decisions to evaluate the use of *Chevron* and *Skidmore* in the workplace-law context. James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497 (2014). And a final contribution argues that federalism concerns should play no role at *Chevron* Step Zero. Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633, 646–52 (2014).

20. 133 S. Ct. 1863 (2013).

21. See *infra* notes 110–15 and accompanying text.

22. See *infra* notes 117–20 and accompanying text.

exception to *Chevron* would be too uncertain to permit principled application.²³

The dissenters in *City of Arlington*, led by Chief Justice Roberts, protested that giving *Chevron* deference to agencies' views about the scope of their own authority was completely at odds with what I have called the boundary maintenance function of the courts. As he put it, "[a]n agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency."²⁴ He also suggested, intriguingly, that courts could effectively monitor attempts by agencies to transgress the boundaries of their delegated authority by applying the *Mead* factors in an appropriately particularized fashion.²⁵ The suggestion was that courts should carefully calibrate the scope of the delegation to agencies to act with the force of law, taking into account both affirmative grants of delegated power and negative limitations on those grants.²⁶

This Article considers whether the traditional boundary maintenance function of judicial review can be reconciled with *Chevron* through appropriate implementation of Step Zero. I begin by reviewing the rationale for Step Zero, its rather confusing adoption in *Mead*, and the failed attempt to expand Step Zero in *City of Arlington*. I then argue that *City of Arlington* has solidified the Court's commitment to Step Zero, at least as articulated in *Mead*. Next, I turn to Chief Justice Roberts's suggestion that a more carefully calibrated application of the *Mead* factors could serve as a substitute for an explicit "agency jurisdiction" inquiry as part of Step Zero. I conclude that the Chief Justice's suggestion represents the best available solution to reconciling *Chevron* with the courts' traditional boundary maintenance function. The Chief Justice's approach would situate the boundary maintenance function as part of Step Zero, where the court engages in de novo review. This would suggest that the reviewing court is free to ignore the views of the agency—which is unfortunate. Nevertheless, it would allow courts to draw upon traditions other than *Chevron*, such as the doctrines that inform questions of separation of powers, individual constitutional rights, and preemption of state law, in deciding whether the agency has transgressed the limits of its authority. It would also allow courts to consider a variety of contextual sources, such as the history of an agency's exercise of regulatory authority in a particular area, in asking whether Congress intended the agency to act with the force of law with respect to the issue in question. The Chief Justice's proposal can be regarded as a second-best solution to preserving the boundary maintenance function of courts in a world in which the Supreme Court is committed to preserving *Chevron*. His solution would provide better guidance to lower courts and agencies than having the Supreme Court engage in episodic and unpredictable manipulation of

23. See *infra* notes 117–20 and accompanying text.

24. 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

25. *Id.* at 1884.

26. *Id.* at 1880–84.

Chevron's Step One and Step Two. It might also do more to promote the use of *Chevron* as a genuine mandate for deference to agency views.

I. WHY STEP ZERO?

Chevron did not itself use the terms “Step One” and “Step Two” in describing how courts should evaluate agency interpretations of statutes. But lower courts quickly dubbed it the “two-step framework,”²⁷ and this locution is now familiar. Although the formulation of the steps varies, Step One is generally thought to require courts to determine whether the statute has a “clear” meaning with respect to the issue in controversy.²⁸ If the answer is yes, then the court adopts this meaning (which of course might be the agency’s interpretation). If the court concludes that the statute is not clear, then it moves on to Step Two, where the relevant inquiry is whether the agency’s interpretation is “reasonable” or “permissible.” If the answer to this question is affirmative, then the court upholds the agency interpretation; if not, the court either remands to the agency or adopts its own interpretation of the statute.

Chevron said relatively little about the threshold conditions that would trigger the application of this two-step approach, other than to note in passing that the EPA, whose interpretation was at issue, had been “entrusted to administer” the Clean Air Act.²⁹ Later decisions also spoke vaguely about interpretations of statutes that an agency had been “charged” with administering.³⁰ As time passed, it became increasingly clear that a more precise understanding of what was required to trigger the *Chevron* two-step approach was needed. Because *Chevron* had already commandeered Steps One and Two, Kristin Hickman and I, in an article published in 2001, dubbed this threshold inquiry *Chevron* “Step Zero,” and this locution has caught on.³¹ Three considerations, in particular, made it imperative to develop a more precise conception of when *Chevron* should be applied.

One reason some limiting principle was necessary is that *Chevron* included language about the rationale for deference that was vastly overbroad. In a key passage, Justice Stevens noted that sometimes Congress explicitly delegates authority to agencies to define specific statutory provisions. When it does so, he observed, the agencies’ interpretations are “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”³² Without missing a beat, Justice Stevens immediately added: “Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such

27. See, e.g., Int’l Bd. of Teamsters v. ICC, 801 F.2d 1423, 1426 (D.C. Cir. 1986).

28. Sometimes Step One is framed in terms of the opposite of “clear,” where it is generally said the statute is “ambiguous” or contains a “gap.” E.g., Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

29. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

30. *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 739 (1996).

31. Merrill & Hickman, *supra* note 11, at 836–37. The phrase was given an important boost by Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207–11 (2006).

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

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.”³³ This passage suggested that any time Congress has left a gap or ambiguity in a statute administered by an agency this should be viewed as an “implied delegation” of interpretative authority to the agency, and that this entitles the agency to deference.

Taken literally, the idea that any gap or ambiguity is an implied delegation to an agency would represent a massive expansion of administrative authority. The standard assumption, derived from the nondelegation doctrine, is that agencies have no authority to act unless power is delegated to them.³⁴ Every statute contains gaps and ambiguities. If gaps and ambiguities are implied delegations, then once Congress delegates any authority to an agency, it could limit the delegation only by enacting clear statutory language restricting that authority. In other words, rather than putting the burden on an agency to show authority to act, the burden would be on Congress to constrain the agency’s authority to act by unambiguous language.³⁵ There is no support in our constitutional traditions for such an inversion of the standard assumption about delegation. Even *Chevron*’s most enthusiastic champions admit that the idea of an “implied delegation” is a fiction.³⁶ As to whether Congress has embraced such an understanding, such evidence as exists suggests the opposite.³⁷

The novelty and implausibility of the implied delegation fiction suggested the need for a more persuasive basis for concluding that Congress has delegated interpretational authority to the agency.³⁸ The identification of this triggering set of circumstances would obviously have to be undertaken before applying the *Chevron* two-step. In other words, the identification would have to be made at Step Zero.

A second reason why some threshold inquiry was needed was that it became increasingly clear—as it should have been from the beginning—that *Chevron* cannot serve as the exclusive standard for reviewing questions of statutory interpretation decided by agencies. For example, the Court has never suggested that trans-substantive statutes like the Administrative Procedure Act³⁹ (APA) or the Religious Freedom Restoration Act⁴⁰ (RFRA) should be interpreted by giving deference to agency interpretations.⁴¹ Such statutes are designed to constrain agency action—

33. *Id.*

34. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109–14 (2004).

35. See *id.*

36. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–17.

37. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 470–76 (1989).

38. See Merrill & Hickman, *supra* note 11, at 874–88.

39. 5 U.S.C. § 500 (2012).

40. 42 U.S.C. §§ 2000bb, 2000bb–1 to 2000bb–4 (2012).

41. See *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (holding that *Chevron* does not apply to agency interpretations of the APA). The Court recently

they have always been and will continue to be interpreted by courts through exercises in independent judgment about the meaning of contested provisions. Nor has the Court ever suggested that it would defer to agency views regarding the meaning of statutes that have traditionally been enforced by the courts, such as the criminal law or the antitrust laws.

Conceivably, one could operate with two standards of review—de novo review for the APA, criminal law, and statutes like the antitrust laws, and *Chevron* review for statutes a particular agency has been “charged” or “entrusted” with administering. But this simple move became untenable once the Court, in a series of post-*Chevron* decisions, reaffirmed that there are in fact two deference doctrines, even in cases where agencies have in some sense been singled out as having authority to administer the statute. The Equal Employment Opportunity Commission (EEOC) proved to be the key stumbling block. Some years before *Chevron*, the Court had adopted the discretionary standard of review articulated by Justice Jackson in *Skidmore v. Swift & Co.*⁴² for purposes of reviewing a statutory interpretation by the EEOC.⁴³ *Skidmore* deference, as it came to be called, requires courts to consider a number of contextual factors that make an agency interpretation more or less persuasive to the court.⁴⁴ Some years after *Chevron*, over Justice Scalia’s objections, the Court reaffirmed that *Skidmore* was the proper standard for evaluating EEOC interpretations.⁴⁵ This was followed by other decisions which also applied or reaffirmed *Skidmore* in a variety of employment-related contexts. The most prominent of these decisions, *Christensen v. Harris County*,⁴⁶ found all but Justice Scalia reaffirming the continued vitality of *Skidmore* deference in appropriate circumstances, although, as I will discuss momentarily, it also revealed some deep schisms about the proper way to understand the relationship between *Chevron* and *Skidmore*.

Once it became clear that the Court was committed to applying two different deference doctrines when an agency has been “entrusted” in some sense with administration of the statute, some kind of Step Zero became inevitable. The full menu of review standards included three options: sometimes de novo review was appropriate (as in cases involving the meaning of the APA or where courts act as the implementing body); sometimes *Skidmore* was appropriate (as in cases reviewing agencies like the EEOC); and sometimes *Chevron* was appropriate (as in cases involving the EPA and the like). Obviously, a court should determine which standard is appropriate before it undertakes to resolve the question at hand. The

invalidated a regulation of the Department of Health and Human Services for violating RFRA; no suggestion was made by any Justice that the agency was entitled to deference for its interpretation of the Act. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

42. 323 U.S. 134 (1944).

43. The Court adopted *Skidmore* as the standard for reviewing EEOC interpretations in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140–46 (1976).

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

45. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991).

