

CHEVRON IS DEAD; LONG LIVE CHEVRON

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The Supreme Court's decision in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. continues to obsess academics and courts alike. Despite all the attention, however, the "Chevron revolution" never quite happens. This decision, though seen as transformatively important, is honored in the breach, in constant danger of being abandoned, and the subject of perpetual confusion and uncertainty. This Essay seeks both to bury and to praise Chevron.

Chevron is not a revolutionary shift of authority from the judiciary to the executive. That Chevron is dead. The Chevron that survives is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign.

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INTRODUCTION

At this point, it takes chutzpah to write about *Chevron*.¹ Everyone is sick to death of *Chevron*, and four gazillion other people have written about it, creating a huge pile of scholarship and precious little left to say. Most daunting, Peter Strauss has contributed significantly to the existing

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1. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

pile.² If Professor Strauss has half-a-dozen articles on a subject, the sensible thing is to get one's hands on them, read and learn from them, and keep quiet.

Nonetheless, here is an addition to the pile. It comes at a critical moment for the *Chevron* doctrine. In 2007, Linda Jellum reported *Chevron's* "demise."³ "Demise" is a strong word, as Mark Twain famously noted. Still, reports of *Chevron's* death seemed to get significant confirmation at the end of the Supreme Court's 2014–2015 Term, when the Court decided three important cases that suggested that *Chevron's* condition was, if not terminal, at least serious.

First, in *King v. Burwell*,⁴ a challenge to an Internal Revenue Service (IRS) rule regarding eligibility for tax credits under the Affordable Care Act,⁵ Chief Justice Roberts perfunctorily rejected the claim that *Chevron* applied, brushing the case aside like a slightly annoying but unthreatening bug. The relevant statutory provision was in the Internal Revenue Code;⁶ the statute granted the IRS authority to write all necessary regulations to implement the provision;⁷ the IRS had, through notice-and-comment rulemaking and in express reliance on that authority, issued a regulation directly addressing the legal question in the case.⁸ Yet in two succinct paragraphs, the Chief Justice concluded that *Chevron* simply did not apply—the issue was of such "economic and political significance" that it was inconceivable that Congress would simply have left it to the IRS to resolve.⁹ This was a particularly robust application of the "major questions doctrine," which holds that judicial deference is out of place with regard to hugely significant policy questions—the sort of issues that

2. See generally Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 Va. L. Rev. 611 (2009); Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight", 112 Colum. L. Rev. 1143 (2012) [hereinafter Strauss, Space/Weight]; Peter L. Strauss, In Search of *Skidmore*, 83 Fordham L. Rev. 789 (2014) [hereinafter Strauss, In Search of *Skidmore*]; Peter L. Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093 (1987) [hereinafter Strauss, 150 Cases]; Peter L. Strauss, Overseers or "The Deciders"—The Courts in Administrative Law, 75 U. Chi. L. Rev. 815 (2008) [hereinafter Strauss, Overseers or Deciders].

3. Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 Admin. L. Rev. 725, 772 (2007).

4. 135 S. Ct. 2480, 2495–96 (2015) (holding insurance exchange set up by Department of Health and Human Services qualified as "exchange established by a state" for purposes of participants' eligibility for tax credits to cover premium payments).

5. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

6. I.R.C. § 36B (2012).

7. Id. § 36B(g) (authorizing IRS to "prescribe such regulations as may be necessary to carry out the provisions of this section"). The IRS already had authority to "prescribe all needful rules and regulations for the enforcement of this title." Id. § 7805(a).

8. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,385 (May 23, 2012) (codified at 26 C.F.R. pts. 1, 602).

9. *King*, 135 S. Ct. at 2488–89.

Congress should, or must, or can be presumed to, decide.¹⁰ Strikingly, the magnitude of the issue did not simply keep the Court in “step one” of *Chevron*, it induced the Court to jettison *Chevron* altogether.

Second, in *Michigan v. EPA*,¹¹ the Court rejected the Environmental Protection Agency’s (EPA) reading of a provision of the Clean Air Act. This time, it accepted that *Chevron* applied, but rejected the EPA’s view as unreasonable, a rare “step two” agency loss.¹² There is nothing remotely deferential about the majority opinion. Moreover, Justice Thomas concurred, writing separately (though for himself only) to argue that the *Chevron* doctrine is unconstitutional because it cedes to the executive the exclusive judicial authority to “say what the law is.”¹³

Third, in *Perez v. Mortgage Bankers Ass’n*,¹⁴ Justice Scalia, of all people, revealed some waning of his longstanding and strident enthusiasm for *Chevron*. In an opinion that was primarily an attack on the distinct doctrine of deference to agency interpretations of their own regulations, Justice Scalia noted that *Chevron* is “[h]eedless of the original design of the [Administrative Procedure Act]”¹⁵ and hinted that perhaps it should be “uprooted.”¹⁶ This from the Justice generally understood as the firmest and most ferocious defender of *Chevron*.¹⁷

Some early commenters see these decisions as at least potentially marking a watershed moment, a fundamental shift from a regime of meaningful deference to a reassertion of judicial supremacy.¹⁸ Time will

10. Other examples include *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

11. 135 S. Ct. 2699 (2015).

12. *Id.* at 2706–07 (reviewing agency interpretation “under the standard set out in *Chevron*” and holding “EPA strayed far beyond those bounds”).

13. *Id.* at 2712 (Thomas, J., concurring) (internal quotation marks omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

14. 135 S. Ct. 1199 (2015).

15. *Id.* at 1211 (Scalia, J., concurring in the judgment).

16. *Id.* at 1212 (Scalia, J., concurring in the judgment).

17. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *Geo. L.J.* 833, 859–60 (2001) (“Justice Scalia has consistently argued for the broadest possible conception of the scope of the *Chevron* doctrine, urging, for example, that it applies to agencies that lack the power to render binding legal rulings and to interpretations by agencies issued in opinion letters or in briefs.”).

18. See, e.g., Randolph J. May, *Chevron Decision’s Domain May Be Shrinking*, *The Hill* (July 7, 2015), <http://thehill.com/blogs/pundits-blog/the-judiciary/247015-chevron-decisions-domain-may-be-shrinking> [<http://perma.cc/8P9Y-2RUV>] (suggesting while “*Chevron*’s demise” is not “imminent,” recent cases “could portend a diminished [agency] role”); Cass R. Sunstein, *The Catch in the Obamacare Opinion*, *Bloomberg View* (June 25, 2015), <http://www.bloombergtview.com/articles/2015-06-25/the-catch-in-the-obamacare-opinion> [<http://>

tell, but in fact it has long been the case that deference under *Chevron* is a principle often honored in the breach. For all the clamor, attention, and citations,¹⁹ *Chevron* has had less of an impact than this attention implies. Several scholars have surveyed the case law and reported that judges, especially those on the Supreme Court, do not defer as much as the doctrine seems to require. Rather, they have narrowed the circumstances in which *Chevron*, by its own terms, applies and invoke *Chevron* only intermittently in those circumstances.²⁰

perma.cc/CQ37-W8PP] (comparing *King* to *Marbury* in that Court made strong assertion of judicial power but declined to use that power to counter executive action in case before it).

19. It seems an obligation of the form to point out that *Chevron* is the most cited decision in administrative law. See, e.g., Jack M. Beermann, *Chevron* at the Roberts Court: Still Failing After All These Years, 83 Fordham L. Rev. 731, 731 (2014) (stating *Chevron* is most cited Supreme Court administrative law decision); Thomas W. Merrill, The Story of *Chevron*: The Making of an Accidental Landmark, in *Administrative Law Stories* 399 & n.2 (Peter L. Strauss ed., 2006) (noting *Chevron* is most cited administrative law case, though not “the overall citation champion.”); Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 823 (2006) (labeling *Chevron* most cited case in “modern public law”). So: obligation fulfilled. It is sometimes said that it is the most cited U.S. Supreme Court decision, period. See, e.g., Richard J. Pierce, Jr., *Administrative Law Treatise* 140 (4th ed. 2002) (“*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in more cases than any other Supreme Court decision in history.”). This is an overstatement; in fact *Chevron* is miles behind some other decisions. As of September 18, 2015, *Chevron* had been cited in 13,454 federal cases. See WestlawNext, <https://a.next.westlaw.com> (last visited Sept. 18, 2015) [hereinafter WestlawNext Search] (conducting search by accessing *Chevron* case, then Citing References tab, and narrowing list of citing cases by clicking cases and federal jurisdiction in left-hand sidebar). But *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), has been cited 17,188 times; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), was cited 98,104 times in just six years; and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), has been cited a whopping 120,975 times in about eight years, an order of magnitude more than *Chevron*. See WestlawNext Search, *supra* (conducting search with same methodology as for *Chevron* discussed above).

20. See Jack M. Beermann, The Turn Toward Congress in Administrative Law, 89 B.U. L. Rev. 727, 743 n.65 (2009) [hereinafter Beerman, Turn Toward Congress] (“*Chevron* no longer has much of an affect [sic] on statutory interpretation.”); William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1122 (2008) (“[I]t might be the case that the Court is more likely to cite *Chevron* and follow its two-step approach when the majority is prepared to uphold the agency action.”); Daniel J. Gifford, The Emerging Outlines of a Revised *Chevron* Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy, 59 Admin. L. Rev. 783, 833 (2007) (noting emergence of “new model of judicial review of agency interpretations” in which “mandatory obligation to defer . . . is limited”); Ann Graham, Searching for *Chevron* in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations, 60 Admin. L. Rev. 229, 271 n.257 (2008) (surveying recent Supreme Court decisions and concluding Court has abandoned *Chevron* and accepts only agency interpretations with which it agrees); Linda D. Jellum, The Impact of the Rise and Fall of *Chevron* on the Executive’s Power to Make and Interpret Law, 44 Loy. U. Chi. L.J. 141, 173–88 (2012) (describing ways Supreme Court, in recent years, has reclaimed authority it had ceded to executive in *Chevron*); Deborah N. Pearlstein, After Deference: Formalizing the Judicial Power for Foreign Relations Law, 159 U. Pa. L. Rev. 783, 807–17 (2011) (detailing limited impact and scope of

Two responses to this shortfall are appropriate. The first, the subject of Part I, is: “What did you expect?” Only in the rarest of self-protective settings will courts create and stand by a super-strong hands-off principle. *Chevron* has never, in practice, amounted to an abdication of the judicial role, if only because judges are not going voluntarily to disarm. The second response, considered in the remainder of this Article, is: “Good.” That is, *Chevron* should not be seen as a revolutionary decision. It insists on respect for the delegation of policymaking authority to administrative agencies, but it preserves interpretive authority for courts. The question “What should be done?” is for agencies. The question “What did Congress do?” is for courts (although they should take seriously what agencies have to say on the matter).

This Essay proceeds in three parts. Part I describes *Chevron* as a self-regulating doctrine, one that, for that reason, has not taken over the world and will never do so. Part II lays out a basic understanding of *Chevron* and of *Skidmore*.²¹ The argument here is for a reading of *Chevron* that is both weaker and stronger than that often proposed. On the one hand, courts retain an essential and meaningful role in determining, to use Professor Strauss’s terms, the boundaries of “*Chevron* space”;²² they have real work to do. On the other hand, in doing that work, the views of the agency can never be ignored; there is no completely agency-free space within which courts interpret statutes that agencies administer. These principles are explicated in part by reviewing the vocabulary of the *Chevron* doctrine. This Part concludes by placing *Chevron* in a jurisprudential framework that draws on the distinction between “interpretation” and “construction.” That distinction has been elaborated in other areas but has not infiltrated administrative law. In the *Chevron* opinion, its progeny, and the commentary, “interpretation” and “construction” are used as synonyms. But they can be seen as distinct undertakings; one concerns determining semantic meaning, the other applying that meaning to concrete situations. That distinction, or something like it, maps onto and helps elucidate the distinction between the proper roles of the courts and agencies, and the activities of step one and step two. Part III applies the framework developed in Part II to the Supreme

Chevron and arguing against deference to executive interpretations in foreign relations); Connor N. Raso & William N. Eskridge, Jr., *Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1740 (2010) (surveying 1,014 post-*Chevron* Supreme Court cases and finding Court invoked *Chevron* in only one-third of cases where it should have applied); Brian G. Slocum, The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State, 69 Md. L. Rev. 791, 794–98 (2010) (“[*Chevron*] is a far less significant doctrine if it does not require significant changes to statutory interpretation methodology, it is routinely ignored by courts, and it does not constrain judicial discretion because it allows judges to decide cases in accordance with their ideological preferences.”).

21. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994).

22. See generally Strauss, *Space/Weight*, supra note 2, at 1143.

Court's decision in *City of Arlington*,²³ which held that *Chevron* applies to agency determinations going to their own jurisdiction. The majority and the dissent in that case were both correct, making *City of Arlington* that rare creature, a unanimous 6-3 decision.

I. CHEVRON AS SELF-REGULATION

*Chevron U.S.A. Inc. v. Natural Resources Defense Council*²⁴ is the Supreme Court's most important decision regarding judicial deference to agency views of statutory meaning. It lays out a seemingly straightforward approach to considering whether to uphold an agency's view of a statute:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²⁵

In what is always referred to as "step one" (though that term does not appear in the *Chevron* opinion itself), the reviewing court "employ[s] traditional tools of statutory construction" to determine statutory meaning.²⁶ What exactly happens in step two is disputed, though the dominant judicial and academic formulation is that there, the court asks (a) whether the statute clearly precludes the agency's reading (in which case the inquiry largely, if not completely, overlaps with step one) and (b) whether the agency's determination is arbitrary and capricious.²⁷

23. *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

24. 467 U.S. 837 (1984).

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

26. *Id.* at 843 n.9.

