TAILORING DEFEERENCE TO VARIETY
WITH A WINK AND A NOD TO CHEVRON:
THE ROBERTS COURT AND THE
AMORPHOUS JUDICIAL FRAMEWORK
FOR REVIEW OF AGENCY
INTERPRETATIONS OF LAW

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Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law

J. Lyn Entrikin Goering∗

Abstract

In the 25 years since the Court issued its venerable opinion in *Chevron*, the Supreme Court has all but disregarded the judicial review provisions of the Administrative Procedure Act (APA), first enacted in 1946. From 1984 to 2000, *Chevron* took center stage as the most-cited opinion in administrative law. Beginning in 2000, the Rehnquist Court issued a series of decisions limiting the reach of *Chevron*. At the same time, the Court revived common law deference frameworks that predate the APA. Yet the Rehnquist Court failed to fully reconcile *Chevron* with its previous common law deference doctrines and with the APA’s judicial review provisions.

During its first four terms, the Roberts Court has been anything but consistent in its approach to administrative deference issues. The Court has drawn unevenly and unpredictably upon the various common law deference approaches, only rarely acknowledging the controlling provisions of the APA. Moreover, the Roberts Court has failed to articulate a systematic basis for determining whether a statute or rule is ambiguous, the critical threshold issue in deference jurisprudence. In practice, the scope of judicial review varies depending on which justice authors the majority opinion and which justices vote with the majority. The result is a haphazard common law deference doctrine that fails to offer clear guidance to federal courts for resolving complex issues of administrative law.

This article examines the historical evolution of common law deference doctrines, together with the Supreme Court’s general disregard for the APA’s express standards of judicial review. It concludes that the Roberts Court has so far failed to reconcile its administrative deference doctrine into a cohesive, integrated, workable framework. To remedy the problem, the article urges Congress to reestablish the recently reauthorized (but unfunded) Administrative Conference to provide a continuing forum for addressing complex issues pertaining to administrative law. Congress should also substantially amend the Administrative Procedure Act to clarify and delineate the important oversight role the federal courts play in reviewing agency interpretations of black-letter law. Finally, the Supreme Court must articulate and apply a reasoned framework for determining and resolving statutory ambiguity.

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“[B]alancing the necessary respect for an agency’s knowledge, expertise, and constitutional office with the courts’ role as interpreter of laws can be a delicate matter . . .” Gonzalez v. Oregon, 546 U.S. 243, 255 (2006) (Kennedy, J).

“The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference . . . .” United States v. Mead, 533 U.S. 218, 237 (2001) (Souter, J).

“We will be sorting out the consequences of the Mead doctrine, which has today replaced the Chevron doctrine, for years to come.” Id. at 239 (Scalia, J., dissenting) (citation omitted).

Introduction

Twenty-five years ago, the Supreme Court issued its unanimous opinion in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. The holding, authored by Justice Stevens, was concise and circumspect, and the relatively easy facts of that case should have limited its reach. Certainly the Court could not have then foreseen that Chevron would be declared a watershed case. Yet in retrospect, the decision took hold as one of the most controversial in the history of administrative law. A quarter-century later, Justice Stevens must rue the day he penned the concise words of Chevron’s central holding. Indeed, after many years of stretching the Court’s decision well beyond its original bounds, a shifting majority of the Court appears to be backpedaling in a sporadic effort to devise a more balanced, nuanced deference framework.

3 Merrill, supra note 2, at 400.
Beginning in 2000, the Rehnquist Court began sketching out the parameters of a more flexible, multi-factor approach to determine the nature and degree of judicial deference warranted for agency interpretations. In doing so, the Court followed a discernable pattern of retrenchment from the unwittingly simplistic approach mapped out in *Chevron*. In a series of decisions, the Rehnquist Court chipped away at *Chevron’s* sweeping “domain,” generally confining its doctrine of heightened deference to regulations adopted in notice-and-comment rulemaking.

The most controversial of these was *United States v. Mead Corp.*, decided in 2001. The *Mead* Court breathed new life into *Skidmore v. Swift & Co.*, a 1944 decision predating the Administrative Procedure Act (APA). *Skidmore* had articulated a multifaceted common law deference framework depending upon various enumerated factors the Court credited as lending persuasive value to agency interpretations. While *Mead* expressly revived the more flexible common law deference doctrine, it failed to reconcile *Skidmore* with the superseding provisions of the APA governing judicial review.

By the end of Chief Justice Rehnquist’s last term, the Court had settled into a relatively predictable dichotomy. The Court generally applied *Chevron* deference if a rule had been adopted in notice-and-comment proceedings, and otherwise defaulted to classic deference.

*Id.* (footnotes omitted).

9 323 U.S. 134 (1944).
10 323 U.S. at 140; see infra note 104 and accompanying text (quoting *Skidmore*).
Skidmore analysis of various persuasive factors to determine whether a less formal agency interpretation warranted deference. In its final term, the Rehnquist Court resolved a complex issue concerning the stare decisis effect on agencies of judicial precedents interpreting black-letter law. In *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, the Court held that an agency is bound by a court’s prior interpretation of a statute or rule only if the court declared its language unambiguous. In that event, the prior judicial interpretation controls over any subsequent agency interpretation to the contrary.

Nevertheless, the Rehnquist Court failed to reconcile its generally narrower deference framework with the Court’s sweepingly deferential 1997 holding in *Auer v. Robbins*. Authored by Justice Scalia for a unanimous Court, *Auer* held that an agency’s interpretation of its own ambiguous regulation was entitled to particularly deferential respect. Moreover, the Court rejected an argument that agencies should apply canons of statutory construction to resolve apparent ambiguities in their own regulations.

While its legacy was a relatively stable yet more complex deference doctrine, the Rehnquist Court essentially disregarded the APA’s language governing judicial review. If the Court was unable to resolve an ambiguity in a statute Congress had delegated authority to an agency to administer, the Court applied one of three common law deference frameworks: *Chevron* if the agency had interpreted an ambiguous statute by adopting regulations in notice-and-comment proceedings, *Mead/Skidmore* if the agency had issued its interpretation of an ambiguous statute by informal means such as letter rulings or policy statements, and

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14 Id. at 982-83.
15 Id. at 982.
17 Id. at 461. *Auer* deferred to the Department of Labor’s amicus brief interpreting an ambiguous agency regulation. See id.
18 Id. at 462.
Auer if the agency had interpreted its own ambiguous regulation, by whatever means. 20

What remained was for the Court to reconcile Auer deference with the less deferential Skidmore doctrine revived by Mead.

Chief Justice John Roberts, Jr. took up the Court’s reins in October 2005. Less than four months later in Gonzales v. Oregon, 21 Roberts joined his first dissenting opinion. 22 The 6-3 majority further narrowed Chevron’s reach by refusing to defer to Attorney General John Ashcroft’s interpretive ruling 23 that sought to unilaterally preempt Oregon’s Death with Dignity Act. 24 Justice Kennedy, writing for the majority, reasoned that Auer deference did not apply because Ashcroft’s “interpretive” ruling merely “parroted” the relevant statutory language rather than interpreting an ambiguous regulation. 25 Nor could Ashcroft invoke Chevron deference because the Controlled Substances Act did not authorize him to unilaterally issue interpretive rules having the force of law. 26

During its first four terms, the Roberts Court has been anything but consistent in resolving administrative deference issues. 27 A recent empirical study identified no fewer than seven distinct “deference regimes” the Court has applied since it decided Chevron. 28 The Roberts Court has drawn unevenly and unpredictably upon each of these approaches,

20 An agency’s interpretation of its own regulation would surely take shape in a medium less formal than notice-and-comment rulemaking. Thus, it is difficult to square Auer’s super-deference with the Court’s revival of Skidmore for interpretations embodied in policy statements, guidelines, litigation documents, letter rulings, and the like.


22 Id. at 275 (Scalia, J., dissenting, joined by Roberts, C.J. & Thomas, J.).


25 543 U.S. at 258; see id. at 256-57 (distinguishing Auer, 519 U.S. at 461-63).

26 Id. at 268.

27 See Eskridge & Baer, supra note 4, at 1098 (concluding that the Court is “wildly inconsistent” in applying administrative deference doctrines); cf. Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern Skidmore Standard, 107 COLUM. L. REV. 1235, 1237 (2007) (noting that “the scope of Skidmore’s applicability in the post-Mead era is still unclear”).

28 Eskridge & Baer, supra note 4, at 1098-1117.
and its reasoning often varies depending on which justice writes the opinion and which justices vote with the majority and thus influence the Court’s reasoning. Nearly a decade after the Rehnquist Court began to narrow *Chevron’s* reach, the unfortunate result is a mish-mash of a muddled mess. And so far, the Roberts Court has done very little to straighten it out.

Rather than continuing the pretense that *Chevron* remains the presumptive default rule, the Roberts Court should reconcile its multiple common law deference doctrines by expressly articulating and systematically applying an integrated approach incorporating the multi-factor standard revived by the Rehnquist Court. While *Chevron* did not expressly invoke the multivariate deference standard rooted in *Skidmore*, the Court surely would have reached the same result had it applied that analysis. Without doubt, the factors articulated in *Chevron* favoring the agency’s interpretation of the controlling statute were highly persuasive, even under the *Skidmore* analysis. The sweepingly broad influence *Chevron* enjoyed during its heyday may have had more to do with the political influence of the Reagan administration and the scholars who championed the decision as revolutionizing administrative law.

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29 The assignment is made by the Chief Justice if he votes with the majority, or otherwise by the senior justice voting with the majority. See, e.g., Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1731 (2006).

30 See id. at 1733-34 (explaining the assigned author’s strategic advantage).


33 See Mead, 533 U.S. at 234.

While *Chevron* may not be a dead letter, its twenty-five year reign is drawing to a close—and rightly so. It remains to be seen whether federal courts applying the post-*Chevron* deference framework will strike the proper balance, yielding an adequate margin of interpretive discretion to agencies while also imposing sufficient constraints on maverick officials who would otherwise strain the limits of delegated rulemaking authority. Without doubt, federal courts and administrative officials alike need clearer guidance on the appropriate scope of judicial review as well as the factors that influence courts to defer to agency interpretations.

This article attempts to assimilate and synthesize the evolution of the Court’s post-*Chevron* deference doctrine over the last decade, reconcile the principal common law deference regimes with the relevant provisions of the APA, and offer suggestions on how to ameliorate confusion among courts, agencies, and Congress regarding how the Court applies common law deference doctrines to agency interpretations.

To provide temporal context for the Court’s increasingly disjointed deference jurisprudence and some of its missing links, Parts I and II offer an historical overview. Part I begins with the origins of administrative law in the late nineteenth century and discusses the common law deference doctrines that developed during and after the New Deal, culminating

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35 But see Graham, *supra* note 31, at 239 (“Classic *Chevron* analysis is dead.”).
36 See Eskridge & Bae, *supra* note 5, at 1098 (“[T]he *Chevron* regime . . . plays a surprisingly modest role in the Court’s deference jurisprudence.”).
37 Recent federal circuit opinions suggest an ongoing struggle to sort out and apply the multifarious deference regimes. See Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing *Chevron* and *Mead*, 6 VILL. ENVTL. L.J. 19, 34 (2005) (“In an area of doctrine now fraught with rhetorical confusion, some new measure of clarity would be a virtue.”).
38 See *supra* note 38; see also, e.g., Ohio State Univ. v. Sec’y, 996 F.2d 122, 123 n.1 (6th Cir. 1993) (noting that the inconsistent standard of judicial deference to administrative interpretations frustrates intermediate appellate courts); Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 316 F.3d 913, 921 (9th Cir.) (“*After Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* deference applies, and *Mead* provides an example of when it does not.”), vacated on reh’g en banc, 353 F.3d 1051 (9th Cir. 2003), am. on reh’g en banc in part, 360 F.3d 1374 (9th Cir. 2004).
with *Chevron* in 1984. Part II analyzes the Court’s administrative deference jurisprudence during *Chevron*’s heyday from 1984 until 2000.

Part III seeks to reconcile and synthesize the Supreme Court’s judicial deference decisions since the turn of the twenty-first century, beginning with brief discussion of *Auer v. Robbins*,\(^39\) representing the apex of the Rehnquist Court’s attitude of deference to agency interpretations. Part III continues by discussing the Rehnquist Court’s decision in *Christensen v. Harris County*\(^40\) as later refined by *Mead*.\(^41\) It concludes with a summary of the primary common law deference doctrines as they had evolved by the close of the Rehnquist Court’s final term.

Part IV addresses the haphazard evolution of administrative deference jurisprudence that has characterized the Roberts Court during its first four terms. Selected decisions illustrate that the Court’s deference doctrine turns largely on the interpretive ideology of the justices who command a majority vote in any dispute regarding agency interpretations of law.

Finally, Part V makes a few recommendations and identifies unresolved issues that warrant further research, scholarly commentary, and congressional action.

The Supreme Court’s common law deference jurisprudence has significantly influenced the nature and degree of judicial oversight of agency rulemaking at all levels of the court system for more than sixty-five years.\(^42\) To ensure that agency rulemaking effectively carries out its purpose, Congress must take affirmative steps to clarify the proper

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\(^{39}\) 519 U.S. 452 (1997).
\(^{40}\) 529 U.S. 576 (2000).
\(^{41}\) 533 U.S. 218 (2001).
\(^{42}\) The administrative deference framework applies not only to federal agency interpretations. Federal courts often review state agency interpretations of federal statutes governing cooperative programs. See, e.g., Wis. Dep’t of Health & Family Servs. v. Blumer, 534 U.S. 473, 479 (2002) (Medicaid); Batterson v. Francis, 432 U.S. 416, 420 (1977) (AFDC).
role the federal courts play in ensuring that executive branch agencies exercise rulemaking power within the constraints of the authorizing statutes. For Congress to allow deference jurisprudence to remain in its current muddled state raises troubling constitutional issues regarding separation of powers and the long-dormant nondelegation doctrine.

I. Historical Overview

While *Chevron* has been regarded as “one of the most important decisions in the history of administrative law,” the Supreme Court’s administrative deference doctrine did not begin with *Chevron*. More to the point, many aspects of what currently appears to be an “ad hoc approach” can be traced to the historical development of administrative law.

Thus, a complete understanding of the significance of *Chevron* and its successors requires an appreciation of its historical context, including the various judicial deference doctrines that ebbed and flowed during most of the twentieth century.

A. The Origins of Administrative Law

The middle fifty years of the twentieth century witnessed unprecedented growth of the “headless fourth branch of government,” beginning with the New Deal in the mid-

43 See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
44 See infra notes 70-84 and accompanying text (discussing nondelegation doctrine).
45 1 Richard J. Pierce, Jr., *ADMINISTRATIVE LAW TREATISE* 140 (4th ed. 2002).
47 Eskridge & Baer, supra note 4, at 1157, 1179, 1182.
48 For a concise and informative history of administrative rulemaking, see Cornelius M. Kerwin, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 7-21 (3d ed. 2003).
49 “The spirit of an age has a way of working its way into all the cases with which a court deals.” Alfred G. Aman, Jr., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 12 (1992).
50 This well-known term originated in the 1937 final report of the Committee on Administrative Management, appointed by President Franklin Roosevelt to study the reorganization of the executive branch. See President’s Comm. on Admin. Mgmt., *REPORT OF THE COMMITTEE, WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT* 39-41, 74th Cong., 2d Sess. (1937). The Committee used the term to express caution about the proliferation of independent boards and commissions that were not directly accountable to the President. *Id.* The issue remains controversial; the Roberts Court will address the political accountability of independent agencies in its October 2009 term. See Free Enterprise Fund v. Public Co. Accounting Oversight
1930’s and ending with *Chevron* in 1984. In the early part of the twentieth century, bench and bar, having grown comfortable with common law jurisprudence, resisted development of the administrative state. Both legal institutions were slow to acknowledge the increasingly important role agencies had assumed in both litigation and lawmaking.

Administrative law originated in the industrial era of the late nineteenth century, when political pressure compelled the federal government to intervene.\(^1\) Controversy resulted from expansion of the railroads and discriminatory tariffs, and congressional initiatives to directly regulate rates proved unworkable.\(^2\) The cumbersome judicial process lacked sufficient continuity to comprehensively address complex social and economic issues associated with the railroads.\(^3\)

In 1887, the political and pragmatic need for ongoing oversight of the railroad industry led Congress to establish the Interstate Commerce Commission, the first federal regulatory agency.\(^4\) In subsequent years, the administrative state began overseeing other segments of the economy, including banking, insurance, and communications.\(^5\) Congress created new administrative agencies to constrain abusive business tactics that the judicial system was ill-equipped to control by traditional means.\(^6\)

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\(^1\) *See* James M. Landis, *The Administrative Process* 7-8 (1938).

\(^2\) *Id.* at 9.

\(^3\) *Id.* at 9, 89. In particular, the judicial process was inadequate to address the rate disparities of a national railroad system, the original impetus for establishing federal administrative agencies. *Id.* at 125.

\(^4\) *See* id. at 10, 89.

\(^5\) *Id.*

\(^6\) *Id.* at 14.
During the economic downturn of the 1930’s, administrative law’s original focus on regulation shifted to protectionism.\textsuperscript{57} Beginning with the New Deal, the courts began to accept the role agencies necessarily played in stabilizing the economy and mitigating rampant unemployment.\textsuperscript{58} Nevertheless, the unfamiliar remedial process of the administrative state met with continued opposition and suspicion from the legal profession.\textsuperscript{59}

In 1938, responding to the Attorney General’s request, President Roosevelt appointed a committee of “eminent lawyers, jurists, scholars and administrators,”\textsuperscript{60} later known as the Attorney General’s Committee on Administrative Procedure.\textsuperscript{61} The Committee engaged in a comprehensive two-year investigation of government agencies. Its final report was later declared “a landmark in the field of administrative law.”\textsuperscript{62}

The reliance on government expertise was a natural outgrowth of the rise of the administrative state during the New Deal.\textsuperscript{63} In large part, the philosophical justification for the civil service system, designed to foster political independence and agency expertise, rested on the shared social value of allowing agency officials flexibility and discretion to carry out their responsibilities.\textsuperscript{64} Agency expertise was considered a natural extension of the federal government to intervene when market forces fail.\textsuperscript{65}

\textsuperscript{57} See id. at 12-16. “The dominant theme in the administrative structure is . . . concern for an industry whose economic health has become a responsibility of government.” Id. at 12; see Aman, supra note 50, at 12-13.

\textsuperscript{58} See Aman, supra note 50, at 8 (noting that the courts’ “hands-off approach” during and after the New Deal “facilitated agency change and the evolutionary growth of the administrative state”); Landis, supra note 52, at 14-15 (observing that after the 1929 stock market crash, “a perplexed state relied almost exclusively upon the administrative approach to its many and staggering problems”). Eighty years later, the dramatic economic downturn in 2008-09 and associated political events are stunning reminders of the political pressure on the federal government to intervene when market forces fail.


\textsuperscript{60} Dep’t of Justice, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947) [hereinafter APA MANUAL].

\textsuperscript{61} Id. The Supreme Court recently cited the Manual, acknowledging its continuing persuasive value. See Shinseki v. Sanders, 129 S. Ct. 1696, 1704 (2009).

\textsuperscript{62} Id. The report was the primary source of recommendations later incorporated in the APA. Id.

\textsuperscript{63} See Aman, supra note 50, at 22.

\textsuperscript{64} Gary C. Bryner, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 5 (1987).
authority granted to elected representatives, who were thought to have more expertise than average voters regarding social and economic policy.\textsuperscript{65} From this perspective, the expertise and independence entrusted to agency officials reflected the political values characteristic of representative democracy.\textsuperscript{66}

Judicial respect for the specialized expertise of government agencies would soon become a primary principle underpinning early deference doctrines.\textsuperscript{67} Indeed, federal courts continue to cite agency expertise as one of the primary factors justifying deference to administrative interpretations of law.\textsuperscript{68} As we will see, the deference doctrines that developed as a matter of practical necessity during the New Deal would continue to wield influence for many years to come.\textsuperscript{69}

B. The Nondelegation Doctrine

As early as 1825, the United States Supreme Court articulated what would later be known as the nondelegation doctrine,\textsuperscript{70} a corollary to the constitutional principle of separation of powers. Under traditional nondelegation doctrine, “Congress may not constitutionally delegate its legislative power to another branch of government.”\textsuperscript{71} The
Constitution nevertheless permits Congress to “seek assistance” from coordinate branches as long as they operate within properly defined limits known as “intelligible principles.”

The nondelegation doctrine has obvious implications for administrative rulemaking, which always depends on a congressional grant of authority, whether express or implied. Only twice, however, has the Supreme Court relied on the nondelegation doctrine to strike down legislation. Both decisions invalidated parts of the National Industrial Recovery Act, by all accounts unusually broad-sweeping legislation. But never again has the Court invalidated legislation on nondelegation principles.

Some observers have gone so far as to declare the nondelegation doctrine dead. Others consider it “on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it.” Still others have reasoned that the nondelegation doctrine cannot be defended based on constitutional analysis.

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72 J.W. Hampton v. United States, 276 U.S. 394, 409 (1928); see Touby, 500 U.S. at 165 (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)).

73 See Pierce, supra note 46, at 306.

74 Id. at 91; see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550-551 (1935) (striking broad delegation of power by the National Industrial Recovery Act to the President to prescribe codes regulating nationwide trade and industry); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (striking one subsection of the Act as unconstitutional delegation of power).

75 See, e.g., Pierce, supra note 46, at 91-92.


77 E.g., Sunstein, supra note 77, at 315. But see id. (contending that the doctrine is alive and well); see also Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1299 (2003) (same).