46. 529 U.S. 576 (2000).

process of sorting out the relevant scope of these divergent standards required the development of something like Step Zero.

A third reason why a threshold inquiry became imperative was that multiple conflicts and controversies emerged over time about the scope of the *Chevron* doctrine. In our 2001 article, Hickman and I counted fourteen unresolved questions about *Chevron*'s domain.⁴⁷ I will not repeat the full list. Examples included: whether *Chevron* applies to statutes enforced by multiple agencies; whether *Chevron* applies to interpretations set forth in interpretative rules or opinion letters; whether *Chevron* applies to interpretations offered by lower-level employees in an agency; whether *Chevron* applies to agency interpretations that conflict with judicial precedent; and whether *Chevron* applies to agency interpretations about the scope of the agency's authority—the issue presented in *City of Arlington*.⁴⁸ As time passed, additional important conflicts emerged, such as whether *Chevron* applies to agency judgments about the preemptive effect of a statutory provision.⁴⁹

Conceivably, the Supreme Court could resolve these conflicts on an ad hoc basis, or simply leave them to fester in the lower courts. But a much better solution would be to adopt a principled understanding of the threshold conditions for the application of the *Chevron* doctrine, which could then be applied by lower courts in sorting out, as they arise, the many issues about the proper scope of *Chevron*. A principled understanding of Step Zero would go far toward bringing the burgeoning discord about *Chevron*'s domain under control.

In short, three mutually supporting reasons emerged after 1984, each of which suggested that *Chevron*-style review is appropriate in some circumstances but not others. By the time oral argument was held in *City of Arlington*, the Court itself had taken to calling this threshold inquiry Step Zero.⁵⁰

II. THE CONTENT OF STEP ZERO

In the last decade of the twentieth century, starting in roughly the tenth year of Our *Chevron*, the Supreme Court began to intimate what Step Zero might look like. As previously noted, *Chevron* itself had spoken about express and implied “delegations” of interpretative authority.⁵¹ Justice Scalia, in a law review article (written shortly after he joined the Court) had opined that *Chevron* rests on a “fiction[]” of congressional intent to delegate interpretational authority to agencies to fill in the gaps created by

47. Merrill & Hickman, *supra* note 11, at 848–52.

48. 133 S. Ct. 1863, 1866 (2013).

49. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 576 (2009); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

50. *See* Transcript of Oral Argument at 6, *City of Arlington*, 133 S. Ct. 1863 (Nos. 11–1545, 11–1547) (Breyer, J.); *id.* at 8 (Scalia, J.); *id.* at 11, 26 (Kennedy, J.); *id.* at 28 (Sotomayor, J.).

51. *See supra* notes 32–33 and accompanying text.

unclear statutes.⁵² The Court's *Chevron* decisions also began to speak more consistently of *Chevron* deference being a function of delegated authority from Congress.⁵³

This, of course, left open the critical question: What kind of delegated authority should count as an (implied) delegation of interpretational authority? One possibility, fleshed out in a law review article by John Duffy, was that delegated authority to promulgate legislative rules is the key.⁵⁴ As Duffy observed, if Congress has delegated legislative rulemaking authority to an agency, and the agency uses this authority to resolve an ambiguity in a statute, the questions on review should be (a) whether the legislative rule conflicts with the statute and (b) if not, whether the rule is arbitrary and capricious.⁵⁵ This is essentially *Chevron* Step One and Step Two. This was nifty, but it failed to account for many decisions in which courts had applied *Chevron* in reviewing interpretations adopted in other decisional formats, such as adjudication.

A. *Christensen v. Harris County*

Justice Thomas's opinion for the Court in *Christensen v. Harris County*⁵⁶ spoke more broadly about *Chevron* being the appropriate standard when an agency interprets a statute in a decision that has "the force of law," which he indicated by example would include "formal adjudication or notice-and-comment rulemaking."⁵⁷ This seemed to track a report of the Administrative Conference of the United States, which similarly recommended that *Chevron* be limited to interpretations rendered with some degree of procedural formality, such as formal adjudication and notice-and-comment rulemaking.⁵⁸ Justice Thomas in *Christensen* declined to give *Chevron* deference to a Department of Labor opinion letter about the meaning of the Fair Labor Standards Act, because the letter was merely advisory and did not have the force of law. Instead, the Department was entitled to *Skidmore* deference, asking whether its views were persuasive. Justice Thomas concluded that the Department's interpretation was not persuasive, and therefore it was rejected.⁵⁹

Foreshadowing future fissures, Justices Scalia and Breyer filed separate opinions in *Christensen* offering different views about the proper scope of *Chevron*. Justice Scalia argued that there was only one deference doctrine—*Chevron*. *Skidmore* was an "anachronism" and should be

52. See Scalia, *supra* note 36, at 517.

53. 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.").

54. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 199–202 (1998).

55. *Id.* at 202–03.

56. 529 U.S. 576 (2000).

57. *Id.* at 587.

58. OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS AND REPORTS, RECOMMENDATION 89-5: ACHIEVING JUDICIAL ACCEPTANCE OF AGENCY STATUTORY INTERPRETATIONS 31–33 (1989).

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

relegated to the dustbin of history.⁶⁰ *Chevron* should apply whenever the court has the benefit of the “authoritative” view of the agency about the meaning of a statutory gap or ambiguity.⁶¹ This was satisfied in *Christensen*, he said, because the Acting Administrator of the Wage and Hour Division of the Department of Labor had announced the interpretation in an opinion letter, and this had been defended by the Solicitor General in an amicus brief cosigned by the Solicitor of Labor.⁶²

Justice Breyer also thought there was only one deference doctrine, but that it was the doctrine applied in *Skidmore*. *Chevron* had not rendered *Skidmore* an anachronism; indeed it “made no relevant change” in deference doctrine.⁶³ *Chevron* should be understood simply as a decision that “focused upon 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.”⁶⁴ As to the scope of this additional factor supporting deference, Justice Breyer said, oddly enough, that Justice Scalia “may well be right” that that the opinion letter was enough to elicit *Chevron* deference.⁶⁵

Hickman and I published our article on Step Zero shortly after *Christensen* was decided. The article was intended to function as a restatement of the law of *Chevron*, rather than as a pitch for an ideal regime.⁶⁶ Building on the growing consensus supporting implied delegation as the foundation of *Chevron*, we sought to unpack what kind of agency interpretations could fairly be said to represent an exercise of delegated interpretational authority. Taking a cue from the majority opinion in *Christensen* and other decisions by the Court, we argued that two conditions should be met. First, Congress must have delegated authority to the agency to act with the “force of law,” either by conferring power on the agency to issue legislative regulations or binding adjudications.⁶⁷ Second, the interpretation in question must have been made by the agency in the exercise of this authority—that is, it must have been rendered in a legislative rule or an adjudication that yields a self-enforcing order.⁶⁸

We argued that a delegation of authority to act with the force of law, in contrast to other types of delegations, is an appropriate signal that Congress intended the agency, rather than the courts, to play the primary role in making policy. Not every agency and not every agency function is given authority to bind persons outside the agency with the force of law.

60. *Id.* at 589 (Scalia, J., concurring in part and concurring in judgment).

61. *Id.* at 591.

62. *Id.*

63. *Id.* at 596 (Breyer, J., dissenting).

64. *Id.*

65. *Id.*

66. In earlier writing, I advocated that *Chevron* be discarded in favor of an approach that would treat agency interpretations as a form of “inter-branch” precedent. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). By 2001, it was clear that *Chevron* was not going away.

67. Merrill & Hickman, *supra* note 11, at 874–89.

68. *Id.*

Restricting *Chevron* to agencies that have been delegated such authority narrows the scope of delegated authority to a subset of agencies and agency functions where one can plausibly say that Congress has conferred highly significant powers on the agency.⁶⁹

We further argued that limiting *Chevron* to interpretations rendered by the agency in the exercise of delegated authority to act with the force of law was necessary to preserve the limitations on congressional delegations. Giving *Chevron*-style deference to interpretations rendered in non-binding formats like opinion letters or amicus briefs would in effect allow agencies to leverage their delegated authority beyond the limits prescribed by Congress.⁷⁰

Finally, we said that requiring the interpretation emerge through legally binding agency action would tend to limit *Chevron* to circumstances in which some kind of relatively formal public process has been followed in rendering an interpretation. We noted that the match would not be perfect, since agencies can, for example, forego notice-and-comment procedures for good cause in issuing legislative rules.⁷¹ Still, the “force of law” limitation would tend in the large run of cases to reinforce the correlation between *Chevron* deference and the use of some kind of process in which public input occurs at the agency level.

The article, perhaps unfortunately, did not probe deeply into what it means for an agency to act with the “force of law.” We did say that it refers to the capacity of an agency to compel behavior by persons outside the agency, on pain of suffering adverse consequences (sanctions) for failing to conform to the agency edict.⁷² We said that the only types of agency action that have the force of law in this sense are legislative regulations and self-executing adjudications.⁷³ And we tried to make clear that, although agency action having the force of law has certain consequences for the procedures agencies must follow (subject to exceptions for good cause, etc.), and that action having the force of law should have certain consequences for the degree of deference a court gives the agency, neither the procedures the agency employs nor the deference the court gives the agency determines whether its action has the force of law.⁷⁴ In hindsight, we should have made more of an effort to clarify that agency action has the force of law when Congress and the agency *intend* that the agency’s action will have the force of law, i.e., both the delegator and the delegatee intend that agency action will compel certain behavior by persons outside the agency. The procedures an agency follows may provide evidence of the

69. *Id.* at 876.

70. *Id.* at 883–84.

71. *Id.* at 885; *see also* 5 U.S.C. § 553(a) (2012) (exempting rules related to military affairs and agency personnel management or loans or grants from notice-and-comment requirements); *id.* § 553(b) (exempting interpretative rules, statements of policy or organizational rules from notice-and-comment, and allowing agencies to forego notice-and-comment for good cause).

72. Merrill & Hickman, *supra* note 11, at 881.

73. *Id.* at 882.