27. See, e.g., *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2034 (2012) (deferring under step two because relevant agency regulations were "neither arbitrary or capricious in substance, [n]or manifestly contrary to the statute" (alteration in original) (internal quotation marks omitted) (quoting *Mayo Found. for Med. Educ. and Research v. United States*, 131 S. Ct. 704, 711 (2011))); *Mayo*, 131 S. Ct. at 711 ("[U]nder [*Chevron* step two] we may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" (citations omitted)); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 *Chi.-Kent L. Rev.* 1253 (1997) (arguing step two tracks arbitrary-and-capricious test).

If *Chevron* is revolutionary, it is because step two seems to take courts out of the statutory-interpretation game, compelling them to accept the agency's view of statutory meaning. Contrary to settled understandings, it charges agencies rather than courts with the authority to "say what the law is."²⁸ Hence Cass Sunstein's much-quoted description of the decision as "a kind of counter-*Marbury* for the administrative state."²⁹

Doctrinally, the impact and meaning of *Chevron* will depend on (a) in what circumstances it is triggered,³⁰ and (b) how capacious step one is, i.e., how quickly a court throws up its hands and defers in step two.³¹ Were *Chevron* to apply any time an agency had taken a view regarding statutory meaning, and were the court to yield to that view in the face of any statutory uncertainty, the decision would be enormously consequential (and problematic). As discussed above, that has not happened. At least part of the reason is that *Chevron* is an example of self-regulation.

Self-regulatory regimes rely on entities to oversee themselves. The *Chevron* doctrine is essentially an example of self-regulation. It is a judicially imposed limitation on the scope of judicial authority, a doctrine through which those in the judging business constrain the activities of the members of their own industry.

Some doubters object that the "self" in "self-regulation" is like the "constructive" in "constructive consent," or the "quasi" in "quasi-contract"—that is, a synonym for "not." If you are doing it yourself, it is not regulation.³² On this account, self-regulation guarantees under-regulation. That may be an overstatement, but indisputably, the essential risk of self-regulation is excessive laxity. After all, it is a regime in which the regulator

28. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

29. Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 *Yale L.J.* 2580, 2589 (2006) [hereinafter Sunstein, *Beyond Marbury*].

30. Here the leading case in a complicated body of decisions is *United States v. Mead Corp.*, 533 U.S. 218 (2001), which held that *Chevron* only applies when Congress has delegated to the agency authority to make rules with the force of law and the agency has acted pursuant to that authority. See generally Merrill & Hickman, *supra* note 17 (surveying *Chevron*'s application). Though it predates *Mead* and is somewhat out of date, Merrill and Hickman's article, *id.*, remains the most useful and comprehensive survey of exactly when *Chevron* applies and when it does not.

31. This is sometimes referred to as the "how clear is clear?" question. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *Duke L.J.* 511, 520–21 ("How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought."); see also Note, "How Clear is Clear" in *Chevron*'s Step One?, 118 *Harv. L. Rev.* 1687, 1698–703 (2005) (arguing in determining "how clear is clear," reviewing court should consider agency's institutional advantages, if any).

32. *Bos. Consulting Grp.*, U.S. Securities and Exchange Commission: Organizational Study and Reform 25 (2011), <http://www.sec.gov/news/studies/2011/967study.pdf> [<https://perma.cc/5NJU-CUQ4?type=pdf>] ("The most fundamental critique is that self-regulation is not real regulation at all: at best, self-regulation is less effective than government regulation, and at worst, is merely 'an illusion' meant to deflect calls for government oversight.").

is not merely “captured” by regulated interests; regulator and regulatee are one and the same.³³

To some extent, this dubiousness reflects a misunderstanding of the concept; “self-regulation” is not a synonym for “will power.” The principle is not that an individual person or firm will control *itself*, but rather that an *industry* will control its members. That will not necessarily work, but it can work in a market setting if the individual firms recognize that their long-term prosperity depends on mutual constraint. As one scholar concluded from a study of self-regulation in the nuclear power and chemical manufacturing industries: “[T]he key to the rise of self-regulation was the industry’s collective perception of itself as a ‘community of fate.’ Each industry’s future prosperity was seen as depending upon its ability to impose collective self-restraint on its members’ profit-seeking activities in the name of public safety.”³⁴

If that is the case, then one setting where one would expect self-regulation to fail is where the industry consists of a single monopolist or, relatedly, where there are multiple players but the industry produces a good for which there are no substitutes. The federal judiciary is one such setting; it enjoys a constitutionally established monopoly on adjudication. Therefore, norms of conduct would have to be overwhelmingly powerful for self-regulation to function effectively.

The federal judiciary self-regulates in many settings; indeed, it is the norm. The traditional approach to judicial misconduct, conflicts of interest, and incompetence has been one of self-regulation (at least up to the point where there has been an impeachable offense, at which juncture the U.S. Congress may take over). There are powerful arguments sounding in judicial independence for this approach.³⁵ And professional and ethical norms may be so imbued, and reputational capital so precious, that self-regulation may function adequately in this setting. But the risk of underenforcement is real.³⁶ Indeed, Congress has recently grown uneasy with the traditional approach.³⁷

33. See, e.g., Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 *Admin. L. Rev.* 171, 189–90 (1995) (identifying inadequate enforcement as one of three principal shortcomings of self-regulation).

34. Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 *U. Pa. L. Rev.* 411, 420 (2011) (citation omitted).

35. See, e.g., Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for Federal Judges*, 87 *Mich. L. Rev.* 765, 766 (1989) (“[T]he only constitutionally permissible way to regulate judicial misconduct and disability that does not involve impeachable action is a system of judicial self-regulation unencumbered by any form of congressional interference.”).

36. See generally, Anthony D’Amato, *Self-Regulation of Judicial Misconduct Could Be Mis-Regulation*, 89 *Mich. L. Rev.* 609 (1990) (arguing judiciary cannot be left to police itself).

37. See Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 *Yale L. & Pol’y Rev.* 33, 61–70 (2012) (describing new approach in legisla-

Judicial deference doctrines are also examples of self-regulation. This is clearly true of *Skidmore*³⁸ and *Auer*,³⁹ which do not purport to rest on congressional command. And, of course, courts defer to actors other than administrative agencies offering legal interpretations. They defer to agencies doing other things (e.g., making enforcement decisions⁴⁰), they defer to other actors' legal interpretations (e.g., state courts' decisions regarding their own law⁴¹), and they defer to non-agencies who are not interpreting the law (e.g., the presumption of the constitutionality of federal statutes⁴² the political question doctrine⁴³). Almost none of these hang on a statutory or constitutional peg; they are prudential doctrines of self-restraint.

Chevron is a self-imposed limitation of this sort. To be sure, the Court and commentators often assert that *Chevron* is not self-imposed but rests on congressional instructions.⁴⁴ This theory solves one huge, oft-noted problem, namely that the Administrative Procedure Act (APA), pursuant to which most cases in which *Chevron* is in play are brought, instructs courts to “decide all relevant questions of law, interpret constitutional and

tion that “undermined judicial regulation” through Judicial Transparency and Ethics Enhancement Act of 2006).

38. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (instructing lower courts to take into account agency interpretations of statutes because, “while not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

39. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding when meaning of regulation is in doubt, agency's interpretation is “controlling unless ‘plainly erroneous or inconsistent with the regulation’” (internal quotation marks omitted) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))).

40. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985) (holding agency decisions not to enforce are presumptively unreviewable).

41. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding federal courts deciding questions of state law must apply law of state in which they sit as determined by courts of that state).

42. See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) (referring to “presumption of constitutionality” and noting “[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds”); Neal Kumyar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 *Harv. L. Rev.* 2109, 2139 (2015) (“The principle that the Court must presume laws constitutional is as old as judicial review.”); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 & n.9 (1983) (holding presumption of constitutionality afforded federal statutes is stronger than presumption of regularity afforded agency action being reviewed for arbitrariness).

43. See, e.g., *Nixon v. United States*, 506 U.S. 224, 233–36, 238 (1993) (holding federal courts could not review procedures used by U.S. Senate to convict impeached federal judge); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (cataloging varieties of nonjusticiable cases that have been labeled “political questions”).

44. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally,” as shown by some “indication of . . . congressional intent”).

statutory provisions,” and set aside agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”⁴⁵ But it is hard to find anyone who does not consider congressional delegation a fiction.⁴⁶ Most recently, Mark Seidenfeld has articulated the view that it is a doctrine of “self-restraint,” laying out at length the shortcomings of claims that it rests on any actual statutory mandate or congressional intent.⁴⁷ He has a lot of company.⁴⁸

45. 5 U.S.C. § 706 (2012). The tension between *Chevron* and the text of the APA has been often noted. See, e.g., *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (“Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations. Never mentioning § 706’s directive that the ‘reviewing court . . . interpret . . . statutory provisions,’ we have held that *agencies* may authoritatively resolve ambiguities in statutes.” (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984))); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and How and Why It Should Be Overruled*, 42 Conn. L. Rev. 779, 788–94 (2010) (arguing first among *Chevron*’s “intrinsic failings” is its inconsistency with APA); Ronald A. Cass, *Vive La Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 Geo. Wash. L. Rev. (forthcoming 2015) (manuscript at 29 & n.134) (on file with the *Columbia Law Review*) (arguing courts should “implement the APA’s review provisions as written,” deferring only on matters within agency discretion and not on questions of statutory meaning); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 472–73 (1989) (noting *Chevron* approach does not “take section 706 at face value”); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 Yale L.J. 676, 689 (2007) (stating theory Congress has delegated interpretive authority to agencies is fiction undercut by APA’s explicit instruction that courts shall decide all questions of law).

46. See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212–25 (concluding *Chevron* does not rest on actual congressional intent); Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 Va. L. Rev. 2009, 2009 (2011) (“The framework for judicial review of agency statutory interpretation rests on a legal fiction: Congress intends to delegate interpretive authority to federal agencies whenever it fails to resolve clearly the meaning of statutory language.”); Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. 607, 613 (2014) (“[I]n contrast to most of the other interpretive rules, there is widespread agreement about *Chevron*’s source: the Court created the doctrine.”); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 Admin. L. Rev. 735, 749 (2002) (“*Chevron* deference revolves around the fiction of a congressional delegation . . .”); Scalia, *supra* note 31, at 517 (noting “any rule [regarding congressional allocation of interpretive authority] represents merely a fictional, presumed intent”); Sunstein, *Beyond Marbury*, *supra* note 29, at 2589–91 (describing proposition Congress has delegated authority to executive as “fiction”).

47. Mark Seidenfeld, *Chevron’s Foundation*, 86 Notre Dame L. Rev. 273, 276–88 (2011) (debunking claim Congress delegated interpretive authority to agencies in any conscious or legally operative way).

48. See, e.g., Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes? A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 Wis. L. Rev. 1275, 1289 (labeling *Chevron* “principle of self-restraint, related to the various well-established prudential limitations on justiciability in the federal courts”); Frederick Liu, *Chevron as a Doctrine of Hard Cases*, 66 Admin. L. Rev. 285, 318, 326–29 (2014) (labeling *Chevron* “a doctrine of judicial self-restraint” that has no basis in congressional command); Note, *Justifying*

In any event, the *theoretical* debate is beside the point. Whether self-imposed or derived from an implicit congressional delegation, *Chevron's* command to accept any reasonable agency interpretation is *in practice* a form of self-regulation. The Court made it up and imposed it on itself; it is administrative common law.⁴⁹ So understood, *Chevron* is heir to the shortcomings and risks that generally bedevil self-regulation: a lack of transparency, the failure to evaluate or monitor performance, and the absence of meaningful penalties.⁵⁰ Judges, like most human beings (especially successful human beings holding prestigious positions, possessed of high self-regard, surrounded by sycophants, and blessed with matchless job security), will only go so far in ceding authority. Of course, this or that individual judge may be *too* deferential, may overregulate, so to speak.⁵¹ Teddy Roosevelt famously complained that Oliver Wendell Holmes was such a judge.⁵² But as an overall tendency, judges generally, federal judges in particular, and Supreme Court Justices most of all, simply are not going to be *too* constrained.⁵³

the *Chevron* Doctrine: Insights from the Rule of Lenity, 123 Harv. L. Rev. 2043, 2046 (2010) (“The problem, as many commentators have observed, is that the notion that each statutory ambiguity represents a specific decision by Congress to delegate interpretive authority to the agencies strains credibility.”).

49. Gillian E. Metzger, Foreword: Embracing Administrative Common Law, 80 Geo. Wash. L. Rev. 1293, 1300–03 (2012) (describing *Chevron* and its progeny as “exemplars of administrative common law”).

50. See Neil Gunningham & Peter Grabosky, Smart Regulation 152–53 (1998) (describing these shortcomings of self-regulation).

51. Cf. Jean Roiphe, Aggression, Unconscious Conflict, and the Role of the Lawyer, 16 Cardozo L. Rev. 1205, 1214–18 (1995) (explaining one role of lawyer is to protect client from client’s own superego, which might keep her from being aggressive enough on her own behalf).

52. When, early in his tenure, Holmes dissented in an important government victory in an antitrust case, the President who appointed him fumed, “I could carve out of a banana a Judge with more backbone than that.” Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* 69 (3d ed. 1992).

53. Psychological study of the judiciary has focused on the fact that judges are heirs to all the same decisionmaking shortcomings that plague ordinary mortals. See, e.g., Chris Guthrie, *Misjudging*, 7 Nev. L.J. 420, 420 (2007) (reviewing literature and extensive evidence showing judges are hampered by cognitive biases and multiple “blindnesses”). Some of this work may assume a particular judicial tendency to overconfidence, but it does not prove it. Accordingly, the support for the statement in text is impressionistic rather than scientifically established. The impression is widely shared, however. See, e.g., Henry Paul Monaghan, Comment on Professor Van Alstyne’s Paper, 72 Iowa L. Rev. 1309, 1309 (1987) (“Judges constitute an elite group whose self-confidence is seldom matched by genuine learning.”); Louis H. Pollack, “Liberty”: Enumerated Rights? Unenumerated Rights? Penumbra Rights? Other?, 8 U. Pa. J. Const. L. 905, 911 (2006) (“Provided that the judicial miscue [of misconstruing lawyers’ arguments] doesn’t turn a win into a loss, lawyers go back to their offices with their win and get big bucks, and judges go back to their chambers with their big egos inflated some more and get little bucks.”); Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 Denv. U. L. Rev. 335, 349–60 (2010) (discussing “cult of the judge” and observing “with the pedestal of center stage comes some sense of entitlement and even arrogance”).