78 Alexander & Prakash, supra note 71, at 1038.

79 See Eric Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1722, 1762 (2002). Professor Cass Sunstein has taken a middle ground. He suggests that the Supreme Court has recast the doctrine in the form of “nondelegation canons,” which narrowly constrain agency action absent a “clear congressional statement” to the contrary. Sunstein, supra note 77, at 316, 338.
While the nondelegation doctrine has only rarely succeeded as a constitutional basis for challenging legislative action,\(^\text{80}\) it continues to operate as a loose constraint on agency action. In theory, Congress must adequately articulate “intelligible principles” to which administrative agencies must conform in exercising the power to legislate.\(^\text{81}\) But in practice, even the most broadly drawn parameters are deemed sufficient to withstand constitutional challenge.\(^\text{82}\)

Nevertheless, the nondelegation doctrine implicitly assumes, at least in theory, that an agency will exercise its delegated authority within the specific constraints imposed by Congress in the agency’s authorizing legislation.\(^\text{83}\) As applied by the Supreme Court in recent times, the nondelegation doctrine simply means, as a practical matter, that the legal boundaries confining an agency’s interpretive power are primarily statutory rather than constitutional in nature. In the absence of constitutional constraints on delegations of legislative power, judicial review of an agency’s exercise of statutory authority provides a critical check on executive power.

Once it was settled that Congress, within broad constraints, may delegate lawmaking authority to the executive branch, it was a natural evolutionary step for the Court to gradually adopt an attitude of deference to agency interpretations of their own authorizing statutes.

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\(^{80}\) For a recent but short-lived example, see South Dakota v. Dep’t of Interior, 69 F.3d 878, 884-85 (8th Cir. 1995) (striking down § 5 of the Indian Reorganization Act (IRA) as contrary to nondelegation doctrine), vacated, 519 U.S. 919 (1996). \textit{But see, e.g.}, Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005) (upholding IRA § 5 over nondelegation doctrine challenge), \textit{on reh’g en banc sub nom.}, Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007), \textit{rev’d on other grounds sub nom.}, Carcieri v. Salazar, 129 S. Ct. 1058 (2009).

\(^{81}\) \textit{J.W. Hampton}, 276 U.S. at 409.

\(^{82}\) \textit{See generally Whitman}, 531 U.S. at 472-76 (upholding broad delegation of legislative power to EPA).

\(^{83}\) \textit{See id.} at 475 (“T”he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”). \textit{Chevron} itself, and perhaps other deference regimes, may be considered “nondelegation canons.” \textit{See Sunstein, supra note 77,} at 316, 338.
However, this development would further blur the lines separating the three branches of government. 84

C. Early Deference Doctrines

During the New Deal and World War II eras, the Supreme Court declined to apply the same deferential standard of review to agency adjudication and rulemaking as it applied to statutes and judgments. In SEC v. Chenery Corp., 85 for example, the Court insisted that an administrative agency set out its explicit reasoning for developing a disputed policy position. 86 The Court declined to invent its own reasoning to justify agency action, 87 restricting its review to the specific rationale expressly invoked by the agency to support its decision in the first instance. 88

Two of the Supreme Court’s earliest decisions addressing judicial deference to agency interpretations have resumed center stage: Skidmore v. Swift & Co. 89 and Bowles v. Seminole Rock & Sand Co. 90 Although both predated the APA, they continue to strongly influence the Supreme Court’s evolving deference framework. While neither addressed

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85 318 U.S. 80 (1943). The Court observed that “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” Id. at 88. Chenery still governs when the Court reviews agency adjudications. See, e.g., Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1, 128 S. Ct. 2733, 2745 (2008) (FERC adjudication) (citing Chenery); see also FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1838 (2009) (Breyer, J., dissenting) (citing Chenery).
86 Chenery, 318 U.S. at 88 (distinguishing review of lower court decisions from review of agency actions).
87 Cf., e.g., U.S. v. Carolene Prods. Co., 304 U.S. 144, 152-53 (1938) (reasoning that where legislative judgment is questioned, judicial inquiry must be restricted to whether any state of facts could reasonably be assumed that would support it).
88 Id. at 94. This stringent standard of judicial review suggests that the Court put the burden of persuasion on the agency to defend its regulatory action, rather than imposing that burden on the challenging party.
89 323 U.S. 134 (1944).
90 325 U.S. 410 (1945).
notice-and-comment rulemaking, both shed helpful light on the various common-law
defERENCE REGIMES regularly invoked by the Roberts Court.

The Skidmore plaintiffs worked in defendant’s meat packing plant. They sought
OVERTIME PAY under the Fair Labor Standards Act (FLSA) for time they spent on call at the
plant’s fire hall after normal duty hours. The Fifth Circuit affirmed the trial court’s
“CONCLUSION OF LAW” that on-call time was not working time because plaintiffs were entitled to
engage in pleasurable activities at the fire hall, subject to call. The Supreme Court reversed,
holding that as a matter of law, neither the FLSA nor case law precluded the district court
from classifying waiting time as compensable. Rather, whether plaintiffs had engaged in
COMPENSABLE WORK while on call was a question of fact under the circumstances.

Skidmore noted that no administrative agency was specifically charged with
adjudicating FLSA disputes, but Congress had established the Office of Administrator
empowered to seek injunctive relief to remedy violations. As the Court observed, the
Administrator had issued “an interpretive bulletin and several informal rulings” concerning
FLSA enforcement. Notably, the Court found no statute suggesting how much deference
the courts should pay those interpretations. Nevertheless, the Court concluded that policy
statements issued as part of the Administrator’s official duties and based upon his specialized
expertise were persuasive, if not binding, legal authority.

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91 323 U.S. at 135.
93 323 U.S. at 140.
94 Id. at 136-37. In NLRB v. Hearst Publications, 322 U.S. 111 (1944), the Court distinguished the
administrative process of applying law to the facts from the judicial function of interpreting law in the abstract.
95 Id. at 130-31.
96 323 U.S. at 137.
97 Id. at 138.
98 323 U.S. at 139. Skidmore was decided two years before the APA was enacted.
99 See supra notes 64-68 and accompanying text (noting the importance of agency expertise in justifying broad
deleGATIONS OF STATUTORY AUTHORITY during the New Deal).
The rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.\footnote{323 U.S. at 140. The Court also rejected the notion that the agency’s interpretation was any less persuasive in the form of an interpretive ruling rather than an adjudication. \textit{Id.}}

On remand, the district court was directed to consider the persuasive value of the Administrator’s interpretive bulletin, without regard to the lower court’s initial conclusion that as a matter of law, waiting time was not compensable.\footnote{\textit{Id.}}

A year later, the Supreme Court once again addressed the scope of judicial review of an agency interpretation. This time the Office of Price Administration had interpreted its own regulations that in turn interpreted its authorizing statute.\footnote{\textit{Id.}} In \textit{Bowles v. Seminole Rock & Sand Co.},\footnote{\textit{Seminole Rock}, 325 U.S. at 410 (1945). \textit{Seminole Rock} was decided after \textit{Skidmore} but before Congress enacted the APA.} the Court held that judicial deference due an agency’s interpretation of law extended as well to an agency’s interpretation of \textit{its own regulations} if promulgated in the exercise of congressional authority.

Since this involves an interpretation of an administrative regulation[,] a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion

\footnote{\textit{Id.} at 241 (Scalia, J., dissenting) (quoting \textit{Skidmore}, 323 U.S. at 140).}
is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.\textsuperscript{104}

Seminole Rock addressed a 1942 price-control regulation applicable to the sale of crushed stone.\textsuperscript{105} The Court initially resolved an ambiguity in the regulation as applied to the facts,\textsuperscript{106} finding it persuasive that the Office had interpreted the regulation in the same manner in an explanatory bulletin to manufacturers and vendors.\textsuperscript{107} Lending additional support, the interpretation had been published in the Administrator’s first quarterly report to Congress.\textsuperscript{108} Finally, the same interpretation had been uniformly offered in “countless” informal responses to others similarly affected by maximum price determinations.\textsuperscript{109} In light of the Court’s independent interpretation of the ambiguous regulation, the agency’s interpretation was ultimately upheld based upon its consistent application over time.\textsuperscript{110}

While Skidmore and Seminole Rock have been criticized,\textsuperscript{111} each retains its vitality as a Supreme Court precedent influencing judicial deference to agency interpretations.\textsuperscript{112} Both cases anticipated a category of administrative interpretations that the APA would soon define

\textsuperscript{104}See id. at 414-15. The Seminole Rock Court did not address the statutory or constitutional validity of the agency’s interpretation for jurisdictional reasons unique to the times. The only issue was the proper interpretation of the agency’s regulation. Even if its validity had been challenged, the Emergency Court of Appeals had exclusive jurisdiction to decide that issue. Seminole Rock, 325 U.S. at 418-19.

\textsuperscript{105}Id. at 412.

\textsuperscript{106}Id. at 415-17.

\textsuperscript{107}Id. at 417. Note that the Court independently interpreted the regulation by resolving the ambiguity before turning to the agency’s informal interpretation for support. See id. at 415-17.

\textsuperscript{108}Id. at 417.

\textsuperscript{109}Id. at 418.

\textsuperscript{110}Id.

\textsuperscript{111}See, e.g., Christensen, 529 U.S. at 589 (Scalia, J., dissenting) (“Skidmore deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations . . . authoritative effect.”); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 639-40 (1996) (questioning constitutionality of Seminole Rock deference); see also infra note 403 (quoting Justice Scalia’s recent public comments critiquing Skidmore deference).

\textsuperscript{112}See, e.g., Gonzales v. Oregon, 543 U.S. at 922 (applying Skidmore to Attorney General’s interpretive ruling, finding it unpersuasive); see also, e.g., Auer v. Robbins, 519 U.S. 452, 461 (1997) (applying “deferential standard” of Seminole Rock to uphold interpretation of regulation governing FLSA exemption). Seminole Rock has been called “[t]he classic case” espousing “[o]ne of the most venerable doctrines in administrative law.” 3 Charles H. Koch, Jr., ADMINISTRATIVE LAW & PRACTICE § 11.26 (2d ed. 2006).
as “interpretative rules,” as distinguished from more formal “legislative rules.”\textsuperscript{113} In Part III, we will return to a discussion of these two cases and their continuing influence on judicial deference doctrines.

D. Administrative Procedure Act

Following years of controversy and compromise between the executive branch and the American Bar Association over the ever-expanding role of administrative decisionmaking,\textsuperscript{114} Congress in 1946 unanimously enacted the APA\textsuperscript{115}. One scholar has described the resulting legislation as “a sophisticated instrument of considerable


\textsuperscript{114} See supra note 60 and accompanying text; \textit{see also} Aman, supra note 50, at 16 (describing political and philosophical controversies surrounding APA’s enactment); Pierce, supra note 46, at 15; George B. Shepherd, \textit{Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics}, 90 NW. U.L. REV. 1557 (1996). The fight over the APA was a pitched political battle for the life of the New Deal. The more than a decade of political combat that preceded the adoption of the APA was one of the major political struggles in the war between supporters and opponents of the New Deal. . . . The shape of the administrative law statute that emerged would determine the shape of the policies that the New Deal administrative agencies would implement. The APA that finally emerged in 1946 did not represent a unanimous social consensus about the proper balance between individual rights and agency powers. The APA was a hard-fought compromise that left many legislators and interest groups far from completely satisfied. Congressional support for the bill was unanimous only because many legislators recognized that, although the bill was imperfect, it was better than no bill. The APA passed only with much grumbling.

\textit{Id.} at 1560.

\textsuperscript{115} Pierce, supra note 46, at 15; \textit{see also} APA MANUAL, supra note 61, at 6 (noting that APA was enacted without dissenting vote). President Truman signed the APA into law on June 11, 1946. \textit{Id.} at 5. The APA, as amended, is codified at 5 U.S.C. §§ 551-39, 701-06, 1305, 5344, 5362, 7562 (2006). Pierce, supra note 46, at 15.

intricacy.”

A primary goal of the APA was to strengthen and improve the administrative process, in part by maintaining basic limits on the scope of judicial review.

The APA’s underlying theme was to distinguish rulemaking from adjudication. It expressly acknowledged that the purpose of rulemaking is to determine policy, while agency adjudication, like the judicial function, is designed to resolve disputes involving specific parties and particularized facts.

Thus the procedures the APA prescribed for rulemaking and adjudication were “radically different,” rendering the proper classification of agency action “of fundamental importance.”

Section 4, which governs “informal” rulemaking, was specifically drafted to guarantee the public the right to participate. In general, agencies must provide public notice of a proposed substantive rule, allowing interested persons to present their viewpoints before the agency finalizes the rule. This process is better known as “notice-and-comment” rulemaking.

The APA, then and now, explicitly makes exceptions to the general rule favoring notice-and-comment rulemaking (1) “where notice and hearing is [otherwise] required by

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117 Pierce, supra note 46, at 15; see APA MANUAL, supra note 61, at 9 (summarizing APA’s four basic purposes, which include “restat[ing] the law of judicial review”).
118 APA MANUAL, supra note 61, at 15.
119 Id.
120 See id. at 50. “The [APA] is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions.”
121 APA MANUAL, supra note 61, at 12; see id. at 111 (reprinting APA § 2(c), (d) as originally enacted); see also 5 U.S.C. § 551(4)-(7) (2006) (defining “rule,” “rule making,” “order,” and “adjudication” in terms virtually identical to original language).
123 APA MANUAL, supra note 61, at 26; see 5 U.S.C. § 553(b).
124 Kerwin, supra note 49, at 52; Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING 5-6 (3d ed. 1998) (explaining derivation of notice-and-comment label). As distinguished from “informal” notice-and-comment rulemaking, the APA also provides for “formal rulemaking” when a statute (other than the APA) specifically provides for a hearing and rulemaking “on the record.” Lubbers, supra, at 5; see 5 U.S.C. § 553(c).
125 These rarely invoked formalities characterize ratemaking proceedings and other narrow categories of rulemaking unique to specific federal agencies. Lubbers, supra, at 5.

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statute,” and (2) for “interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

The APA also provides explicit and more or less specific guidelines for judicial review of agency interpretations of law. Section 10 unequivocally sets forth the standard of judicial review for agency interpretations, specifically “agency action,” expressly defined in the APA to include agency rules. The relevant APA sections governing judicial review provide as follows:

To the extent necessary to [the] decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

126 APA MANUAL, supra note 61, at 114 (original text of APA § (4)(a)). See supra note 126 (discussion of formal rulemaking).

127 By 1946, the Supreme Court had already articulated its own administrative deference doctrines in Skidmore and Seminole Rock. Given the close proximity of those important decisions to the controversial enactment of the APA, its judicial review provisions must be analyzed in light of the common law deference doctrines that were already well under development by 1946.


129 Id. § 704.

130 Id. §§ 551(13), 701. APA § 10, 5 U.S.C. § 706, took effect on September 11, 1946. APA MANUAL, supra note 61, at 93 (citing APA § 12, which provided effective dates for each provision). In Supreme Court briefs filed after its effective date, the Department of Justice took the position that the APA did not apply to cases then pending. Id. A year later, noting the absence of any express reference in the Court’s opinions to APA § 10, the Attorney General surmised “that the Court has accepted this construction.” Id. at 94 (citations omitted).

Perhaps the better implication is that the Court tacitly disregarded APA § 10.
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(D) without observance of procedure required by law[.]

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.\footnote{\textit{5 U.S.C. § 706 (2006)} (emphasis added).}

Ironically, Supreme Court references to the APA have been noticeably lacking, particularly since \textit{Chevron} was decided.\footnote{\textit{Compare Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 548 (1978) and Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 89 (1983) with Thomas Jefferson Univ., 512 U.S. at 512 and \textit{Chevron}, 467 U.S. 837.}} The best example of this striking phenomenon is \textit{Chevron} itself. Although the \textit{Chevron} Court claimed to have set forth well-settled principles of judicial deference to agency interpretations,\footnote{\textit{Chevron}, 467 U.S. at 844 (“We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations.”) (citations omitted).} the opinion failed to acknowledge the statutory standards of judicial review in the either the APA or the \textit{Clean Air Act}\footnote{42 U.S.C. § 7607(d)(9)(A) (2006).} that explicitly relate to agency rulemaking.

More recent Supreme Court opinions have occasionally cited the APA, but only in passing.\footnote{See, e.g., Negusie v. Holder, 129 S. Ct. 1159, 1172 n.3 (2009) (Stevens, J., dissenting); United States v. Eurodif S.A., 129 S. Ct. 878, 888 n.6 (2009) (Souter, J.); Rapanos v. United States, 547 U.S. 715, 765, 786 (2006) (Kennedy, J., concurring). \textit{But cf. Mead}, 533 U.S. at 226, 227 & n.6, 229 (Souter, J.) (citing APA provisions in support of deference analysis applied to Customs tariff classifications).} Yet the APA unambiguously requires the reviewing court to “decide all relevant questions of law, interpret . . . statutory provisions, and determine the meaning or applicability of the terms of an agency action,” broadly defined in the APA to include agency
It is almost as if the APA’s judicial review provisions were implicitly repealed by *Chevron.*

Indeed, Dean Aman has observed that after the APA took effect, “agency interpretations of law rarely received the judicial scrutiny that the APA itself would allow.” Consistent with early common law doctrines, the APA provided for relatively deferential review of agency fact-finding and policy decisions. On questions of policy, the APA apparently codified the “rational basis” doctrine the courts applied when reviewing the constitutionality of social and economic legislation. But Section 10, which undoubtedly applied to questions of law, was silent on the degree of judicial deference due agency interpretations. While the explicit wording of Section 10 plainly allowed for traditional de novo review, the courts nevertheless continued to develop “elaborate deference doctrines.”

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137 5 U.S.C. § 551(4) (2006) (defining “rule”). As the APA broadly defines the term, “rule” includes both legislative and interpretive rules. See *id.* The uniform APA standard of review undermines the Court’s common law distinction between “legislative rules” and “interpretative rules.”

138 Professor John F. Duffy has acknowledged and aptly described this odd phenomenon of administrative law: “[S]tatutory law and judge-made doctrines continue an uneasy coexistence that cannot be reconciled with the theoretical limits on federal common law.” John F. Duffy, *Administrative Common Law in Judicial Review,* 77 *Tex. L. Rev.* 113, 120 (1998). As an example of the slow transformation of administrative law from “a common-law method to a more rigorous statutory method based on the APA,” he cites *Darby v. Cisneros,* 509 U.S. 137, 145 (1993). In *Darby,* the Supreme Court acknowledged and applied an APA provision dealing with exhaustion of administrative remedies, which to the Court’s surprise “had been almost completely ignored in judicial opinions” for more than 45 years. *Darby,* 509 U.S. at 145 (quoting 4 Kenneth Culp Davis, *Administrative Law Treatise* § 26.12, at 468-69 (2d ed. 1983)).


141 See Aman, *supra* note 50, at 160 n.9. “On questions of policy, the courts equated administrators with legislators. On matters pertaining to the application of law, courts allowed administrators the interpretive discretion normally reserved to judges.” *Id.* at 22-23 (footnotes and citations omitted).

142 *Id.* see also *Skidmore,* 323 U.S. at 139 (noting absence of statute suggesting the level of deference courts should give informal agency interpretations).

143 Aman, *supra* note 50, at 8.
Judicial deference “regimes,” as some scholars refer to them, ¹⁴⁴ are essentially common law doctrines developed without regard to the APA.¹⁴⁵

The “uneasy coexistence”¹⁴⁶ of federal common law deference doctrines and the APA’s plain language raised provocative questions about the balance of powers between Congress, the federal judiciary, and the executive branch. For example, in 1982, Guido Calabresi proposed what he conceded was a “quite radical” approach to the “statutorification of American law and to the growing obsolescence of statutes.”¹⁴⁷ He suggested that courts should have the power to amend outdated statutes, just as they have always modified common law doctrines—by altering or even abandoning the written law.¹⁴⁸ Calabresi argued in favor of “judicial common law review of statutes” that are no longer consistent with “dominant principles.”¹⁴⁹

In support of his “hypothetical doctrine,”¹⁵⁰ Dean Calabresi suggested that Dean James Landis had foreseen the need for such an approach during the New Deal when he posited that once statutes  became  a dominant mode of lawmaking, they  could  no longer “live apart from the common law.”¹⁵¹ Perhaps coincidentally,¹⁵² Calabresi’s radical proposal predated by just two years the Supreme Court’s watershed decision in  Chevron.  By tacitly ignoring the judicial review provisions of the APA and Clean Air Act, the  Chevron Court

¹⁴⁴ Eskridge & Baer, supra note 4, at 1090-91, 1095.
¹⁴⁶ Duffy, supra note 139, at 120; see Calabresi, supra note 68, at 4-5.
¹⁴⁷ Calabresi, supra note 68, at 81, 83.
¹⁴⁸ Id. at 82.
¹⁴⁹ Id. at 90.
¹⁵⁰ Id. at 82.
¹⁵¹ Id. at 85-86 & n.15 (citing James M. Landis, Statutes and the Sources of Law, Harvard Legal Essays 213 (1934)).
¹⁵² Dean Calabresi has addressed the “statutorification” or petrification of American law. Calabresi, supra note 68, at 1-2, 7, 21, 81, 163. In fact, he observed that “delegation of authority to administrative agencies was the paradigmatic New Deal response to the danger of legal petrification,” id. at 21, by which he meant statutory obsolescence. See id. at 21-26. Justice Scalia, appointed to the Court in 1986, has famously developed his own rubric that apparently echoes Dean Calabresi’s, frequently chastising the majority for permitting “ossification” of statutory interpretations. E.g., Mead, 533 U.S. at 247 (Scalia, J., dissenting).
implicitly endorsed Calabresi’s novel and activist approach to judicial review. In that respect, APA § 10 has become a dead letter by atrophy and judicial nullification.\footnote{But see Sorrells v. United States, 287 U.S. 435, 450 (1932) (Hughes, C.J.) (“Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system.”); cf. Graham, supra note 31, at 239.} Thus, the federal courts have declined to abide by the standard of review codified in the APA for questions of law. Instead they continue, in effect, to exercise common law deference to administrative interpretations of law.\footnote{Id. Aman, supra note 50, at 17. “The legal discourse used to justify such extensions of agency power relied upon broad notions of congressional intent and was usually cast in a legal rhetoric particularly familiar to the common-law minded judges who wrote these opinions.” Id. (footnotes and citations omitted); see also id. at 24.} As discussed in Part IV, the lenient deference regimes that evolved after the New Deal and before enactment of the APA continue to strongly influence the Supreme Court when it reviews agency interpretations of law.\footnote{Cf. id. at 22, 24.} Whether the Court’s common law deference doctrines can be reconciled with the plain language of the APA remains to be seen.

