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## Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review

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# RECONCILING *CHEVRON*, *MEAD*, AND THE REVIEW OF AGENCY DISCRETION: SOURCE OF LAW AND THE STANDARDS OF JUDICIAL REVIEW

Michael P. Healy\*

## INTRODUCTION

Although the Supreme Court's watershed decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> has been understood by many as defining the framework for judicial review of agency legal determinations,<sup>2</sup> there have been longstanding questions about the application of the standards for reviewing administrative action.<sup>3</sup> These questions have become more troublesome following the Supreme Court's 2001 decision in *United States v. Mead Corp.*<sup>4</sup> *Mead* established that *Chevron* review only applies when defined requirements are met and held that so-called *Skid-*

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<sup>1</sup> 467 U.S. 837 (1984).

<sup>2</sup> See, e.g., RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.4, at 399 (5th ed. 2009) ("The Court has applied the *Chevron* two-step in over one hundred cases decided since 1984, and circuit courts have applied it in thousands of cases."); BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.35, at 703 (3d ed. 1991) ("[T]he *Chevron* doctrine applies to review of all statutory interpretation by agencies—whether in rules or adjudicatory decisions."); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008) (describing *Chevron* as "the formative case governing the allocation of interpretive authority in the administrative state"); E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 2 (2005) ("*Chevron* signified a fundamental paradigm-shift that redefined the roles of courts and agencies when construing statutes over which agencies have been given interpretive rights." (footnote omitted)); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006) ("[*Chevron*] has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies."). See generally PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1032-33 (rev. 10th ed. 2003) (providing "[s]oundbites on *Chevron*'s importance").

<sup>3</sup> See generally Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (providing a critique of court of appeals decisions under step two of *Chevron*). More recently, prominent scholars have debated whether *Chevron* is better understood as involving one or two steps of analysis. See generally Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611 (2009); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

<sup>4</sup> 533 U.S. 218 (2001).

*more*<sup>5</sup> deference applies when *Chevron* deference does not apply.<sup>6</sup> Surveying the aftermath of *Mead* and its effect on the lower courts, one scholar has written that “*Mead* has muddled judicial review of agency action,”<sup>7</sup> and Justice Antonin Scalia has recently lamented the *Mead* decision’s “ongoing obfuscation of this once-clear area of administrative law.”<sup>8</sup> Another prominent scholar has opined that “a threshold question—the scope of judicial review—has become one of the most vexing in regulatory cases.”<sup>9</sup>

This Article seeks to reconcile the principles that have animated judicial review of agency legal determinations, including agency exercises of discretion, since before the enactment of the Administrative Procedure Act (“APA”).<sup>10</sup> The reconciliation accounts for the relevant review standards defined in APA Section 706.<sup>11</sup>

<sup>5</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). When a court employs *Skidmore* deference, it follows the agency interpretation only to the extent the court is persuaded by the agency’s interpretation. See *infra* Part I.B.

<sup>6</sup> See *infra* Part I.F for a discussion of the Court’s decision in *Mead*.

<sup>7</sup> Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005) (“As Justice Scalia predicted, *Mead* has muddled judicial review of agency action. Lower courts apply different analytical frameworks to determine when Congress delegates, and agencies exercise, authority to issue interpretations with the force of law. Furthermore, courts avoid *Mead* and *Chevron* when *Skidmore* will do. Finally, they disregard *Mead*’s basic purpose and invert the case.”); see also *id.* at 1443-44 (“When the Supreme Court decided [*Mead*] four years ago, Justice Scalia predicted that judicial review of agency action would devolve into chaos. This Article puts that prediction to the test by examining the court of appeals decisions applying the decision. Justice Scalia actually understated the effect of *Mead*.” (footnote omitted)); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 560-61 (2006) (noting that “[t]he precise meaning of *Mead*, both in general and with respect to the significance of procedural formality, is difficult to discern” and that “the immediate impact of the decision appears to have been widespread confusion in the courts of appeals, and the Justices themselves continue to squabble over what the opinion actually held” (footnote omitted)).