Accordingly, the continued reports of *Chevron's* demise are not a surprise. Nor is the fact that empiricists have had difficulty determining whether *Chevron* has actually had an impact in the real world.⁵⁴ That does not mean it has had no impact, and it seems likely that it has had some. But the fact that it is so difficult to conclusively demonstrate an impact at least establishes that any shift has not been fundamental.

Chevron is an example of what one might call *doctrinal* self-regulation. It is a doctrine that by its nature will not get out of hand. Self-regulation simply does not lead to overregulation. The risks of self-regulation are one-sided. Like most people, judges will protect their turf. Moreover, even after all these years, strong readings of *Chevron* remain counterintuitive; judges' learned intuitions do not generally lead them to defer on questions of law.⁵⁵

The point is not that deference doctrines are meaningless, and this is not a rant about the imperial judiciary or a complaint that the Supreme Court "seems incapable of admitting that some matters—any matters—are none of its business."⁵⁶ Indeed, in general, administrative law doctrines align poorly with such objections.⁵⁷ The point is only that, as with justiciability doctrines, the nature and structure of the judiciary guard against overdoing deference, and the danger will almost always be that courts go too far in the other direction.

54. The literature, and the challenges in attempting to measure the decision's impact, are summarized in John Manning & Matthew Stephenson, *Legislation and Regulation* 772–75 (2d ed. 2013).

55. Gary Lawson and Stephen Kam put it this way:

To the extent *Chevron* increases the range of circumstances in which judges defer to agencies on pure legal questions, it seems to reverse the common-sense view of comparative institutional competence in which courts are generally better at determining the law and agencies are generally better at finding facts and making policy. Anyone who subscribes to the legal process approach, in which decisional authority should be allocated where best applied, will find a broad reading of *Chevron* troublesome at best and absurd at worst. Given the number of judges (and law clerks) trained either at Harvard Law School or by professors who were trained at Harvard Law School, where the legal process approach grew and flourished, it would not be surprising to find serious resistance to the *Chevron* revolution.

Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 *Admin. L. Rev.* 1, 61 (2013).

56. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) (emphasis omitted).

57. See generally Michael Herz, *The Rehnquist Court and Administrative Law*, 99 *Nw. U. L. Rev.* 297 (2004) (describing how Rehnquist Court's administrative law jurisprudence fits poorly with standard academic objections that Court was too sure of itself and inadequately deferential).

A 1992 article by the present author cautioning against too strong a reading of *Chevron* was entitled *Deference Running Riot*.⁵⁸ In the intervening decades, that title has been shown to be fear mongering. Deference has not run riot, and experience and common sense both suggest that it will not. At the same time, *Chevron* is far from dead. Properly understood and sensibly applied, that decision is a salutary recognition that Congress delegates broad authority to agencies and courts must respect those delegations. But it leaves courts with an essential role in determining the scope of those delegations. The remainder of this Essay accepts that the revolutionary *Chevron*, that apotheosis of judicial self-abdication, is indeed dead (if it ever was truly alive) and articulates the nature and scope of the robust and appropriate *Chevron* that should survive.

II. A VIABLE *CHEVRON* (AND *SKIDMORE*)

What, then, should a viable *Chevron*—a *Chevron* that is sustainable, consistently applied, and aligns with separation-of-powers norms and judicial realities—prescribe? This Part lays out an understanding of *Chevron* that is both consistent with basic principles of separation of powers and an implementable form of judicial self-regulation. It focuses on the distinctions between *Chevron* and *Skidmore*, because each is best understood in comparison to the other.

A. *Doctrinal Consequences of the Categorical Model*

Chevron and *Skidmore* are both doctrines of judicial “deference.” It is often said that the first requires “strong deference” and the second “weak deference.”⁵⁹ This misconceives the distinction as one of degree when it is in fact a difference in kind. Where *Chevron* has courts accept any reasonable agency interpretation of an ambiguous statute, *Skidmore* insists that courts take agency views seriously but cautions that those views are “not controlling upon the courts by reason of their authority,” offer “guidance,” and at most have the “power to persuade.”⁶⁰

58. Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L.J. Am. U. 187 (1992) [hereinafter Herz, *Deference Running Riot*].

59. See, e.g., *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1268–69 (9th Cir. 2015) (using phrase “strong deference under *Chevron*” or “strong *Chevron* deference” in headnotes 4, 9, 10, and 11); *Cetto v. LaSalle Bank Nat. Ass’n*, 518 F.3d 263, 274 (4th Cir. 2008) (referring to *Chevron* framework as requiring “strong deference”); Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 Wm. & Mary L. Rev. 1105, 1109–10 (2001) (referring to “*Skidmore* ‘weak deference’” and “*Chevron* step-two ‘strong deference’”); Charles A. Sullivan, *On Vacation*, 43 Hous. L. Rev. 1143, 1204 n.287 (2006) (“[T]he Court requires strong deference, usually called *Chevron* deference, in some situations, and weak deference, usually called *Skidmore* deference, in others.”).

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

Peter Strauss's helpful route to understanding the distinction between these two sorts of deference begins with terminology. As the title to his influential article puts it, "deference" is "too confusing"; instead, he would refer to "*Chevron* space" and "*Skidmore* weight."⁶¹ On this conception, *Chevron* marks off and insists that courts respect a space within which the agency is in charge. The court must define the boundaries of that space;⁶² an interpretation that is "unreasonable" exceeds those boundaries. But within *Chevron* space, the decisionmaker is the agency and the court's job is to defer rather than second-guess. *Chevron* space is the area between what a statute "must mean and what it cannot mean."⁶³ Under *Skidmore*, in contrast, the court is the ultimate decisionmaker. The agency's views must be taken seriously; they carry weight. But the court has the ultimate say.⁶⁴

Accordingly, there are two fundamental differences between *Chevron* and *Skidmore*: the who and the what. First, the ultimate decisionmaker is different in the two settings. Under *Skidmore*, at the end of the day the decisionmaker is the court; the agency's views have the power to persuade but they "lack[] power to control" and are "not controlling upon the courts by reason of their authority."⁶⁵ Under *Chevron*, the decisionmaker is the agency; as long as the agency has not gone off the deep end, the court must accept its decision. Thus, in *Alaska Department of Environmental Conservation v. EPA*, Justice Ginsburg observed that in *Chevron*, the Court had "accorded *dispositive effect* to the EPA's interpretation of an ambiguous [statutory] provision," whereas the interpretation challenged here "does not qualify for the dispositive force described in *Chevron*."⁶⁶ Instead, it merely "warrant[s] respect."⁶⁷ The Court *agreed* with the agency, but it did not *defer* in the strong sense.⁶⁸ In other cases, the Court has cited *Skidmore* but ultimately rejected

61. See generally Strauss, *Space/Weight*, supra note 2. "Weight" was the term used by the *Skidmore* Court itself. *Skidmore*, 323 U.S. at 140 (stating "Court has long given considerable and in some cases decisive weight to" agency views and "weight of [the agency's] judgment in a particular case will depend on" various factors).

62. Strauss, *Space/Weight*, supra note 2, at 1165 (stating "lines defining an agency's *Chevron* space must be judicially determined," because that determination constitutes "statement of what the law is").

63. *Id.* at 1159.

64. *Id.* at 1156 ("Once a question of statutory interpretation has been put before a court, it is for the court to resolve the question of meaning.").

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

66. 540 U.S. 461, 487 (2004) (emphasis added).

67. *Id.* at 488 (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)). These quotations from *Alaska Department of Environmental Conservation* are admittedly rather selective; Justice Ginsburg's wording is not always so precise.

68. For similar Supreme Court decisions upholding agency interpretations under *Skidmore* because it agreed with them, see *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) (upholding agency's interpretation because it was "reasonable" and "consistent with the [statute]"); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401-02 (2008) (upholding agency view as "consistent with the statutory framework," whereas respondents' view was "in considerable tension with [its] structure

the agency interpretation—not because it was unreasonable, but because it was wrong.⁶⁹ Whether agreeing or disagreeing with the agency, the Court was making the decision.

To say that in *Skidmore* the court is the ultimate decisionmaker whereas in *Chevron* step two the agency is the ultimate decisionmaker is true but incomplete. Equally important, the court and the agency are making different sorts of decisions. The agency is making a policy decision. By definition, within its *Chevron* space, the agency is unconstrained by the statute, which has given out. It must act reasonably, i.e., not arbitrarily and capriciously, and it cannot exceed statutory boundaries. However, within those limits (which may be expansive), the agency can do what it wants. In contrast, in a *Skidmore* case, the court is the decisionmaker, but it *cannot* do whatever it wants. Its role is to do what Congress wants (or, alternatively, what the statute dictates). That description of the judicial role may sound naïve or old-fashioned.⁷⁰ Interpreters, including judges, are never wholly constrained, must make judgment calls, and will (properly) be influenced by policy concerns. But the constitutional structure, the APA's distinction between legislative and interpretative rules, centuries of jurisprudence, and most people's intuitions accept a distinction between interpreting law and making law. The court's job is to give the statute the best possible reading, not to adopt the best possible policy.

Under *Skidmore*, the weight due an agency's interpretation varies according to the circumstances.⁷¹ The "*Skidmore* factors" that determine where the interpretation falls along this sliding scale help illuminate the difference between the judicial task under that decision and the judicial task under *Chevron*. For example, the most familiar and well-settled factor is that under *Skidmore*, a long-standing, consistent interpretation merits special weight.⁷² Three justifications might support this principle. First, if the agency *has* flipped, then at least one of its positions must be wrong,

and purposes"); *Estate of Keffeler*, 537 U.S. at 385 (applying canons of construction to interpret statutory provision before noting agency guidance document "confirmed" Court's reading).

69. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012) (rejecting agency's interpretation of its own regulation); *Wyeth v. Levine*, 555 U.S. 555, 576–81 (2009) (noting agency's views were "inherently suspect" and conflicted with "Congress' purposes"); *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (finding agency's rule was not persuasive and noting decisionmaker's "lack of expertise"); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpreting statute independently and simply stating agency's contrary view was "unpersuasive").

70. See generally Sunstein, *Beyond Marbury*, supra note 29, at 2583 (defending fairly robust version of *Chevron* in light of "legal realist attack on the autonomy" of legal reasoning and shift of regulatory authority from common law courts to administrative agencies).

71. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

72. *Id.* (listing factors that give agency decisions persuasive authority).

and there is a meaningful chance (though in principle less than fifty-fifty) that the one under review is the wrong one. Therefore, judicial confidence in the agency is significantly undercut. Second, if the agency has *not* flipped, and Congress has left the statute alone, there is implicit congressional approval of the agency view.⁷³ Many things explain congressional inaction besides agreement (e.g., ignorance, distraction, inability to agree on an alternative, lack of time), so the acquiescence argument is thin, but courts still trot it out and it is not absurd. Finally, reliance interests always counsel, to some degree or another, sticking with the status quo; upsetting a long-standing interpretation could be disruptive and costly.

The relevance of the first two considerations, though not the third, hinges on the rationale for deferring. Both go to the likelihood that the agency interpretation is “right” in the sense of being an accurate understanding of what the statute means. Thus, the implicit premise is that the statute has a meaning (and a “correct” meaning); the answer lies in the statute; and there is reason to have some (though a varying) degree of confidence in the agency’s understanding of it. Longstanding interpretations get special weight because they are more likely to be correct. In contrast, if the court is deferring because Congress has delegated policymaking authority to the agency, then by definition the statute does not have a correct reading. A flip-flop does not undercut the agency decision at all; indeed it may reflect the delegation, expertise, and accountability that are thought to justify deference in the first place. Appropriately, then, the Court has held that this most familiar and central feature of non-*Chevron* deference—reduced deference to inconsistent agency positions—is inapplicable under *Chevron*.⁷⁴

This leads to a final point. Within its *Chevron* space, is the agency really “interpreting”? It is very common to speak of *Chevron* as involving situations where the agency has been granted “interpretive authority.”⁷⁵ Yet

73. The same idea underlies the rule that stare decisis is especially robust in statutory cases. See, e.g., *Patterson v. MacLean Credit Union*, 491 U.S. 164, 172 (1989) (“[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction.”). Whether that rule rests in part on an implicit congressional endorsement of the precedent is debated. Compare *id.* at 175 n.1 (denying congressional failure to overturn precedent is in itself reason for standing by precedent), with *id.* at 200–01 (Brennan, J., concurring in the judgment) (stating Congress’s failure to pass legislation to override decision is de facto ratification of that decision), and *Johnson v. Transp. Agency*, 480 U.S. 616, 629–30 n.7 (1987) (making ratification argument).

74. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (explaining agency inconsistency does not preclude *Chevron* deference because “initial agency interpretation is not instantly carved in stone” and that, “[o]n the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis” (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984))).

75. See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878, 1882–83, 1885–86 (2013) (Roberts, C.J., dissenting) (characterizing *Chevron* as resting on congressional grants of

to the extent the agency is making a normative, policy-based, prescriptive decision, it is not “interpreting” a statute. It is not explaining what Congress has decided; it is deciding in Congress’s place. Judge Posner’s well-known opinion in *Hector v. United States Department of Agriculture* makes the point.⁷⁶ An agency memorandum provided that only fences eight feet and higher would satisfy a regulatory requirement that certain wild animals be adequately contained.⁷⁷ The agency argued that the memorandum did not have to go through notice-and-comment since it was an interpretive rule, simply explicating what the regulation already required.⁷⁸ The court disagreed, stating that the shift from the general standard requiring effective containment to the specific rule requiring an eight-foot fence cannot “be derived from the regulation by a process reasonably described as interpretation.”⁷⁹ The same can be said of any step-two case: By definition, interpretation has failed to produce an answer. The statute is silent, so the court goes with the agency. It is a category mistake to view *Chevron* as being about deference to agency interpretations.⁸⁰

It is more than a little odd that courts and commentators continue to insist that *Chevron* is about “interpretive authority” because, when courts operate in step two (which is what counts, after all), they do not treat the agency decision under review like an interpretation. They treat it like a policy judgment and review it pursuant to the arbitrary-and-capricious test.