E. Presidential and Congressional Initiatives

During the decade following its enactment, judicial interpretations of the APA were generally deferential to its purposes.\footnote{See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 36-45 (1950) (describing legislative history and purpose of the APA with approval); Pierce, supra note 46, at 16.} Yet political controversy continued unabated regarding the scope of quasi-judicial functions undertaken by the executive branch.

In 1955, the President’s Commission on Organization of Executive Branch of the Government, better known as the Hoover Commission, issued a controversial report recommending establishment of an Administrative Court within the judicial branch.\footnote{Pierce, supra note 46, at 16-17.} As proposed, the Court would have initially subsumed the quasi-judicial functions of several

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\textit{Deleted:} Aman, Jr., supra note 36

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major administrative agencies. The Commission predicted that more specialized adjudicatory functions would be transferred to the Court over time as it proved its effectiveness.

The Hoover Commission expressed concern that Congress had frequently authorized only limited judicial review of agency action, or had precluded it altogether. The Commission ominously cautioned that “[t]he courts, as the guardians of the rule of law, must be in a position to review all administrative action, or the rule of law is destroyed.” The Commission’s final report proposed nineteen distinct amendments to the APA to implement its recommendations. In response, the ABA proposed a new Code of Administrative Procedure, which would have enacted many of the Commission’s controversial recommendations.

In a 1961 executive order, President Kennedy established the Administrative Conference of the United States as a successor to the Hoover Commission. Its mission was to encourage cooperative efforts to improve federal administrative procedure. The Conference included representatives of the executive branch, administrative agencies, the practicing bar, scholars, and others with special knowledge and experience in administrative law. The Conference was directed to periodically report its conclusions and

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158 Id.
159 Id. at 81.
160 Id. at 77.
161 Id. Its report concluded that claimants must “have a day in court to test the exercise of administrative action in the light of the authority conferred by Congress.” Id.
164 Id.
recommendations to the President.\footnote{165} Three years later, Congress enacted the Administrative Conference Act\footnote{166} to ensure its continuity.\footnote{167}

Perhaps in part because of the ongoing success of the Administrative Conference in generating cooperation among competing interests, the political and institutional controversies associated with the Hoover Commission gradually subsided.\footnote{168} By nearly all accounts, the Conference worked well to achieve consensus and made a number of significant contributions to administrative law.\footnote{168} By 1970, the ABA had abandoned its proposal for a new code in favor of recommending less sweeping revisions to the APA, which the Conference endorsed in part in 1973.\footnote{169} Undoubtedly the Administrative Conference played a significant role in quelling political concerns about administrative agencies’ increasingly influential role in lawmaking and adjudication.\footnote{170}
F. The “Hard Look” Doctrine

During the 1970’s, administrative rulemaking, rather than adjudication, became the most pervasive form of agency regulation.\(^{171}\) Congress enacted numerous initiatives that conferred broad rulemaking powers to agencies such as the Occupational Safety and Health Administration, the Federal Trade Commission, and the Environmental Protection Agency, among others.\(^{172}\) In particular, technically complex, far-reaching environmental concerns took center stage, supplanting the pressing social and economic issues that had characterized the New Deal.\(^{173}\) Increasingly, agencies adopted rulemaking as their primary mode of decision making.\(^{174}\) In some instances, Congress established agency-specific rulemaking procedures and judicial review standards that superseded the APA.\(^{175}\)

In response to the burgeoning and more substantively complex rulemaking authority Congress repeatedly delegated to agencies, the Supreme Court began to devise a more “searching and skeptical” approach to judicial review.\(^{176}\) As one scholar put it, “The deference the courts had shown Congress and its agents during the New Deal era was revoked.”\(^{177}\) In *Citizens to Preserve Overton Park v. Volpe*,\(^{178}\) decided in 1971, the Court applied a level of judicial scrutiny to agency reasoning that was “searching and careful.”\(^{179}\)


\(^{172}\) Bryner, supra note 65, at 23; see Aman, supra note 50, at 26 (noting considerable growth in administrative bureaucracy between 1966 and 1981); Magill, supra note 172, at 1398.

\(^{173}\) Aman, supra note 50, at 24-26.

\(^{174}\) Id.; Magill, supra note 172, at 1398.

\(^{175}\) See Aman, supra note 50, at 40 (noting that some “hybrid” rulemaking statutes called for application of a substantial evidence test on judicial review); Lubbers, supra note 126, at 3; see also 5 U.S.C. §§ 559, 701(a) (allowing for specific statutory exceptions to APA judicial review).

\(^{176}\) Kerwin, supra note 49, at 248.

\(^{177}\) Aman, supra note 50, at 28. Ironically, however, the earliest case cited as an example of the “hard look” doctrine was SEC v. Chenery Corp., 318 U.S. 80 (1943) (requiring agency to adequately explain its reasoning for reaching its discretionary decision). See supra notes 86-89 and accompanying text.


\(^{179}\) Id. at 416. In that case, “the Court turned an otherwise discretionary environmental statute into an absolutist one.” Aman, supra note 50, at 28; see id. at 168 n.139.
The issue in *Overton Park* was whether the Secretary of Transportation had appropriately taken into account the likely effects on the environment in approving a highway project through a city park site.\(^{180}\) The authorizing statute required the Secretary to undertake “*all possible planning to minimize harm*”\(^{181}\) when routing highways over *public parkland*. Characterizing the issue as one of law rather than policy,\(^{182}\) the Court held that the appropriate standard of review was more stringent than the APA’s generally deferential “*arbitrary and capricious*” review.\(^{183}\) Specifically, the Court questioned whether the agency had taken relevant factors into account and whether the agency had committed a “*clear error*” in judgment.\(^{184}\)

The Court’s new approach to judicial review that scrutinized the reasoning process underlying the agency’s interpretation would become known as the “*hard look*” doctrine.\(^{185}\) Throughout the 1970’s and early 1980’s, the Court generally followed a pattern of heightened judicial review of agency rulemaking. The decision that became the hallmark—and the end point—of the “*hard look*” era was *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*\(^{186}\) The *State Farm* Court held that an agency rule was invalid.

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\(^{180}\) See 401 U.S. at 405 n.3 (quoting 23 U.S.C. § 138 (1964 Supp. V)).

\(^{181}\) Id. at 441 (citing 23 U.S.C. § 138).

\(^{182}\) See id. at 441-15 (holding that while a presumption of regularity attached, that did not shield the agency’s actions from “a thorough, probing in-depth review”).

\(^{183}\) Id. at 416; see Aman, *supra* note 50, at 39.

\(^{184}\) 401 U.S. at 416.

\(^{185}\) Kerwin, *supra* note 49, at 248. Judge Leventhal of the D.C. Circuit is credited with authoring an early example of the “*hard look*” doctrine in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); see Aman, *supra* note 36, at 35. The case involved a television station’s application to renew its operating license. During the proceedings, the FCC departed from its usual practice in reviewing renewal applications. On appeal, Judge Leventhal held that the court was required to take a “*hard look*” to ensure the FCC had engaged in “*reasoned decision-making*.” “[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . .” *Id.* at 852-53.

\(^{186}\) 463 U.S. 29 (1983).
if the agency . . . relied on factors Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it or is so implausible that it could not be ascribed to a difference in view or a product of agency expertise.\textsuperscript{187}

The “hard look” doctrine insisted that agencies make their reasoning process explicit.\textsuperscript{188} As one author observed, hard-look deference (or perhaps more accurately non-deference), “tended to demand right answers, not just examples of agency reasoning . . . .”\textsuperscript{189} In effect, “hard-look” courts adopted a heightened standard of administrative review. Courts exercised greater oversight, and consequently deferred to agencies less often, than did courts applying more deferential New Deal standards of review.\textsuperscript{190}

In addition to enhancing substantive review of agency reasoning, the “hard look” doctrine entailed greater procedural scrutiny.\textsuperscript{191} For the better part of a decade, the Court was relatively tolerant of additional procedural constraints the courts imposed on rulemaking. But the Supreme Court called a halt in \textit{Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.}\textsuperscript{192} \textit{Vermont Yankee} held a reviewing court could not reverse an agency rulemaking for procedural reasons as long it complied with minimum procedural requirements of the APA.\textsuperscript{193} As discussed in Parts III and IV, some of the key features of “hard look” review have nevertheless continued to influence deference jurisprudence.\textsuperscript{194}

\begin{itemize}
\item \textsuperscript{187} Id. at 43.
\item \textsuperscript{188} Compare \textit{id. at 43-44} with \textit{Chenery}, 318 U.S. at 94. “We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.” \textit{id.}
\item \textsuperscript{189} Aman, supra note 50, at 40 (emphasis in original).
\item \textsuperscript{190} See \textit{id.} at 24-26, 40.
\item \textsuperscript{191} \textit{id.} at 33-35.
\item \textsuperscript{192} 355 U.S. 519 (1978).
\item \textsuperscript{193} Id. at 548-49.
\item \textsuperscript{194} E.g., \textit{Mead}, 533 U.S. at 230-31 (emphasizing process considerations); see Gillian E. Metzger, \textit{The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste}, in \textit{ADMINISTRATIVE LAW STORIES} 124, at 162-63 (Peter L. Strauss ed. 2006) (explaining \textit{Vermont Yankee’s} minimal effect on courts’ expansive readings of the APA’s procedural requirements). \textit{But see} \textit{FCC v. Fox Television Stations, Inc.}, 129 S. Ct. 1800,
By the early 1980’s, following election of President Reagan, the constitutionality of 
broad delegations of legislative power came under renewed scrutiny.\(^{195}\) Immediately upon 
taking office, Reagan announced that one his primary objectives was to get the federal 
government “off of the backs of the people.”\(^{196}\) One month later, an executive order\(^{197}\) 
directed the Office of Management and Budget (OMB) to review each “major” rule proposed 
by an agency.\(^{198}\) Agencies were directed to submit a Regulatory Impact Analysis for each 
proposed major rule, including specific information regarding its potential costs and 
benefits.\(^{199}\)

President Reagan’s initiatives to discourage significant legislative rulemaking had 
their desired effect, sharply curtailing the number of new regulatory proposals.\(^{200}\) Not long 
after, the Court, perhaps unwittingly,\(^{201}\) endorsed congressional delegation of policymaking 
to agencies\(^{202}\) when it decided *Chevron*\(^{203}\). With that opinion, the Court returned to its more 
deferential approach to agency interpretations of law.\(^{204}\)
II. The *Chevron* “Two-Step” Doctrine

Before *Chevron*, federal courts varied widely with respect to the deference they afforded administrative interpretations. As discussed in Part I, the Supreme Court had developed two distinct lines of reasoning. One, originating in the New Deal, held that courts should generally defer to an agency’s interpretation of a statute Congress had charged it with administering, at least if the interpretation had a reasonable basis in the law. The other, representing the “hard look” doctrine, took almost the opposite approach, scrutinizing the agency’s reasoning and procedure, and in some cases substituting the reviewing court’s own interpretation.

In the early 1980’s, the Supreme Court’s decisions reviewing administrative interpretations typically followed one of these two deference frameworks and commonly ignored the other with little or no explanation. Whether and to what extent the Court would defer to an agency’s interpretation of law was unpredictable, leaving the lower courts with little guidance. Like the Supreme Court, the federal circuit courts deferred to agency interpretations.

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205 The “*Chevron* two-step” moniker originated with Dean Kenneth Starr, then a judge on the District of Columbia Court of Appeals. *See* Kenneth W. Starr *et al.*, supra note 35, at 360-66.

206 Richard Pierce, *et al.*, *ADMINISTRATIVE LAW & PROCESS* 382 (4th ed. 2004); *see* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976) (acknowledging “two lines of Supreme Court decisions . . . which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand”), aff’d sub nom., Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

207 *See, e.g.*, NLRB v. *Hearst Publ’ns*, 322 U.S. 111 (1944). In *Hearst*, the Court deferred to the NLRB’s conclusion that newsboys were “employees” and thus entitled to collective bargaining rights. The Court distinguished between pure questions of law and issues requiring application of law to facts:Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. But where the question is one of specific application of a broad statutory term . . . the reviewing court’s function is limited. . . . [T]he 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. *Id.* at 130-31 (citations omitted).


interpretations in some cases and substituted their own judgment in others. As one administrative law scholar has observed, “The lower courts had tried to decide the deference question on a case-by-case basis, producing a recipe for confusion.” Reviewing court decisions were frequently inconsistent regarding the institutional allocation of responsibility for interpreting agency-administered statutes.

Refreshingly, *Chevron* appeared to articulate a straightforward, two-step test for judicial review whenever an agency had interpreted an unclear statute Congress had authorized it to administer. Justice Stevens succinctly stated *Chevron*’s central holding:

> 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.

While apparently espousing a simple two-step approach, *Chevron* would prove considerably more complex in application.

### A. Step One: Has Congress unambiguously addressed the precise issue?

To begin, deference to an administrative interpretation expressly assumes two important prerequisites. First, the reviewing court must determine whether the statutory language plainly addresses the precise question; if it does, the reviewing court must carry out

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210 *Pierce*, *supra* note 46, at 138.

211 *Sunstein*, *supra* note 7, at 202.

212 *Pierce*, *supra* note 46, at 138.

213 Note that *Chevron* did not disturb precedents conferring broad discretion to an agency when interpreting its own ambiguous regulations. See, e.g., *Seminole Rock*, 325 U.S. at 413-14, see also, e.g., *Auer*, 519 U.S. at 461 (citing *Seminole Rock* with approval).

214 *Chevron*, 467 U.S. at 846.

215 *Id.* at 842-43 (footnotes omitted).
the unambiguously expressed legislative intent. Stated more concisely, the statute must be “silent or ambiguous with respect to the specific issue” before an agency’s interpretation warrants *Chevron* deference.

A statute is “silent,” for example, if it fails to define a term, leaving its interpretation to the agency charged with implementing the statutory scheme. To illustrate, Congress failed to define the statutory term “legitimate medical purpose” in the Controlled Substances Act, and the Attorney General’s interpretation of that term was central to the dispute in *Gonzales v. Oregon*. When a statute leaves a term undefined, its interpretation is generally considered a question of law, the resolution of which the APA delegates to the reviewing

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216 *Id.* at 843. While few would disagree with this basic premise of statutory interpretation, the Court’s decisions illustrate that even this threshold issue—whether a statute’s language plainly resolves a legal issue—is highly debatable. See, e.g., *Cuomo v. Clearing House Ass’n, LLC*, 129 S. Ct. 2710 (2009); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438 (2002).

217 *Id.* This point was clarified by Justice Stevens in INS v. St. Cyr, 583 U.S. 289, 292, 320 n.45 (2001). “We only defer . . . to agency interpretations of statutes that, applying the normal ‘tools of statutory construction,’ are ambiguous.” *Id.* (citing *Chevron*, 467 U.S. at 843; INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987)). What the Supreme Court considers normal tools of statutory construction, however, is not at all clear, adding yet another dimension to *Chevron*’s complexity.


222 See, e.g., *Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001) (reviewing de novo an issue of statutory construction, according no deference to district court’s interpretation). *But see* Gill v. INS, 420 F.3d 82, 89 (2d Cir. 2005) (affording *Chevron* deference to agency’s interpretation of undefined statutory term given its expertise in immigration law); cf. Kentuckians for Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 443-444 (4th Cir. 2003) (reviewing de novo an issue of statutory construction, but applying *Chevron* to determine whether agency action was based on permissible construction).
Yet *Chevron* yields to the agency’s interpretation of an undefined statutory term if its other requirements are met.

More commonly, *Chevron* applies to ambiguous statutes. While the Court begins with a textual analysis of the statute to determine its ambiguity, it is not enough if the plain language suggests more than one plausible interpretation. At the end of a lengthy footnote, Justice Stevens noted that determining ambiguity—commonly known as *Chevron* “Step One”—requires the reviewing court to first apply traditional “tools” or canons of statutory interpretation. In other words, the Court must initially engage in traditional statutory interpretation, a classic question of law, to decide whether the agency’s interpretation warrants any deference. If “traditional tools of statutory construction” resolve the ambiguity, then the Court’s interpretation controls, even if the agency considers the statute ambiguous and interprets it differently.

To those familiar with Justice Scalia’s role as cheerleader for *Chevron* and his disdain for legislative history, the irony of this analytical step should be obvious. To resolve a statutory ambiguity, one classic canon of statutory interpretation requires a court to consult

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224 See, e.g., Bower v. Fed. Express Corp., 96 F.3d 200, 208 (6th Cir. 1996) (“[C]ongressional delegation to an agency of the power to issue regulations interpreting a statute extends only to the proper extent of ambiguities in the statute.”) (emphasis in original).
227 *Chevron*, 467 U.S. at 843 n.9.
228 Id.
229 “[T]here is no need to resolve deference issues when there is no need for deference.” Edelman v. Lynchburg Coll., 535 U.S. 106, 114 n.8 (2002), *But cf.* Auer, 519 U.S. at 462-63 (Scalia, J.) (rejecting argument that longstanding canon of construction should have resolved ambiguity in agency regulations, as canons apply only to judicial constructions of ambiguous statutes).
230 Justice Scalia consistently continues to sing the *Chevron* refrain at every possible opportunity, even as he eschews legislative history as a means of resolving statutory ambiguity. *See, e.g.*, Zuni Pub. Sch. Dist., 550 U.S. at 108 (Scalia, J., dissenting).
legislative history to determine the intended meaning. While generally a strong proponent of *Chevron*, Justice Scalia rejects legislative history as a legitimate source to resolve ambiguous statutory language. Therefore, even if *Chevron* applies, it is not clear which canons the Court as a whole considers “traditional tools of statutory construction,” or for that matter, how they apply.

B. Step 1.5: Has Congress delegated rulemaking authority to the agency, and did it issue its interpretation in the exercise of that authority?

Once the Court concludes that Congress has not unambiguously addressed the issue, it must determine next whether Congress has delegated authority to the agency to administer a program, either explicitly or implicitly. While *Chevron* did not expressly state this prerequisite, its rule of judicial deference was necessarily rooted in *Morton v. Ruiz*, which it quoted with approval: “The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”

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231 E.g., 2A SUTHERLAND STATUTORY CONSTRUCTION § 48:4 (7th ed. 2008); see, e.g., *Zuni Pub. Sch. Dist.* 550 U.S. at 106 ("Analysis of legislative history is, of course, a traditional tool of statutory construction."); *But cf.* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 568 (2005) (Kennedy, J.) (noting legislative history is vulnerable to serious criticism).

232 See, e.g., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., dissenting) (referring to legislative history as “an omnipresent makeweight for decisions arrived at on other grounds”).

233 See, e.g., *Zuni Pub. Sch. Dist.*, 550 U.S. at 99-100 (5-4 opinion) (dividing on whether relevant statutory language was sufficiently ambiguous to warrant *Chevron* deference). In dissent, Justice Scalia referred to the majority’s statutory interpretation in typically colorful language as “sheer applesauce.” *Id.* at 113 (Scalia, J., dissenting).


235 E.g., *Chevron*, 467 U.S. at 843-44 (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)); see also *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“If there is no statute conferring authority, a federal agency has none.”).


237 *Id.* at 231, quoted in *Chevron*, 467 U.S. at 843-44.
Chevron was an easy case; the Clean Air Act explicitly directed the EPA to adopt legislative rules governing ambient air quality.\(^\text{238}\) With respect to implicit delegations of authority, however, scholars have argued for years whether Chevron applies.\(^\text{239}\) Also in doubt is whether Chevron applies when Congress has delegated only limited authority to the agency—for example, to regulate procedural but not substantive matters.\(^\text{240}\) Nevertheless, Justice Stevens made a point of discussing the application of Chevron deference to statutory delegations, whether explicit or implicit, and most courts have interpreted Chevron to reach both.\(^\text{241}\)

Caselaw, however, suggests that the Court may be less willing to defer if Congress has delegated only general authority to the agency to administer a statute, as opposed to a specific grant of authority to issue regulations to implement a statutory initiative. Under the rationale of Morton v. Ruiz,\(^\text{242}\) the Court may be more likely to view a specific delegation of authority as an indication of congressional intent that the Court should defer to the agency’s interpretation, assuming it is within the scope of that authority.\(^\text{243}\)

C. Step Two: Is the agency’s interpretation permissible and reasonable?

Even if the court concludes that the statute is silent or ambiguous (Step One) and that Congress has delegated the agency authority to administer the statute, whether explicit or implicit, \(\ldots\)

\(^{238}\) See Chevron, 467 U.S. at 846.


\(^{240}\) E.g., Edelman, 535 U.S. at 113-14 (noting that Title VII limits EEOC authority to procedural regulations, but declining to decide scope of deference due because the Court clearly agreed with EEOC’s interpretation).

\(^{241}\) E.g., Texas v. United States, 497 F.3d 491, 502-03 (5th Cir. 2007), cert. denied, 129 S. Ct. 32 (2008). To the extent Chevron entailed an explicit delegation to EPA, however, its discussion of implicit delegation was mere dicta.

\(^{242}\) 415 U.S. 199.