74. *Id.*

agency's intent, but the procedures do not themselves give agency action the force of law. Similarly, the deference a court gives to an agency's action does not give the agency's action the force of law. The case law and the commentary have exhibited considerable confusion on these points,⁷⁵ and our relatively brief treatment would have been more useful had we acknowledged the confusion and made a more sustained effort to explain how agency action having the force of law exists independently of agency procedures and judicial review.

B. *United States v. Mead Corp.*

The three-way split over the proper scope of the *Chevron* doctrine in *Christensen* evidently persuaded the Court that better guidance was required. The vehicle the Court selected for providing such guidance, *United States v. Mead Corp.*,⁷⁶ was an unfortunate choice. *Mead* involved a very idiosyncratic administrative process called tariff classification rulings. These rulings did not correspond to any of the more familiar modes of administrative action, such as legislative rules, interpretative rules, opinion letters, adjudications, and so forth.⁷⁷ They were letter rulings issued by the Customs Service in response to a request by an importer for advice as to what tariff applies to a proposed importation of goods. The implementing regulations specified that these rulings were "binding on all Customs Service personnel."⁷⁸ But they did not bind anyone outside the agency, including the importer who sought the ruling, who could pay the tariff stated in the letter and then sue for a refund. Nor were these rulings regarded as controlling for any other importation of goods, however similar.⁷⁹ In effect, they were a safe pass given to an importer for purposes of a single importation of goods. Typically, no public notice or opportunity to comment was provided before tariff classification rulings were issued, nor was the importer entitled to a hearing beyond the request for a ruling and the responsive letter.⁸⁰ Tariff classification rulings were extremely numerous; forty-six different Customs Service offices issued over ten thousand rulings every year.⁸¹ Given the oddball nature of tariff classification rulings, it was hard to see how a decision whether *Chevron* should apply to an interpretation reflected in such a ruling would generalize to other, more typical modes of administrative action.

The Court in *Mead* nevertheless gamely sought to synthesize a general understanding about the threshold conditions for applying *Chevron*. The majority opinion, written by Justice Souter, commanded eight votes, including those of Justice Thomas and Justice Breyer. The Souter opinion

75. See generally 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.4 (5th ed. 2010).

76. 533 U.S. 218 (2001).

77. See *id.* at 221–22.

78. 19 C.F.R. § 177.9(a) (2000).

79. *Id.* § 177.9(c).

80. *Mead*, 533 U.S. at 223, 233.

81. *Id.* at 224.

reaffirmed or settled a number of contested questions. It reaffirmed that federal administrative law includes two deference doctrines, the one articulated in *Chevron* and the one expressed in *Skidmore*.⁸² It reaffirmed that the ultimate touchstone for determining the proper standard of review is the intent of Congress, and that courts must decide, exercising de novo review, which standard applies.⁸³ It reaffirmed the proposition set forth in *Christensen* that *Chevron* applies only to agency interpretations that have the “force of law.”⁸⁴ It even seemed to endorse the two-part exegesis advanced in the Merrill/Hickman article (which appeared before *Mead* was decided and was cited by the Court in a footnote⁸⁵), stating: “We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”⁸⁶ In short, *Mead* held that *Chevron* is subject to a Step Zero inquiry, that the inquiry entails asking whether the agency has been delegated authority to act with the force of law, and that the interpretation must have been made in the exercise of such authority to qualify for *Chevron* deference.⁸⁷ All this, in my view, was positive.

Otherwise, the majority opinion was a mess. The opinion left readers wondering whether having the force of law was an independent criterion, with certain consequences following for the required package of procedures in the usual case (but not always), or whether following certain procedures was in fact the test for determining whether action has the force of law.⁸⁸ Justice Souter was also clearly troubled by the question whether the odd-duck tariff classification rulings could fairly be characterized as “law,” given that they are a one-way day ticket having no precedential value, and can be issued, potentially in contradictory terms, by forty-six different regional offices.⁸⁹ But he had been given little guidance as to what it means for agency action to be “law.” For ordinary administrative law purposes, it is generally good enough to say that agency action has the “force of law” when it binds actors outside the agency.⁹⁰ Justice Souter evidently wanted to probe more deeply, yet he did not have the material at hand to do so in more than a very suggestive fashion. All of which left lower courts and commentators scratching their heads.

82. *Id.* at 227–28, 234–35.

83. *Id.*

84. *Id.* at 226–27.

85. *Id.* at 230 n.11.

86. *Id.* at 226–27.

87. *Id.*

88. *E.g., id.* at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”).

89. *Id.* at 232–34.

90. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 309 (1979) (distinguishing binding rules that affect “individual rights and obligations” from those that merely regulate an agency’s “own affairs”).

Two other factors, beyond the idiosyncratic facts, help explain the maddening application of Step Zero in *Mead*. One was that Justice Souter likely was eager to secure the votes of both the Justices who had joined Justice Thomas's majority opinion in *Christensen*, which had viewed *Chevron* as distinct deference doctrine based on implied delegation,⁹¹ but also the votes of the three Justices who had joined Justice Breyer's dissent in *Christensen*, which had stated that *Chevron* had "made no relevant change" in traditional deference doctrine other than to add a new factor to the conventional mix of variables determining how much deference is owed to an agency in any particular instance.⁹² This required Justice Souter to embrace both the understanding that *Chevron* rests on a delegation of interpretational authority to the agency, while simultaneously offering up a "Skidmore-ized" version of *Chevron* compatible with Justice Breyer's views about the need to consider multiple contextual factors in deciding how much deference to give to agency interpretations in any particular case.

The second factor producing confusion was that Justice Souter appeared anxious to avoid casting doubt on any of the many dozens of Supreme Court decisions that previously had cited *Chevron* in reviewing an agency action. In other words, he sought to state the threshold condition for applying *Chevron* in such a way that every prior Supreme Court decision could be viewed as having correctly anticipated the newly-articulated threshold condition.⁹³ This was misguided and unnecessary, given that the question whether *Chevron* was the correct standard of review had not been at issue in these cases. Nevertheless, by suggesting that Step Zero had been satisfied in every prior *Chevron* decision, Justice Souter left the threshold inquiry so flabby that even opinion letters might qualify in certain circumstances, contrary to *Christensen*.⁹⁴

Justice Scalia penned a lengthy and vitriolic dissent, which no other Justice joined. It is clear that Justice Scalia was primarily exercised by the perpetuation of *Skidmore* as an alternative to *Chevron*. Justice Scalia has long viewed *Skidmore* as a mushy standard—one he sarcastically characterized in *Mead* as "th'ol' 'totality of the circumstances' test"—whereas he regards *Chevron* as a much more rule-like formulation.⁹⁵ Justice Scalia prefers rules over standards, in significant part because he believes they constrain willful decision making by judges eager to impose their policy preferences on society.⁹⁶ Since the other eight Justices were all committed to the perpetuation of *Skidmore* in some circumstances, these fulminations fell on deaf ears. Justice Scalia also complained, with greater

91. See *supra* notes 57–59 and accompanying text.

92. See *supra* notes 63–65 and accompanying text.

93. See *Mead*, 533 U.S. at 229–31.

94. The Court stated that "interpretive rules . . . enjoy no *Chevron* status as a class," *id.* at 232, yet it also cited a decision applying *Chevron* to an opinion letter and said that the lack of formal procedures "does not alone" bar the application of *Chevron*. *Id.* at 231 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995)).

95. *Id.* at 241 (Scalia, J., dissenting).

96. See generally Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

justification, that the majority opinion was maddeningly imprecise about what sorts of agency actions would be entitled to *Chevron* review.⁹⁷ To quell this complaint, Justice Souter should have said that *Chevron* is triggered when Congress gives authority to agencies to make legislative rules or to render self-executing adjudications, and the agency interprets the statute in the exercise of these delegated powers, and left it at that.

For a while, it appeared that *Mead* had sowed greater confusion about the scope of *Chevron* than it had eliminated. Lower courts and commentators were predictably confused by the all-things-considered aspects of the decision.⁹⁸ Did this refer to the inquiry at Step Zero, or had *Chevron* been displaced by or merged with *Skidmore*, turning every deference decision into an all-things-considered inquiry? Matters were made worse when, a year later, Justice Breyer penned a majority opinion in a Social Security case that seemed to invoke *Skidmore*-like variables in determining whether *Chevron* applies, and even suggested that *Mead* had dispensed with any “absolute rule” in favor of an ad hoc balancing test.⁹⁹

Gradually, however, decisions began accumulating at the Court in which *Mead*’s two-part test was treated as a controlling statement of law regarding the conditions for applying *Chevron*. Summarizing broadly, these decisions recognize that agency action is eligible for *Chevron* deference only if it has the “force of law,” without offering any clarification of precisely what this means. For example, notice-and-comment rulemaking and formal adjudication are treated as presumptively having the force of law,¹⁰⁰ while interpretative rules, internal guidance documents, and repealed rules are recognized as beyond the pale.¹⁰¹

Nevertheless, those aspects of *Mead* that appeared to endorse a “*Skidmore*-ized” *Chevron* continue to pop up in opinions authored by Justice Breyer. For example, in *Long Island Care at Home Ltd. v. Coke*,¹⁰² the question was whether a Department of Labor regulation exempting certain “companionship services” from the Fair Labor Standards Act was entitled to *Chevron* deference. Under the general two-part test of *Mead*, the answer was simple: Congress had expressly delegated authority to the Labor Department to “define[] and delimit[]” companionship services by regulation, and the Department had issued a regulation doing so.¹⁰³ Writing

97. *Mead*, 533 U.S. at 245–46 (Scalia, J., dissenting).

98. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

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

100. See, e.g., *SEC v. Zandford*, 535 U.S. 813, 819–20 (2002) (interpretation in formal adjudication entitled to *Chevron* deference).