Consider *Judulang v. Holder*.⁸¹ This was a complicated case in which a unanimous Court set aside a policy of the Board of Immigration Appeals

interpretive authority); *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (same); Kenneth A. Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 77 N.Y.U. L. Rev. 1272, 1284–86 (2002) (discussing what it means for Congress to “delegate primary interpretive authority to agencies”); Evan J. Criddle, *Chevron’s* Consensus, 88 B.U. L. Rev. 1271, 1284–85, 1300, 1303–04, 1313 (2008) (“Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration.”).

76. 82 F.3d 165 (7th Cir. 1996).

77. *Id.* at 168.

78. *Id.* at 169.

79. *Id.* at 170.

80. See Elizabeth V. Foote, Statutory Interpretation or Public Administration: How *Chevron* Misconceives the Function of Agencies and Why It Matters, 59 Admin. L. Rev. 673, 684–708 (2007) (making extended argument that treating agency implementation of statutes as being “statutory interpretation” is both incorrect and harmful); Herz, Deference Running Riot, *supra* note 58, at 196–200 (arguing *Chevron* deference applies to agency policymaking but not agency “interpretation” in sense of determining what it is Congress has done); Richard J. Pierce, Jr., How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss, 59 Admin. L. Rev. 197, 200 (2007) (“Step two . . . does not . . . authorize agencies to ‘interpret’ statutes . . . [I]t recognizes that institutions may choose among competing constructions of a statutory provision that is within the range of meanings that the statutory language can support . . . An institution can make that choice only by engaging in a policymaking process.” (footnotes omitted)).

81. 132 S. Ct. 476 (2011).

concerning the circumstances in which the government would waive deportation of a deportable alien. The government urged the Court to defer under *Chevron*, but instead the Court reviewed the policy under the arbitrary-and-capricious test:

The Government urges us instead to analyze this case under the second step of the test we announced in [*Chevron*] to govern judicial review of an agency's statutory interpretations. Were we to do so, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is "arbitrary or capricious in substance." But we think the more apt analytic framework in this case is standard "arbitrary [or] capricious" review under the APA. The BIA's . . . policy . . . is not an interpretation of any statutory language . . .⁸²

So, if the argument is not really about statutory meaning, it is not a *Chevron* case, but rather an arbitrary-and-capricious case. An example is *Fox Television*, in which the FCC had found that when Fox aired a fleeting expletive, it had broadcast "indecent" material in violation of the relevant statute.⁸³ There was no dispute that fleeting expletives were indecent within the meaning of the statute, but the agency had heretofore not bothered to enforce the prohibition in the case of fleeting expletives.⁸⁴ It then changed its policy, and Fox challenged the new policy.⁸⁵ That argument sounded in arbitrariness; it was not a *Chevron* case about the meaning of the term "indecent." Similarly, *State Farm*⁸⁶ did not turn on whether the revoked passive-restraint standard met the statutory requirements that it be "practicable," satisfy "the need for motor vehicle safety," and be "stated in objective terms."⁸⁷ Instead, the Court focused on the adequacy of the reasoning supporting the agency's judgment calls.⁸⁸

So far so good. But note that Justice Kagan explicitly says that were *Judulang* to be resolved under *Chevron*, "*our analysis would be the same.*"⁸⁹ So *Chevron* is the arbitrary and capricious test.⁹⁰ Except, she says, that test does not apply to statutory interpretation!

82. *Id.* at 483 n.7 (citations omitted).

83. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 510–11 (2009).

84. *Id.* at 507–08 (describing enforcement history).

85. *Id.* at 521–22.

86. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

87. 15 U.S.C. § 1392(a) (1976) (current version at 49 U.S.C. § 30111(a) (2012)).

88. See *State Farm*, 463 U.S. at 47–50 (rejecting agency's decision because of failure to consider obvious alternative).

89. *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (emphasis added).

90. On the congruence of step two and the arbitrary-and-capricious test, see *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 710 n.4 (D.C. Cir. 2008) (noting overlap between two standards and concluding that because agency interpretation was reasonable under step two, it also survived arbitrary-and-capricious challenge); Bamberger & Strauss, *supra* note 2, at 621 &

The only way to resolve all this is to view step one as being about statutory interpretation—i.e., figuring out what constraints are actually imposed by the statute—and step two as being about the review of policymaking—i.e., determining whether the agency, free of statutory constraint, engaged in reasoned decisionmaking.

All of this sits comfortably with traditional understandings of the separation of powers. In a *Skidmore* case, and in *Chevron* step one, the court and the agency are engaged in the same task, and it is one in which the court has primacy. In *Chevron* step two, the agency is no longer on the court's turf, the court is on the agency's. In the absence of an agency conclusion, the court will do the best it can (just as, in the absence of a directly applicable judicial precedent, an agency will do the best it can in determining statutory meaning). But if the agency has acted, it prevails.⁹¹

This account is at least part of the response to Justice Thomas's objection that *Chevron* is unconstitutional. In *Michigan v. EPA*, Justice Thomas concurred to challenge the constitutionality of *Chevron*.⁹² In his view, it violates either Article I or Article III, which vest the legislative and judicial powers in the courts and Congress, respectively.⁹³ Viewed as an allocation of "interpretive authority," *Chevron* deference "precludes judges from exercising" the constitutionally required "independent judgment in interpreting and expounding the laws."⁹⁴ For constitutional purposes, and in reality, that just is not happening. Courts retain primacy in interpretation; the agency's views matter but are not dispositive and thus the judicial power has not been ceded to another branch. Where courts must defer is when the agency is making a policy decision within the scope of its delegation, within its *Chevron* space. That is not a judicial task. (Justice Thomas, of course, would say such deference is still unconstitutional, this time because it accepts legislation by the executive branch in violation of Article II.⁹⁵ That is a question for another Essay.)

n.39 (citing sources); Levin, *supra* note 27, at 1254 (arguing step two is identical to arbitrary-and-capricious test); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 *Tex. L. Rev.* 83, 128–29 (1994) (arguing for "something akin to hard look review" in step two).

91. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 984 (2005) ("[A] court's prior interpretation of a statute [may] override an agency's interpretation only if the relevant court decision held the statute unambiguous.").

92. *Michigan v. EPA*, 135 S. Ct. 2699, 2714 (2015) (Thomas, J., concurring) ("We should stop to consider [the Constitution] before blithely giving the force of law to any other agency 'interpretations' of federal statutes.").

93. See *id.* at 2712–13 (Thomas, J., concurring) (concluding *Chevron* deference "is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts" while also "run[ning] headlong into the teeth of Article I[]").

94. *Id.* at 2712 (quoting *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring)).

95. See *id.* at 2713 (Thomas, J., concurring) (stating *Chevron* "wrests from Courts the ultimate interpretive authority to 'say what the law is,' and hands it over to the Executive" (citation omitted)); see also *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1251–

B. Skidmore *Within* Chevron

Accepting the foregoing, *Skidmore* turns out to have a role to play within *Chevron*. These are generally perceived as wholly distinct and alternative regimes. Never the twain shall meet. Yet they do meet. To be precise, they meet in *Chevron* step one. In determining whether the statute answers the question before it in step one, a court should consider the views of the agency charged with its implementation.

Professor Strauss has said as much,⁹⁶ and he is not quite alone.⁹⁷ But these have been lonely voices. Apparently no court, ever, has expressly stated that *Skidmore* applies within step one; some have expressly rejected any sort of deference within step one.⁹⁸ Overwhelmingly, step one is seen as, to reframe Strauss's terminology, "judicial space." The court is on its own.⁹⁹

This is a mistake. What a court is doing in step one is the same thing it is doing in a *Skidmore* case (or a statutory case where there is no relevant agency interpretation): trying to figure out statutory meaning. If

52 (2015) (Thomas, J., concurring in the judgment) ("It may never be possible perfectly to distinguish between legislative and executive power, but that does not mean we may look the other way when the Government asks us to apply a legally binding rule that is not enacted by Congress pursuant to Article I.").

96. See Strauss, *Space/Weight*, supra note 2, at 1165 (asserting in determining boundaries of *Chevron* space, which is "unmistakably [a] judicial determination," courts should be informed by agency judgments); Strauss, *In Search of Skidmore*, supra note 2, at 795 (pointing out *Skidmore* deference is "traditional tool[] of statutory interpretation" that should be employed in step one (internal quotation marks omitted)); Strauss, *Overseers or Deciders*, supra note 2, at 818 ("*Skidmore* deference is one of those 'traditional tools of statutory interpretation' that bear on a court's independent conclusion about the extent of agency authority.").

97. See Herz, *Deference Running Riot*, supra note 58, at 208–09 ("Within step one, the court seeks to determine the meaning of the statute; for all the traditional reasons the agency's view may be helpful in doing so." (footnote omitted)); Michael Herz, *Judicial Review of Statutory Issues Outside of the Chevron Doctrine*, in *A Guide to Judicial and Political Review of Federal Agencies* 125, 142–43 (John F. Duffy & Michael Herz eds., 2005) (arguing courts should consider agency views within step one of *Chevron*); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 Mich. St. L. Rev. 89, 120 (noting one benefit of *Skidmore* deference within step one is it permits courts to be informed by agencies' superior understanding of legislative purpose).

Recently, other academics have concurred that *Skidmore* applies in step one. See, e.g., William N. Eskridge, *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 Wis. L. Rev. 411, 449–50 (citing Strauss and agreeing "Court should announce that federal judges must give *Skidmore* deference to an agency's reading of the statute for purposes of Step One"); Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 Wm. & Mary L. Rev. 221, 264 n.208 (2013) (citing Herz and agreeing courts "should give *Skidmore* deference to an agency's resolution of questions of law under the first step of *Chevron*").

98. See, e.g., *Mylan Pharms., Inc. v. FDA*, 454 F.3d 270, 274 (4th Cir. 2006) ("At the first step a court focuses purely on statutory construction without according any weight to the agency's position . . .").

99. See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 998 (1992) ("If the issue is resolved at step one, then the court gives no consideration to the views of the executive and decides the matter independently.").

agency views are relevant outside of *Chevron*, then they are relevant in step one. In examining the statute to see if Congress spoke to the matter in question, a court is performing the traditional judicial task of statutory interpretation, trying to find a legislative answer. A *Chevron* step-one case, then, is essentially the same as a *Skidmore* case. They are both settings in which the court itself is determining the meaning of the statute and there is a relevant agency interpretation in the background. Because the enterprise is the same, the tools should be the same.

The *Chevron* opinion supports this approach in two ways. First, it approaches step one like any other statutory case, examining the standard inputs before abandoning the effort and moving to step two. Second, Justice Stevens directs courts to apply the “traditional tools of statutory construction” in step one.¹⁰⁰ Consideration of agency views is emphatically such a tool. To be sure, Justice Stevens did not give weight to the EPA’s views when searching high and low for clues as to the meaning of “source” under the Clean Air Act.¹⁰¹ That might suggest he deemed the agency views irrelevant in step one. Alternatively, however, he did not invoke the agency for two other reasons. First, he ultimately accepted the EPA’s views outright;¹⁰² whether he did so in step one or step two may not have seemed consequential. Second, it is important to remember that step one did not at that point exist as the rigid, distinct step that it has become.

This view may seem counterintuitive. But it is not so different from what the courts already do. Consider the use of substantive canons. After a certain amount of confusion, it is now generally settled that the canons are applicable in step one.¹⁰³ That is, in trying to determine whether a statute is sufficiently clear to avoid step two, a court will consider, along with text and, depending on the judge, purpose and history, substantive canons. A statutory provision may be ambiguous unless and until such a canon is applied; the canon can resolve the ambiguity and keep the court in step one. For example, it may be unclear whether a particular provision applies retroactively. Judicial uncertainty disappears, however, in light of the canon that statutes should be construed to apply retroactively only if they explicitly so provide. Read in light of the canon, the statute is not ambiguous.¹⁰⁴ Agency views can be given weight in step one in just the same way.

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

101. See *id.*

102. See *id.* at 865 (holding “EPA’s definition of the term ‘source’ is a permissible construction of the statute”).

103. See Kenneth A. Bamberger, Normative Canons in the Review of Administrative Policymaking, 118 *Yale L.J.* 64, 77–80 (2008) [hereinafter Bamberger, Normative Canons] (describing courts’ use of substantive canons to resolve textual ambiguities in step one).

104. See *INS v. St. Cyr*, 533 U.S. 289, 320–21 n.45 (2001) (“Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be

C. *It's Not Just "Deference" That Is Too Confusing—A Chevron Lexicon*

The terminological problems in the *Chevron* case law go beyond the difficulty of the term “deference” that Professor Strauss highlights. This section examines additional terms that are also “too confusing.” It begins with three terms—deference, persuasion, construction—that are problematic because they have two different meanings and courts fail to distinguish between them. It then turns to two two-word pairs—interpretation/construction and ambiguity/vagueness—that present the opposite problem: They mean different things but are employed as synonyms. The goal is partly to get the terminology right and partly to use the terminological discussion to clarify the underlying concepts.