\(^{246}\) Texas, 497 U.S. at 502-03 & n.9.
implicit (Step 1.5), judicial deference is not guaranteed.\footnote{Chevron, 467 U.S. at 843.} \textit{Chevron} “Step Two” requires the agency’s interpretation of \textit{explicitly} delegated authority to be based on a “\textit{permissible} construction of the statute.”\footnote{Id. at 843 n.11 (multiple citations omitted).} Justice Stevens cautioned that in making this determination, the court need not conclude that the agency’s interpretation was the only permissible one, or that the court would have read it the same way had the question been addressed in litigation.\footnote{Id. at 843 n.11 (multiple citations omitted).} Rather, the agency’s interpretation need only fall \textit{within the range of alternatives} the reviewing court deems “\textit{permissible}” as a matter of law.\footnote{Id.; see Peter L. Strauss, \textit{Within Marbury: The Importance of Judicial Limits on the Executive’s Power to Say What the Law Is}, 116 YALE L.J. POCKET PART 59, 60 (2009). The Court’s recent decisions blur the apparent distinction between “\textit{permissible}” and “\textit{reasonable}” interpretations. See, e.g., United States v. Eurodif S.A., 129 S. Ct. 878, 882, 890 (2009) (holding agency interpretation both “\textit{permissible}” and “\textit{eminently reasonable}”).}

\textit{Chevron} went on to elucidate the bounds of a “\textit{permissible}” construction:

If Congress has explicitly left a gap for the agency to fill, there is an \textit{express} delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such \textit{legislative regulations} are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.\footnote{Id. at 843-44 (emphasis added) (footnote citations omitted). Note the similarity of this language to APA § 10(2)(A); 5 U.S.C. § 706(2)(A). \textit{See supra} text accompanying note 133 (quoting § 706).}

\textit{In summary, Chevron} first requires the reviewing court to apply traditional tools of statutory construction to determine whether the statute unambiguously addresses the specific issue.\footnote{See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (“Even for an agency able to claim all the authority possible under \textit{Chevron}, deference . . . is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.”) (citing \textit{Cardoza-Fonseca}, 480 U.S. at 421, 107 S. Ct. at 1568). \textit{See, e.g., Edelman}, 555 U.S. at 113 (reasoning that challenged regulation was within EEOC’s explicit statutory authority to adopt procedural regulations).} If it does, no deference is due, and the court’s independent interpretation controls.\footnote{Edelman, 535 U.S. at 113 (reasoning that challenged regulation was within EEOC’s explicit statutory authority to adopt procedural regulations).}

\textit{But if the court concludes that the statute is silent or ambiguous, it must next decide whether} Congress \textit{expressly} delegated interpretive authority to the agency seeking deference.\footnote{See, e.g., Edelman, 555 U.S. at 113.} If so, a “\textit{legislative regulation}” will be sustained unless “arbitrary, capricious, or manifestly
contrary to the statute.” In other words, deference is relatively broad when Congress has explicitly delegated authority to the agency and its interpretation is issued within the scope of that delegated authority.

On the other hand, if Congress has only implicitly delegated the agency authority to address a particular question, the reviewing court will uphold the agency’s interpretation only if “reasonable.” In Justice Stevens’ words,

Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Justice Stevens’ wording suggests that if the delegation is implicit, an agency interpretation warrants less deference—not only must it be within legally permissible bounds, but it must also be “reasonable.” Just how much less deference is due an agency interpretation issued in the exercise of implicitly delegated authority, and what factors the Court considers to decide whether the agency’s interpretation is reasonable, remain open questions.

IV. The Rehnquist Court’s Legacy: Reframing Chevron

After William Rehnquist was appointed Chief Justice in 1986, Chevron took center stage as the deference regime of choice. The Rehnquist Court reached the apex of judicial deference.

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254 Chevron, 467 U.S. at 844.

In Chevron . . . , the Court established that judicial review of an agency action taken with an express grant of authority from Congress is held to an “arbitrary and capricious” standard. By contrast, action taken without that express delegation is held to a “deference if reasonable” standard. Id. at 7-8 (citing Chevron, 467 U.S. at 843-44). But see, e.g., Barnhart v. Walton, 535 U.S. 212, 217, 224 (2002) (concluding that “the [Social Security Administration’s] regulation seems a reasonable, hence permissible, interpretation,” after acknowledging agency’s explicit statutory authority); Edelman, 535 U.S. at 112-13 (concluding agency’s interpretation “reasonable” after acknowledging its explicit statutory authority to promulgate regulations).

256 Chevron, 467 U.S. at 843-44 (emphasis added) (footnote citations omitted).
deference to administrative interpretations of law in 1997 when it decided Auer v. Robbins, when it decided Auer v. Robbins discussed next. But just three years later, the Court began laying the groundwork for reasserting the judicial role in interpreting statutes by reviving the pre-Chevron multi-factor approach to determining the scope of deference.

Retrenching from the more deferential Chevron framework, the Rehnquist Court generally limited its heightened deference to adjudications and to regulations adopted in notice-and-comment proceedings. At the same time, the Court reinvigorated Skidmore deference for agency interpretations adopted by less formal means. By the end of the October 2004 term, the Court generally applied Chevron if the agency followed APA procedures in issuing regulations, and otherwise defaulted to Skidmore analysis. What remained was for the Court to reconcile the revived Skidmore doctrine with its super-deferential Auer standard.

Auer Super-Deference to Agency Interpretations of Regulations

The wave of post-Chevron deference arguably crested in 1997 with Auer v. Robbins, a unanimous decision authored by Justice Scalia. Some scholars have suggested that Auer and its World War II-era predecessor, Seminole Rock, simply mirrored Chevron deference. Others, with whom this author agrees, have concluded that Auer affords even greater deference to agency interpretations of their own ambiguous regulations.

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257 519 U.S. 452 (1997).
259 See Mead, 533 U.S. at 230.
260 See Skidmore, 323 U.S. at 140; see supra note 104 and accompanying text.
262 Id. at 454.
263 325 U.S. 410. See supra notes 104-11 and accompanying text.
264 See Manning, supra note 112, at 627; Richard J. Pierce, Jr., Democratizing the Administrative State, 48 WM. & MARY L. REV. 559; 569 (2006).
than *Chevron* yields interpretations of ambiguous *statutes*.\(^{265}\) Indeed, a careful reading of *Auer* reveals an important basis for distinguishing *Auer* from its predecessors as a form of “super-deference.”\(^{266}\) In short, *Auer* is an outlier and cannot be reconciled with the Court’s more recent deference jurisprudence.\(^{267}\)

The dispute in *Auer* involved a claim by St. Louis police officers that the City had erroneously designated them exempt from the wage and hour provisions of the Fair Labor Standards Act (FLSA).\(^{268}\) The Secretary of Labor, carrying out specific rulemaking authority conferred by the FLSA,\(^{269}\) had issued regulations defining the scope of the exemption,\(^{270}\) which in part turned on the outcome of the “salary basis test,”\(^{271}\) defined in the agency’s regulations.\(^{272}\) As one condition for exempt status, an employee’s salary could not be subject to reduction for variations in work performance.\(^{273}\) The officers argued that the mere possibility that their salaries might be reduced was sufficient to defeat exempt status. The City argued that to be nonexempt, the officers had to be realistically vulnerable to an actual pay reduction; a theoretical possibility was not enough.\(^{274}\)

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\(^{265}\) See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 551 (2003); Eskridge & Baer, supra note 4, at 1103; id. at 1184 (“To the extent that *Seminole Rock* deference exceeds *Chevron* deference, it is open to abuse by agencies that try to bootstrap unauthorized policy innovations under cover of interpreting vague housekeeping rules.”); Strauss, supra note 273, at 59 n.23 (noting that the fox-guarding-the-henhouse problem is compounded by the view that an agency interpreting its own regulations is entitled to even stronger deference than *Chevron*). See generally Manning, supra note 112, at 681 (urging the Court to revisit *Seminole Rock*).


\(^{267}\) Nevertheless, a slim majority of the Court has very recently (but unconvincingly) attempted the impossible. See *Covers Alaska*, 129 S. Ct. at 2472-74 (Kennedy, J.) (attempting to reconcile *Auer* super-deference with analysis of Skidmore-like persuasive factors).

\(^{268}\) 519 U.S. at 455.


\(^{270}\) 519 U.S. at 456; see 29 C.F.R. §§ 541.1-.3 (1996).

\(^{271}\) 519 U.S. at 456-457.

\(^{272}\) See 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1996).

\(^{273}\) 519 U.S. at 456; see 29 C.F.R. § 541.118(a) (1996) (defining “salary basis” test), *quoted in Auer*, 519 U.S. at 455.

\(^{274}\) Id. at 454, 459. *One plaintiff’s pay had been reduced for violating the City’s residency rule.* Id. at 460.
The Court first concluded that the FLSA did not directly address the issue. At the Court’s request, the Secretary of Labor submitted an amicus brief that interpreted the ambiguous regulation to mean that plaintiffs were exempt unless the City actually imposed pay deductions—not just in theory but “as a practical matter.” Justice Scalia concluded,  

Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless “plainly erroneous or inconsistent with the regulation.” That deferential standard is easily met here. The critical phrase “subject to [reductions]” comfortably bears the meaning the Secretary assigns. Admittedly, this language did not vary appreciably from the Court’s previous opinions deferring to an agency’s interpretation of its own regulations. What set Auer apart was that it granted super-deference to an informal agency interpretation expressed in an amicus brief that the Court had specifically requested. In an earlier decision, the Court had disregarded an agency interpretation embodied in a litigation brief as a “post-hoc” effort to defend the agency’s action. Distinguishing that case, Auer held that the Secretary’s amicus brief was nevertheless entitled to deference, even if not the product of formal rulemaking proceedings, because “there was no reason to suspect that the interpretation [did] not reflect the agency’s fair and considered judgment . . . .” But Justice Scalia did not stop there. In response to the officers’ well-supported argument that FLSA exemptions should be narrowly interpreted against the employer,  

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275 519 U.S. at 457.  
276 Id. at 461 (quoting amicus brief filed by Secretary of Labor).  
277 Id. (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Seminole Rock, 325 U.S. at 414)).  
278 Id. (dictionary citations omitted).  
279 See, e.g., Seminole Rock, 325 U.S. at 314.  
281 Id. at 212. The Court has generally given little if any deference to agency interpretations stated as “litigation positions.” See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 485 n.3 (1991) (citing cases).  
282 Auer, 519 U.S. at 462.  
283 Id.; see, e.g., Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)).
Justice Scalia declined to impose that longstanding canon of statutory interpretation on the agency:

But that is a rule governing judicial interpretation of statutes and regulations, not a limitation on the Secretary’s power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute. 285

Auer sweeps all too broadly, conflating the Chevron analysis as applied to an agency’s interpretation of its own rules. 286 Without citing support, Auer ignored the reviewing court’s responsibility to resolve any apparent ambiguity in an agency’s legislative rule before deferring to the agency’s informal interpretation. 287

If the Court’s rationale for deferring to an agency’s interpretation is that Congress has delegated the agency authority to adopt legislative rules, the reviewing court has no less responsibility to resolve regulatory ambiguities than it does statutory ones. In fact, common sense suggests that the Court should apply even more stringent review of an agency’s interpretation of its own ambiguous regulation; an agency’s post-hoc interpretation is even more attenuated from the congressional intent than either a legislative rule or the authorizing statute itself. Whether statutory or regulatory, a legislative rule has the force of law, 288 and each warrants judicial interpretation to determine whether or not it is ambiguous. If either

285 Auer, 519 U.S. at 462-63 (emphasis added).

286 See Anthony, supra note 114, at 5 (“The Court has laid down an indulgent if not downright abject standard of deference toward agencies’ interpretations of their own regulations.”).

287 See Chevron, 467 U.S. at 843 n.9; see also Anthony, supra note 114, at 9 (arguing that it is “wrong for the courts to abdicate their office of determining the meaning of the agency regulation and submissively giving controlling effect to a not-inconsistent agency position”). Id.


288 E.g., APA MANUAL, supra note 61, at 30 n.3.
can be judicially interpreted to resolve any ambiguity, the reviewing court’s interpretation should control.

In subsequent decisions, the Court has repeatedly referred to “Auer deference” rather than Seminole Rock deference, from which it claims to have derived.\(^{289}\) Certainly Auer’s super-deference, which apparently absolves the agency of any duty to resolve an ambiguity in its own regulation before adding another layer of interpretive gloss, cannot be reconciled with Chevron’s “two-step” approach. In effect, Auer deference abdicates judicial responsibility for resolving ambiguities, if that can be done. Nor can Auer be reconciled with APA § 10(2)(A), which requires the reviewing court to decide all questions of law and interpret the terms of “agency action,”\(^{290}\) including, by definition, agency rules.\(^{291}\)

Notwithstanding its anomalous reasoning, the Court continues to apply Auer deference when an agency interprets its own regulations.\(^{292}\) Nevertheless, a number of scholars have urged reversal of Seminole Rock and presumably Auer as its progeny.\(^{293}\) It remains to be seen whether, when, and how the Roberts Court will reconcile Auer with the increasing constraints a majority of the Court has imposed on the scope of agency discretion to interpret statutes and legislative rules.

### B. Christensen v. Harris County

\(^{289}\) See Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147, 1156 (2008); Gonzales v. Oregon, 546 U.S. at 257-58; Christensen, 529 U.S. at 588.

\(^{290}\) 5 U.S.C. § 706; see supra note 114, at 9 (opining that the Court’s standard of deference to an agency’s interpretation of its own regulations is “incompatible with the APA.”)


\(^{292}\) See, e.g., Couer Alaska, 129 S. Ct. at 2468; Holowecki, 128 S. Ct. at 1155; Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007). But cf., e.g., Gonzales v. Oregon, 546 U.S. at 257 (declining to apply Auer because underlying regulation merely parroted relevant statutory language).

\(^{293}\) See, e.g., Eskridge & Baer, supra note 4, at 1184 (urging the Court to abrogate Seminole Rock deference as “contributing to doctrinal confusion”); Strauss, supra note 273, at 65 n.23 (noting complications associated with conferring more deference to agency interpretations of their own ambiguous regulations). See generally Manning, supra note 112 (criticizing Seminole Rock).
Another question left unanswered by *Chevron* was the appropriate scope of judicial review applicable to agency interpretations issued by less formal procedures than notice-and-comment rulemaking. As noted above, *Auer* deferred to the Secretary of Labor’s regulatory interpretation embodied in an *amicus* brief specifically solicited by the Court. The Court’s opinion all but disregarded the fact that the interpretation took the form of an appellate brief rather than a legislative rule. Yet a coalescing majority of the Court would not wait long for an opportunity to distinguish the scope of deference due agency interpretations depending on the specific nature of the authority delegated and the relative formality of the rulemaking process.

In *Christensen v. Harris County*, the Court effectively curtailed the reach of both *Chevron* and *Auer*. As had *Auer*, *Christensen* interpreted the FLSA as applied to law enforcement officers—this time, 127 deputy sheriffs. The issue was whether the County could require nonexempt deputies to take compensatory time off to avoid paying them for working overtime. The FLSA expressly permitted state and county employers to grant compensatory time off rather than pay overtime wages. However, the statute did not address whether an employer could compel an employee to deplete earned compensatory time.

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295 *Auer*, 519 U.S. at 461-63.

296 *Id.* at 461.


298 *Id.* at 580.

299 *See id.* at 581.

time so as not to exceed the **number of unpaid overtime hours that** would require the employer to pay wages for any excess.\(^\text{301}\)

In *Auer*, the Secretary of Labor’s interpretation contradicted the plaintiffs’ argument that they were nonexempt.\(^\text{302}\) But in *Christensen*, the Secretary agreed that the deputy sheriffs should not be compelled to deplete unused compensatory time to keep the County from having to pay overtime wages.\(^\text{303}\) As in *Auer*, the agency’s interpretation was submitted in an *amicus* brief by special leave of the Court.\(^\text{304}\) Moreover, the Department of Labor had issued an opinion letter to Harris County\(^\text{305}\) at its request, concluding that a government employer could not compel employees to use compensatory time in lieu of paying overtime wages.\(^\text{306}\)

The *Christensen* majority took pains to distinguish *Auer*, noting that the regulation addressing compensatory time\(^\text{307}\) was “plainly permissive,” unlike the “ambiguous” regulation at issue in *Auer*.\(^\text{308}\) For that reason, the Court concluded that the regulation explicitly allowed Harris County to compel plaintiffs to deplete their compensatory time to avoid the mandate to pay overtime wages.\(^\text{309}\) Writing for the majority, Justice Thomas bluntly observed, “To defer to the [Secretary of Labor’s] position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.

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\(^\text{301}\) 529 U.S. at 580 (citing § 207(k)(3)(A)).
\(^\text{302}\) *Auer*, 519 U.S. at 454, 459.
\(^\text{303}\) *See* *Christensen*, 529 U.S. at 581.
\(^\text{304}\) *Id.* at 577, 582; *see* *Auer*, 519 U.S. at 453.
\(^\text{305}\) 529 U.S. at 580.
\(^\text{306}\) *Id.* at 581 (quoting Opinion Letter from Dep’t of Labor, Wage & Hour Div. (Sept. 14, 1992), *available at* 1992 WL 845100); *id.* at 586.
\(^\text{307}\) 29 C.F.R. § 553.23(a)(2) (1999).
\(^\text{308}\) “The text of the regulation itself indicates that its command is permissive, not mandatory.” 529 U.S. at 588.
\(^\text{309}\) *Id.*
Because the regulation is not ambiguous on the issue of compelled compensatory time, Auer deference is unwarranted.\textsuperscript{310}

Before concluding that the regulation was unambiguous,\textsuperscript{311} the majority applied traditional canons of construction\textsuperscript{312} to interpret the statute and its implementing regulations “from scratch.”\textsuperscript{313} At the same time, the majority disavowed reliance on Chevron, noting that agency interpretations “lack[ing] the force of law,”\textsuperscript{314} such as opinion letters, were not entitled to Chevron deference.\textsuperscript{315} Citing Skidmore, the Court held that the agency’s opinion letter to Harris County was “‘entitled to respect,’” but only to the extent it had “‘power to persuade.’”\textsuperscript{316} Having already independently interpreted the statute and overtime regulation, the majority concluded that the agency’s opinion letter was simply “unpersuasive.”\textsuperscript{317}

Christensen presaged what Justice Scalia would later declare “one of the most significant opinions ever rendered by the Court dealing with the judicial review of

\textsuperscript{310}Id. at 588. Although Justice Scalia concurred in the judgment, id. at 589-591, he applied Chevron and concluded that the agency’s informal interpretations of the statute were not reasonable. See id. at 591. In deciding the issue at Step Two, Scalia implicitly reasoned that the statute— and presumably the Secretary’s implementing regulation—were both ambiguous. See id. at 589 n.* (noting that Chevron presumes “that ambiguities are to be resolved (within the bounds of reasonable interpretation) by the administering agency”). However, Justice Scalia has consistently conflated the Chevron analysis. See supra note 290 and accompanying text.

\textsuperscript{311}529 U.S. at 588.

\textsuperscript{312}See Christensen, 529 U.S. at 582-86.

\textsuperscript{313}Edelman, 535 U.S. at 114.

\textsuperscript{314}Christensen, 529 U.S. at 587.

\textsuperscript{315}Id.

\textsuperscript{316}Id. (quoting Skidmore, 323 U.S. at 140).

\textsuperscript{317}Id. Justice Scalia concurred but explicitly declined to join the holding that Chevron did not apply. Id. at 589 (Scalia, J., concurring).
Each justice comprising the *Christensen* majority either authored or joined opinions citing *Skidmore* with approval. By doing so, a solid majority signaled that it considered *Chevron* and *Skidmore* complementary—and hence reconcilable—deference frameworks. The following year, the Court squarely held just that.

**C. United States v. Mead Corp.**

*Christensen* was only the first of a series of decisions by which the Rehnquist Court would “cabin” *Chevron*’s expansive influence. Just one year later, in *United States v. Mead Corp.*, the Court refused to extend *Chevron* deference to Customs tariff classification rulings. *Mead* likened tariff rulings to “interpretations in policy statements, agency manuals, and enforcement guidelines,” which lack the force of law and thus are “beyond the *Chevron* pale.”

*Mead* squarely limited *Chevron* deference to agency interpretations issued in the exercise of specific congressional authority to make rules “carrying the force of law.” The Court rejected the Federal Circuit’s reasoning that if tariff rulings did not warrant *Chevron* deference for lack of notice-and-comment proceedings, they were due no deference at all.

Even if a tariff ruling did not qualify for *Chevron* deference, *Skidmore* might apply.

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318 *Mead*, 533 U.S. at 261 (Scalia, J., dissenting).
319 See *Christensen*, 529 U.S. at 587 (Thomas, J., joined by Rehnquist, C.J. & O’Connor, Kennedy & Souter, JJ.); id. at 595 (Stevens, J., joined by Ginsburg & Breyer, J., dissenting); see also id. at 597 (Breyer, J., joined by Ginsburg, J.).
320 See, e.g., id. at 587 (holding that while *Chevron* deference did not apply, the opinion letter was nevertheless due respect under *Skidmore*).
321 See, e.g., Richard Murphy, *The Brand X Constitution*, 2007 BYU L. Rev. 1247, 1290, “[A] dominant theme of *Mead* remains the Court’s effort to cabin the scope of *Chevron* deference with procedure.” Id.
323 See *id. at 234* (quoting *Christensen*, 529 U.S. at 587).
324 *Id. at 226-27*.
325 See *id. at 234*. The Federal Circuit held that tariff rulings lacked the force of law because none was intended to apply to anyone other than the subject importer. *Id. at 226.*
regardless of form depending upon its “power to persuade, if not power to control.” The case was remanded with instructions to consider the persuasiveness of the tariff rulings under *Skidmore.*

*Mead* thus held that even if an agency’s interpretation is not entitled to heightened deference under *Chevron,* it may nevertheless merit *Skidmore deference* based upon its persuasive value. Over Justice Scalia’s strident objections, *Mead* erased any doubt that “*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no [congressional] intent to delegate general authority to make rules with force of law, or where such authority [is] not invoked . . . .”

The central holding of *Mead* should not have been surprising, especially not to Justice Scalia, best known among the justices as a strict textual constructionist. *Mead* simply limited *Chevron*’s holding to its facts and its plain language, reining in those who had expansively interpreted its presumption of deference to apply well beyond its facts: an express statutory delegation of authority to the EPA and a notice-and-comment rulemaking.

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326 Id. at 234; *Skidmore,* 323 U.S. at 139. The Court’s catchphrase suggests that if *Chevron deference* applies, the interpretation is presumptively binding, while *Mead* or *Skidmore deference* confers more or less persuasive value depending upon various factors. *See* 533 U.S. at 234.

327 Id. at 238-39.

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

329 *Mead,* 533 U.S. at 239-61 (Scalia, J., dissenting).

330 Id. at 237 (acknowledging that the Court was so holding). The latter phrase pointedly suggests that agencies to which Congress has delegated authority to issue rules having the force of law are not entitled to heightened deference if they avoid the procedural formalities. *See id.*


332 It is this interpretation of *Mead* that has led a number of scholars to refer to its influence in “cabining” *Chevron.* *See supra* note 7 and accompanying text; e.g., Sunstein, *supra* note 7, at 193 (referring to Supreme Court efforts to “cabin” *Chevron*’s reach); *id.* at 227 (“*Mead* is evidently motivated by a concern that *Chevron* deference would ensure an insufficient safeguard against agency decisions not preceded by formal procedures.”)