101. See, e.g., *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013) (enforcement guideline no longer in effect not entitled to *Chevron* deference); *Alaska Dep’t of Env’tl. Conservation v. EPA*, 540 U.S. 461, 487–88 (2004) (internal guidance entitled only to respect); *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473 (2002) (proposed regulation entitled only to *Skidmore* deference).

102. 551 U.S. 158 (2007).

103. *Id.* at 172.

for a unanimous Court applying *Chevron*, Justice Breyer nevertheless made the inquiry much more complicated. As he summarized:

Where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination. *See Mead*.¹⁰⁴

The notion that the agency's "full and direct focus" on an issue and the "reasonableness" of its rule are relevant to whether the Court should defer to the agency's interpretation sounds like *Skidmore*, not *Chevron*.

The one constant in the Court's post-*Mead* decisions—at least until *City of Arlington*—was Justice Scalia's continued condemnation of the decision. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,¹⁰⁵ which held that agencies eligible for *Chevron* deference under *Mead* can effectively overrule prior judicial interpretations, Justice Scalia launched another vitriolic assault on *Mead*.¹⁰⁶ He continued his campaign against *Mead* in separate opinions in several other decisions.¹⁰⁷ None of these diatribes gathered the support of any other Justice. Looking at the bigger picture, if one filters out the noise generated by Justices Breyer and Scalia—both of whom harbor idiosyncratic views about *Chevron* not shared by other Justices—support for *Mead* on the Court today is solid.

C. City of Arlington v. FCC

I come then to the Court's decision in *City of Arlington v. FCC*. The underlying question in the case concerned the meaning of an amendment to the Federal Communications Act adopted in 1996 that requires local land use agencies to process applications to construct or expand wireless transmission towers "within a reasonable period of time."¹⁰⁸ The statute provided that parties who believe requests are not being processed within a reasonable time could seek relief in a "court of competent jurisdiction."¹⁰⁹ There was not a word in the amendment about FCC implementation or enforcement of the reasonable time mandate. After initially disclaiming authority under the statute, the FCC changed its mind and issued a declaratory order interpreting reasonable time presumptively to mean no more than ninety days in the case of a tower expansion or 150 days in the case of new construction of a wireless tower.¹¹⁰ The Fifth Circuit, in

104. *Id.* at 173–74.

105. 545 U.S. 967 (2005).

106. *Id.* at 1014–20 (Scalia, J., dissenting).

107. *See* *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 296 (2009) (Scalia, J., concurring); *Smith v. City of Jackson*, 544 U.S. 228, 244–45 (2005) (Scalia, J., concurring); *Raymond Yates M.D., P.C. Profit Sharing Plan v. Herndon*, 541 U.S. 1, 24 (2004) (Scalia, J., concurring).

108. 47 U.S.C. § 332(c)(7)(B)(ii) (2012).

109. *Id.* § 332(c)(7)(B)(v).

110. *See* *City of Arlington v. FCC*, 668 F.3d 229, 234–36 (5th Cir. 2012), *rev'd*, 133 S. Ct. 1863 (2013).

reviewing a challenge to the declaratory order by several local governments, recognized that the case presented a question about whether the FCC had “jurisdiction” to interpret the reasonable time provision.¹¹¹ Following circuit precedent, it held that *Chevron* applied to jurisdictional questions, and it deferred to the FCC’s interpretation that it had jurisdiction.¹¹² It also applied *Chevron* on the merits, and upheld the FCC’s time limits as a permissible interpretation of “reasonable period of time.”¹¹³

The Court granted review limited to the question whether “a court should apply *Chevron* to review an agency’s interpretation of its own jurisdiction.”¹¹⁴ It declined to review whether the FCC had jurisdiction to limit or affect state and local zoning authority over the placement of wireless service facilities.¹¹⁵ In other words, the Court agreed to decide the abstract “meta-question” whether courts should apply *Chevron* to agencies’ interpretations of their own authority, but nothing else.¹¹⁶ Five Justices joined in an opinion by Justice Scalia answering the meta-question in the affirmative. Justice Breyer concurred in the judgment. Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented.

For Justice Scalia and the majority, the case was about preserving the workability of the decisional framework set forth in *Chevron*. The primary thrust of the opinion, which had been previewed years earlier by Justice Scalia in separate writing,¹¹⁷ was that there is no principled distinction between agency statutory interpretations that are jurisdictional and those which are not. Justice Scalia heaped scorn on the jurisdictional-nonjurisdictional distinction, calling it “a mirage,” an “empty distraction,” a “bogeyman,” “specious,” and caricaturing the opposing view as urging a distinction between “big, important” decisions and “humdrum, run-of-the-mill stuff.”¹¹⁸ He cited numerous Supreme Court decisions in which “jurisdictional questions” had been resolved by applying or citing *Chevron*.¹¹⁹ He did not acknowledge the supreme irony that somehow he

111. *Id.* at 247–48.

112. *Id.* at 249–54.

113. *Id.* at 255–60.

114. Petition for a Writ of Certiorari at Questions Presented, *City of Arlington*, 133 S. Ct. 1863 (No. 11-1545), 2012 WL 2516693.

115. *City of Arlington v. FCC*, 133 S. Ct. 524 (2012) (granting certiorari limited to the first question).

116. It was, in my view, unwise for the Court to limit its consideration to the abstract question about the scope of “*Chevron*.” Petitioners’ counsel was repeatedly interrupted at oral argument by Justices Breyer and Ginsburg with questions about the merits of the FCC’s interpretation of “reasonable time,” Transcript of Oral Argument, *supra* note 50, at 5–7, 20–25, and Justice Breyer ultimately based his concurrence in the judgment on his assessment of the merits of the regulation. See *infra* note 140 and accompanying text. A consideration of the merits would also have illuminated why the decision had been identified without any difficulty by both the FCC and the Fifth Circuit as being “jurisdictional,” which in turn would have required more effort by the majority to dismiss the distinction between jurisdictional and nonjurisdictional questions as a “false dichotomy.” *City of Arlington*, 133 S. Ct. at 1872.

117. Most notably, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring in judgment).

118. *City of Arlington*, 133 S. Ct. at 1868–73.

119. *Id.* at 1871–72.

could identify these cases as posing “jurisdictional questions,” even while professing that the distinction was meaningless. Nor did he note that nearly all these decisions were “drive-by” precedents in which the jurisdictional-nonjurisdictional distinction had not been discussed.

The clinching argument for the majority, however, was not so much that the jurisdictional-nonjurisdictional line was meaningless. Rather it was that the line would be manipulated by litigants and lower courts to recapture for the judiciary authority to make policy that *Chevron* had ceded to agencies. As Justice Scalia wrote:

Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the “jurisdictional” card in every case. Some judges would be deceived by the specious, but scary-sounding “jurisdictional”-“nonjurisdictional” line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretative decisions—archetypical *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.¹²⁰

In other words, Justice Scalia saw the case as an assault on *Chevron* motivated by a desire to return to some imagined golden age of judicial activism in administrative law.

It is not my purpose here to offer a point-by-point rebuttal of Justice Scalia’s opinion. But I cannot resist several observations.

First, the APA specifically instructs reviewing courts to decide “all relevant questions of law.”¹²¹ Although ignored in *Chevron*, this provision can be reconciled with deference to agency interpretations of law under a theory of implied delegation of interpretational authority. When Congress delegates policy authority to an agency with respect to a particular statutory provision, this can be seen as an implied instruction to courts to accept reasonable agency interpretations of that provision. In effect, the APA’s general command instructing courts to exercise independent judgment in deciding questions of law requires the court to accept reasonable interpretations of the agency, because Congress has given the agency authority to make policy judgments with respect to the provision in question. However, the APA also enjoins reviewing courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.*”¹²² This command cannot be reconciled with deference to agency interpretations of the scope of their own jurisdiction on a theory of implied delegation, since the very question at issue is whether such a delegation does or does not exist. The text of the APA therefore seems plainly to require that courts exercise independent judgment about whether the agency is acting “in excess of statutory jurisdiction.” Justice Scalia,

120. *Id.* at 1873 (citations omitted).

121. 5 U.S.C. § 706 (2012).

122. *Id.* § 706(2)(C) (emphasis added).

ordinarily a master at statutory exegesis, made no effort to square his extension of *Chevron* to questions of agency jurisdiction with the text of the APA.

Second, Justice Scalia acknowledged that there is a “very real division” between jurisdictional and nonjurisdictional questions insofar as *judicial* jurisdiction is concerned.¹²³ He nevertheless insisted that this did not carry over to agencies. The explanation he gave was that judicial decisions made outside a court’s jurisdiction are *ultra vires* whereas erroneous judicial decisions made within the court’s jurisdiction are not.¹²⁴ In contrast, he insisted, any agency decision contrary to law is *ultra vires*.¹²⁵ This may be, but Justice Scalia’s proffered distinction does not explain why the jurisdictional-nonjurisdictional line is conceptually meaningful in the one context but not in the other. If courts can apply the jurisdictional-nonjurisdictional distinction in deciding whether a judicial judgment is *ultra vires*, why are they incapable of applying the same distinction in deciding whether agency action is *ultra vires*?¹²⁶

Third, Justice Scalia dismissed out of hand the idea that discerning the limits of the FCC’s authority had anything to do with federalism.¹²⁷ The only thing at issue, he said, was the meaning of a federal statute, and the question was whether its ambiguity should be resolved by a federal agency or a federal court. This, he insisted, was simply a separation of powers question, not a question of federalism.¹²⁸ But, in fact, the underlying dispute involved the exercise of local land use authority, unquestionably a matter of traditional state and local concern. Congress had partially preempted such authority by requiring that applications for wireless towers had to be resolved in a reasonable period of time. But it stipulated that aside from this specific constraint, nothing in the amendment was to limit the authority of state and local governments over siting decisions.¹²⁹ And Congress instructed that the reasonable time limit was to be enforced by “courts of competent jurisdiction.”¹³⁰ In the context of local land use disputes, the phrase “courts of competent jurisdiction” invariably means *state* courts, which have exclusive jurisdiction to resolve appeals from local

123. 133 S. Ct. at 1868–69.