1. *Deference*. — Professor Strauss would replace “deference” with “*Chevron* space” and “*Skidmore* weight.”¹⁰⁵ The proposition is that “the d-word” is being used to label two different activities. His point is about judicial usage, but it is worth adding that the roots of the difficulty can be found in the two different dictionary definitions of “deference.” The first is “[s]ubmission or courteous yielding to the opinion, wishes, or judgment of another.”¹⁰⁶ The second is “[c]ourteous respect.”¹⁰⁷ The first definition implies subordination; the person deferring “submits” or “yields” to another, evidently superior decisionmaker. The second definition implies authority; the person deferring is the ultimate decisionmaker but must give weight to, take seriously, or respect the views meriting deference.¹⁰⁸

These two definitions easily map onto the deference case law. The first is *Chevron* step two; the second is *Skidmore*.¹⁰⁹ Thus, if a court “defers” under *Chevron*, it by definition accepts the agency’s view; under *Skidmore*, in contrast, a court can give an agency interpretation “deference” while still rejecting it.

unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.” (citations omitted)).

105. “Weight” was the term used by the *Skidmore* Court itself. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting “Court has long given considerable and in some cases decisive weight” to agency views and “the weight of [the agency’s] judgment in a particular case will depend on” various factors). See generally Strauss, *Space/Weight*, *supra* note 2.

106. 1 *The Heritage Illustrated Dictionary of the English Language* 346 (1979).

107. *Id.*

108. To be sure, different dictionaries give different definitions. The Merriam-Webster Collegiate Dictionary, for example, has only one relevant definition, and it is the *Chevron* version. See Merriam-Webster’s Collegiate Dictionary 302 (10th ed. 1993) (defining “defer” as “to submit to another’s wishes, opinion, or governance” and giving “yield” as sole synonym). For present purposes, it is enough that the definitions abroad in the land include both the *Skidmore* version and the *Chevron* version. “Defer” can mean either, and courts do both.

109. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (“*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form . . .”). The phrase “some deference” is only coherent when “deference” is the “courteous respect” kind; the *Chevron* type is by its nature all or nothing.

Justice Scalia has made half this point. He thinks “defer” has only one meaning, the *Chevron* meaning. Dissenting in a case where the majority invoked *Skidmore* and noting that the agency’s views “add force to our conclusion” about the meaning of the statute,¹¹⁰ Scalia objected:

In my view this doctrine (if it can be called that) is incoherent, both linguistically and practically. To defer is to subordinate one’s own judgment to another’s. If one has been persuaded by another, so that one’s judgment accords with the other’s, there is no room for deferral—only for agreement.¹¹¹

He is right, *if Chevron* is the only deference regime. But if, as a majority of Supreme Court Justices have held, there are two deference regimes, then they involve the two different meanings of “defer” that are found in most dictionaries (though not Justice Scalia’s).

2. *Persuasive*. — A similar problem arises with regard to “persuasive.” It is also “too confusing” because it has two distinct meanings. “Persuasive” may mean “tending to persuade,”¹¹² and it may mean “convincing.”¹¹³ That is why a “persuasive advocate” can leave one “unpersuaded.”

Opinions in *Skidmore* cases are awash with careless use of this term. With dismaying frequency, courts assert that the persuasiveness of the agency’s reasoning is one of the factors affecting the weight to be given the agency’s views under *Skidmore*.¹¹⁴ This proposition is either a truism or incoherent. Undeniably, a powerfully reasoned agency conclusion is more likely to be upheld than a poorly reasoned one. Courts reward “reasoned decision-making.” However, to accept an interpretation *because* it is “persuasive” is not to defer (in either of its senses), but rather to *agree*.¹¹⁵ The various *Skidmore* factors (consistency, contemporaneousness, age) all add to the weight of the

110. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011).

111. *Id.* at 1340 n.6 (Scalia, J., dissenting).

112. See, e.g., Merriam-Webster’s Collegiate Dictionary, *supra* note 108, at 868.

113. See, e.g., *Harbison v. Bell*, 556 U.S. 180, 182 (2009) (“[T]he evidence proved persuasive to one Circuit Judge.”); *id.* at 189 (“Neither argument is persuasive.”); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 583 (2008) (“We are not persuaded [by the Government’s statutory arguments].”).

114. See, e.g., *Power v. Barnhart*, 292 F.3d 781, 786 (D.C. Cir. 2002) (“Under *Skidmore*, we grant an agency’s interpretation only so much deference as its persuasiveness warrants.”); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) (“[T]he agency position should be followed to the extent persuasive.”).

115. In the words of a leading casebook: “We would not say that a court persuaded by the excellent brief of a private litigant to decide in its favor is deferring to the litigant’s lawyers.” Peter L. Strauss et al., Gellhorn & Byse’s Administrative Law: Cases and Comments 975 (11th ed. 2011); see also *Kasten*, 131 S. Ct. at 1340 n.6 (Scalia, J., dissenting) (“Speaking of ‘*Skidmore* deference’ to a persuasive agency position does nothing but confuse.”); *id.* (Scalia, J., dissenting) (“If one has been persuaded by another, so that one’s judgment accords with the other’s, there is no room for deferral—only for agreement.”).

agency interpretation, making it more “persuasive”; the interpretation’s “persuasiveness” is not itself a *Skidmore* factor.

The Supreme Court has done much to sow this confusion. For example, *Mead* identifies “the persuasiveness of the agency’s position” as one of the *Skidmore* factors.¹¹⁶ But this is not what *Skidmore* actually says. On Justice Jackson’s formulation, the *Skidmore* factors are the things that give the agency’s interpretation “the power to persuade”; to say that the “persuasiveness” of the agency’s position is one of the things that give it “the power to persuade” is tautological.

Similarly, in a problematic but much-quoted formulation, the *Christensen* majority opinion stated that agency interpretations are “entitled to respect” . . . , but only to the extent that those interpretations have the ‘power to persuade.’¹¹⁷ This is self-contradictory. *Everything*, including the arguments of the lawyers in the case, is entitled to respect “to the extent [it has] the power to persuade.”¹¹⁸ Under this approach, if the court agrees with the agency it will label the interpretation persuasive and “defer” to it, whereas if it disagrees, it will label the interpretation “unpersuasive” and ignore it.¹¹⁹ For example, consider this sentence from a court of appeal’s opinion: “[T]he Director is not entitled to *Skidmore* respect . . . because his position . . . is simply unpersuasive, notwithstanding its inclusion in the agency’s manual and the Director’s consistent application of [this interpretation] for some time.”¹²⁰ This is not deference; the court is reaching an independent conclusion. On this approach, *Skidmore* means nothing more than “we will defer to the agency if we believe the agency is

116. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); see also *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013) (“[T]o [defer to the EEOC] would be proper only if the EEOC Guidance has the power to persuade [W]e do not find the EEOC Guidance persuasive.”).

117. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); see also *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (observing “under *Skidmore*, we follow an agency’s rule only to the extent it is persuasive,” and finding Attorney General’s opinion unpersuasive); *Pub. Citizen, Inc. v. U.S. Dep’t of Health and Human Servs.*, 332 F.3d 654, 662–71 (D.C. Cir. 2003) (concluding *Skidmore* deference due but rejecting agency’s view as “unpersuasive” because statutory text, history, and purpose were all against it); *id.* at 670 n.25 (invoking views of Department’s Inspector General “not because they legally command our deference, but because we find them logically persuasive”).

118. *Christensen*, 529 U.S. at 587 (emphasis added) (internal quotation marks omitted).

119. See Rossi, *supra* note 59, at 1131–34 (describing courts’ tendency to defer under *Skidmore* only when their independent determination of best interpretation accords with agency’s view); see also *Catskill Mountains*, 273 F.3d at 491 (noting “agency position should be followed to the extent persuasive” and rejecting agency’s position as unpersuasive because wrong).

120. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 832 (9th Cir. 2012); see also *id.* at 833 (“[T]he Board’s explanations as to the contested issues here are not persuasive and would thus not be entitled to deference in any event.”).

right.”¹²¹ If that’s what it means, it means nothing at all, and *Skidmore* deference is a fiction.

There are two points here. First, thinking about “persuasiveness” helps clarify the difference between *Chevron* and *Skidmore*. The concept is simply irrelevant in step two of *Chevron*. There, the issue is not whether the agency is right or whether the court agrees with (is persuaded by) the agency’s views. Unless unreasonable (a very different standard), the agency’s views control. It is because the court’s views ultimately control in *Skidmore* that the question of persuasiveness arises. Second, the relevant meaning of “persuasive” is not “convincing,” but rather “tending to persuade.” Otherwise, the concept is meaningless.

If the Straussian lexicon is adopted, “persuasive” can be abandoned. In the *Chevron* setting, the term is inapplicable. In the *Skidmore* setting, where “persuasive” should mean “tending to persuade,” the term “weight” does all the work necessary.

3. *Construction*. — “Construction,” too, has two meanings that are often confounded. This is because the word is the noun form of two separate verbs with the same etymological root: *construe* and *construct*. The first implies interpretation, determining the meaning of the text being construed; the second implies creation, building on the text to construct something new. Which verb is at work in the term “statutory construction”? The answer is both, depending on the context. In *Skidmore*, the agency, and then the court, are *construing* the statute, working “to understand or explain the sense or intention of” it.¹²² In contrast, under *Chevron*, the agency has *constructed* something—not the statute, which by definition was “built” by Congress, but a determination of legal rights or obligations in the space Congress left for the agency to work within—that the court must accept. Courts *construe*; agencies *construct*.

To simply abandon the term “construction” would be a mistake, and would not be possible in any event. The following section suggests, however, that clarity would be advanced if “construction” in this setting were limited to being the noun for “construct,” and “interpretation” the noun for “construe.”

4. *Construction Versus Interpretation*. — Almost without exception, writing about statutory interpretation uses “interpretation” and “con-

121. See Barron & Kagan, *supra* note 46, at 227 n.98 (wondering aloud whether “*Skidmore* deference amounts to something more than a court saying ‘we will defer to the agency if we believe the agency is right’”); see also Panel, Agency Preemption: Speak Softly, but Carry a Big Stick?, 11 Chap. L. Rev. 363, 382 (2008) (comments of Ronald A. Cass) (“[T]hat’s why the notion of *Skidmore* deference is a wonderful concept for courts, which means that they do what the agency says when they would’ve done it without the agency doing it anyway.”).

122. Merriam-Webster’s Collegiate Dictionary, *supra* note 108, at 248 (defining “construe”).

struction” as synonyms.¹²³ Indeed, Reed Dickerson defines “construction” with a single word: “interpretation.”¹²⁴ In *Chevron* itself, Justice Stevens uses the two terms interchangeably.¹²⁵ Later courts have done the same, alternating between the two mainly, it would seem, to avoid repeating the same word too many times in one sentence.¹²⁶ Commentators also alternate between the two at random.¹²⁷

This was not always so, and it is not so today in some legal fields. This section explores the possible distinction between interpretation and construction as a way of understanding *Chevron*.

Section II.A concluded that what judges do in *Skidmore* or step one is interpretation in a standard sense—trying to figure out what the statute means (or, on traditional accounts, what Congress meant or intended).¹²⁸ In a *Skidmore* case, where the court has the last word, the underlying premise is Dworkinian: There is a right answer. For Ronald Dworkin, the question “what is the law on this issue?” always has a discoverable right answer, and the judge’s job is to discover it. Even in hard cases, law does

123. See, e.g., Bryan A. Garner, *A Dictionary of Modern Legal Usage* 462 (2d ed. 1995); Gary E. O’Connor, *Restatement (First) of Statutory Interpretation*, 7 *NYU. J. Legis. & Pub. Pol’y* 333, 335 n.5 (2004) (“This article treats the terms ‘statutory interpretation’ and ‘statutory construction’ as interchangeable synonyms.”).

124. Reed Dickerson, *The Interpretation and Application of Statutes* 283 (1975).

125. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 844, 865–66 (1984) (referring interchangeably to EPA’s “interpretation” and EPA’s “construction” of Clean Air Act).

126. See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (“If the statute is ambiguous on the point, we defer at step two to the agency’s interpretation so long as the construction is [reasonable]”); *id.* at 982–83 (noting “statute unambiguously forecloses the agency’s interpretation” and “displaces conflicting agency construction”); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506 (1994) (“The dispositive question is whether the Secretary’s interpretation is a reasonable construction of the regulatory language.”); *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 n.5 (1994) (“In view of our construction of § 3001(i), we need not consider whether an agency interpretation”); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (“[W]here the agency’s interpretation of [its regulation] is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction.”); *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1062 (6th Cir. 2014) (“Affording the agency’s interpretation *Chevron* deference, this court held that the agency’s construction was permissible”); *Perry v. Dowling*, 95 F.3d 231, 237 (2d Cir. 1996) (“[T]he interpretation is a permissible construction of the statute”).

127. See Beermann, *supra* note 20, at 744 (“The *Chevron* doctrine . . . establishes a two-step process for judicial review of agency interpretations of statutory construction.”); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 *Va. L. Rev.* 597, 598 (2009) (“[E]ven if the agency’s interpretation is plausible as a construction of the statutory language, the agency’s choice among plausible interpretations must not be ‘arbitrary [or] capricious.’”).

128. See *supra* notes 82–97 and accompanying text (explaining “interpretation” is what courts do in *Skidmore* cases and in *Chevron* step one, but not what agencies have done in a case decided in step two).

not run out and judges are not forced to legislate.¹²⁹ Now, Dworkin is not asserting that the one right answer is one that *Congress* put there. To ensure “integrity in legislation,”¹³⁰ courts must interpret a statute, just as they must interpret the Constitution or common law precedents, in light of the underlying principles of the community. In hard cases, the right interpretation is the one that aligns with underlying values and makes the statute the best statute it can be.¹³¹ That is a tall order, which is why only a judge such as Hercules can be counted upon to get it right. Because herculean judges are few and far between, courts should take help where they can find it. One such source of assistance is the agency charged with administration of the statute.