333 533 U.S. at 240 (Scalia, J., dissenting) (noting that *Chevron* presumed that when Congress left an ambiguity in a statute, the agency charged with its implementation was intended to resolve the ambiguity).
yielding a legislative rule with the force of law.\textsuperscript{334} \textit{Mead} held, however, that even if Congress did not expressly grant rulemaking authority, it may have done so implicitly if other circumstances suggest that Congress expected the agency to “speak with the force of law” when resolving statutory ambiguities.\textsuperscript{335} In either instance, \textit{Chevron} deference is due.\textsuperscript{336} But what if an agency’s interpretation is not entitled to \textit{Chevron} deference because Congress did not apparently expect the agency to “speak with the force of law” when addressing statutory ambiguities? \textit{Mead} acknowledged that numerous agencies charged with implementing statutes, even if not authorized to speak with the force of law, make “all sorts of interpretive choices [that] certainly may influence courts facing questions the agencies have already answered.”\textsuperscript{337}

The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position. The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other.\textsuperscript{338}

Thus, if \textit{Skidmore} deference applies, the reviewing court will afford the ruling “respect proportional to its ‘power to persuade.’”\textsuperscript{339} However, the burden of persuasion apparently rests with the agency to defend its interpretation; \textit{if Skidmore applies, the agency lacks the benefit of the court’s doubt. In contrast, Chevron yields presumptive deference to the agency’s interpretation unless the challenger rebuts the presumption by convincing the


\textsuperscript{335} \textit{Mead}, 533 U.S. at 229.

\textsuperscript{336} Id. (citing \textit{Chevron}, 467 U.S. at 842-846). The fact that this passage applies to both explicit and implicit delegations suggests that \textit{Mead} abandoned any distinction \textit{Chevron} initially drew between them. See id. at 843-44; supra notes 274-78 and accompanying text.

\textsuperscript{337} \textit{Mead}, 533 U.S. at 227.

\textsuperscript{338} Id. at 227-28.

\textsuperscript{339} \textit{Skidmore}, 323 U.S. at 140. “Such a ruling may surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight.” \textit{Mead}, 533 U.S. at 235.
reviewing court that the statute unambiguously precludes the agency’s reading (Step One), that the agency’s interpretation exceeds the scope of its lawful authority (Step 1.5), or that the agency’s interpretation is otherwise unreasonable or impermissible (Step Two).  

Notably, Justice Souter, writing for the Mead majority, apparently made a conscious effort to reconcile the common law deference framework with the judicial review provisions of the APA. For example, the majority opinion cited the relevant APA section when it observed that Chevron deference is due a regulation that carries out an explicit delegation of authority. More tellingly, Justice Scalia’s dissent openly acknowledged “some question” whether Chevron had been “faithful” to the APA. But he nevertheless went on to justify Chevron as consistent with the “origins of federal-court judicial review,” which, of course, predated the APA.

D. Mead’s Progeny

In a series of decisions issued after Christensen, the Rehnquist Court sketched out the parameters of a new framework of judicial deference to the various types of less formal administrative interpretations. In mapping out its deference regime, or as Justice Scalia puts

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340 In this sense, Chevron may be considered not only a standard of judicial review for agency actions, but also a burden-shifting doctrine. Under Mead, the agency generally bears the initial burden of persuasion that Congress meant its interpretations to have presumptively binding effect. If the agency succeeds and the court applies Chevron, the agency’s interpretation is presumptively binding unless the opponent persuades the court that it is either impermissible, unreasonable, or otherwise beyond the scope of the agency’s lawful authority.

341 See Mead, 533 U.S. at 227 & n.6.

342 Id. (citing 5 U.S.C. § 706(2)). By integrating APA citations using carefully selected citation signals, Justice Souter subtly acknowledged that the common law deference framework is difficult to square with the APA’s express language. Id. at 229. Justice Scalia apparently agrees but less subtly; in a recent keynote address he conceded that the Court has “ignored” the APA’s key language. See Chevron Symposium, supra note 299.

343 Mead, 533 U.S. at 241 (Scalia, J., dissenting). In a footnote to his dissent, Scalia essentially conceded that the plain language of 5 U.S.C. § 706 means that “all statutory ambiguities are to be resolved judicially.” Id. at 241 n.2 (citing Anthony, supra note 114, at 9-11). Somewhat grudgingly, however, he went on to criticize the majority opinion for being “no more observant of the APA’s text than Chevron was—and indeed...even more difficult to reconcile with it.” Id. (emphasis added). In a recent speech, Scalia openly acknowledged that the Court has ignored the APA directive that reviewing courts are to resolve all issues of statutory interpretation.

See Chevron Symposium, supra note 311.

344 See supra notes 66-114 and accompanying text (discussing pre-APA judicial deference doctrines).
it, “administrative-law improvisation project,” the Court identified several factors to consider in determining the degree of deference due an informal agency interpretation. Two broad categories overarch the others: first, the nature, scope, and clarity of the legislative authority delegated to the agency; and second, the specific rulemaking procedures the agency used and the format of the resulting interpretation. Other persuasive but less influential factors include the consistency of the agency’s interpretation over time and any prior judicial interpretations of the statute.

The cumulative result of the Rehnquist Court’s decisions is difficult to characterize, perhaps because the Court’s deference framework continues to evolve. Beginning with *Mead*, the Court mapped out two primary approaches to judicial deference that purport to be mutually exclusive: one based upon *Chevron* and the other grounded in *Skidmore*. The Court’s hyperfocus on deciding the applicable deference framework regrettably obviates the more important threshold issue that implicates constitutional concerns: Before a reviewing court selects the applicable deference framework, the threshold question must be whether the agency’s interpretation is entitled to any judicial deference at all. If not, which deference framework applies is a moot point.

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346 See *Brand X*, 545 U.S. at 1014 (Scalia, J., dissenting).
347 *But cf. Mead*, 533 U.S. at 230-31 (“The want of” notice and comment “does not decide the case.”); *Brand X*, 545 U.S. at 1004 (Breyer, J., concurring) (“[A] formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency’s interpretation of a statute.”).
348 Cf., e.g., *Brand X*, 545 U.S. at 981. “Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA].” *Id.*
349 See, e.g., *id.* at 985. “Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency’s, the court must hold that the statute unambiguously requires the court’s construction.” *Id.*
350 “Difficult” puts it mildly. As several scholars have confirmed, “the Supreme Court’s deference jurisprudence is a mess.” E.g., Eskridge & Baer, *supra* note 4, at 1157; see also *supra* note 32 and accompanying text.
351 See *Mead*, 533 U.S. at 238 (“[J]udicial responses to administrative action must continue to differentiate between *Chevron* and *Skidmore* . . .”). The two deference frameworks are not as independent as the Court suggests. The Court’s deference jurisprudence attempts to characterize the degree of deference due by using its own precedents as pigeonholes. Instead, the Court should devise a more abstract deference framework that bridges them all.
1. Is the agency’s interpretation worthy of any judicial deference? If the reviewing court independently interprets the relevant statute consistent with the agency’s interpretation, “there is no occasion to defer and no point in asking what kind of deference, or how much.”\textsuperscript{352} If the statutory language is plain, or if disputed language has a settled judicial interpretation, then the court simply decides what the law is and no deference is due the agency’s interpretation.

As a corollary, if the court’s initial review reaches an interpretation contrary to the agency’s, it need not give the agency’s interpretation any deference at all. In that event, whether Chevron or Skidmore deference applies is irrelevant. For example, if the reviewing court concludes after invoking traditional methods of statutory interpretation\textsuperscript{353} that the pertinent statute or rule is neither silent nor ambiguous, the court’s own interpretation becomes the controlling one and the agency’s contrary interpretation warrants no deference whatsoever.\textsuperscript{354}

To illustrate, in \textit{General Dynamics Land Systems, Inc. v. Cline},\textsuperscript{355} the Rehnquist Court held that the Age Discrimination in Employment Act (ADEA) did not protect relatively young employees against discrimination favoring older employees, rejecting the EEOC’s contrary regulatory interpretation.\textsuperscript{356} Interpreting the statute \textit{de novo}, the Court

\textsuperscript{352} Edelman, 535 U.S. at 114 n.8. In Edelman, a college professor sued for discrimination after he was denied tenure. \textit{Id.} at 109. The district court dismissed for his failure to verify the complaint until after the filing date. \textit{Id.} at 110. An EEOC regulation, however, allowed a charge to be amended for technical defects, with the amendments relating back to the original filing date. \textit{Id.} at 110 n.2. The Supreme Court unanimously reversed, reasoning that EEOC’s interpretation in favor of the plaintiff was “unassailable.” \textit{Id.} at 118, based upon longstanding judicial precedent.

\textsuperscript{353} See, e.g., Edelman, \textit{id.} at 117 (relying on congressional acquiescence, a longstanding canon of statutory construction).

\textsuperscript{354} See, e.g., Christensen, 529 U.S. at 585 (reading the statute “in the context of the overall statutory scheme” to reach “the better reading”); see also \textit{id.} at 592-96 (Stevens, J., dissenting) (finding the statute ambiguous but reaching the opposite interpretation); \textit{id.} at 596 (Breyer, J., dissenting) (same).

\textsuperscript{355} 540 U.S. 581 (2004).

\textsuperscript{356} \textit{id.} at 584.
concluded that it was unambiguous. The majority reasoned that EEOC’s admittedly long-standing regulation expressing a contrary interpretation was “clearly wrong.” Having reached that conclusion as a matter of judicial interpretation, the majority correctly declined to address the degree of deference the regulation otherwise might have been due.

Echoing Chevron, the Court held that an agency’s interpretation of a statute is entitled to deference only if “the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.” Regardless of the ADEA’s plain language favoring the plaintiffs’ position, the statute as judicially construed did not prohibit employer favoritism of older workers at the expense of younger ones. General Dynamics is a classic example of traditional de novo review, which resolved the interpretive issue as a matter of law without deference to the agency’s regulation.

2. If the agency’s interpretation warrants deference, which framework applies? If the reviewing court applies traditional tools of statutory interpretation and concludes that the meaning of the statute remains in doubt, only then must it decide which deference framework applies. In Mead, the majority carefully distinguished Chevron from Skidmore deference.
holding that *Chevron* applies only when the authorizing statutes suggest that Congress would have expected the agency to “speak with the force of law” when resolving statutory ambiguities.\(^{365}\) An *express* delegation of authority to engage in formal rulemaking or adjudication, while not a necessary prerequisite,\(^ {366}\) is “a very good indicator of delegation meriting *Chevron* treatment.”\(^ {367}\) But the agency’s interpretation may nevertheless warrant “some deference” under *Skidmore*, even if the delegated authority is merely *implicit*, if the procedure used was relatively informal or the interpretation is otherwise “beyond the *Chevron* pale.”\(^ {368}\) The difficulty, of course, is figuring out the dividing lines between the two deference frameworks and how each applies in a particular case.

### E. Shrinking *Chevron’s Cabin*

Of the two alternative deference frameworks, *Chevron* is unquestionably the most deferential. If the reviewing court deems it applicable, *Chevron* deference gives presumptive validity to the agency’s view as long as it adopts a “reasonable” or “permissible” interpretation\(^ {369}\) of the ambiguous statute or legislative rule.

A year after deciding *Mead*, the Rehnquist Court applied its post-*Mead* reformulation of *Chevron* deference in *Barnhart v. Walton*.\(^ {370}\) The case involved an application for disability benefits under the Social Security Act. The relevant statute was ambiguous regarding whether a twelve-month duration requirement for a work disability applied to the applicant’s “inability to engage in any substantial gainful activity” or only his

\(^{365}\) *Mead*, 533 U.S. at 229 (quoting *Chevron*, 467 U.S. at 845).

\(^{366}\) Id. at 229-231; see *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002).

\(^{367}\) *Mead*, 533 U.S. at 229.

\(^{368}\) Id. at 234.

\(^{369}\) Id. at 229.

\(^{370}\) 535 U.S. 212 (2002) (8-1 opinion). Justice Scalia’s concurring opinion also applied *Chevron*. Id. at 226-27 (Scalia, J., concurring).
The agency denied the application because the applicant had taken another job eleven months after losing his teaching position due to a psychiatric disorder. On judicial review, he argued that his impairment exceeded the duration requirement, even though he had returned to work within twelve months. But the regulation interpreted the statute to require the inability to work to last twelve months, not just the impairment.

The Court first applied Auer to the agency’s interpretation of its own regulation. Next, the Court applied Chevron, presumably because the regulation had been issued in notice-and-comment proceedings. Writing for the majority, Justice Breyer reformulated Chevron’s two-step analysis but in a negative image of the original: “Hence we must decide (1) whether the statute unambiguously forbids the Agency’s interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible.” As reformulated, the Court’s two-step analysis suggests that the burden of persuasion is on the party seeking judicial review of the agency’s interpretation, which enjoys presumptive validity if Chevron applies.

Applying the framework, the majority first concluded that the Act did not “unambiguously forbid the regulation.” While the statute itself did not explicitly impose a duration requirement on the “inability to engage in any substantial gainful activity,” other

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372 Id. at 215.
373 Id. at 214-15. See 20 C.F.R. § 404.1520(b) (2001), quoted in Barnhart, 533 U.S. at 217.
374 “Courts grant an agency’s interpretation of its own regulations considerable legal leeway.” Id. at 214 (citing Auer, 519 U.S. at 461; Udall v. Tallman, 380 U.S. 1, 16-17 (1965)).
375 533 U.S. at 217.
376 Id. at 218 (citing Chevron, 467 U.S. at 843) (emphasis added); cf. Chevron, 467 U.S. at 842-43 (suggesting the agency has the burden of demonstrating that the statute is silent or ambiguous and that its interpretation is permissible).
377 533 U.S. at 218.
parts of the Act suggested that a “disability” required an impairment severe enough to preclude any work for at least twelve months. The majority concluded that the agency’s interpretation was a “fair inference” from the ambiguous statutory language and hence permissible.

Finally, in a concise concluding paragraph, Justice Breyer enumerated several factors summarizing the majority’s reasons for applying Chevron:

In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that Chevron provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

As the reader will note, all of these are similar to the persuasive factors enumerated in Skidmore. Yet Justice Breyer invoked them to argue in favor of applying the more deferential Chevron framework, suggesting that both deference regimes are cut from the same cloth.

F. Reviving Skidmore

In contrast to Chevron deference, Mead/Skidmore is generally less likely to result in judicial endorsement of the agency’s interpretation. Unlike Chevron, all that Skidmore and

535 U.S. at 218.
Id. at 219.
Id. at 222 (citing Mead).
See Skidmore, 323 U.S. at 140; supra note 101 and accompanying text (quoting Skidmore’s enumerated factors). Although Justice Scalia concurred with the majority in nearly all respects, he disagreed with its reliance on the longstanding nature of the SSA’s interpretation, Id. at 226 (Scalia, J., concurring). Justice Scalia would have held that the agency’s interpretation warranted Chevron deference simply because it “emerged from notice-and-comment rulemaking.” Id. at 227.
But cf. SEC v. Zandford, 535 U.S. 813, 819-20 (2002) (Stevens, J.) (unanimous decision) (citing Mead in upholding a formal SEC adjudication of civil fraud based on SEC’s consistently broad reading, which was entitled to deference if reasonable).
Mead guarantee is that the court will give the agency’s interpretation some consideration. Just how much depends upon a host of factors, some of which appear to overlap with the very factors that trigger Chevron deference. As Mead noted, the Skidmore “approach has produced a spectrum of judicial responses,” depending upon the agency’s thoroughness, reasoning, consistency, and other persuasive factors.

The Rehnquist Court applied the Skidmore/Mead sliding-scale standard in Clackamas Gastroenterology Associates, P.C. v. Wells. A bookkeeper claimed that a professional corporation had discharged her on the basis of disability. Plaintiff’s claim turned on whether four physicians who were shareholder-directors could be considered “employees” under the Americans with Disabilities Act (ADA), which defines “employee” as “an individual employed by an employer.” Finding the ADA definition unhelpful, the Court turned to its own precedents construing similar language in other statutes, which had

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387 See Mead, 533 U.S. at 228.

388 See id.

389 Id. (quoting Skidmore, 323 U.S. at 140). Justice Scalia continues to colorfully express his disdain for Skidmore. At a recent symposium commemorating the 25th Anniversary of Chevron, he responded to a student whose question suggested the continuing need for Skidmore deference:

I would eliminate Skidmore deference. Skidmore deference is a farce! Skidmore deference is — you give it as much value as you think it’s worth. Give it as much value as you would give a law review article. I mean, you know, of course you take into account who it was that’s the author of that article, but still in all, it’s moosh! And, you know what’s good about it? What’s good about Skidmore deference and what’s good about the new rule is precisely that it’s a good ‘ol totality of the circumstances rule, which means basically the court can do whatever it wants! Case by case—there are no rules. Whatever seems like a good result here. It is empowering—it is empowering of the courts. So, far from thinking that this is something that is going to enable you to lessen the impact of the agencies, I think it’s just the opposite. I don’t believe in Skidmore deference. It’s either Chevron or — you know, Chevron or the road!

390 Chevron Symposium, supra note 299.


392 Id. at 442.

393 Id.

394 Id. at 441.

395 See id. at 444 (quoting 42 U.S.C. § 12111(4) (defining “employee”)).

396 “A definition must not contain, directly or indirectly, the term being defined.” F. Reed Dickerson, LEGISLATIVE DRAFTING 93 (1954).
generally relied on the common law meaning. Indeed, the Court reasoned, “Congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law.”

The Court next considered the interpretive guidelines in EEOC’s Compliance Manual, conceding they were not “controlling” under Chevron. The Court expressly invoked Skidmore, observing that EEOC had been granted “special enforcement responsibilities under the ADA” and other statutes with similar employment thresholds. The Court was persuaded by the EEOC guidelines’ reliance on six factors grounded in “the common law touchstone of control.” Ultimately, the Court endorsed EEOC’s guidelines for defining “employee” as persuasive, while not binding.

The Rehnquist Court’s application of the reinvigorated Skidmore doctrine reflects the strong influence common law meanings continue to play in administrative law. Wells also illustrates the Court’s ongoing struggle to strike the appropriate balance as it sorts out the relative influence of Congress, the executive branch, and the courts in determining the proper scope of judicial review.

G. Unravelling Stare Decisis: Do Agency Interpretations Trump Statutory Precedent?

One of the last cases decided by the Rehnquist Court, National Cable & Telecommunications Ass’n v. Brand X Internet Services, addressed whether a prior judicial interpretation of an ambiguous statutory term controls over a subsequent contrary

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397 Id. at 447 (citing Darden, 503 U.S. at 324-25).
398 See id. at 449 & n.9.
399 Id. at 448.
400 Id. at 449-450.
401 Id. at 451 & n.11.
interpretation by the agency charged with enforcing the statute. Author by Justice Thomas, the 6-3 decision clarified the Rehnquist Court’s deference doctrine in several respects. In particular, the Court applied *Chevron* as a basis for yielding to an agency’s interpretation of an ambiguous statutory term, even in light of a prior circuit court opinion reaching a contrary interpretation.

*Brand X* was an appeal from a Federal Communications Commission (FCC) formal rulemaking proceeding. The FCC ruled that broadband internet service did not qualify as “telecommunications service” if provided by cable companies, which therefore were not subject to FCC regulation. On appeal, the Ninth Circuit, relying on its own precedent, vacated the FCC’s decision.

The Supreme Court reversed. In a carefully reasoned decision, Justice Thomas, writing for the majority, reviewed the legislative history of the Telecommunications Act of 1996 and the history of the FCC’s proceeding. Without doubt, the FCC had been delegated authority to enforce the Act and to issue binding implementing rules. Further, the FCC’s interpretation carried out its statutory authority and was the product of formal rulemaking. The FCC ruling thus met all prerequisites for *Chevron* deference.

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403 See id. at 982.
404 Id. at 982-83.
405 Id. at 977-78.
406 Id. at 977-78 (citing In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4821-22, ¶ 36-37 (2002)). A Ninth Circuit panel had previously held in an unrelated Oregon case that cable modem service qualified as a “telecommunications service.” See AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000). The question in *Brand X* was whether the decision nevertheless had binding precedential effect on the FCC’s subsequent rulemaking process.
407 See AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000).
408 Brand X Internet Svcs. v. FCC, 345 F.3d 1120, 1130-31 (9th Cir. 2003), rev’d sub nom., 545 U.S. 967 (2005).
409 545 U.S. at 1003.
410 Id. at 975-979.
412 545 U.S. at 981.
413 Id. at 977-78.
The Court next addressed whether the Ninth Circuit precedent trumped the FCC’s subsequent interpretation favoring the cable companies. Justice Thomas openly acknowledged the “genuine confusion in the lower courts over the interaction between the Chevron doctrine and stare decisis principles.” He noted that the Ninth Circuit’s precedent had not concluded that the key statutory language was unambiguous, nor that its interpretation was the only permissible reading. Rather, it had concluded only that the best interpretation of the Act suggested that cable broadband providers did not provide “telecommunications service.”

Underscoring Chevron’s presumptive deference to the agency’s resolution of a statutory ambiguity, Justice Thomas concluded:

The better rule is to hold judicial interpretations contained in precedents to the same demanding Chevron step one standard that applies if the court is reviewing the agency’s construction on a blank slate: Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.

In other words, unless a court concludes that Congress has spoken unambiguously on the issue, even a judicial interpretation must yield to the agency’s later interpretation if (1) entitled to Chevron deference, and (2) within the range of permissible interpretations from

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414 See id. at 980-81. The Court disregarded the argument that the FCC’s interpretation was “inconsistent with its past practice,” reasoning that agency inconsistency does not defeat Chevron deference as long as (1) the statute is ambiguous and (2) the agency “adequately explains the reasons” for reversing course. Id. at 981; see id. at 1001 & n.4. In this case, the FCC adequately defended its decision based on changing market conditions, including rapidly expanding access to internet service that justified minimal regulation of broadband. Id. at 1001.
415 545 U.S. at 982-86.
416 Id. at 985.
417 Id. at 982 (citing 345 F.2d at 1131).
418 Id. at 985.
419 Id. at 984.
420 Id. at 982.
421 Id. at 982-83.
which the agency has authority to select. In light of *Mead* and *Christensen*, *Brand X* left open how the Court would have
resolved the matter had the FCC interpretation not warranted *Chevron* deference. For example, in the absence of notice-and-comment rulemaking is an agency bound by a prior judicial interpretation of an ambiguous statute? If a federal district court or a state court holds that a statute is unambiguous, must an agency treat that interpretation as binding, even in a notice-and-comment rulemaking? Moreover, how should a federal district court or state court choose between (1) a federal circuit’s otherwise binding interpretation of an ambiguous federal statute, and (2) an inconsistent regulation later adopted by the agency charged with enforcing it?