124. *Id.*

125. *Id.* at 1869.

126. In some contexts, judicial jurisdiction is governed by statutes which are wholly separate from whatever law governs the decision on the merits. Federal diversity jurisdiction under 28 U.S.C. § 1332 is an obvious example: the statute governing jurisdiction speaks of the residence of the parties, whereas the merits are determined by applying the appropriate state substantive law. But in other contexts, such as determining whether federal question jurisdiction exists, the very same statute that establishes jurisdiction also governs the resolution of a claim on the merits. Yet courts somehow manage to resolve the question whether a federal question is presented without confounding this with the resolution of the merits.

127. 133 S. Ct. at 1873.

128. *Id.*

129. 47 U.S.C. § 332(c)(7)(A) (2012).

130. *Id.* § 332(c)(7)(B)(v).

zoning boards.¹³¹ The FCC's interpretation transformed a general standard, whose meaning Congress intended local zoning boards and state courts define on a case-by-case basis, into a presumption that local agencies must abide by specific deadlines established by federal law. This interpretation expanded the scope of preemption—necessarily contracting state and local land use authority. Justice Scalia made no mention of the fact that the Court has consistently rejected the application of *Chevron* to preemption questions,¹³² precisely because those questions have a pronounced effect on the balance of authority between the federal government and the states.¹³³

Fourth, Justice Scalia had little to say in response to the central theme of the Chief Justice's dissent, namely, that deferring to agency interpretations of the scope of their own authority undermines the role of the courts in assuring that agencies act within the boundaries laid down by Congress.¹³⁴ The solution to the “fox-in-the-henhouse syndrome,” according to Justice Scalia, was for courts to strictly enforce statutes at *Chevron*'s Step One.¹³⁵ What this means, if taken seriously, is that agency power will be limited only when Congress has legislated unambiguously to limit it. In other words, it is up to Congress to draft better statutes if the administrative state is to be held in check. With many challenges to significant rulemaking by the Obama administration on the horizon (by the EPA, as it undertakes to regulate greenhouse gases without clear statutory authority, or under the many rulemakings mandated by the Dodd-Frank Act), one wonders if this

131. The Standard State Zoning Enabling Act, widely adopted throughout the country, provides that appeals from zoning decisions and ordinances are to be filed “in the circuit court of the county in which the premises affected are located.” See 5 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 34.31 (4th ed. & Supp. 2008) (reproducing statute). The federal statute requiring that wireless tower siting decisions be made in a reasonable time would presumably suffice to create federal question jurisdiction over an action challenging the pace of the local zoning process. See 28 U.S.C. § 1331 (2012). Any such action might give rise, however, to a demand for federal court abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), or some other abstention doctrine. Even federal constitutional challenges to zoning decisions must generally be channeled through state courts, see *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which means they are generally immune from challenge in federal district courts. See *San Remo Hotel v. City of San Francisco*, 545 U.S. 323 (2005) (relitigating issues decided by state court is precluded in federal court). In practice, therefore, litigation over local zoning decisions is overwhelmingly a state court affair.

132. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009).

133. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (describing preemption of state law as “a serious intrusion into state sovereignty”).

134. In a curious footnote, Justice Scalia chastised the Chief Justice for characterizing agencies as exercising “legislative” and “judicial” power. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013). He acknowledged that agencies “make rules” and “conduct adjudications,” but he insisted that under the Constitution all legislative power is reserved for Congress and the judicial power is reserved for the federal courts. *Id.* As he has in other decisions, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001), Justice Scalia seemed to suggest that the massive accumulation of power by federal administrative agencies, even if a matter of “discomfort,” is of no constitutional concern as long as the correct label (“executive”) is attached to federal administrative action. *City of Arlington*, 133 S. Ct. at 1873 n.4.

135. 133 S. Ct. at 1874.

expansion of executive authority partially explains why Justices Ginsburg, Sotomayor, and Kagan signed on to the Scalia opinion.

Justice Breyer filed an opinion concurring in part and concurring in the judgment, which must be a puzzle to observers not familiar with his previously expressed views about *Chevron*. Justice Breyer agreed that the jurisdictional-nonjurisdictional distinction is “a mirage.”¹³⁶ But he insisted that ambiguity is not enough to infer a delegation of authority to an agency to exercise primary interpretational authority. He cited *Mead* for the proposition that *Chevron* applies when the agency acts with the force of law, and he agreed that courts must resolve this question independently, without deferring to the agency’s view.¹³⁷ But he also quoted from his opinion in *Barnhart v. Walton*¹³⁸ for the proposition that a variety of contextual factors are relevant in determining whether an agency acts with the force of law.¹³⁹ Although it is difficult to be sure, Justice Breyer appears to regard the phrase “force of law” as a label stating the conclusion that “*Chevron* applies” (or perhaps “the court should defer”), and that in making this determination all kinds of *Skidmore*-like contextual factors are relevant. This is essentially a convoluted way of expressing the view he maintained in *Christensen*, which is that *Skidmore* captures the basic deference doctrine, and *Chevron* merely stands for the proposition that congressional delegation of power to the agency is one factor among many to consider in determining whether to defer.¹⁴⁰

Chief Justice Roberts’s dissent, joined by Justices Kennedy and Alito, deserves to enter the annals as one of the classic statements of administrative law. His disagreement with the majority was “fundamental.”¹⁴¹ Deferring to agencies about the scope of their own authority would significantly undermine a central reason Congress has provided for judicial review in the first place, namely, to assure that agencies do not stray from their delegated mandate. As he summed up in his opening paragraph: “A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”¹⁴²

The Chief Justice sought to deflect Justice Scalia’s debunking of the jurisdictional-nonjurisdictional line by admitting that “jurisdiction” is a word of many meanings and that the “parties, amici, and court below too often use the term ‘jurisdiction’ imprecisely.”¹⁴³ The correct way to frame

136. *Id.* at 1875 (Breyer, J., concurring in part and concurring in judgment).

137. *Id.*

138. 535 U.S. 212 (2002).

139. *City of Arlington*, 133 S. Ct. at 1875.

140. Justice Breyer ultimately concurred in the judgment on the ground that he believed the FCC had determined correctly that it has authority to interpret the meaning of the phrase “reasonable period of time,” *id.* at 1876–77—which of course was a question the Court had declined to review.

141. *Id.* at 1877 (Roberts, C.J., dissenting).

142. *Id.*

143. *Id.* at 1879. In defense of the “amici” (one of whom I represented, see *supra* *), the question presented on which the Court granted review spoke in terms of agency “jurisdiction.” Petition for a Writ of Certiorari at Questions Presented, *City of Arlington*, 133

the inquiry, according the Chief Justice, was whether “Congress has granted the agency interpretative authority over the statutory ambiguity at issue.”¹⁴⁴ Moreover, this question must be addressed in terms of the specific provision before the court. If Congress has delegated authority to the agency to implement or enforce this provision with the force of law, and the agency has done so, then *Chevron* applies in assessing the agency’s interpretation.¹⁴⁵ But if Congress has not delegated authority to the agency over the provision in question, or the agency has not exercised this authority in rendering its interpretation, then *Chevron* should not apply.

By way of illustration, the Chief Justice pointed out that many statutes, including the Americans with Disabilities Act¹⁴⁶ and the Dodd-Frank Wall Street Reform and Consumer Protection Act¹⁴⁷, “parcel out authority to multiple agencies.”¹⁴⁸ Clearly, courts must determine, using independent judgment, whether an agency opining on the meaning of a provision in one of these statutes is in fact the one to which delegated authority has been given. He conceded that “[a] general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretative authority over the ambiguity at issue.”¹⁴⁹ But he added, “if Congress has exempted particular provisions from that authority, that exemption must be respected, and the determination whether Congress has done so is for the courts alone.”¹⁵⁰

With respect to Justice Scalia’s fears of judicial manipulation of the inquiry into the scope of agency authority, and of potential judicial intrusion into the policymaking sphere of the agencies, the Chief Justice responded that larger considerations of constitutional structure were at stake. The judiciary is obligated not only to confine itself to its proper role, but also “to ensure that the other branches do so as well.”¹⁵¹ The court should not abdicate its basic task of fixing the “boundaries of delegated authority.”¹⁵² “Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. . . . We do not leave it to the agency to decide when it is in charge.”¹⁵³

S. Ct. 1863 (No. 11-1545), 2012 WL 2516693. It is hazardous to insist that the Court should consider a different question than the one it has agreed to hear.

144. 133 S. Ct. at 1880 (Roberts, C.J., dissenting).

145. *Id.* at 1880–81.

146. 42 U.S.C. §§ 12101–12213 (2012).

147. Pub. L. No. 11-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, 42 U.S.C.).

148. *City of Arlington*, 133 S. Ct. at 1883–84 (Roberts, C.J., dissenting).

149. *Id.* at 1884.

150. *Id.*

151. *Id.* at 1886.

152. *Id.* (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 27 (1983)).

153. *Id.*

III. SECURING STEP ZERO

Many administrative law scholars have expressed concern that *Chevron*-style judicial review can undermine what I have called the judicial function of boundary maintenance, and they have accordingly urged that courts should continue to exercise independent judgment to assure that the agency is acting within the scope of its delegated authority.¹⁵⁴ Step Zero, which asks whether Congress has delegated interpretational authority to the agency, could readily be augmented by adding an inquiry into whether the agency is acting within the scope of its delegated authority or “jurisdiction.” By rejecting any inquiry into agency “jurisdiction” before turning to *Chevron*, the majority in *City of Arlington* has seemingly dealt a blow to such a conception of Step Zero. Or perhaps not. I argue that Step Zero is in fact more secure after *City of Arlington* than ever before. What is more, *City of Arlington* may have planted the seeds for a meaningful inquiry into the scope of an agency’s regulatory authority as part of Step Zero.