In contrast, *Chevron* is positivist. Its very premise is that law sometimes runs out. Under *Chevron*, the question, “What is the law on this issue?” does *not* always have a right answer (at least if it is understood to mean “what does the statute prescribe?”). Professor Dworkin asserts that because positivists believe the law “runs out,” they must endorse some version of strong discretion whereby judicial decision is unconstrained by legal principles.¹³² *Chevron* is not inconsistent with the basis of that critique, it just offers a different resolution. Instead of accepting unconstrained judicial discretion, it requires judicial acceptance of (largely) unconstrained administrative discretion. In other words, Professor Dworkin does not believe that law ever runs out (so there is no reason not to leave decisionmaking to judges), but *Chevron* does (which is why, in the absence of law, decisions should be made by agencies).

This is a coherent and even appealing view of the *Skidmore/Chevron* divide. The question is whether it has any basis in reality. Professor Dworkin came late to the question of statutory interpretation and paid almost no attention to administrative agencies.¹³³ And the belief that

129. See generally Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057 (1975), reprinted in Ronald Dworkin, *Taking Rights Seriously* 81, 84 (1977) (distinguishing between arguments on principle and arguments on policy and asserting judges’ decisions are and should be based on the former).

130. Ronald Dworkin, *Law’s Empire* 167, 176–84, 217–28 (1986) [hereinafter Dworkin, *Law’s Empire*].

131. See Ronald Dworkin, *How to Read the Civil Rights Act*, in *A Matter of Principle* 316, 329 (1985) [hereinafter Dworkin, *A Matter of Principle*] (arguing judges faced with unclear statutory text should apply statute so as to further justification that “is superior as a matter of political morality”); Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, in Dworkin, *A Matter of Principle*, supra, at 119, 129 (noting view that judge should interpret statute so as to “best advance[] the set of principles and policies that provides the best political justification for the statute at the time it was passed”); Dworkin, *Law’s Empire*, supra note 130, at 313–54 (characterizing judges as herculean coauthors of statutes in relying on their best judgment when deciding hard cases).

132. Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 35 (1967) (“[W]hen a judge runs out of rules he has discretion, in the sense that he is not bound by any standards from the authority of law . . .”).

133. See, e.g., Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. Rev. 227, 323 (2002) (“I know of nothing in Dworkin’s writings that

texts have a single, determinate, correct meaning is not a popular one. If all interpretation involves discretion, and any text might have multiple meanings, then the clear distinction between what is happening in *Skidmore* and what is happening in *Chevron* starts to collapse.

One possible route out of that difficulty is the distinction that is drawn in some areas of the law between interpretation and construction.

Almost two centuries ago, Francis Lieber, later to author the first and still influential codification of the laws of warfare and to become one of the first professors at the Columbia Law School, wrote a book with the strikingly modern title of *Legal and Political Hermeneutics*.¹³⁴ This volume, which is not quite as cutting edge as the title makes it sound to modern readers, set out a theory of textual interpretation. Central to Lieber's hermeneutics was a distinction between interpretation and construction. Interpretation was the narrower task, consisting of "the discovery and representation of the true meaning of any signs used to convey ideas."¹³⁵ Every text requires interpretation, for "[t]here is no direct communion between the minds of men."¹³⁶ In some cases, the interpreter can discover the true meaning based on little besides a careful reading of the text. In others, resort must be had to other materials, but the goal is always to ascertain the speaker's meaning.¹³⁷

Where interpretation does not "suffice[] . . . we must have recourse to construction."¹³⁸ "Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text."¹³⁹ Most often, construction is necessary where unanticipated circumstances have arisen or background circumstances have changed so much as to make interpretation impossible.

suggests he knows that there is a 'counter-*Marbury*, for the administrative state,' the rule of *Chevron*." (footnote omitted)); Cass R. Sunstein, Justice Scalia's Democratic Formalism, 107 Yale L.J. 529, 566 & n.204 (2007) (reviewing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997)) (stating writings on statutory interpretation by both Professor Dworkin and Justice Scalia fail to come to terms with centrality of agency interpretation).

134. Francis Lieber, *Legal and Political Hermeneutics: Principles of Interpretation and Construction in Law and Politics, With Remarks on Precedents and Authorities* (William G. Hammond ed., 3d ed. 1880).

135. *Id.* at 5; see also *id.* at 11 ("Interpretation is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey.").

136. *Id.* at 1.

137. *Id.* at 106–07 (explaining process of interpreting ambiguous terms using context and related sources).

138. *Id.* at 50.

139. *Id.* at 44; see also *id.* at 46 ("[C]onstruction signifies the discovery of the spirit, principles and rules that ought to guide us according to the text . . .").

Lieber's distinction maps tidily onto *Chevron*, particularly if step one is not especially capacious. Lieber's definition of interpretation corresponds to *Chevron's* step one: "First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . ." ¹⁴⁰ In determining whether Congress has spoken to the issue, the court should employ the "traditional tools of statutory construction." ¹⁴¹ In *Chevron* itself, the Court used the "traditional tools" of examining language, purpose, and legislative history before it gave up and deferred to the agency. The premise here is pure Lieber: Congress had an intent, the statute has one true meaning, and through interpretation (which is not the same as a literal reading and may require more than simply reading the statute and seeing what it says) the court comes to understand Congress's meaning.

A court moves to *Chevron's* step two, upholding any reasonable or permissible agency reading, if "the statute is silent or ambiguous with respect to the specific issue." ¹⁴² In these circumstances, Congress has not resolved the issue and the court will simply accept any reasonable agency determination. In other words, the court does not try to wring some meaning out of the statute beyond what Congress put there. Or, as Lieber puts it: "Interpretation, seeking but for the true sense, forsakes us when the text is no longer *directly* applicable; because the utterer, not foreseeing this case, did not mean it, therefore it has no true sense in this particular case." ¹⁴³ In these circumstances, the *Chevron* analysis moves to step two and Lieber moves to construction. For both, the agency is still limited by whatever constraints the statute, the Constitution, and general requirements of reasonableness impose.

Lieber's distinction has never really taken hold in the realm of statutory interpretation. However, in recent years, several theorists have emphasized the distinction between interpretation and construction as a way of understanding what is going on when courts attempt to understand and apply the Constitution. Keith Whittington and Lawrence Solum are leading examples. ¹⁴⁴ They articulate a distinction between understanding

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

141. *Id.* at 843 n.9.

142. *Id.* at 843.

143. Lieber, *supra* note 134, at 111.

144. See, e.g., Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 2, 5 (1999) (arguing "[n]ot everything that courts do is consistent with the ideal of interpretation," and "[u]nlike jurisprudential interpretation, construction" is more political and "provides for an element of creativity in construing constitutional meaning"); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *Const. Comment.* 95, 95 (2010) [hereinafter Solum, *Interpretation-Construction Distinction*] (arguing "interpretation-construction distinction . . . marks a deep difference in two different stages . . . in the way that legal and political actors process legal texts"); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 489 (2013) [hereinafter Solum, *Originalism*] ("The distinction rests on an underlying set of distinctions about communicative content (meaning), legal content (doctrine), and legal effect

the semantic content of the constitutional text (interpretation) and applying that meaning in actual, often unanticipated, circumstances (construction). The latter necessarily goes beyond the meaning of the document; though guided by it, construction involves some input from, or additions by, the constructor. As Whittington puts it: “The process of constitutional construction is concerned with fleshing out constitutional principles, practices[,] and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution.”¹⁴⁵

The two steps of interpretation and then construction—determining semantic meaning and then applying that meaning to particular circumstances—occur in statutory cases as well, even if the vocabulary is unfamiliar.¹⁴⁶ In the constitutional sphere, Professor Solum has referred to issues involving construction as opposed to interpretation as arising in “the construction zone.”¹⁴⁷ The term of course resonates with the idea of “*Chevron* space.”¹⁴⁸ The parallel would be that interpretation takes place in step one of *Chevron* and in *Skidmore* cases, whereas construction, within statutorily defined boundaries, takes place in step two.

Gillian Metzger utilizes the interpretation/construction distinction in writing about administrative constitutionalism, i.e., the various ways in

(decision).”); Keith E. Whittington, *Constructing a New American Constitution*, 27 *Const. Comment.* 119, 128 (2010) [hereinafter Whittington, *Constructing*] (“Constitutional interpretation may put the judiciary on the strongest footing for exercising the power of judicial review and overturning the actions of other government officials, but there are circumstances in which judges like other political actors might engage in constitutional construction.”); see also Jack M. Balkin, *Living Originalism* 3–6, 69–73 (2011) (distinguishing “interpretation-as-ascertainment” from “interpretation-as-construction”); Randy E. Barnett, *Interpretation and Construction*, 34 *Harv. J.L. & Pub. Pol’y* 65, 69 (2011) (describing limits of originalism and emphasizing necessity of judicial interpretation in constitutional construction).

145. Whittington, *Constructing*, supra note 144, at 120.

146. For example, Reed Dickerson distinguishes between the “ascertainment of meaning” (which he labels “cognitive function”) and the “assignment of meaning” (which he calls “creative function”). Dickerson, supra note 124, at 15. Professor Dickerson mentions that this distinction resembles or overlaps with the interpretation/construction distinction. *Id.* at 19; see also Robert Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 *Geo. Wash. L. Rev.* 1, 2 n.1 (1993) (quoting Robert Martineau, *Drafting Legislation and Rules in Plain English* (1991)) (describing statutory construction as involving, first, interpretation to determine meaning and, second, application to facts, and stating often courts do not realize they are engaging in two steps rather than one).

147. Solum, *Originalism*, supra note 144, at 469–72.

148. The term also brings to mind the “zone of indeterminacy,” a phrase Peter Strauss may have coined. See Strauss, 150 *Cases*, supra note 2, at 1124 (stating within “zone of determinacy,” “Supreme Court should tolerate the gradual accretion of circuit interpretations of indeterminate statutes, focusing . . . instead on . . . issues on which Congress appears to have ‘directly spoken,’” which “reduces the need for the Court to exercise direct control”); see also Bamberger, *Normative Canons*, supra note 103, at 106 (referring to “zone of indeterminacy”); David S. Rubenstein, “Relative Checks”: Toward Optimal Control of Administrative Power, 51 *Wm. & Mary L. Rev.* 2169, 2193 (2010) (same).

which administrative agencies interpret, implement, and help define the meaning of the U.S. Constitution.¹⁴⁹ She argues that administrative constitutionalism “stands as a prime example of constitutional construction.”¹⁵⁰ Such construction takes place subject to judicial oversight; courts have ultimate but not exclusive (if that is not an oxymoron) authority to determine constitutional meaning.¹⁵¹ Precisely the same phenomenon exists with regard to “administrative statism.” Properly read, *Chevron* is an admonition to respect agency statutory *construction*—which is different from statutory *interpretation*.

An illustration is the classic Supreme Court decision of *NLRB v. Hearst Publications, Inc.*¹⁵² The National Labor Relations Board (NLRB) had concluded that newspaper sellers were “employees” of the papers they sold within the meaning of the labor laws.¹⁵³ The Court of Appeals rejected this conclusion, relying on the common law of California.¹⁵⁴ The Supreme Court reversed, upholding the Board’s initial decision. It did so in two steps. First, it concluded that the question did not turn on common law standards, which vary from state to state: “Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan for securing freedom of employees’ organization and of collective bargaining.”¹⁵⁵ In this portion of the opinion, the Court made only a passing reference to the Board and did not even mention its views on the legal issue. It then turned to the question of whether, as a matter of federal law, the newsboys were employees. With regard to this issue, the agency loomed large. The Court spent some time on the general purposes of the Act, noted that there will be lots of borderline situations, and stated that the definitional “task has been assigned primarily to the agency created by Congress to administer the Act.”¹⁵⁶ Accordingly, “the Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law,”¹⁵⁷ which it did.

The two parts of the Court’s opinion might be categorized in many ways. The standard administrative law formulation would be to call the first a “pure question of law” and the second a “mixed question of law

149. See generally Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897 (2013) (analyzing administrative constitutionalism as form of constitutional interpretation).

150. *Id.* at 1914.

151. See *id.* at 1925–27 (discussing relationship between judicial review and administrative constitutionalism).

152. 322 U.S. 111 (1944).

153. *Id.* at 114.

154. *Id.* at 114–15 (outlining procedural history).

155. *Id.* at 123.

156. *Id.* at 130.

157. *Id.* at 131.

and fact.”¹⁵⁸ Those categories correspond to interpretation and construction. When there are no facts, the inquiry is abstract and the answer need not be applied to particular circumstances; it is “pure.” Lawmaking is “pure” in this way as well. But statutory meaning (like the meaning of a common law precedent) is fully developed through application to particular cases. That is construction, and *Hearst* and *Chevron* alike teach that agencies have a particular role to play in that activity.

5. *Ambiguity Versus Vagueness.* — The interpretation-versus-construction distinction rests on one other distinction: that between ambiguity and vagueness.¹⁵⁹ A term is ambiguous when it can have two or more meanings; each alone is clear and understandable, but the reader is uncertain as to which is in play. A term is vague when its scope is unclear and there are marginal cases to which it may or may not apply. Professor Solum explains:

A word, phrase, sentence, or clause is ambiguous if it has more than one sense: for example, the word “cool” is ambiguous because it can mean (a) hip, (b) of low temperature, or (c) of even temperament. A word or phrase is vague when it has borderline cases: for example, the word “tall” is vague, because there is no bright line between those individuals who are tall and those who are not. The same word can be both ambiguous and vague in one of its senses: cool is ambiguous and each sense of cool is vague.¹⁶⁰

The distinction maps on to the interpretation/construction distinction. In general, interpretation is the process for resolving ambiguity; construction is the process for resolving vagueness.

If this distinction is indeed applicable to *Chevron* as suggested above, then step one should involve resolving ambiguity and step two should

158. Justice Stevens, with uncertain support from his colleagues, consistently took the position that *Chevron* does not apply to “pure questions of statutory interpretation.” See, e.g., *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring and dissenting) (stating “pure questions of statutory interpretation . . . remain within the purview of the courts, even when the statute is not entirely clear”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (“The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide.”).