Perhaps not surprisingly, *Brand X*, the Rehnquist Court’s last word on judicial deference, raised more questions than it answered. However, it underscored the critical nature of the threshold question in deference jurisprudence: whether the statutory language is ambiguous.

### IV. The Roberts Court’s Amorphous Judicial Review Framework

As we have seen, by the end of the October 2004 term, the Rehnquist Court had firmly reestablished *Skidmore* alongside *Chevron* as the two primary doctrines of judicial deference. At the end of the term, Justice O’Connor unexpectedly resigned. Less than two months later, cancer claimed the life of Chief Justice Rehnquist.

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422 Justice Stevens concurred, hinting that the majority’s reasoning might not apply if the Supreme Court had issued the statutory precedent, which "would presumably remove any pre-existing ambiguity." *Id.* at 1003 (Stevens, J., concurring).

423 See *Mead*, 533 U.S. at 238; see also *Wells*, 538 U.S. at 448-49 (declining *Chevron* deference but applying *Skidmore* factors to EEOC Compliance Manual).


Bush initially appointed John Roberts, Jr. to replace Justice O’Connor, but later designated him Chief Justice to replace the late Rehnquist. Roberts was confirmed just in time to open the Court’s October 2005 term.

In the meantime, Justice O’Connor had agreed to remain on the Court until her successor was nominated and confirmed. During the transition, Justice O’Connor participated in Gonzales v. Oregon, voting with the majority. Just two weeks later, Justice Alito was confirmed and took Justice O’Connor’s seat.

A. Gonzales v. Oregon

On the morning of his third day on the Supreme Court, Chief Justice Roberts opened oral arguments in the case of Gonzales v. Oregon. The decision in that case would set the course for a divided Roberts Court on issues involving judicial deference to administrative interpretations of law.

The dispute arose after the Attorney General issued an interpretive ruling concluding that physician-assisted suicide was not a “legitimate medical purpose” as defined by the Controlled Substances Act. Upon publication in the Federal Register, the ruling

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427 Id.
428 See Charles Babington & Peter Baker, Roberts Confirmed as 17th Chief Justice, WASHINGTON POST A01 (Sept. 30, 2005).
took effect immediately without prior notice or opportunity for public comment.\textsuperscript{437} Its purpose and effect was to preempt the State of Oregon’s Death with Dignity Act,\textsuperscript{438} which authorizes registered physicians to lawfully prescribe lethal doses of controlled substances at the request of terminally ill patients under strictly limited circumstances.\textsuperscript{439} Moreover, the ruling put Oregon physicians at risk of federal criminal prosecution for actions otherwise consistent with state law.\textsuperscript{440}

The State of Oregon, joined by several terminally ill patients and others, secured an injunction blocking enforcement, and the Ninth Circuit affirmed.\textsuperscript{441} The Supreme Court granted certiorari to decide whether the Attorney General had permissibly interpreted the Controlled Substances Act and the Department’s regulations.\textsuperscript{442}

A solid majority of the Court affirmed, barring enforcement of the interpretive ruling.\textsuperscript{443} The opinion, authored by Justice Kennedy, rejected Ashcroft’s argument that the ruling was entitled to Auer deference, reasoning that it merely “parroted” the relevant statutory terms and therefore did not interpret ambiguous regulations.\textsuperscript{444} Nor did Chevron deference apply because the ruling exceeded the Attorney General’s limited rulemaking.

\textsuperscript{441} Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (D. Ore. 2002), aff’d, 368 F.3d 1118 (9th Cir. 2004), aff’d, 546 U.S. 243 (2006).
\textsuperscript{444} Id. at 257.
authority under the Controlled Substances Act. In short, the ruling failed to pass muster under Chevron Step 1.5.

Having held both Auer and Chevron inapplicable, the Court held that the ruling was entitled to “deference only in accordance with Skidmore.” Applying the Skidmore factors, the Court concluded that the interpretive ruling was unpersuasive. In particular, the majority expressed concern about the ruling’s preemptive effect.

Justices Scalia and Thomas dissented, joined by Chief Justice Roberts. They rejected the majority’s reasoning that Auer did not apply, arguing that no authority existed for the “parroting” exception. The dissenters also reasoned that the Attorney General’s interpretation was correct even applying de novo review. Finally, they took issue with the majority’s conclusion that Chevron did not apply on the ground that the interpretive ruling exceeded the Attorney General’s authority.

Gonzales v. Oregon is notable for curtailing the reach of Auer and its predecessor Seminole Rock. The Government argued that the ruling was entitled to substantial deference under Auer because it was simply an administrative interpretation of the agency’s own

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445 See id. at 274-75.
446 See supra notes 21-27 and accompanying text.
447 546 U.S. at 268.
448 Id. at 268-69.
449 Id. at 269.
450 Id. at 274. Justice Kennedy disclaimed reliance on “clear statement requirements . . . or presumptions against pre-emption . . . to reach this commonsense conclusion.” Id. Otherwise, the dispositive portion of the majority’s holding suggests traditional de novo review consistent with 5 U.S.C. § 706. Ironically, however, the Court never once cited § 706 in its opinion.
451 546 U.S. at 275 (Scalia, J., dissenting, joined by Roberts, C.J.); id. at 299 (Thomas, J., dissenting). The fact that the opinion drew the Chief Justice’s first dissenting vote is particularly significant because the Roberts Court was noted for unanimity during its initial term. See Bill Mears, Consensus is Roberts’ Rule of Order, CNN.com (June 2, 2006), available at http://www.cnn.com/2006/LAW/06/02/roberts.rules/index.html (last visited May 14, 2009).
452 546 U.S. at 275, 277-85.
453 Id. at 276, 285-92.
454 Id. at 276, 292-97.
ambiguous regulation, and the dissenters agreed.\textsuperscript{455} The majority rejected that argument, refusing to extend \textit{Auer} super-deference to a regulation that \textit{merely} restated or “parroted”\textsuperscript{456} the disputed \textit{statutory terms}.\textsuperscript{456} The majority’s reasoning signaled its awareness that the lenient deference standard in \textit{Auer} for informal interpretations of an agency’s own ambiguous regulations could be readily exploited and was difficult to reconcile with \textit{Mead}’s more constrained deference doctrine.

\textbf{B. \textit{Rapanos v. United States}}

Shortly after Justice Alito was confirmed, the Court again addressed an issue of administrative interpretation in \textit{Rapanos v. United States}.\textsuperscript{457} A four-justice plurality rejected the agency’s regulation as inconsistent with the statute’s plain language.\textsuperscript{458} Justice Kennedy concurred based on entirely different reasoning.\textsuperscript{459} Justice Stevens authored a dissent joined by three other justices that would have deferred to the agency’s longstanding regulation.\textsuperscript{460} The dispute involved \textit{dredging permits} issued by the U.S. Army Corps of Engineers (\textit{Corps}). The question was whether the Corps had jurisdiction to require permits for wetlands adjacent to navigable waters.\textsuperscript{461} The Clean Water Act\textsuperscript{462} defines “\textit{navigable waters}” to mean

\textsuperscript{455} See 21 C.F.R. § 1306.04 (2005) (requiring all prescriptions to \textit{be issued “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice”}).
\textsuperscript{456} Id. at 257 (citing 21 U.S.C. § 830(b)(1)(A)(ii) (“\textit{legitimate medical purpose}”) and 21 U.S.C. § 802(21) (“in the course of professional practice”)). Note the anomaly that otherwise would have resulted had the majority not recognized the “parroting” exception. \textit{Auer} declined to require an agency to apply canons of \textit{statutory construction} to resolve regulatory \textit{ambiguities}. \textit{See supra note 307-11 and accompanying text}. Had the \textit{Oregon} Court granted \textit{Auer} deference, it would have simply deferred to the agency’s interpretation of ambiguous \textit{statutory terms}, thus insulating the Court from its interpretive responsibility under \textit{Chevron} Step One. \textit{See 467 U.S. at 843 n.9.}
\textsuperscript{457} 547 U.S. 715 (2006). The case was argued on February 21, 2006, just three weeks after Justice Alito was confirmed.
\textsuperscript{458} Id. at 716 (Scalia, J., plurality opinion).
\textsuperscript{459} Id. at 759 (Kennedy, J., concurring).
\textsuperscript{460} Id. at 783 (Stevens, J., dissenting). Chief Justice Roberts added a separate concurring opinion, \textit{id. at 757}, and Justice Breyer added a separate dissent, \textit{id. at 811}.
\textsuperscript{461} Id. at 719-20, 763.
\textsuperscript{462} 33 U.S.C. § 1251 et seq.
“waters of the United States.” A longstanding Corps regulation had defined the term to include not only navigable waters in the traditional sense, but also tributaries and adjacent wetlands. The Supreme Court granted certiorari to decide whether petitioners’ wetlands qualified as “waters of the United States” under the Clean Water Act. If so, the Corps had jurisdiction to regulate dredging on the petitioners’ property.

Justice Scalia, writing for the plurality, concluded that the Corps’ regulation was impermissibly broad. In reaching that conclusion, he focused on the isolated term “waters.” While not ambiguous standing alone, the Court’s precedents had acknowledged the “inherent ambiguity in drawing the boundaries of any ‘waters,’” because the Corps must decide at what point “water ends and land begins.”

After consulting a dictionary, Justice Scalia concluded that the only “plausible” interpretation limited the term to “relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes[,]’” not including “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” Although Justice Scalia expressly concluded that the Corps’ interpretation was impermissible (Chevron Step Two), the plurality’s reasoning suggested instead that the regulations failed Step One because

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464 33 C.F.R. §§ 328.3(a)(1), (5), (7) (2005); see 547 U.S. at 724.
465 Id. at 723-24.
466 Id. at 737.
467 Id. at 740-41.
468 Id. at 740 (quoting United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985)).
469 Id.
470 Id. at 739 (citations omitted).
Congress had unambiguously limited the Corps’ jurisdiction to “waters” in the narrow sense.\footnote{See id. at 725. Once again, Justice Scalia conflated the Chevron steps by concluding that the Corps’ interpretation was not permissible. If, as the plurality reasoned, the plain meaning of “waters” precluded any other interpretation, it was unnecessary to decide whether the Corps’ interpretation was permissible.} Justice Kennedy concurred based on entirely different reasoning.\footnote{Kennedy, J., concurring} He primarily relied on two Supreme Court precedents interpreting the same statutory language. In the first, the Court had unanimously upheld the Corps’ regulation interpreting “waters of the United States” to include adjacent wetlands.\footnote{United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).} In the second, the Court had held that a pond located in a former sand and gravel pit, neither adjacent nor connected to any navigable water, was beyond the Corps’ jurisdiction.\footnote{Solid Waste Agency of N. Cook County v. Army Corps of Eng’rs, 531 U.S. 159, 173-74 (2001).} Synthesizing these precedents, Kennedy concluded that “waters of the United States” require a “significant nexus” with navigable water to fall within the Corps’ jurisdiction.\footnote{547 U.S. at 767 (Kennedy, J., concurring).} Rejecting the plurality’s interpretation as too narrow,\footnote{Id. at 776.} Justice Kennedy nevertheless concluded that “[a]bsent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”\footnote{Id. at 787 (Stevens, J., dissenting).} The dissent criticized the

Justice Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer.\footnote{Id. at 782.} Applying Chevron, they concluded that the regulation was “a quintessential example of the Executive’s reasonable interpretation of a statutory provision.”\footnote{Id. at 788.}
plurality’s “revisionist reading” as inconsistent with the Court’s unanimous precedent holding the identical regulation permissible.

Rapanos illustrates the complexity and confusion that characterize the Court’s evolving deference jurisprudence. The deeply divided Court took three distinctly different approaches in interpreting the Corps’ regulatory jurisdiction under the Clean Water Act. Justice Scalia adopted a strict textualist approach, reasoning that unambiguous statutory language precluded the Corps’ expansive interpretation. The dissenters reached exactly the opposite conclusion, relying on post-Chevron deference jurisprudence to conclude that the agency’s interpretation was reasonable. Finally, Justice Kennedy’s concurring opinion rejected both the plurality’s narrow interpretation and the dissent’s highly deferential one, instead adopting a strictly common law analysis based on factually analogous precedents.

One might wonder how the courts below addressed the case on remand without any clear mandate from a majority. Moreover, when the Supreme Court itself is so seriously divided on how to apply its administrative deference doctrine, it should be no surprise when district and circuit courts reach different conclusions on the same or similar questions.

C. Long Island Care at Home, Ltd. v. Coke

480 Id. at 793.
481 Id. (citing Riverside Bayview, 474 U.S. 121).
482 Id. at 733-34. Justice Scalia is well-known as the Court’s most strident textualist. Paul Killebrew, Where Are All The Left-Wing Textualists?, 82 N.Y.U. L. Rev. 1895, 1896 (2007). “Textualism” is a plain-language methodology for interpreting statutes commonly associated with Justice Scalia and Judge Easterbrook of the Seventh Circuit. Id.
483 Id. at 788, 797 (Stevens, J., dissenting).
484 Id. at 759 (Kennedy, J., concurring). Consistent with the theme of his concurring opinion, Justice Kennedy has been called by one scholar a “judicial supremaist” and “the Court’s most vocal defender of judicial power.” Jeffrey Rosen, The Roberts Court and Executive Power, 35 Pepp. L. Rev. 503, 508 (2008). By relying on the Court’s own precedents to synthesize a required “nexus” between wetlands and other waters, Justice Kennedy subjugated the Court’s common law deference regimes to classic analogous reasoning.
486 For one recent example of a badly split three-judge panel, see Creekstone Farms Premium Beef, L.L.C. v. Dep’t of Agric., 539 F.3d 492, 502, 503 (D.C. Cir. 2008) (2-1 opinion).
One year after its badly divided decision in *Rapanos*, the Court reached a unanimous opinion in *Long Island Care at Home, Ltd. v. Coke.* The case involved a Department of Labor regulation interpreting a provision in the FLSA pertaining to domestic companion services. Justice Breyer, writing for the Court, addressed a number of interrelated deference questions involving an unambiguous statute, conflicting regulations, and an Advisory Memorandum.

Evelyn Coke, a former employee of Long Island Care at Home (Long Island), had provided domestic companion services to its clients. She sued for minimum wages and overtime pay. The FLSA exempts “any employee employed in *domestic service employment* to provide companionship services for individuals who . . . are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary of Labor).” However, define “domestic service employment” as “services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed . . .” Coke argued that this regulation controlled. Long Island, however, cited an “Interpretive Regulation,” which specifically exempts domestic companion workers “employed by an employer or agency other than the family or household using their services . . .” The issue was whether the “domestic service employment” exemption applied to domestic companion workers employed by third-party agencies like Long Island.

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488 551 U.S. at 164.
489 *Id.*
491 29 C.F.R. § 552.3 (emphasis added).
492 29 C.F.R. § 552.109(a) (emphasis added).
493 See 551 U.S. at 164. While the case was pending, the Secretary of Labor issued an “Advisory Memorandum” regarding the challenged regulation. *Id.*
The Court first noted that the FLSA specifically authorized the Secretary of Labor to issue implementing rules and regulations.\textsuperscript{494} Next, the Court acknowledged the agency’s expertise in employment matters and that the dispute involved an “interstitial”\textsuperscript{495} issue Congress had delegated to the agency.\textsuperscript{496} Further, the agency had issued its interpretive regulations in a notice-and-comment proceeding.\textsuperscript{497} Citing the Department’s broad “definitional authority,” the Court held it was for the agency to answer such questions.\textsuperscript{498}

Acknowledging that the agency’s regulations were inconsistent,\textsuperscript{499} the Court concluded that the interpretive regulation controlled, in part because it was more specific—its sole purpose was to clarify that the exemption applied to domestic companion employees of third-party agencies.\textsuperscript{500} Next, the Court addressed the Secretary’s Advisory Memorandum issued in response to the Coke litigation. Analogizing it to a legal brief, the Court applied Auer in concluding that the agency’s interpretation controlled unless plainly erroneous or inconsistent with the regulation.\textsuperscript{501}

Coke urged that the “Interpretive Regulation” was entitled only to Skidmore deference to the extent persuasive.\textsuperscript{502} The Court disagreed, emphasizing that the interpretive regulation was the product of a notice-and-comment proceeding, although not required for

\textsuperscript{494} 551 U.S. at 165.
\textsuperscript{495} The Court explained in passing that an “interstitial” matter is “a portion of a broader definition.” \textit{Id}.
\textsuperscript{496} \textit{Id}.
\textsuperscript{497} \textit{Id}.
\textsuperscript{498} \textit{Id}.
\textsuperscript{499} 551 U.S. at 168. This is a classic application of \textit{Chevron} Step 1.5. See \textit{supra} notes 257-67 and accompanying text.
\textsuperscript{500} 551 U.S. at 168.
\textsuperscript{501} \textit{Id} at 170.
\textsuperscript{502} \textit{Id} at 171. Note that Justice Breyer did not explicitly refer to the regulations as “ambiguous,” an important criterion for \textit{Auer} deference. Tactically, the Court reasoned that it was a sufficient ambiguity that there were two conflicting agency regulations. See Transcript of Oral Argument, No. 06-593 (April 16, 2007), at 35-36 (colloquy between Justice Scalia and counsel for Respondent on whether contradictory regulations amount to ambiguity).
\textsuperscript{503} 551 U.S. at 171-72.
interpretive rules. Further, the challenged regulation had been treated as binding for some thirty years and was thus longstanding and consistently applied, both hallmarks of judicial deference.

Finally, the Court observed that “the ultimate question” was whether Congress would have expected a reviewing court to treat the agency action as within its delegated authority.

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

In short, the Court deferred to the Secretary’s Advisory Memorandum, although prepared in anticipation of litigation, and held that the agency’s interpretation of its inconsistent regulations was controlling.

In the wake of Rapanos, it was if the Court took pains to demonstrate that it continued to embrace Chevron and Auer, as well as the more flexible Skidmore factors revived by Mead. The unanimous decision relied on a merged deference doctrine incorporating Chevron criteria as well as Mead/Skidmore factors. Acknowledging Skidmore’s applicability to interpretive rules, the Court nevertheless declined to apply it, in part because the disputed rule had been issued in a notice-and-comment proceeding. While not necessary to the result, Justice Breyer also deferred to the Secretary’s Advisory Memorandum.

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503 Id. at 173 (citing 5 U.S.C. § 553(b)(3)(A)).
504 Id., id.
505 Id., id. at 173-74 (citing Mead, 533 U.S. at 229-233).
506 Id., id. at 171, 174.
507 Id., id. at 165 (citing both Chevron and Mead); id., id. at 173-74 (citing Mead and enumerating “factors” favoring judicial deference).
508 Id., id. at 173. The Court once again signaled its preference for notice-and-comment proceedings.
Memorandum because it interpreted the agency’s own regulations and thus warranted Auer deference.\footnote{Id. at 171 (citing Auer, 519 U.S. at 462).}

The Court’s reasoning implicitly suggested that inconsistent agency regulations amounts to a regulatory ambiguity that the agency is best equipped to resolve. However, its reasoning disregarded the unambiguous language of the statute itself\footnote{See 551 U.S. at 162 (quoting FLSA).}, which clearly exempts “any employee employed in domestic service employment to provide companionship services . . .”\footnote{29 U.S.C. § 213(a)(15).} While neither regulation directly contradicted the statutory language, the more specific, to which the Court ultimately deferred, was more consistent with the statute’s plain language than the definitional regulation on which Coke relied.