Ironically, *City of Arlington* has done more than any decision since *Mead* to secure the core content of Step Zero as a basic limitation on the scope of the *Chevron* doctrine. The strategy of the government in *City of Arlington*, both in its brief and in Solicitor General Donald Verrilli’s oral argument, was to convince the Court that the two *Mead* factors provide a fully adequate statement of the threshold conditions for application of *Chevron*. The slogan of the government’s presentation might read: “All you need is *Mead*.” The first thing Verrilli said when he stood up at oral argument was to reaffirm *Mead* as a basic precondition for the application of *Chevron* deference.¹⁵⁵ In response to a question from Justice Sotomayor, he acknowledged that this threshold determination had to be made by the court exercising de novo review.¹⁵⁶ He followed this up with effective jabs at the petitioners’ position, suggesting that any exception for jurisdictional questions would turn the interpretation of the *Chevron* doctrine “into the complexity of the Internal Revenue Code.”¹⁵⁷ As he put it at one point:

[W]hat my friends on the other side are asking is, actually, for an additional layer of complexity in the analysis, even after the general authority is established to . . . make rules with the force of law and even after it’s established that the rule at issue . . . has been done in the exercise of that . . . authority to act with the force of law.¹⁵⁸

154. E.g., Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497; Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989 (1999); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM & MARY L. REV. 1463, 1466–67 (2000); Merrill & Hickman, *supra* note 11, at 837; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 14 (1983). For opposing views, see Sunstein, *supra* note 31, at 234–36; Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations That Delimit the Scope of the Agency’s Jurisdiction*, 61 U. CHI. L. REV. 957, 958 (1994).

155. Transcript of Oral Argument, *supra* note 50, at 30.

156. *Id.* at 35–36.

157. *Id.* at 40.

158. *Id.* at 41–42.

The choice he depicted was between a straightforward, well-established threshold inquiry—*Mead*—and “Pandora’s box.”¹⁵⁹

The characterization of a “jurisdictional” inquiry as an additional layer of doctrinal complexity in already-convoluted *Chevron* doctrine appears to have been the winning argument. The multiple petitioners did not help matters by filing briefs presenting divergent views of how to define a “jurisdictional” question. The brief filed by the International Municipal Lawyers Association (IMLA) in particular, which argued that jurisdictional questions concern “who, what, when, or where” as opposed to questions about “how,”¹⁶⁰ drew particular skepticism from the Justices. At oral argument, petitioners’ counsel, Tom Goldstein, repudiated this version of the “jurisdictional” inquiry, and attempted to reframe the question in terms of whether Congress had delegated authority to interpret the particular provision in question, along the lines ultimately adopted by Chief Justice Roberts.¹⁶¹ But Justice Kagan demanded that Goldstein state whether his position was the same or different than the one espoused in the IMLA brief. When he said it was different, she was obviously unpersuaded.¹⁶² The aversion to turning *Chevron* into “the Internal Revenue Code” is, I believe, the best explanation for how Justice Scalia got five votes to require judges to defer to agency’s views about the scope of their own authority. The government made this step appear less radical than it was, in light of the traditions of administrative law, by arguing that judicial enforcement of the twin conditions required by *Mead* would guard against a runaway *Chevron* doctrine.

Assuming that three and possibly all four of the Justices who joined Justice Scalia’s opinion did so, at least in part, because they were convinced that “all you need is *Mead*,” then we have the explanation for one of the more startling aspects of Justice Scalia’s opinion, namely, his endorsement of *Mead*. Recall that Justice Scalia penned an extremely vigorous dissent in *Mead*, reiterated his objections to *Mead* in the strongest terms in *Brand X*, and continued to call for the overruling of *Mead* in subsequent decisions.¹⁶³ In *City of Arlington*, all the vituperation about *Mead* suddenly disappeared. Evidently the imperative of getting five votes to defeat the “jurisdictional” limitation on *Chevron* was achieved at the price of capitulating on his lonely crusade against *Mead*.

The surrender occurred late in the majority opinion in *City of Arlington*. In a section of the opinion described as offering a “few words in response to the dissent,” Justice Scalia wrote: “The dissent is correct that *United States v. Mead Corp.* requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular

159. *Id.* at 33, 54.

160. Brief of Respondents International Municipal Lawyers Ass’n, et al. at 21–35, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Nos. 11–1545, 11–1547), 2012 WL 5884820.

161. Transcript of Oral Argument, *supra* note 50, at 11, 27.

162. *Id.* at 60–62.

163. *See supra* notes 95–97, 105–07 and accompanying text.

matter at issue in the particular manner adopted. *No one disputes that.*¹⁶⁴ In saying “[n]o one disputes that,” Justice Scalia might be taken as simply agreeing that no one disputes this is what *Mead* says. Justice Scalia immediately proceeded, however, to distinguish *Mead* on the ground that “*Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking.”¹⁶⁵ This moves beyond a mere description of *Mead* and appears to reflect an acceptance of its core holding. Recall that in his dissent in *Mead*, and before that in his opinion in *Christensen*, Justice Scalia had argued that it did not matter whether an agency interpretation was advanced in a format like rulemaking, as long as it was the “authoritative” view of the agency, even if set forth in an opinion letter or amicus brief.¹⁶⁶ He has evidently now abandoned that position. An agency that has been delegated rulemaking authority must promulgate the interpretation through rulemaking, or perhaps some other format of the same degree of legal significance, i.e., one that has the force of law.

Any doubt about Justice Scalia’s acceptance of *Mead* was laid to rest in the next paragraph. After further rebuttal of the dissent, Justice Scalia concluded with this statement: “It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”¹⁶⁷ Here we have an affirmative statement that *Chevron* has “preconditions,” that one precondition is the delegation of power to administer a statute through rulemaking or adjudication, and that another precondition is the “promulgation” of the interpretation through an exercise of one of these forms of delegated authority. This is very close, if not identical, to *Mead*. Rulemaking (at least legislative rulemaking) and adjudication (at least adjudication that produces self-executing orders) are the modes of agency action that have the force of law. Whether Justice Scalia will continue, in the future, to urge *Chevron* deference to modes of rulemaking and adjudication that do not have the force of law (such as opinion letters or government amicus briefs) remains to be seen.¹⁶⁸ At the very least, he has staked out a position in *City of Arlington* very different from what he advocated in his dissent in *Mead*.

Justice Breyer of course joined the Court’s opinion in *Mead*, although in separate opinions before and after *Mead* he seemed to endorse a kind of *Skidmore*-ized version of *Chevron*. In his concurrence in *City of Arlington*, however, Justice Breyer unequivocally reaffirmed his commitment to *Mead*. He stated flatly that, in deciding whether to defer to an agency interpretation, a reviewing judge

164. *City of Arlington*, 133 S. Ct. at 1873–74 (emphasis added).

165. *Id.*

166. See *supra* notes 60–62, 95–97, 105–07 and accompanying text.

167. *City of Arlington*, 133 S. Ct. at 1874.

168. It may be significant that Justice Scalia never repeats the “force of law” characterization of the required type of delegated authority as it was expressed in *Mead*.

will have to decide independently whether Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue—interpretations or rules that carry with them “the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). If so, the reviewing court must give special leeway or “deference” to the agency’s interpretation.¹⁶⁹

As we have seen, Justice Breyer appears to harbor idiosyncratic views about what it means for an agency to act with the “force of law.” Be that as it may, his separate opinion in *City of Arlington* puts him fully on board in requiring that courts engage in *Mead*’s analysis of Step Zero before they invoke the type of deference associated with *Chevron*.

The bottom line is that, if there was any doubt about the Court’s fidelity to the basic holding of *Mead*, it has now evaporated. There is a Step Zero. It requires courts to determine in the exercise of independent judgment that the agency has been delegated authority to act with the force of law. It requires that the agency render its interpretation of the contested provision in the exercise of such authority.

IV. A MORE PARTICULARIZED *MEAD*?

City of Arlington may also point toward a more robust version of Step Zero that limits *Chevron* to agency interpretations within the scope of their delegated authority. This is because the actual disagreement between Justice Scalia and Chief Justice Roberts—which mirrors the actual disagreement between the positions of the government and petitioners’ counsel Goldstein as it emerged at oral argument—is actually quite narrow. The disagreement as it finally emerged was over the level of generality with which the first *Mead* inquiry is conducted—whether Congress has delegated authority to the agency to act with the force of law. Justice Scalia, following the lead of the government, insisted that a grant of *general* authority to an agency to act with the force of law is all that is required to trigger *Chevron*.¹⁷⁰ Chief Justice Roberts, echoing the position of petitioners’ counsel at oral argument, insisted that the court must ask whether Congress delegated power to the agency to act with the force of law *with respect to the particular question presented*.¹⁷¹ Only if the reviewing court answers this more particularized inquiry in the affirmative can the court apply *Chevron*.

If Chief Justice Roberts is right, then the *Mead* inquiry at Step Zero could serve as a means of assuring that *Chevron* applies only to interpretations of provisions that fall within the scope of the delegated authority of the agency. If Congress has delegated authority to an agency to act with the force of law with respect to the particular provision in question, then clearly this provision is one that resides within the delegated authority of the agency. If Justice Scalia is right, in contrast, a generic grant of rulemaking

169. 133 S. Ct. at 1875 (Breyer, J., concurring in part and concurring in judgment).

170. See *supra* notes 163–68 and accompanying text.

171. *City of Arlington*, 133 S. Ct. at 1883 (Roberts, C.J., dissenting).

or adjudicatory power would confer *Chevron* deference on an agency with respect to all disputes about the scope of the agency's authority, at least as long as the dispute was over a provision in a statute that the agency in some sense "administers."