159. See, e.g., Caleb Nelson, *Statutory Interpretation* 77–80 (2011) (explicating distinction); Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in *The Oxford Handbook of Language and Law* 128, 128–29 (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (same).

160. Lawrence Solum, *Legal Theory Lexicon 063: Interpretation and Construction* (Apr. 27, 2008), http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html [<http://perma.cc/Q8LZ-SN9Z>]; see also Barnett, *supra* note 144, at 67 (“[L]anguage is ambiguous when it has more than one sense; it is vague when its meaning admits of borderline cases that cannot definitively be ruled in or out of its meaning.” (emphasis omitted)). See generally Solum, *Interpretation-Construction Distinction*, *supra* note 144, at 97–98 (explaining distinction between vagueness and ambiguity).

involve resolving vagueness. And this is indeed (almost always) the case. This is emphatically not what courts say. The *Chevron* opinion and most subsequent case law and commentators state that under *Chevron*, deference is triggered by statutory “ambiguity.”¹⁶¹ Sometimes, courts use the term “vague” alongside “ambiguous”; it is not clear that they mean to distinguish the two.¹⁶² But they are not synonymous, and *Chevron* is not primarily about ambiguity, it is about vagueness.

When a statute is ambiguous—that is, we are unsure as to which of two (or more) meanings apply—Congress generally *has* made a decision and the challenge is figuring out what that decision was. This is not to say that *Chevron* is never applicable in cases of ambiguous statutory language; sometimes, when a term can have either of two meanings, there really is no way of saying which is “right.” But, in general, the challenges of ambiguity are ones of semantic meaning and are resolved by courts. The classic *Chevron* case involves statutory *vagueness*. A provision is of inherently uncertain scope and no amount of staring at the text or rummaging in legislative history can make the penumbra less penumbral. Are wetlands “waters of the United States”?¹⁶³ Is an entire facility a “source”?¹⁶⁴ Are newsboys “employees”?¹⁶⁵

In sum, a different activity is involved in resolving questions of ambiguity and questions of vagueness. This difference is the difference between interpretation and construction.

161. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”); *Calix v. Lynch*, 784 F.3d 1000, 1007 (5th Cir. 2015) (“When a statute is ambiguous, we defer to an agency’s reasonable interpretation.”). The word “vague” does not appear in *Chevron*. See generally *Chevron*, 467 U.S. 837.

162. See, e.g., *Rollins v. Admin. Review Bd.*, 311 F. App’x 85, 86 (10th Cir. 2008) (noting court moves to step two “if the statute uses a vague or ambiguous term”); *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1240 (11th Cir. 2000) (noting under *Chevron* “statute is not vague or ambiguous just because it is broad”).

163. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 121, 131 (1985) (upholding agency regulation concluding they are under step two).

164. *Chevron*, 467 U.S. at 840.

165. *NLRB v. Hearst Publ’ns.*, 322 U.S. 111, 132 (1944). This is not to say that *Chevron* is per se inapplicable in cases of ambiguity. If a statute is confoundingly ambiguous, the court must defer, because it cannot find an answer using the traditional tools of statutory construction. However, vague statutes can be inherently uninterpretable; by definition, the right answer not only cannot be *found* in the statute, it does not *exist* there. Moreover, to the extent *Chevron* is understood to rest on an explicit or implicit delegation, it is much more reasonable to discover a delegation in a vague statute than an ambiguous one. This point is made by Ryan D. Doerfler, *Mead as (Mostly) Moot: Predictive Interpretation in Administrative Law*, 36 *Cardozo L. Rev.* 499, 500 n.4 (2014) (arguing claim of implicit delegation is more plausible with respect to vague statutes than with respect to ambiguous ones, as matter of principle).

III. A CASE STUDY: *CHEVRON* AND JURISDICTIONAL QUESTIONS

A much-debated issue of “Chevronology”¹⁶⁶ is whether *Chevron* applies to an agency’s statutory interpretation bearing on its “jurisdiction,” or the scope of its power. Until recently, this was a matter of dispute.¹⁶⁷ Many shared an intuition against deference on such issues, fearing that *Chevron* would enable agency empire-building. In *City of Arlington v. FCC*,¹⁶⁸ the Court held that *Chevron* does apply to jurisdictional questions. For Justice Scalia, this was a case about whether *Chevron* lived or died:

Make no mistake—the ultimate target [of those arguing for an exception] is *Chevron* itself. Savvy challengers of agency action would play the “jurisdictional” card in every case The effect would be to transfer any number of interpretive decisions—archetypal *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. We have cautioned that “judges ought to refrain from substituting their own interstitial lawmaking” for that of an agency. That is precisely what *Chevron* prevents.¹⁶⁹

On this account, *City of Arlington* is the case that saved *Chevron*.¹⁷⁰ This Part assesses just what version of *Chevron* survived, using this con-

166. This neologism seems to have been coined by John Manning, who, at the Columbia conference mentioned in the opening footnote, referred to Peter Strauss as “our leading *Chevronologist*.” John Manning, Remarks at The Harold Leventhal Memorial Symposium, Celebrating Peter Strauss, Columbia Law School (Apr. 24, 2015). The term is so apt (not least because of hint of a reference to “phrenology” and the quasi-scientific dubiousness of that field) and appealing that it is hard to believe it took three decades to appear.

167. See Ernest Gellhorn & Paul Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989 (1999) (contending *Chevron* deference should not extend to jurisdictional issues); Nathan A. Sales & Jonathan H. Adler, The Rest Is Silence: *Chevron* Deference, Agency Jurisdiction, and Statutory Silences, 2009 U. Ill. L. Rev. 1497, 1518 (describing conflicting lower court decisions and noting “D.C. and Eighth Circuits appear to have resolved the issue both ways”). Compare *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring in the judgment) (contending “there is no discernible line between an agency’s exceeding its authority [i.e., ‘jurisdiction’] and an agency’s exceeding authorized application of its authority”), with *id.* at 386–87 (Brennan, J., dissenting) (contending “[a]gencies do not ‘administer’ statutes confining the scope of their jurisdiction, and such statutes are not ‘entrusted’ to agencies”).

168. 133 S. Ct. 1863 (2013).

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

170. At least for the time being. Some have suggested that *King v. Burwell*, 135 S. Ct. 2480 (2015), represents the triumph of the Chief Justice’s position in dissent in *City of Arlington*. See, e.g., Jody Freeman, The *Chevron* Sidestep: Professor Freeman on *King v. Burwell*, Blog of the Harv. Law Sch. Envtl. Law Program, <http://environment.law.harvard.edu/2015/06/the-chevron-sidestep/> [<http://perma.cc/UYB4-LWBT>] (last visited Aug. 3, 2015) (stating after *City of Arlington*, Chief Justice “has clearly been waiting in the weeds”

trovery to elucidate the approach to *Chevron* outlined above, concluding that both the majority *and* the dissent are consistent with it.

A. *Defining “Jurisdictional” Questions*

Justice Scalia’s opinion for the Court rejected the idea that a distinct category of jurisdictional questions even existed and admonished that “judges should not waste their time in the mental acrobatics needed to decide whether an agency’s interpretation of a statutory provision is ‘jurisdictional’ or ‘nonjurisdictional.’”¹⁷¹ Echoing his long-ago opinion in *Mississippi Power & Light*,¹⁷² Justice Scalia wrote that it just does not matter whether an agency action is characterized as marking an improper assertion of power or an improper application of an accepted power. In either event, if the charge is substantively correct, the agency action is *ultra vires*. The real question is therefore “always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”¹⁷³ As such, “there is no principled basis for carving out some arbitrary subset of such claims as ‘jurisdictional.’”¹⁷⁴

Despite Justice Scalia’s objections, it is possible to define “jurisdictional questions” coherently. One clear and administrable definition is that they are disputes over an agency’s authority to regulate particular persons, activities, or geographical locations. For example:

- The Army Corps of Engineers interprets “waters of the United States,” discharges into which require a Clean Water Act permit from the Corps, to include wetlands.¹⁷⁵
- The Food and Drug Administration determines that nicotine in cigarettes is a drug, the cigarette a drug-delivery device, and that the agency can regulate both under the Federal Food, Drug, and Cosmetic Act.¹⁷⁶
- The EPA determines that greenhouse gases are not “air pollutants” and therefore it cannot regulate them under the Clean Air Act.¹⁷⁷
- The Federal Trade Commission (FTC) determines that lawyers and law firms are “financial institutions” subject to the Gramm-Leach-Bliley Financial Modernization Act.¹⁷⁸

and in *King v. Burwell*, he “had his way,” “elevat[ing] his Arlington dissent into a majority opinion”).

171. *City of Arlington*, 133 S. Ct. at 1870.

172. See *supra* note 167 (describing divisions among Justices in that case).

173. *City of Arlington*, 133 S. Ct. at 1868.

174. *Id.* at 1869.

175. E.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123–25 (1985).

176. E.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

177. E.g., *Massachusetts v. EPA*, 549 U.S. 497, 511–13 (2007).

178. E.g., *ABA v. FTC*, 430 F.3d 457, 465–67 (D.C. Cir. 2005).

- The Federal Energy Regulatory Commission determines that a promise to forgo consumption of electricity that would have been purchased in a retail-electricity market is not a “sale of electric energy” (and so subject to state rather than federal regulation) under the Federal Power Act.¹⁷⁹
- The Fish and Wildlife Service concludes that privately owned property can be an “area under Federal jurisdiction” for purposes of the Endangered Species Act.¹⁸⁰
- The Commodity Futures Trading Commission asserts authority to adjudicate counterclaims.¹⁸¹
- The Occupational Safety and Health Administration interprets a statute mandating protection for all workers as applying only to the manufacturing sector.¹⁸²
- The NLRB determines that newsboys are employees (rather than independent contractors) and therefore within the protection of the National Labor Relations Act.¹⁸³
- The Mine Safety and Health Administration determines that a vendor who delivered steel to a mine qualifies as an “operator” of the mine subject to the requirements of the Federal Mine Safety and Health Act.¹⁸⁴

Many pre-*Arlington* commentators seemed to operate from this definition of a jurisdictional question.¹⁸⁵ It is also, possibly, the view Justice Scalia took in *Arlington*. Of course, because his bottom line was that jurisdictional questions are indistinguishable from nonjurisdictional questions, he did not have to, and perhaps could not, explain exactly what a jurisdictional question *is*. Still, his premise seems to be that such questions are of the sort in the list above. Thus, he refers to a brief that “explains, *helpfully*, that ‘[j]urisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and under what conditions.’”¹⁸⁶ In addition, noting that “[t]he

179. E.g., *Elec. Power Supply Ass’n v. FERC*, 753 F.3d 216, 220–21 (D.C. Cir. 2014).

180. E.g., *N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1078 (9th Cir. 2010).

181. E.g., *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 837 (1986).

182. E.g., *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 29 (1990).

183. E.g., *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 114–15 (1944).

184. E.g., *N. Ill. Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 846 (7th Cir. 2002).

185. See, e.g., 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) (“[C]ourts should defer to an agency’s interpretation of an ambiguous statute even if the interpretation delimits the scope of the agency’s jurisdiction.”); Gellhorn & Verkuil, *supra* note 167, at 993 (“[A] requirement of independent judicial evaluation of peripheral jurisdictional issues is consistent with the terms and rationale of *Chevron*.”); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2097–101 (1990) (“[C]ourts should probably refuse to defer to agency decisions with respect to issues of jurisdiction . . .”).

186. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870 (2013) (first emphasis added).

U.S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction,"¹⁸⁷ he cites primarily (though not exclusively) cases about whether the agency had authority over particular persons or activities: cigarettes, wetlands, particular toxic pollutants, "pole attachments."¹⁸⁸ And he relies in particular on *NLRB v. City Disposal Systems, Inc.*, which explicitly stated that no "exception exists to the normal [deferential] standard of review" for "jurisdictional or legal question[s] concerning the coverage" of an Act.¹⁸⁹

On this definition of a jurisdictional question, the majority was clearly correct that *Chevron* should apply with full force. Numerous precedents had invoked *Chevron* in such settings;¹⁹⁰ none had said it was inapplicable; agency self-aggrandizement or abuse are not greater threats with regard to jurisdictional issues than with regard to substantive ones; and all the various rationales for *Chevron* apply equally to jurisdictional and substantive questions. Indeed, not only does *Chevron* apply to jurisdictional questions so understood, these are the paradigmatic *Chevron* questions because they are disputes over the boundaries of vague terms.¹⁹¹

On the other hand, Chief Justice Roberts's dissent is also correct. Joined by Justices Kennedy and Alito, the Chief Justice described the question as being whether court or agency determines whether Congress has delegated to the agency authority to act with the force of law.¹⁹² That is the threshold requirement for *Chevron* to apply, and in his view it is necessarily a matter for judicial decision. He began with an admirably succinct summation:

A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that

187. *Id.* at 1872.

188. *Id.* at 1870–73.

189. 465 U.S. 822, 830 n.7 (1984) (internal quotation marks omitted).

190. Each of the cases cited earlier is an example. See *supra* notes 175–184. Some upheld the agency. See, e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131, 139 (1985) (upholding Corps of Engineers' reading of "waters of the United States" to include wetlands under *Chevron* step two). Some did not. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 529 n.26 (2007) (rejecting EPA's reading of "air pollutant" to exclude greenhouse gases under *Chevron* step one). But none found *Chevron* inapplicable.

191. See *supra* notes 159–165 and accompanying text (describing step two as involving resolution of vague, as opposed to ambiguous, terms).

192. *City of Arlington*, 133 S. Ct. at 1879–80 (Roberts, C.J., dissenting).

authority must be decided by a court, without deference to the agency.¹⁹³

This is exactly right. But it rests on a different definition of a “jurisdictional question” than the majority’s. To have jurisdiction is to have authority to decide. The dissent focuses not on whether an agency has authority to regulate particular places or things, but rather whether it has authority to regulate at all, that is, whether it has authority to act with the force of law. Applied to *Chevron*, the question is not whether agencies should receive deference regarding their determinations of what persons or activities fall within their authority, but rather whether they should receive deference regarding their determinations of whether they have the authority to act with the force of law, period.