But the Court could have resolved the dispute and reached the same result at Chevron Step One, simply by interpreting the relevant statutory language. Instead, it relied on strained reasoning to declare an “ambiguity” based on inconsistent regulations, each of which standing alone was unambiguous. As we will see next, the implicit reasoning in Long Island Care at Home would soon become the basis of a more far-reaching decision declaring an ambiguity based on two apparently inconsistent statutes that the majority refused to reconcile.\footnote{E.g. Frost v. Wenie, 157 U.S. 46, 58 (1895) ("[W]here two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both.").}

\begin{itemize}
  \item[D.] National Ass’n of Home Builders v. Defenders of Wildlife
  
  The apparent unanimity of the Roberts Court on issues of administrative deference would not last long. Just two weeks after issuing Long Island Care at Home, a deeply divided Court decided National Ass’n of Home Builders v. Defenders of Wildlife,\footnote{551 U.S. 644 (2007) (5-4 opinion).} which
\end{itemize}
addressed an apparent conflict between the Clean Water Act and the Endangered Species Act.\footnote{515 Id. at 649.} Justice Alito authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia and Thomas.\footnote{516 Id. at 647.} Justice Stevens wrote the dissent, joined by Justices Souter, Ginsburg, and Breyer.\footnote{517 Id. at 673 (Stevens, J., dissenting).} Justice Kennedy, once again the swing vote, joined the conservative majority to decide the outcome.\footnote{518 See id. at 647.}

The dispute involved EPA’s transfer of authority to the State of Arizona to issue permits under the National Pollution Discharge Elimination System (NPDES),\footnote{519 Id.} designed to mitigate water pollution as required by the Clean Water Act.\footnote{520 Id.} EPA administers the program, but a state may seek transfer of permit authority with continuing EPA oversight.\footnote{521 Id.}

The Clean Water Act specifies nine criteria for transfer of permit authority, all relating to whether state law gives state officials necessary oversight authority.\footnote{522 See id. at 650-51 & n.2 (listing the nine prerequisites for transfer of permit authority to a state).} If all nine criteria are met, the EPA must approve the transfer.\footnote{523 Id. at 650.}

In apparent conflict is § 7(a)(2) of the Endangered Species Act (ESA),\footnote{524 See 16 U.S.C. § 1536 (2006) (codifying § 7 of the Endangered Species Act).} which requires federal agencies, before taking any proposed action, to consult with Fish and Wildlife Services (FWS) and the National Marine Fisheries Service (NMFS) to avoid jeopardizing endangered species.\footnote{525 551 U.S. at 649, 652 (quoting § 7(a)(2), 16 U.S.C. § 1536(a)(2)).} As the statute requires, EPA had consulted with FWS, which initially expressed concern about the potentially indirect adverse impact if the transfer...
should result in more discharge permits and therefore more development.\textsuperscript{526} Ultimately, however, FWS concluded that EPA’s continuing oversight would sufficiently protect endangered species.\textsuperscript{527}

Defenders of Wildlife and other environmental groups sought judicial review.\textsuperscript{528} The Ninth Circuit vacated the transfer, reasoning that § 7(a)(2) in effect added a tenth prerequisite to the nine enumerated in the Clean Water Act for transfer of permit authority.\textsuperscript{529} and EPA’s transfer decision was arbitrary and capricious.\textsuperscript{530}

The Supreme Court reversed.\textsuperscript{531} Quoting directly from \textit{State Farm},\textsuperscript{532} Justice Alito, writing for the majority, described arbitrary and capricious review as deferential in nature.\textsuperscript{533} That the relevant federal agencies had changed their minds during the consultation process was irrelevant as long as they had followed proper procedures.\textsuperscript{534} Turning to the merits, the majority acknowledged that it was required to “mediate a clash of seemingly categorical—and at first glance irreconcilable—legislative commands.”\textsuperscript{535} But Justice Alito worried that a broad reading of § 7(a)(2) would in effect partially trump every other federal statute calling for agency action, contrary to the Court’s longstanding “presumption against implied repeals.”\textsuperscript{536}

\textsuperscript{526} 551 U.S. at 653.
\textsuperscript{527} \textit{Id}. at 654.
\textsuperscript{528} Id. at 655 (citing 33 U.S.C. § 1369(b)(1)(D)). The statute allows private parties to petition for judicial review of EPA determinations concerning state permit programs.
\textsuperscript{529} Id. at 656 (citing 420 F.3d 946 (9th Cir. 2005)).
\textsuperscript{530} Id. at 655 (citing 420 F.3d at 959); see also id. at 657.
\textsuperscript{531} Id. at 657.
\textsuperscript{532} 463 U.S. 29; see supra notes 188-92 and accompanying text (discussing \textit{State Farm}).
\textsuperscript{533} 551 U.S. at 658.
\textsuperscript{534} Id. at 659 (“F.\textit{ederal courts ordinarily are empowered to review only an agency’s final action . . . .}” (citing 5 U.S.C. § 704 (2006))).
\textsuperscript{535} Id. at 661.
\textsuperscript{536} Id. at 662, 664.
Allegedly to resolve the “tension” between the statutes, FWS and the NMFS had issued a joint regulation after notice-and-comment proceedings. The regulation simply stated that § 7 applied to discretionary federal actions. The question on certiorari was whether the regulation lawfully interpreted § 7, and if so, whether the EPA acted lawfully in transferring its permit authority.

Reciting Chevron’s two-step test, Justice Alito hypothesized an ambiguity in the ESA that its language simply does not illuminate. Recognizing implicitly that Chevron deference does not apply in the absence of an ambiguity, Justice Alito recited a traditional tool of statutory construction: “[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” From there, Justice Alito read the otherwise unambiguous mandatory language of § 7(a)(2) not just in the context of the ESA, but rather “against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed . . . broadly.” In other words, the majority considered the ESA’s interpretive context to be virtually unlimited.

Having fabricated a statutory ambiguity out of whole cloth, Justice Alito next deferred to the implementing agencies’ “expert interpretation” that appeared to confine the reach of § 7(a)(2) to discretionary agency actions, thus “harmoniz[ing] the statutes.” Justice Alito concluded that the agencies’ interpretation was “reasonable in light of the

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537 50 C.F.R. § 402.03. “Section 7 [of the Endangered Species Act] and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.” Id.
538 Id. “Section 7 [of the Endangered Species Act] and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.” Id.
539 551 U.S. at 665 (quoting Chevron, 467 U.S. at 842-43).
540 Id.
541 Id. at 666 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)).
542 Id.
543 Id.
544 Id.
Finally, the majority invoked Auer super-deference, citing “formal letter[s]” FWS and NMFS had submitted concluding that EPA transfers were not the kind of discretionary actions the regulation described. Without identifying an ambiguity in the regulation, Justice Alito simply declared the agencies’ interpretation entitled to Auer deference. From there, the majority reasoned that because the regulation limited the scope of ESA § 7 to discretionary federal actions, its language did not conflict with mandatory statutes, including the Clean Water Act’s provisions requiring transfer of permit authority once the nine enumerated criteria were met. The majority thus avoided reconciling the two apparently conflicting statutes by narrowly construing the agencies’ interpretive regulation to undercut the mandatory nature of the ESA.

Justice Stevens, writing for the dissenters, recognized that the Court had the duty to reconcile conflicting statutory mandates if possible. He aptly noted that the majority had failed to do so, instead interpreting the regulation to restrict application of § 7(a)(2) only to discretionary actions, excluding mandatory ones. Justice Stevens declared that the majority’s interpretation contradicted not only the text and history of the regulation, but also the Clean Water Act, the very statute it purported to interpret.

The dissent relied heavily on TVA v. Hill, better known as the “snail darter case,” in which the Court itself held that the language of ESA § 7 could not have been more plain: it

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544 Id.
545 Id. at 672 (quoting Auer, 519 U.S. at 461).
546 Id. at 665, 673.
547 Id. at 673 (Stevens, J., joined by Souter, Ginsburg, and Breyer, J.J., dissenting).
548 Id. at 674.
549 Id.
551 551 U.S. at 677 (quoting 437 U.S. at 173).
trumped all other federal action. Justice Stevens concluded that the majority had erroneously interpreted the wildlife agencies’ regulation to “permit[] a wholesale limitation on the reach of the ESA.” Indeed, “both the text of the ESA and our opinion in Hill compel the contrary determination that Congress intended the ESA to apply to ‘all federal agencies’ and to all ‘actions authorized, funded, or carried out by them.’”

Furthermore, the regulatory history squarely supported the dissenters’ conclusion that the regulation was never intended to limit § 7 to only discretionary agency actions, but simply to clarify that it reached discretionary as well as mandatory actions. Read in its historical context, the regulation simply clarified that ESA § 7 applied to all federal agency actions, both mandatory and discretionary. Finally, the dissent offered alternative ways to reconcile the conflicting federal statutes without limiting ESA § 7. In fact, the consultation process set out in that section offered a method for giving effect to both statutes.

In effect, the majority opinion in National Ass’n of Home Builders turned the Chevron doctrine on its head. By fabricating an ambiguity to bypass Chevron Step One, Justice Alito ignored the requirement that an agency’s authority to interpret a statute is constrained by the extent of the statutory ambiguity. Further, by construing the regulation

552 Id. at 677, 678.
553 Id. at 679.
554 Id. at 678 (quoting TVA v. Hill, 437 U.S. at 173).
555 Id. at 679. The dissent correctly noted that this interpretation made more sense given the longstanding ambiguity posed by the words “shall” and “may.” Indeed, federal statutes sometimes use the word “shall” in a manner that allows room for discretion. Id. at 692 & n.12.
556 Id. at 684-90.
557 Id. at 685-86.
558 See supra note 226; see also, e.g., Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996). “We accord deference to agencies under Chevron . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.” Id. (emphasis added) (citing Chevron, 467 U.S. at 843-44). Very recently, Justice Scalia restated the principle in Cuomo v. Clearing House Ass’n, LLC, 129 S. Ct. 2710, 2715
to limit the ESA’s reach to discretionary actions, the majority essentially eviscerated the ESA and avoided its judicial responsibility to resolve the apparent conflict if at all possible.\footnote{559}

The majority opinion reveals the fundamental flaw in \textit{Chevron}: Ambiguity is in the eye of the beholder.\footnote{560} In this case, the plain language of § 7(a)(2), considered in its proper context – the Act of which it is a part – was unambiguous.\footnote{561} Yet the majority invented an ambiguity simply by declaring that the language of § 7(a)(2) contradicted a host of other unrelated federal statutes that mandate agency action.\footnote{562} Justice Alito, for the majority, reinterpreted a regulation adopted thirteen years after ESA’s enactment to strikingly curtail the effect of § 7(a)(2). Yet a direct comparison of the regulation’s language with the statutory provision it purportedly interprets yields the undeniable conclusion that the statute is unambiguous and thus “beyond the \textit{Chevron} pale.”\footnote{563} Declaring an agency’s strained interpretation of an unambiguous statute reasonable, even by a majority of the Supreme Court, does not make it so.

\footnote{559} See 551 U.S. at 673-74 (Stevens, J., dissenting).
\footnote{561} Indeed, the Court had so held in 1978. \textit{TVA v. Hill}, 437 U.S. at 173, 194.
\footnote{562} See 551 U.S. at 666.
\footnote{563} The decision also appears inconsistent with the Court’s own precedent in \textit{Brand X}, 545 U.S. at 505. As a postscript, the Departments of Interior and Commerce published a final rule on May 4, 2009 withdrawing a December 16, 2008 rule issued by the Bush Administration, apparently in the wake of \textit{National Home Builders}. The last-minute Bush regulation eased even further federal agencies’ consulting obligations under the ESA. See Bush Rule on Consultations Withdrawn as Agencies Consider Further Changes, 77 U.S.L.W. 2684 (May 12, 2009) (citing 77 U.S.L.W. 2361 (Dec. 16, 2008)).
E. Federal Express Corp. v. Holowecki

In February 2008, the Court decided whether an EEOC complainant had timely filed a “charge” of age discrimination. Federal Express Corp. v. Holowecki involved a narrow issue of statutory interpretation: Whether an EEOC complainant had timely filed a “charge” at least sixty days before filing suit. The term “charge” was not defined in the ADEA. Although EEOC had defined the term in various ways, none were conclusive in this case.

Holowecki had filed a completed “Intake Questionnaire” with the EEOC and an affidavit supporting her allegations. Federal Express argued that her questionnaire did not qualify as a “charge” until the EEOC acted upon it. The Government argued that the questionnaire could qualify as a charge, but only if it expressed intent that the EEOC take action. Plaintiff took the position that any completed questionnaire qualified as a “charge” for purposes of tolling the sixty-day waiting period for filing suit.

A majority of the Court concluded that the contents of the questionnaire and affidavit, read together, were sufficient to qualify as a “charge” for purposes of the ADEA. In reaching its conclusion, the majority acknowledged, at least implicitly, that the statutory term “charge” was ambiguous; and that even with the aid of EEOC regulations, its meaning was unclear. Under these circumstances, the majority initially invoked Auer, deferring to the

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565 Id. at 1153 (citing 29 U.S.C. § 626(d)).
566 Id. at 1152.
567 Id. at 1154.
568 Id.
569 Id. at 1154.
570 Id.
571 See id.
572 Id. at 1159.
573 Id. at 1154. “The agency has statutory authority to issue regulations, see [29 U.S.C.] § 628; and when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations.” Id. (citing Chevron, 467 U.S. at 843-45).
574 Id.
575 Id. at 1155 (citing Auer, 519 U.S. at 461).
interpretation suggested by the Government’s amicus brief, EEOC’s Compliance Manual, and internal directives disseminated to field offices over several years.\textsuperscript{576}

Then Justice Kennedy, writing for the majority, sidestepped. Observing that “charge” was a statutory term and not a regulatory one, he acknowledged that the EEOC regulations “parroted . . . language from the underlying statute.”\textsuperscript{577} Citing Gonzales v. Oregon, the majority conceded that the agency’s informal interpretations of its own regulations were not entitled to Auer deference.\textsuperscript{578} Nevertheless, the majority concluded that EEOC’s policy statements interpreting both the statute and the regulation warranted respect “under the less deferential Skidmore standard.”\textsuperscript{579}

Justice Kennedy noted that one Skidmore factor was the consistency of the agency’s interpretation.\textsuperscript{580} While EEOC had been “uneven” in implementing its policy, the agency’s interpretation nevertheless warranted some deference.\textsuperscript{581} The Court evaluated the agency’s policy analysis and concluded that it offered a “reasonable alternative” that was consistent with the relevant ADEA provisions. Because “[n]o clearer alternatives are within [the Court’s] authority or expertise to adopt,” the majority held that EEOC’s interpretation warranted deference under the Skidmore framework.\textsuperscript{582} The Court then applied the agency’s interpretation of its own ambiguous regulations to the facts, concluding that the claimant’s

\textsuperscript{576} Id.; see also id. at 1159 (“[T]he agency acted within its authority in formulating the rule that a filing is deemed a charge if the document reasonably can be construed to request agency action and appropriate relief on the employee’s behalf . . . .”).

\textsuperscript{577} Id. at 1156 (citing Gonzales v. Oregon, 546 U.S. at 257).

\textsuperscript{578} See id. (citing Gonzales v. Oregon, 546 U.S. at 257; Christensen, 529 U.S. at 588).

\textsuperscript{579} Id. (citations omitted).

\textsuperscript{580} Id. at 1156.

\textsuperscript{581} Id. at 1156.

\textsuperscript{582} Id. at 1157. Interestingly, the majority went on to conclude, “We find no reason in this case to depart from our usual rule: Where ambiguities in statutory analysis and application are presented, the agency may choose among reasonable alternatives.” Id. at 1158. The reference to “reasonable alternatives” suggests once again that the agency’s discretion is constrained by the scope of the statutory ambiguity.
completed questionnaire and accompanying affidavit provided sufficient information to constitute a “charge.”

Justices Scalia and Thomas dissented. After consulting not one but three dictionaries, the dissenters declared that a document is not a “charge” if it “merely describes the alleged discrimination and requests the EEOC’s assistance, but does not objectively manifest an intent to initiate enforcement proceedings . . . .” In Justice Thomas’ view, “charge” is commonly understood to refer to a request to investigate, which is generally kept confidential from the employer. He agreed with the agency that at minimum, a “charge” must be in writing and must objectively reflect the complainant’s intent for EEOC to initiate enforcement. However, he took issue with the majority’s endorsement of a standard that allowed the agency to define “charge” to mean “whatever the [EEOC] says it is.” He criticized the majority’s definition as “broader than the ordinary meaning of the term ‘charge,’ and so malleable that it effectively absolves the EEOC of its obligation to administer the ADEA according to discernible standards.”

Even under EEOC’s interpretation, the dissenters disagreed that the complainant’s questionnaire and affidavit qualified as a “charge.” They asserted that any interpretation construing Holowecki’s documents as exhibiting an intent to initiate enforcement

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583 128 S. Ct. at 1159-61.
584 Id. at 1161 (Thomas, J., joined by Scalia, J., dissenting).
585 Id. at 1161. Justice Scalia often cites to a veritable library of dictionaries in his textual approach to statutory interpretation. For a colorful and well-documented history of one oft-cited dictionary, see Lynda Mugglestone, LOST FOR WORDS: THE HIDDEN HISTORY OF THE OXFORD ENGLISH DICTIONARY (2005). Like the Roberts Court’s concept of ambiguity, “the English dictionary was to emerge as a fluid rather than static construct, with the capacity to change and evolve as circumstances might demand.” Id. at 209.
586 128 S. Ct. at 1161.
587 Id. at 1161-62.
588 Id. at 1162 (citing Government’s amicus brief).
589 Id. at 1161.
590 Id. This language implicitly hints that the majority’s interpretation of the statute and the regulation amounted to a delegation of authority to the EEOC without “intelligible principles,” contrary to the nondelegation doctrine. See supra notes 71-73 and accompanying text.
591 128 S. Ct. at 1163-68.
proceedings was “an unreasonable construction of the statutory term ‘charge’ and unworthy of deference.”\textsuperscript{592} The dissent chastised the majority for its “utterly vague criteria”\textsuperscript{593} that would allow the EEOC to evade the statutory requirement to notify the employer and thus encourage conciliation.\textsuperscript{594}

*Holowecki* is notable for invoking each of the deference doctrines, suggesting that a majority of the Roberts Court may be attempting to integrate its deference jurisprudence. However, the majority failed to explicitly recognize and resolve the conflict between *Auer* and *Skidmore*, instead dancing once more on the slippery edge of the “parroting” exception.\textsuperscript{595}

**F. Negusie v. Holder**

The Roberts Court revisited its evolving administrative deference framework in *Negusie v. Holder*,\textsuperscript{596} an asylum case invoking the Immigration and Nationality Act (INA). While the case was an appeal from an adjudication rather than a regulatory challenge, the opinion is worthy of note because it addressed a claim of ambiguity-by-silence that the Court declined to resolve on appeal without remanding for specific guidance from the agency.

Negusie, a dual citizen of Ethiopia and Eritrea,\textsuperscript{597} sought asylum after stowing away to the United States.\textsuperscript{598} The issue was whether the INA barred his eligibility for refugee status because he had involuntarily participated in persecuting Eritrean prisoners. The Eritrean government had forced him to work as a prison guard after imprisoning and beating

\textsuperscript{592} Id. at 1162-63 (citing *Chevron*, 467 U.S. at 837).
\textsuperscript{593} Id. at 1168.
\textsuperscript{594} Id.
\textsuperscript{595} See *Gonzales v. Oregon*, 546 U.S. at 257 (recognizing exception to *Auer* deference when regulations “parrot” ambiguous statutory terms).
\textsuperscript{596} 129 S. Ct. 1159 (2009).
\textsuperscript{597} Id. at 1162.
\textsuperscript{598} See id. at 1163.
him for refusing to fight against Ethiopia. The narrow question was whether Negusie’s involuntary participation in persecution barred him from refugee status under the INA.

The INA’s “persecutor bar” applies to “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” Because the statute did not explicitly restrict the exclusion to voluntary persecutors, the issue was whether its silence on the precise issue rendered it ambiguous as applied to Negusie.

The Bureau of Immigration Appeals (BIA) and the Fifth Circuit both agreed with the immigration judge that Negusie could not qualify for refugee status under the persecutor bar. In reaching that conclusion, they relied on Fedorenko v. United States, a Supreme Court asylum case that had similarly interpreted an analogous provision of the Displaced Persons Act of 1948. On certiorari, the Supreme Court held that the lower tribunals had misread Fedorenko to mean that Negusie’s motives for his conduct were irrelevant. The majority remanded with instructions for the BIA to reconsider the issue without constraint by Fedorenko.

Writing for the majority, Justice Kennedy reasoned that the statute’s silence was inconclusive, and congressional intent was otherwise unclear. The parties disagreed whether the undisputed fact of coercion was relevant, and because there was “substance to

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599 Id. at 1162.
600 Id. at 1164.
601 Id. at 1165 (quoting 8 U.S.C. § 1101(a)(42)). The language is known in immigration law as the “persecutor bar.” Id.
602 See id.
603 Id. at 1163.
605 See 129 S. Ct. at 1165 (citing Fedorenko, 449 U.S. at 495).
606 Id. at 1163.
607 Id.; see id. at 1167.
608 Id.
both contentions,” the majority concluded that “the statute has an ambiguity that the agency should address in the first instance.”609 The case was remanded to allow BIA to consider the question anew in light of the Court’s holding that Fedorenko did not control the outcome.610

While concluding that the INA was ambiguous by omission, the majority failed to apply “traditional tools of statutory interpretation” to resolve the ambiguity on its own.611 The majority rationalized its reluctance to interpret the statute without benefit of BIA’s reasoning, reasserting the Chevron fiction that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.”612

Justice Thomas dissented,613 interpreting the INA to “unambiguously preclude[] any inquiry into whether the persecutor acted voluntarily.”614 Reiterating the Chevron doctrine, Justice Thomas noted that if the statute’s plain language resolves the issue, both agency and reviewing court must follow Congress’ expressed intent.615 He concluded that both the specific statutory language and the INA as a whole demonstrated that the persecutor bar applied to Negusie whether or not his conduct had been coerced.616

Justice Thomas rightly chastised the majority to the extent that it declined to apply Chevron Step One, which requires the reviewing court to apply statutory construction in an

609 Id. at 1164 (emphasis added).
610 Id. at 1166. “The BIA deemed its interpretation to be mandated by Fedorenko, and that error prevented it from a full consideration of the statutory question here presented.” Id.
611 See id. But see Chevron, 467 U.S. at 843 n.9.
612 129 S. Ct. at 1167 (quoting Brand X, 545 U.S. at 980). In further support, the majority cited Gonzales v. Thomas, 547 U.S. 183, 186 (2006) (per curiam), in which the Court had summarily reversed a Ninth Circuit decision holding that a family qualified as a protected social group for purposes of claiming refugee status. Thomas held that the case should have been remanded for the agency to apply the law to the facts. Thomas, 547 U.S. at 187.
613 129 S. Ct. at 1176 (Thomas, J., dissenting).
614 Id.
615 Id. at 1178.
616 See id. at 1179.
effort to resolve a statutory ambiguity.\footnote{Id. at 1182-83.} As Thomas cautioned, “[T]he Court should not, ‘in the name of deference, abdicate its responsibility to interpret a statute simply because it requires some effort.”\footnote{Id. at 1183 (quoting Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 550 U.S. 45, 77 (2007) (Thomas, J., dissenting)).} He reasoned that by omitting the qualifying term “voluntary” from the persecutor bar, Congress must not have intended to restrict the nature of the persecution that would bar an asylum applicant from the benefits of refugee status.\footnote{Id. at 1184-85.} Justice Stevens, joined by Justice Breyer, concurred in part and dissented in part.\footnote{Id. at 1170 (Stevens, J., concurring and dissenting).} Like Justice Thomas, they disagreed with the majority’s decision to remand without first interpreting the statutory language, which they too considered unambiguous.\footnote{Id. at 1181.} Quoting his own words from Chevron, Justice Stevens emphasized that “[t]he judiciary is the final authority on issues of statutory construction.”\footnote{Id. at 1171 (quoting Chevron, 467 U.S. at 843 & n.9).} Unlike Justice Thomas, however, Justices Stevens and Breyer would have held that the persecutor bar does not apply to involuntary persecutor.\footnote{See id. at 1176.}

\textit{Negusie} illustrates the starkly different approaches the justices continue to take when addressing issues of statutory interpretation and agency deference.\footnote{Id. at 1184} One thing is clear: The Court remains seriously divided on how to apply Chevron. As the dissenting opinions suggested, the majority erroneously conflated the Chevron framework in a manner that leapfrogged the Court’s threshold responsibility to interpret the statute in the first instance. As the APA plainly requires, the reviewing court is to decide all issues of law, including the

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  \item \footnote{Id. at 1182-83.} \footnote{Id. at 1183 (quoting Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 550 U.S. 45, 77 (2007) (Thomas, J., dissenting)).} \footnote{Id. at 1184-85.} \footnote{Id. at 1170 (Stevens, J., concurring and dissenting).} \footnote{Id. “[T]he threshold question the Court addresses today is a ‘pure question of statutory construction for the courts to decide.’” Id. (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987)).} \footnote{Id. at 1171 (quoting Chevron, 467 U.S. at 843 & n.9).} \footnote{See id. at 1176.}
\end{itemize}
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meaning of disputed statutory language.624

G. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

One of the last cases decided in the 2008 term offered a clear opportunity to resolve the conflict between Auer super-deference and Skidmore sliding-scale deference, as reinvigorated by Mead. Not only did the Court decline to do so, but it also further obscured the distinctions among the common law deference regimes it has articulated and applied over the last decade.

In Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,625 the Court once again addressed the Clean Water Act and regulations adopted by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). The question was whether Coeur Alaska could lawfully carry out its plan to discharge slurry and other waste from a proposed “froth-flotation” gold mine into a small lake in a national forest, which all parties agreed met the statutory definition of “navigable water.”626

Section 306 of the Act imposes stringent effluent limitations on new point sources of water pollution and charges EPA with issuing regulations establishing mandatory “performance standards.”627 The Act plainly prohibits any discharge in violation of EPA’s performance standards.628 In compliance with the Act’s directives, EPA issued a performance standard for new mining facilities, including gold mines using the “froth-flotation” process.629 The standard flatly prohibits new mines from discharging wastewater into navigable waters.630

626 Id. at 2464.
628 Id. § 1316(e).
630 Id.
In apparent conflict with EPA’s mandatory authority to regulate new point sources are two other sections of the Act that give discretionary permit authority to EPA and the Corps respectively to regulate certain kinds of discharges.631 In general, EPA “may” issue permits for pollutants under § 402 “[e]xcept as provided” in § 404, which grants similar authority to the Corps for “fill material.”632 All parties agreed that Coeur Alaska’s slurry and wastewater are regulated pollutants and also qualify as “fill material” under jointly-issued regulations.633

Several environmental groups filed suit, challenging the Corps’ permit, issued after consultation with the EPA, that allowed Couer Alaska to discharge slurry and other mining waste into the lake under specified conditions, including reclamation plans for the lake after mining ceased.634 The Court upheld the permit in a 5-4 opinion authored by Justice Kennedy. Justices Stevens and Souter joined Justice Ginsburg’s opinion in dissent.

Considered in its entirety, the majority opinion demonstrates the Courts’ tendency to find statutes or regulations ambiguous, thus justifying its apparent enthusiasm for deferring to the agency’s interpretation. Initially, Justice Kennedy dodged the question whether the statutes granting discretionary permit authority are ambiguous for lack of clarity whether each agency’s permit authority is mutually exclusive.635 Deferring to the agencies’ resolution of the issue, the majority declared that if the Corps has discretionary authority to

631 Id. §§ 1342(a) (EPA), 1344(a) (Corps).
634 129 S. Ct. at 2465.
635 See id. at 2467. Justice Kennedy first concluded that the Act was “best understood” to provide that if the Corps has discretionary authority to issue a permit, EPA does not. Id. “Even if there were ambiguity on this point, the EPA’s own regulations would resolve it.” Id. (citing 40 C.F.R. § 122.3). Furthermore, by avoiding a conclusion that the statutes are unambiguous, the majority stopped short of foreclosing agency discretion to interpret the statutes differently in the future. See Brand X, 545 U.S. at 982-83; see also supra notes 428-48 and accompanying text. Instead, the majority simply assumed, without deciding, that the joint regulation reasonably resolved the apparent overlap in permit authority. By failing to decide the threshold question of ambiguity, the majority effectively delegated the interpretive issue to the agencies.
issue permits for discharge of fill material, then EPA is “forbid[den]” from doing so.\textsuperscript{636}

Having decided that the Corps’ discretionary authority to regulate fill material trumps EPA’s discretionary authority to regulate pollutants (including fill material),\textsuperscript{637} the majority next turned to the more important issue. The overarching question was whether the Corps had lawfully issued a discharge permit to Couer Alaska that would undoubtedly result in discharge of slurry and wastewater into navigable waters, contrary to EPA’s new source performance standards. This time the majority declared that the Clean Water Act did not directly speak to the “’precise question’” because it allows the Corps to issue permits regulating fill material.\textsuperscript{638}

Next, the majority concluded that the Act was ambiguous as to whether the new source performance standards apply to fill material at all,\textsuperscript{639} again because it grants “blanket authority” to the Corps to permit discharges of fill material. This reasoning, however, erroneously elevates the Corps’ narrow discretionary authority to issue permits for fill material to override the Act’s plain language that prohibits effluent discharges in violation of new source performance standards.

The majority declared the regulations inconclusive about whether the new source performance standards apply to fill material.\textsuperscript{640} That determination led the majority to an internal EPA memorandum concluding that its “’regulatory regime[,] . . . including effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . do not apply’” to Coeur Alaska’s proposed discharge.\textsuperscript{641} From this informal interpretation, the

\textsuperscript{636} 129 S. Ct. at 2476, 2468.
\textsuperscript{637} Id. at 2469.
\textsuperscript{638} Id. at 2470 (quoting \textit{Chevron}, 467 U.S. at 842).
\textsuperscript{639} Id. at 2471-72.
\textsuperscript{640} Id. at 2473.
\textsuperscript{641} Id. (quoting internal EPA memorandum).
majority, using at best strained reasoning, concluded that if a discharge of fill material permitted by the Corps does not require an EPA permit, then EPA’s performance standards do not apply either.\textsuperscript{642}

The majority’s consideration of EPA’s internal memorandum squarely presented the Court once again with the conflict between \textit{Auer} and \textit{Mead/Skidmore}. On the one hand, \textit{Auer} would confer super-deference to the agency’s interpretation of its own ambiguous regulations, even in the form of a litigation position or some other informal policy statement.\textsuperscript{643} On the other, \textit{Mead} provides that informal agency interpretations such as memoranda merit \textit{Skidmore} deference at most, and then only to the extent the reviewing court finds them persuasive.\textsuperscript{644}

Regrettably, neither the majority nor the dissent recognized and resolved the conflict. However, Justice Scalia implicitly acknowledged the irreconcilability in his concurring opinion.\textsuperscript{645} After first excoriating the majority for failing to apply \textit{Chevron} to EPA’s internal memorandum, he went on to criticize it for applying \textit{Auer}. The ambiguity was not limited to the agency’s own regulations; rather, it also involved \textit{their conformity to the governing statute itself}, which Scalia deemed ambiguous as well. In that sense, \textit{Auer} was not controlling, and Justice Scalia thought the majority should have applied \textit{Chevron} instead. In the end, however, he concurred in the result, noting his “pleasure” in joining an opinion that “effectively ignore[d]” \textit{Mead} altogether.\textsuperscript{646}

Not surprisingly, Justice Ginsburg’s dissent concluded that the majority’s reasoning

\textsuperscript{642} See \textit{id.}
\textsuperscript{643} See \textit{supra} notes 284-317 and accompanying text (discussing \textit{Auer}).
\textsuperscript{644} See \textit{supra} notes 345-70 and accompanying text (discussing \textit{Mead}).
\textsuperscript{645} 129 S. Ct. at 2470 (Scalia, J., concurring in part and concurring in the judgment).
\textsuperscript{646} \textit{Id.}
“strain[ed] credulity.” She read the Act to plainly prohibit effluent discharges in violation of EPA’s new source performance standards. Therefore, if a new source discharge were to be authorized at all, EPA was the appropriate agency as Congress had delegated it primary authority to issue effluent permits. Justice Ginsburg convincingly reconciled the Act’s overlapping permissive agency authority with its mandatory effluent limitations on new source discharges. She concluded that if fill material otherwise qualified for a Corps permit but would violate EPA’s new source performance standards, then if permitted at all it should be regulated by EPA, not the Corps.

H. Cuomo v. Clearing House Ass’n, LLC

On the final day of its October 2008 term, the Roberts Court issued Cuomo v. Clearing House Ass’n, LLC. The opinion demonstrates the difficulty in achieving consensus in the deference arena, even on the threshold question of whether a statutory term is ambiguous, let alone which deference framework applies.

The New York Attorney General sought to enforce state lending laws against national banks. In that process, he requested information from several national banks in lieu of issuing subpoenas. The Office of the Comptroller of the Currency (OCC) and a trade group sought injunctive relief, relying on an OCC regulation that interpreted the National Bank Act. Adopted in a notice-and-comment rulemaking, the regulation generally bars state officials from “exercis[ing] “visitorial powers with respect to national banks,” including

647 Id. at 2483 (Ginsburg, J., dissenting).
648 See id. at 2482-83.
649 Id. at 2483.
651 Id. at 2716, 2721.
requiring the banks to produce records or “prosecuting enforcement actions.” The petitioners argued that the OCC regulation preempted New York’s effort to enforce its fair-lending laws against national banks.

Surprisingly, this time Justice Scalia’s majority opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. At the outset, Justice Scalia conceded “some ambiguity” with respect to “visitorial powers” because its boundaries are unclear. The OCC admittedly had authority to interpret the statute to the extent of its ambiguity, subject to the “outer limits of the term” as determined by the Court.

After reviewing sovereigns’ historical use of “visitorial powers” to oversee corporate operations, the majority held that in its modern sense, the term narrowly referred to administrative oversight, excluding enforcement of state statutes of general applicability. The majority concluded that properly interpreted, the regulation did not bar New York from enforcing state law against national banks. To the extent the OCC had expansively interpreted “visitorial powers” to preclude states from filing state-law enforcement suits against national banks, its interpretation was not a reasonable one.

Justice Thomas dissented, joined by Chief Justice Roberts and Justices Kennedy and Alito. Unlike the majority, the dissenters considered the term “visitorial powers” ambiguous, so they would have deferred to the regulation as a reasonable interpretation.

All justices agreed that Chevron was the appropriate framework, but they differed on

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655 See 129 S. Ct. at 2714.
656 Id. at 2714.
657 Id. at 2715.
658 Id. at 2715-17.
659 See id. at 2718.
660 Id.
661 See id. at 2721.
662 Id. at 2722 (Thomas, J., dissenting).
663 See id. at 2723-24.
how to apply Step One—whether an undefined statutory term is ambiguous. Justice Thomas reasoned that the term was indeed ambiguous because it was “susceptible to more than one meaning.” 664 Next, he consulted nineteenth-century dictionaries that disclosed a “broad definition” of the term, concluding that the OCC regulation was reasonable because it was well within the bounds of that definition. 665

V. Conclusion

On the final day of its most recent term, the Roberts Court once again split 5-4 in a case in which all nine justices agreed that Chevron was the applicable deference framework. At twenty-five years of age, Chevron continues to confound the Court in its application. No longer can Justice Scalia rationally endorse Chevron as a predictable rule of judicial deference “against which Congress can legislate.” 666

Only once did any of the Court’s four separate opinions in the recent case of Negusie v. Holder cite the controlling statute: APA § 706. 667 Justice Stevens alone acknowledged the controlling rule of law in footnote three of his dissenting opinion:

> The Administrative Procedure Act [provides] that courts “shall decide all relevant questions of law [and] interpret constitutional and statutory provisions” but shall review “agency action, findings, and conclusions” under the arbitrary and capricious/abuse of discretion standard. 668

Unlike the Supreme Court’s common law deference doctrines, 669 the language of the APA, at least with respect to issues of law, is plain and unambiguous. In reviewing agency actions,

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664 See id.
665 Id. at 2727. “Put simply, OCC selected a permissible construction of a statutory term that was susceptible to multiple interpretations.” Id.
666 See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 517; see also Chevron Symposium, supra note 299.
668 See 129 S. Ct. at 1176 n.3 (Stevens, J., dissenting) (quoting 5 U.S.C. § 706).
669 Even Justice Scalia recently conceded that the Court’s deference doctrine has become muddled, although he simplistically attributes the blame to Mead. See Coner Alaska, 129 S. Ct. at 2479-89 (Scalia, J., concurring in part and concurring in the judgment).
including legislative rules, interpretive regulations, and adjudication, it is for the courts to
decide relevant questions of law, including the meaning of ambiguous statutes and
regulations. And it is for agencies to decide how to apply the law, as interpreted by the
courts, to the facts and circumstances of a particular case.

While continuing to cite Chevron and pretending to apply it as a distinct deference
framework, the Court appears to have delegated away to agencies its own statutory
responsibility to “decide all relevant questions of law.” After twenty-five years, the
Supreme Court has become immersed in the immensely complicated thicket of Chevron and
its progeny, with no clear resolution in sight. The venerable and much-loved doctrine is
simply unworkable because the courts have been unable to apply it in a consistent,
predictable way.

A. Reconciling and Unifying Deference Jurisprudence

The various common law deference regimes can and should be reconciled and
merged into a unified, integrated deference framework. It makes no sense for the Court to
engage in elaborate judicial debates over whether Chevron deference, Auer deference,
Skidmore deference, or some other common law regime applies. In fact, the Chevron
Court would have reached precisely the same result had it applied traditional Skidmore multi-
factor deference: The Court would have deferred to the EPA’s “bubble” definition of “point

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670 As the Court’s deference regimes acknowledge, there may be a range of permissible interpretations within
the boundaries of an agency’s delegation of authority. Under that circumstance, however, it remains the
reviewing court’s responsibility to determine the statutory boundaries.
672 See id.
673 See, e.g., Couer Alaska, 129 S. Ct. at 2479 & n.* (Scalia, J., concurring in part and concurring in the
judgment) (citing conflicting federal circuit cases).
674 In Couer Alaska, Justice Scalia insisted, “If we must not call that practice Chevron deference, then we have
to rechristen the rose.” Id. at 2479 (Scalia, J., concurring). To the contrary, debating how best to “rechristen the
rose” begs the question of whether the agency’s interpretation is due any deference. That determination requires
the Court to carry out its institutional and statutory responsibility to interpret the law in the first instance, rather
than argue about how to “christen” its common law deference doctrines.
source” because the factors in that case were highly persuasive according to Skidmore’s sliding scale of deference.

As Justice Stevens has recently reminded us,

Judicial deference to agencies’ views on statutes they administer was not born in Chevron . . ., nor did the “singularly judicial role of marking the boundaries of agency choice,” die with that case. In the years before Chevron, this Court recognized that statutory interpretation is a multifaceted enterprise, ranging from a precise construction of statutory language to a determination of what policy best effectuates statutory objectives. We accordingly acknowledged that a complete interpretation of a statutory provision might demand both judicial construction and administrative explication.675

The Roberts Court occasionally appears to be striving to devise a deference framework that merges Chevron, Auer, and Mead, certainly a laudable goal.676 However, federal agencies and the reviewing courts need clear guidance now. And after four years, the Roberts Court has demonstrated its inability to reach a consensus.

B. Reviving Congress

It is time for Congress to step in. To its credit, the House Judiciary Committee has embarked on a multi-year study known as the Administrative Law, Procedure, and Process Project of the Twentieth Century.677 One of its purposes is to make a case to Congress for reinstating the Administrative Conference of the United States.678

1. Revising the APA to Clarify Judicial Review of Agency Actions

As part of that Project, Congress should enact comprehensive revisions to the Administrative Procedure Act and set forth clearly what circumstances trigger deference by the courts and what conditions constrain judicial deference. Until it does, the Court will

676 See, e.g., Holowecki, 128 S. Ct. at 1156 (Kennedy, J.).
677 See supra note 168 (discussing efforts to reestablish Administrative Conference).
678 Id.
continue to assume that Congress has acquiesced in its haphazard application of common law deference doctrines, notwithstanding the clear language of the APA that directs the courts to decide all questions of law.\textsuperscript{679}

As we have seen, the APA for all practical purposes is a dead letter.\textsuperscript{680} Courts have devised common law deference frameworks that have little or no relationship to the APA’s provisions dictating the scope of judicial review of agency interpretations of law. Once Congress legislates anew, the courts will have no choice but to begin with the statute’s deference framework rather than continuing to rely primarily, if not exclusively, on convoluted common law deference regimes that predate the APA. After all, the underlying theory of all deference regimes is that Congress intended to delegate policymaking authority to the executive branch. Thus Congress must accept—and execute—its responsibility for clarifying the applicable standard of judicial review when a litigant challenges an agency’s congressionally delegated authority.

2. Reestablishing the Administrative Conference

Congress should also breathe new life into the reauthorized, but as yet unfunded, Administrative Conference of the United States to address the difficult and complex issues of judicial review and separation of powers. The reconstituted Conference should operate in a similar manner as the Judicial Conference of the United States, but with a focus on administrative law. By bringing together representatives of the bench, the bar, the academic community, and Congress, the Conference is fundamentally necessary to provide a focal

\textsuperscript{679} 5 U.S.C. § 706.
\textsuperscript{680} The District of Columbia Circuit recently sought to preserve judicial review under APA § 706 by reasoning, “Even when an agency’s construction of its statute passes muster under Chevron, a party may claim that the disputed agency action is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” Eagle Broad. v. FCC, 563 F.3d 543, 551 (D.C. Cir. 2009) (quoting 5 U.S.C. § 706(2)(A)). It remains unclear whether the Court’s common law deference regimes entirely displace APA § 10, or whether the APA serves as a stop-gap standard even if an agency's interpretation passes muster under whatever common law deference framework the Court sees fit to apply.

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point for resolving the delicate balance about which Justice Kennedy wrote in *Gonzales v. Oregon.* 681

C. Articulating a Reasoned Framework for Determining Ambiguity

The threshold determination of ambiguity remains the most troubling aspect of the Court’s deference jurisprudence. The seemingly endless and unduly heated debate among the justices about which deference regime applies begs the question. The appropriate scope of deference is simply irrelevant unless the Court first determines as a matter of law that a statute is ambiguous after applying traditional statutory interpretation. Only then is it appropriate to consider the agency’s interpretation, and only then should the Court address the degree of deference, if any.

The Rehnquist Court’s decision in *Brand X* has underscored the overarching nature of the threshold question, which must be resolved before deciding the appropriate standard of review. For if the reviewing court determines that a statute is unambiguous, *Brand X* teaches that the judicial interpretation is binding on agencies that have already reached—or may subsequently reach—a different conclusion.

Yet the Supreme Court has never adopted a disciplined framework for deciding whether a statute—or an agency regulation, for that matter—is sufficiently ambiguous to warrant deference to the agency to resolve the ambiguity within permissible statutory boundaries. Lacking such a framework, the Court all too often ducks its responsibility to resolve ambiguities and instead becomes embroiled in bitter ancillary debates about which deference doctrine applies. Moreover, the Court’s inclination to dodge the resolution of legal issues by all too often declaring an ambiguity sets up a poor incentive for Congress and agencies alike to draft statutes and legislative rules with clarity.

681 546 U.S. at 255 (Kennedy, J.)
If one factor explains the degree of deference (or lack of deference) courts ultimately pay agency interpretations of law, it is the outcome of the threshold determination of ambiguity, inherently a judicial function. Legislative ambiguities will always be with us as an inherent aspect of reaching political compromise. Under any of the Court’s modern deference doctrines, Chevron, Auer, Mead, or Gonzales, the extent to which a reviewing court takes initiative to resolve an apparent ambiguity using traditional statutory interpretation ultimately determines the deference it will likely accord an agency’s interpretation rather than its own.

Just what traditional tools of statutory interpretation the federal courts should consistently apply to decide whether a rule or statute is ambiguous is a topic that warrants further research and scholarly debate. More often than not, a shifting majority of the Roberts Court appears to cherry-pick among the traditional tools of statutory construction to reach its desired result, which all too often punts the interpretive ball back to the executive branch.
Delegation of Notice and Comment Rulemaking - Chevron
Interpretive Rulings
Opinion Letters; IRS Rulings
Formal Adjudications
Permits, Licenses
Informal Adjudications subject to agency review

**Regulatory Variety: Sliding Scale or Slippery Slope?**
Notice-and-Comment - Chevron
Voluntary Notice and Comment (APA Exemptions)
Declaratory Rulings (Brand X)
Interpretive Rules

Policy Statements Chrysler Corp. v. Brown, 441 U.S. 281 (1979);
Formal Adjudications
Informal Adjudications subject to administrative review Martin v. OSHRC, 499 U.S. 144, 156-57 (1991)

**Nature of the law interpreted**
Agency interpretations of statutes

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The Rehnquist Court
1. Christensen
2. **Mead**
3. **Brand X**

**The Roberts Court**

A. **Gonzales v. Oregon**

Rapanos

**VIII. The Supreme Court's New Framework for Review of Agency Interpretations of Law**

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1 See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness And Legitimacy In The Administrative State*, 78 N.Y.U. L. REV. 461, 551 (2003) (referring to *Seminole Rock* and *Auer* as examples of “a principle in administrative law that accords agencies unqualified discretion to choose the method for interpreting ambiguities in their own regulations” (as opposed to ambiguities in congressional statutes)); Eskridge and Baer, *supra* note 4, at 1103; *id.* at 1184 (“To the extent that *Seminole Rock* deference exceeds *Chevron* deference, it is open to abuse by agencies that try to bootstrap unauthorized policy innovations under cover of interpreting vague housekeeping rules.”); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo. L. REV. 695, 717 n.110 (2007) (“The *Auer* standard is perhaps even more deferential than the *Chevron* standard . . . .”); Manning, *supra* note 107; Strauss, *supra* note 275, at 59 n.23.

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(“because of variations in the quality or quantity of the work performed”).