When one reads carefully what the Chief Justice wrote about the type of inquiry that would be mandated under the more particularized conception of delegated authority he advocated, the dispute becomes even narrower. Justice Scalia argued that a single generic grant of authority to an agency to engage in rulemaking or adjudication is enough to carry the agency into *Chevron* land.¹⁷² Chief Justice Roberts in fact *agreed* that a general grant would often be sufficient. But he insisted that courts should also consider arguments to the effect that Congress has "exempted particular provisions from that authority," in which case the general grant would not suffice to confer *Chevron* review.¹⁷³ Given the concession by the Chief Justice that general grants of authority may often suffice, the dispute boils down to whether courts, exercising independent judgment, should or should not entertain arguments that the particular issue in question has been *carved out* of a general grant of rulemaking or adjudication authority. It is hard to credit Justice Scalia's charge that asking whether the particular issue before the court is covered by an exception to a general grant of authority would represent a "massive revision of our *Chevron* jurisprudence" or lead to "chaos."¹⁷⁴

Justice Scalia clearly won this round in what promises to be a longer-term contest over the scope of the *Mead* inquiry into the scope of delegated power. It is hard for me to imagine that the Court will not end up adopting a position closer to that of the Chief Justice than to that of Justice Scalia. Another way to frame the issue is to ask whether the first inquiry mandated by *Mead* should be undertaken by reading only part of the agency's organic act or by reading all of it. What Justice Scalia was advocating, in effect, was a superficial examination of the agency's organic statute, looking for one general grant of rulemaking or adjudication authority somewhere in the legislation. Once a court discovers such a provision, and concludes that the agency's interpretation was rendered in a rule or adjudication, *Chevron* kicks in and the court defers to the agency on any and all issues presented under the statute. What Chief Justice Roberts was urging, in contrast, was an actual examination of the agency's organic statute to see not only if there is a general grant of lawmaking authority somewhere but also whether such a grant in fact applies to the dispute before the court. How is it possible to offer a principled justification for a superficial reading of a statute as opposed to a careful reading of a statute?

That Justice Scalia's position was even plausible was made possible only because of a quirk about the organic act in question—the Federal Communications Act (FCA). Like other complex statutes, the FCA includes multiple titles, which have been amended many times over the

172. See *supra* notes 163–68 and accompanying text.

173. *City of Arlington*, 133 S. Ct. at 1884 (Roberts, C.J., dissenting).

174. *Id.* at 1874 (majority opinion).

years, and several different grants of rulemaking authority. Somewhat by chance, the Court had previously held (whether correctly or not is another matter¹⁷⁵) that one of the rulemaking grants in the FCA authorizes legislative rules and extends to all portions of the Act, including subsequently enacted provisions.¹⁷⁶ Thus, without actually reading the FCA, Justice Scalia was able to conclude based on precedent that there is a rulemaking grant in the FCA that conveys omnibus authority to the agency to act with the force of law. But consider what is likely to happen in a future case involving an agency operating under a complex organic statute if a party makes a credible argument that a particular rulemaking grant applies only to one title of an act, but not to another. Will the court simply conclude, based on the presence of one rulemaking grant, that the agency is entitled to *Chevron* deference on all questions arising under the act that implicate the scope of its authority? It seems impossible that courts should do anything other than actually examine the full text of the statute in order to determine whether the particular grant of authority extends to the contested provision at issue. This is all Chief Justice Roberts was saying, and I cannot help but believe that as other cases arise under different statutory schemes, where there is no dispositive precedent to latch on to, time will prove him right.

I would add one important caveat to the Chief Justice's reframing of the question in terms of a search for delegated authority. The search for exemptions to general grants of lawmaking authority cannot be limited to statutes that expressly qualify grants of rulemaking (or adjudicatory) authority. Most agencies have generally worded grants of rulemaking authority, most of which were originally understood to confer power only to make procedural and internal housekeeping rules.¹⁷⁷ For many years, however, the Court has construed virtually every generally worded grant of rulemaking authority as conferring authority to make legislative rules, without regard to the original understanding of Congress when these grants were enacted. This assumption is now embedded in precedents that apply to many important agencies, including the EPA, the FDA, the National Labor Relations Board, and the Federal Reserve Board.¹⁷⁸ The Court, in an opinion by the Chief Justice, has even extended this assumption to a general

175. The rulemaking grant in question is 47 U.S.C. § 201(b) (2012). For a brief discussion of the background of this grant, see Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 519–20 n.264 (2002) (noting that the grant of rulemaking was added by an amendment dealing with furnishing reports about the position of ships at sea).

176. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377–78 (1999).

177. Merrill & Watts, *supra* note 175, at 493–528.

178. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (EPA); *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 616 (1991) (NLRB); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (Federal Reserve Board). The Court first recognized the FDA's legislative rulemaking authority in a group of pre-*Chevron* cases known as the *Hynson Quartet*. See generally *USV Pharm. Corp. v. Weinberger*, 412 U.S. 655 (1973); *Weinberger v. Bentex Pharms., Inc.*, 412 U.S. 645 (1973); *Ciba Corp. v. Weinberger*, 412 U.S. 640 (1973); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

rulemaking grant under the Internal Revenue Code that was long understood as limited to authorizing only non-binding interpretative rules.¹⁷⁹

Given that general grants of rulemaking authority are now routinely (mis)interpreted as conferring authority to act with the force of law, limiting the search for exemptions to specific carve-outs from these grants could create a pervasive bias in favor of expansive agency authority. In effect, the interpretation of the general rulemaking grants would create a presumption in favor of agency authority to act with the force of law with respect to every function covered by these generally-worded grants. Only if Congress had the foresight expressly to qualify the general grant of authority would there be any limitation on the agency's ability to interpret its authority in the most generous possible terms.

The solution is to assure that the search for "exemptions" to Congress's delegatory intent includes not just an examination of affirmative grants of lawmaking and express exceptions to these grants but all types of information that courts consider when attempting to ascertain legislative intent. *Gonzales v. Oregon*,¹⁸⁰ cited with approval by the Chief Justice in his dissenting opinion, provides an apt illustration. At issue was a regulation issued by the Attorney General interpreting the phrase "legitimate medical purpose" in the Controlled Substances Act to make it a crime to use controlled substances for the purpose of physician-assisted suicide. The Court concluded that the Attorney General had exceeded the scope of his delegated authority. Among the factors the Court invoked in support of this conclusion were that the regulation criminalizing the use of substances for the stated purpose was "anomalous" given careful restrictions on the Attorney General's authority to deregister a substance,¹⁸¹ that the statute generally delegated authority to the Secretary of Health and Human Services over "scientific and medical matters,"¹⁸² and that Congress had enacted subsequent legislation designed to preserve the authority of the Department of Health and Human Services in determining the consensus views of the medical community.¹⁸³ As the Chief Justice noted in *City of Arlington*, the Court in *Gonzales* considered "the text, structure, and purpose of the Act" in concluding "on its own" that the Attorney General had exceeded the scope of his delegated authority.¹⁸⁴ This is what one would expect of an inquiry conducted at Step One, where the court exercises de novo review.

179. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011).

180. 546 U.S. 243 (2006).

181. *Id.* at 262–63.

182. *Id.* at 265.

183. *Id.* at 266.

184. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1883 (2013) (Roberts, C.J., dissenting) (emphasis omitted).

V. THE FUTURE OF BOUNDARY MAINTENANCE

Going forward, there are two plausible pathways to achieving a reconciliation between *Chevron* review and the traditional judicial function of boundary maintenance. Justice Scalia, who clearly believes in the importance of boundary maintenance, would achieve a reconciliation by engaging periodically in aggressive review of agency action under Step One or Step Two of *Chevron*. Chief Justice Roberts, who also believes in boundary maintenance, would achieve a reconciliation by asking at Step Zero whether Congress has in fact delegated authority to the agency to act with the force of law with respect to the precise question in controversy. For several reasons, I believe the Roberts pathway is the better one.

The Scalia approach portends a future in which Step One and Step Two are applied in an accordion-like fashion. This is nothing new. *Chevron* jurisprudence is already afflicted with decisions manipulating these inquiries in an ad hoc fashion. Sometimes “clear” means the statute has only one possible interpretation; sometimes it means the statute has one meaning that is slightly preferred over all others; sometimes “reasonable” means the agency interpretation has a rational basis; sometimes it means the agency has fully considered all relevant factors. But using the Step One and Step Two inquiries to engage in boundary maintenance would surely exacerbate the phenomenon. When agencies threaten to transgress perceived boundaries, “clear” and “reasonable” would become indistinguishable from de novo review; when they stay within perceived boundaries these concepts would revert to their more common meanings.

The Roberts approach would not be immune from judicial willfulness. But at least it would take place as part of a candid inquiry into whether Congress intended the agency to act with the force of law with respect to the issue at hand. The court would be required to address boundary maintenance explicitly, not bury it in a discussion about “clarity” or “reasonableness.” And the court would do so exercising independent judgment, free from any need to pretend to be overcoming a presumption in favor of deference to the agency.

There is also the matter of providing appropriate guidance to lower courts and agencies. If the only thing at stake were how the Court writes its own opinions, perhaps little would turn on whether boundary maintenance questions were tackled at Step One, Two, or Zero. But for every case in which the Court confronts a *Chevron* question, thousands are decided by the lower courts. Those courts need appropriate guidance in how to resolve those questions. Given the vital importance of judicial review in preserving the proper place of agencies in American government, the threshold question of agency authority should be highlighted for consideration by the lower courts, not obscured.

The Scalia approach, by relegating boundary maintenance to Step One and Step Two, masks the issue in a completely nontransparent fashion. There will be no announced criteria alerting lower courts and agencies to the types of circumstances that portend a shift from the deference-promoting version of Step One and Step Two to the deference-denying

version. It is unclear how this lack of transparency would affect lower court behavior. On the one hand, it carries the risk that lower courts would apply a mechanical understanding of the *Chevron* framework in cases involving the scope of agency authority, and would defer to agency determinations about their own authority whenever the text of the statute is silent or ambiguous on the issue. On the other hand, by expanding the Step One inquiry into a de facto form of independent judgment in cases that implicate the scope of the agency's authority, the Court would risk diluting the lower courts' understanding of *Chevron* in circumstances where the issue clearly falls within the scope of the agency's domain.