On this conception, applying *Chevron* to jurisdictional questions is deeply problematic. *Chevron* applies *because* the agency has been delegated authority; because the delegation is a condition precedent of deference, it is circular to defer to a determination that the delegation exists. As one influential article put it:

One reason courts should refuse to extend *Chevron* deference to agencies’ jurisdictional interpretations follows from the nature of *Chevron* itself: The existence of agency jurisdiction is a precondition of *Chevron* deference, and *Chevron* therefore has no bearing on how that threshold question should be resolved. Only after it is determined that Congress has conferred jurisdiction on an agency does *Chevron* come into play.¹⁹⁴

This is Chief Justice Roberts’s point. He rightly insists that courts, not agencies, must determine which questions are within an agency’s *Chevron* power to resolve with the force of law.¹⁹⁵ In fact, Justice Scalia would seem to agree. He asserts essentially the same proposition at the end of his opinion:

The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies’ authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an

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

194. Sales & Adler, *supra* note 167, at 1533.

195. See Herz, *Deference Running Riot*, *supra* note 58, at 219 (“*Chevron* does not require a court to accept an agency’s view of the scope of its delegated authority, jurisdictional or substantive. By definition, Congress *cannot* have left this determination to the agency.”). Strauss, *In Search of Skidmore*, *supra* note 2, at 796 (“What are the boundaries of the agency’s authority, conferred by Congress, remains a judicial question, as it must be.”).

ambiguous line, the agency can go no further than the ambiguity will fairly allow.¹⁹⁶

The ships-passing-in-the-night aspect of the opinions is highlighted by looking at subsequent cases that rely on *City of Arlington*. For example, *Pharmaceutical Research & Manufacturers of America v. FTC* was a challenge to an FTC regulation issued under the Hart-Scott-Rodino Antitrust Improvements Act that required pharmaceutical companies to report certain transfers of exclusive patent rights.¹⁹⁷ The challengers argued that the statute did not permit the FTC to impose these obligations on only a single industry; it read the statute to authorize only rules of general application that would cover all transfers of exclusive patents. The district court applied *Chevron*, laying out the two-step test. It cited *City of Arlington* for the propositions that *Chevron* applies to jurisdictional determinations and that there is no difference between exceeding the scope of authority and exceeding authorized application of authority. It then concluded the “FTC is Entitled to Deference on Scope of Statutory Authority,” i.e., on the question whether it could issue a rule limited to a particular industry.¹⁹⁸ A thorough review of text, history, and purpose indicated no particular congressional view on industry-specific regulations; thus, since the statute did not address the “precise question,” it was on to step two, which, of course, the regulation survived.¹⁹⁹

So what happened here in *City of Arlington* terms? The court thought it was doing what the majority in *City of Arlington* told it to: Apply *Chevron* to a question about the scope of agency authority. That question was whether the FTC could write a regulation about a single industry even though the relevant statute applied to mergers and the transfer of assets generally. One could describe that as a jurisdictional issue, though it is a slightly odd one, being about whether the greater includes the lesser rather than which industries are regulable at all. So the case could be seen as a perfect illustration of Justice Scalia’s reasoning and application of his conclusion: It is hard to distinguish jurisdictional from non-jurisdictional questions, the key issue is whether the agency has violated the statute, and where the statute is ambiguous, the court should accept the agency’s reading as long as it is permissible.

But the *Pharmaceutical Research* decision was also completely consistent with Chief Justice Roberts’s dissent in *City of Arlington*. The court did not “defer to [the] agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.”²⁰⁰ It decided

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

197. 44 F. Supp. 3d 95 (D.D.C. 2014).

198. *Id.* at 114–15.

199. *Id.* at 124–25 (“[O]nce the Court has determined that Congress has not directly addressed the issue, the agency is entitled to *Chevron* deference of its interpretation of the scope of its authority. Where, as here, the statute is silent on the issue, the agency’s interpretation of its authority is due deference.” (citation omitted)).

200. *City of Arlington*, 133 S. Ct. at 1879–80 (Roberts, C.J., dissenting).

entirely on its own whether this was a case in which deference was mandated. It may not have done a great job at that (it essentially skipped step zero and only inquired whether the statute was ambiguous), but it was only going to defer if it found the statute ambiguous and ultimately made an independent determination that it was. Of course, the FTC had *said* that the statute was ambiguous,²⁰¹ but the court did not defer on that question.²⁰²

This discussion can be restated in terms of *Chevron* “step zero.”²⁰³ That term, which has never been invoked by the Supreme Court itself, refers to the threshold inquiry as to “whether the *Chevron* framework applies at all.”²⁰⁴ The leading case is *United States v. Mead Corp.*, which held that *Chevron* only applies if Congress has delegated authority to write rules with the force of law and the agency has used that authority.²⁰⁵ *Mead* coexists somewhat uncomfortably with decisions that interpret statutory ambiguity itself to be a delegation to the agency; the Court’s “cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency; and they find in ambiguous language at least a presumptive indication that Congress did delegate that gap-filling authority.”²⁰⁶ Courts never defer in step zero. Thus, another way of explaining the difference between Justice Scalia and the Chief Justice in *City of Arlington* is that the former understood the case to be about *how Chevron* applies and the Chief Justice understood it to be about *whether Chevron* applies. Justice Scalia is completely correct that in deferring (or not) under *Chevron*, jurisdictional questions should not be treated any differently from other questions of statutory meaning. Chief Justice Roberts is completely correct that courts should not yield to agency understandings of whether *Chevron* kicks in or whether a statute is ambiguous.

Finally, to return to “space” and “weight”: In a *Chevron* step-two case, the court’s role under the statute is to ensure that the agency has stayed within its space, that its interpretation is not unreasonable. It is hard to understand how a court *could* grant *Chevron* deference to that determination even if it wanted to. Both Justice Scalia and Chief Justice Roberts in fact endorse that understanding in *City of Arlington*. Where they go

201. *Pharm. Research & Mfrs. of Am.*, 44 F. Supp. 3d at 115 (“The FTC disputes that Congress has directly addressed the issue in the HSR Act and instead contends, under *Chevron* Step Two, that the agency’s interpretation of the statute is entitled to deference.”).

202. For another post-*City of Arlington* decision that is consistent with both the majority and the dissent, see *Pharm. Research & Mfrs. of Am. v. Dep’t of Health & Human Servs.*, 43 F. Supp. 3d 28 (D.D.C. 2014) (rejecting agency regulation under step one, with no deference in sight, because Congress had not given agency authority to regulate particular activities reached by rule).

203. See, e.g., Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187, 191 (2006) (defining “*Chevron* Step Zero”).

204. *Id.*

205. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

206. *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012).

astray, on the Straussian account, is the failure to accord *Skidmore* deference to questions about statutory meaning.²⁰⁷

B. “Jurisdictional” Questions and the APA

Ignored in all this is the text of the APA itself. The Act does actually refer to jurisdictional questions. Not surprisingly, it lumps them together with other sorts of statutory questions. Specifically, section 706 provides that a reviewing court “shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory *jurisdiction*, authority or limitations, or short of statutory right.”²⁰⁸ The APA has a tendency toward the thesauric; often a string of nouns appears where a more parsimonious drafter might have used just one or two.²⁰⁹ But this reflects care and precision, not sloppiness. The no-surplusage canon admonishes us to take each of those words seriously, as indicating something distinct. And indeed, many APA provisions set out a string of not-quite-synonyms, the differences between which should be taken seriously. Especially with phrases as familiar and well-worn as the key provisions of the APA, it can be helpful to read the text with fresh eyes.

The scope-of-review provisions of the APA are one prominent example of cover-the-waterfront drafting. Not just “arbitrary,” but “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²¹⁰ Not just “unconstitutional,” but “contrary to constitutional right, power, privilege, or immunity.”²¹¹ And not just “contrary to a relevant statute,” but “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”²¹² If we take that wording seriously, it means a reviewing court has the same authority (or lack thereof) to determine whether an agency has exceeded its statutory jurisdiction that it has with

207. See Strauss, *In Search of Skidmore*, supra note 2, at 797 (characterizing *Skidmore* deference as “traditional tool[] of statutory interpretation” (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984))); supra section II.B (arguing for application of *Skidmore* deference within *Chevron* step one).

208. 5 U.S.C. § 706(2)(C) (2012) (emphasis added).

209. See Michael Herz, “Data, Views, or Arguments”: A Ruminantion, 22 *Wm. & Mary Bill Rts. J.* 351, 356 (2013) (“The APA contains a number of what we might call ‘thesauric’ provisions.”). Perhaps the most striking instance involves licensing. The APA defines “licensing” as an “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license,” 5 U.S.C. § 551(9), and then defines “license” as “the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” *Id.* § 551(8). That means that “licensing” could in theory be any of eighty-eight different undertakings—the eleven kinds of “licensing” multiplied by the eight kinds of “licenses.”

210. 5 U.S.C. § 706(2)(A) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .”).

211. *Id.* § 706(2)(B).

212. *Id.* § 706(2)(C).

regard to reviewing other statutory limitations or authorizations. That is a textual argument that the great textualist ignored.

On the other hand, the text of this provision undercuts Justice Scalia's opinion as well. By referring separately to "jurisdiction" and "authority,"²¹³ the APA indicates that they are two distinct things. Yet the basis of Justice Scalia's entire opinion is that there is no distinction between them. In a case arising under the APA, his job was to at least try to figure out how these two separately identified concepts differ, even if the question presented treated them as synonyms. Defining "jurisdiction" as being about the persons, places, and things that an agency can regulate, and "authority" as being about the manner and extent of permissible agency regulation of those things over which it has jurisdiction, serves to give each word independent meaning.

Section 706(2)(C) is a Goldilocks provision. Agencies cannot go too far, but they also cannot fail to go far enough. Not too cold and not too hot; neither in excess of maxima nor shy of minima. In a passing comment, Professor Strauss has suggested this formulation may be a statutory peg on which to hang the idea of *Chevron* space. The court must ensure that the agency's reading does not exceed statutory boundaries, that it is inconsistent neither with what the statute must mean ("short of statutory right") nor what it can mean ("in excess of statutory jurisdiction").²¹⁴ It would be delightful if the APA really did articulate the concept of *Chevron* space, but this reading imposes more on the text than it will bear. On the most natural reading of the text, the "in excess of" and "short of" language does not define boundaries of a "geographical" sort. Rather it speaks to the qualitatively different *kinds* of limitations a statute can impose: Some provisions impose restrictions, some impose obligations.²¹⁵ That does not undercut the

213. *Id.* ("The reviewing court shall . . . 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 . . .").

214. See Strauss, *Space/Weight*, *supra* note 2, at 1161 ("Excess of statutory jurisdiction . . . or short of statutory right' readily suggests some space between, space within which the agency may exercise policymaking discretion." (quoting 5 U.S.C. § 706(2)(A))).

215. The legislative history also undercuts this reading. "Short of statutory right" seems to have been intended to reach the situation in which an agency has awarded a prevailing party less than the full relief required by statute; the reports are wholly focused on this question of remedy for an individual party rather than the more abstract question of whether a policy decision exceeds statutory boundaries. See H.R. Rep. No. 79-1980, at 278 (1946) ("Short of statutory right' means that agencies are not authorized to give partial relief where a party demonstrates his right to the whole. Authorized relief must be granted by an agency to the full extent that entitlement is shown."); Staff of S. Comm. on the Judiciary, 79th Cong., *Administrative Procedure* 40 (Comm. Print 1945) ("[I]f Congress has prescribed a measure of right or relief, on principle the citizen is entitled to the full measure and there should be no arbitrary power in administrative agencies to grant less in specific cases."); S. Rep. No. 79-752, at 214 (1945) ("Short of statutory right' means that agencies are not authorized to give partial relief where a party demonstrates his right to the whole.").

Chevron space conceptualization; it just means that the drafters of the APA did not write it into the statute.

CONCLUSION

The argument here is for a reading of *Chevron* that is both weaker and stronger than that often proposed. On the one hand, courts retain an essential and meaningful role in determining the boundaries of *Chevron* space; they have real work to do. On the other hand, in doing that work, the views of the agency can never be ignored. Accordingly, there is no agency-free space within which courts interpret statutes.

The familiar and oft-told narrative is that Congress retreats to vague generalities in order to achieve agreement and, in an effort to take credit and avoid blame, leaves the hard issues to others to decide. *Chevron's* great strength is that it recognizes this narrative is sometimes accurate and admonishes that when it is judges should yield to agencies because of their comparative advantage in policymaking. But this narrative is not always accurate. Sometimes Congress *does* make a decision. *Chevron's* great risk is that it invites judges and agencies to ignore what Congress *has* decided, discovering uncertainty and discretion where they do not exist.²¹⁶ Some scholars would essentially write courts out of the picture in statutory cases, concluding that agencies always have a comparative advantage.²¹⁷ Peter Strauss wisely warns against such an abandonment of the judicial role, while still granting due weight to agency interpretation and, within the congressionally established and judicially policed *Chevron* space, respecting agency construction. So understood, *Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That *Chevron* is dead. Rather, *Chevron* is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign.

216. An example—one that is understandable and prompted by “bad facts” but an example nonetheless—is *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), which held that the EPA could determine the “best technology available for minimizing adverse environmental impact” by balancing the costs and benefits of different alternatives rather than just determining which of the feasible alternatives was most effective at reducing environmental harms. *Id.* at 219–20.

217. See, e.g., Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 205–29 (2006) (arguing for super-strong version of *Chevron* deference); Lisa Schultz Bressman, *Chevron's Mistake*, 58 *Duke L.J.* 549, 566 (2009) (arguing statutes virtually never have specific meaning and therefore virtually always include broad delegations to implementing agencies).