The Roberts approach would run the risk, emphasized by Justice Scalia, that courts would substitute their judgment for agencies' by finding that Congress had not delegated to them the power to act with the force of law. But at least it would render the inquiry into the scope of agency authority far more transparent. Courts would have to consider the scope of an agency's delegated authority before applying *Chevron*, and would be required to find, exercising independent judgment, that such delegated authority exists in every case. Armed with such a mandate, one would expect lower courts, at the margins, to pay more attention to the issue and to act with greater confidence when confronted with cases of improper agency aggrandizement. If they find that the agency has been delegated lawmaking authority, they would be more likely to defer to agency views under *Chevron*.

Another concern involves the type of information a court can consider in resolving questions about the boundaries of agency authority. The Court is fond of saying that Step One of *Chevron* entails the use of all ordinary tools of statutory interpretation.¹⁸⁵ But this is misleading. Several types of information that courts draw upon in ordinary statutory interpretation sit awkwardly with *Chevron*. For instance, it is unclear how substantive (i.e., policy-based) canons of interpretation stand relative to *Chevron*. Does *Chevron* override, or is it subordinate to, the canon of avoiding constitutional questions, the canon disfavoring extraterritorial application of U.S. law, the presumption against preemption, or the doctrine of lenity?¹⁸⁶ Moreover, several cases, including *Chevron* itself, insist that agencies eligible for *Chevron* deference are free to change their mind about the meaning of a statute, perhaps in response to changing administrative priorities.¹⁸⁷ This seems to rule out any consideration of historical practice or understandings as part of Step One, even though such considerations often carry great weight in determining the boundaries of governmental authority.¹⁸⁸

185. See *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987); cf. *City of Arlington*, 133 S. Ct. at 1868 (referring to "ordinary tools" of statutory construction).

186. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 142–44 (1990).

187. E.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

188. As Justice Frankfurter once wrote:

The consistent construction by an administrative agency charged with effectuating the policy of an enactment carries very considerable weight. While assertion of

Under Justice Scalia's approach, boundary enforcement would be complicated by all the controversies about *Chevron's* relationship to substantive canons of interpretation, as well as by the limitations associated with *Chevron* about the relevance of longstanding agency practice. Under the Roberts approach, courts would exercise independent judgment in fixing boundaries, and hence would be free to consider any and all types of information that can be drawn upon in constitutional and statutory interpretation.

A final concern relates to the fact that boundary determination involves far more than statutory interpretation—the sphere in which *Chevron* operates. Other constraints that bear on this important function include the complex body of law elaborating on the meaning of the Constitution, considerations of international law as they are brought to bear through treaties and customary law, and an understanding of the evolved roles of the federal government and state and local governments in different areas of legal regulation. There is every reason to believe that if and when courts perceive that these other bodies of law bear on the issue of agency authority, the courts will determine their relevance exercising independent judgment.¹⁸⁹ To this extent, the determination of boundaries will automatically occur at the functional equivalent of Step Zero. The same is likely to be true of agency decisions that implicate the preemption of state law, which are given at most “weight” under *Skidmore*, not *Chevron* deference.¹⁹⁰

Under Justice Scalia's approach, the sources that bear on the discernment of government boundaries other than federal statutes must be accommodated by a series of ad hoc exceptions to *Chevron*. *Chevron* applies unless a constitutional law issue is presented, or unless an international law issue is presented, or unless a question of federalism is presented. This becomes awkward, since constitutional, international, and federalism questions are commonly interwoven with questions of statutory interpretation. For example, the statute may be open to interpretation in ways that avoid constitutional questions or that permit compliance with international law obligations. With respect to preemption, the Scalia

authority does not demonstrate its existence, long-continued, uncontested assertion is at least evidence that the legislature conveyed the authority. Similarly, while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given.

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

189. *Compare* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 175 (2001) (declining to defer to agency interpretation of “navigable” waters because of concern that this would exceed the outer limits of federal power under the Commerce Clause), *with* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–26 (1985) (deferring to agency interpretation of “navigable waters” under *Chevron* when no constitutional question was perceived). *See also* NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979) (resolving an important question about the jurisdiction of the NLRB under the canon of constitutional avoidance without any suggestion of deference to the position of the Board).

190. *Wyeth v. Levine*, 555 U.S. 555, 576–77 (2009); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996).

approach may lead to a mechanical disjunction between express preemption clauses, where *Chevron* would apply in interpreting the statute, and implied preemption, where it would not.¹⁹¹ But this is utterly unrealistic, since the proper interpretation of express preemption statutes often requires a determination of the permissible degree of tension between federal and state law, which cannot be derived in any straightforward way from an interpretation of the statute.¹⁹² Giving *Chevron* deference to agency views about the express preemption clauses could result in a persistent expansion of federal authority at the expense of the states, when courts would be more sensitive to traditional federal-state balance.¹⁹³

Under the Roberts approach, all legal sources that bear on the identification of governmental boundaries can be seamlessly integrated at Step Zero. Even assuming that agencies have a superior understanding of the statutes they are specifically charged with administering, it does not follow that they have much, if any, understanding of constitutional law, international law, or federalism. Understanding and applying these fundamental legal principles requires more than parsing the words of statutes. It requires knowledge of historically derived conventions about the appropriate functions of different legal institutions—matters that require a more contextual analysis than simply identifying gaps and ambiguities in a statute. There is every reason to believe that courts are the preferred institution for understanding and integrating these sources.¹⁹⁴

My colleague Peter Strauss, writing in this symposium, bemoans the failure of both Justice Scalia and Chief Justice Roberts to consider whether *Skidmore* is the appropriate standard to apply in determining whether an agency is acting within the scope of its authority.¹⁹⁵ I agree that it would be desirable to attend to the agency's reasons for claiming authority over a matter, and to ask whether these reasons are persuasive, as *Skidmore* would require. Applying *Skidmore* to "jurisdictional" questions would also synchronize questions about the scope of agency authority with questions about preemption, where the Court has said *Skidmore*, rather than either

191. Justice Scalia has "assumed" that the question whether a statute impliedly preempts state law "must always be decided *de novo* by the courts." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996); *see also* *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 38–44 (2007) (Stevens, J., joined by Roberts, C.J. & Scalia, J., dissenting); *cf.* *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2732 (2009) (Thomas, J., dissenting) (applying *Chevron* to an express preemption clause).

192. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–59 (2008).

193. Two other contributions to this symposium debate the role of federalism in *Chevron*. Seifter argues that it should play no role at *Chevron* Step Zero—including in the preemption context—*see* Seifter, *supra* note 19, whereas Kent Barnett agrees that agency expertise should be considered and, indeed, Congress has on at least one occasion stripped an agency of *Chevron* deference by statute in the preemption context. Kent Barnett, *Improving Agencies' Preemption Expertise with *Chevron* Codification*, 83 FORDHAM L. REV. 587 (2014) (detailing how in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 25b(5)(A), Congress directed courts to review under the *Skidmore* standard any decision to preempt state law made by the Office of the Comptroller of the Currency).

194. Merrill, *supra* note 192, at 755–59.

195. Strauss, *supra* note 19, at 795–96.

Chevron or de novo review, should apply. One could plausibly argue, therefore, that *Skidmore* review is the first-best solution to questions about the scope of agency authority. *Skidmore* cannot be applied at Step Zero, however, because one of the questions a court seeks to resolve at Step Zero is whether *Skidmore*, as opposed to *Chevron* or de novo review, is the proper standard of review! Chief Justice Roberts's proposal to monitor questions of agency jurisdiction as part of Step Zero, where the court exercises de novo review, should therefore probably be regarded as a second-best solution. Given *City of Arlington*, however, the only feasible option going forward for engaging in boundary maintenance is the Step Zero approach outlined by the Chief Justice. One would of course expect and hope that courts will pay attention to the agency's reasons for asserting authority, even if in doing so they are exercising a form of de novo review.

In sum, Justice Scalia puts *Chevron* first and requires a court, if it is to engage in boundary maintenance, to squeeze its inquiry into the *Chevron* framework. This means, outside the rare case where the agency has transgressed a clear legislative limit or has adopted a manifestly unreasonable interpretation of its organic statute, a court must distort the inquiries at Step One and Step Two in order to preserve the structure of governmental authority. This is unfortunate, because it lacks candor, provides little predictability or guidance to lower courts and agencies, and threatens to dilute the utility of *Chevron* as a true deference doctrine. The Chief Justice's approach to reconciling *Chevron* and the boundary maintenance function, in contrast, is far more transparent, allows the court to draw upon all sources of law in determining whether Congress intended to delegate lawmaking authority to the agency, and preserves *Chevron* in full force in cases where it properly applies.

CONCLUSION

In *Mead*, Justice Souter characterized the root of the disagreement between the majority and Justice Scalia as pitting those who would "limit and simplify" against those who would "tailor deference to variety."¹⁹⁶ Tailoring prevailed in *Mead*, but in *City of Arlington*, Justice Scalia mounted a partial comeback, gaining five votes for those who would "limit and simplify" in the face of what they perceived to be a proposal for more complexity. As Chief Justice Roberts's dissent reveals, however, the real dispute in *City of Arlington* was not one between simple and complex, but between general and particular. Specifically, the issue was whether judges should defer to agencies' interpretations of the scope of their own authority whenever they have been given general authority to act with the force of law, as opposed to an approach that would ask whether the agency has been given authority to act with the force of law with respect to the precise question in controversy. General versus particular is not the same thing as simple versus complex. Deciding the particular issue before them is what judges are supposed to do, without regard to whether the relevant law is

196. *United States v. Mead Corp.*, 533 U.S. 218, 236 (2000).

simple or complex. The Chief Justice's suggestion does not require a repudiation of *City of Arlington*. It merely requires a refinement of *Mead*'s Step Zero—something all members of the Court now say is required before *Chevron* applies. One hopes that the law will evolve in this direction, if courts are to continue to engage effectively in the important function of boundary maintenance in reviewing agency action.