<sup>8</sup> *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.5 (2011) (Scalia, J., dissenting) (“I have chosen to interpret the Court as referring to *Skidmore* deference, rather than *Chevron* deference or something in-between, in order to minimize the Court’s ongoing obfuscation of this once-clear area of administrative law.”); see also *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479 (2009) (Scalia, J., concurring in part) (“It is quite impossible to achieve predictable (and relatively litigation-free) administration of the vast body of complex laws committed to the charge of executive agencies without the assurance that reviewing courts will accept reasonable and authoritative agency interpretation of ambiguous provisions. If we must not call that practice *Chevron* deference, then we have to rechristen the rose. Of course the only reason a new name is required is our misguided opinion in *Mead*, whose incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts . . .”).

<sup>9</sup> Sunstein, *supra* note 2, at 190 (commenting that recent administrative law decisions are “producing not only a decrease in agency authority, but also a significant increase in uncertainty about the appropriate approach. More than at any time in recent years, a threshold question—the scope of judicial review—has become one of the most vexing in regulatory cases”).

<sup>10</sup> The provision defining the standards of judicial review, 5 U.S.C. § 706 (2006), provides as follows:

Critical to the reconciliation and to the coherence of the standards of review, is the determination of whether the agency or Congress has provided the source of the law being applied and reviewed in the case.<sup>12</sup> When Congress has not clearly defined the law, the interpretive role of the court depends on whether the agency itself has made law. If the agency has made law, the court should determine only whether the agency's decisionmaking process was reasonable when the agency defined the substantively permissible law. If the agency has not made law, then the court must itself determine the meaning of the ambiguous statute. In that latter case, the court will substitute its substantive interpretation for the agency's interpretation in the event that they differ. This analytic approach resolves several uncertainties that characterize standards of review following *Mead's* gloss on *Chevron*. First, it clearly defines the interpretive impact of the court's decision that the *Chevron* regime either does or does not apply. Second, it identifies the proper place to pursue the *Mead* analysis. Third, it permits an understanding of the proper nature of *Skidmore* review. Finally, it allows for an understanding of the role of reviewing agency discretion under both the *Chevron* and *Skidmore* frameworks.

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To the extent necessary to 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;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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.

*Id.* The APA was enacted in 1946. See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551 *et seq.* (2006)).

<sup>11</sup> See *supra* note 10.

<sup>12</sup> This focus on the source of law is closely related to Professor Strauss's discussion of the different roles played by courts in their review of agency legal determinations. He writes that:

A common problem is that, for some issues, courts are entitled to be the deciders—perhaps influenced by agency view but nonetheless themselves independently responsible for the conclusions reached. For other issues, the conclusion that Congress has validly delegated authority to the agency carries with it the corollary that the agency is responsible for decisions, and the court's function is limited to oversight. Telling the two apart, and then securing judicial recognition of its subordinate role in the oversight context, has been a constant challenge. It is not made easier by recognition that the intensity of the court's *supervisory* role varies with context. Still, acceptance of the proposition that courts are ultimately responsible for some issues, and agencies are responsible for others, is central.

Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 816-17 (2008).

This Article begins in Part I by briefly describing the development of review standards regarding agency legal determinations. This presentation is brief because the story is well known. This Part, however, asks the key questions about standards for judicial review that remain unresolved. Part II provides examples of the uncertainties that pervade standards of review for agency legal determinations. These uncertainties are present in Supreme Court decisions, thus demonstrating that the Supreme Court itself is uncertain about the review framework that it has developed over many years. Part III presents an integrated understanding of the standards for review of agency legal determinations, including exercises of discretion. Part IV considers the value of the integrated approach when a court must review a change in an agency's legal interpretation. Finally, Part V relates the proposed regime of review to the review standards defined by the APA.

#### I. THE LANDMARKS IN DEFINING MODERN STANDARDS OF REVIEW OF AGENCY LEGAL (AND DISCRETIONARY) DECISIONS

Before attempting to reconcile the Supreme Court decisions that have defined the regime for the review of agency legal determinations, this Part briefly reviews the key decisions and seeks to identify the core principles that animate this area of the law. This review begins with a summary of *SEC v. Chenery Corp. (Chenery I)*,<sup>13</sup> a case that is not generally understood as a standard of review case.<sup>14</sup> The review then turns to the cases traditionally associated with review of agency legal determinations, beginning with the Court's decision in *Skidmore v. Swift & Co.*,<sup>15</sup> considered along with *Armour & Co. v. Wantock*,<sup>16</sup> *Skidmore's* companion case. These cases from 1944 were decided prior to the enactment of the APA. This Part then reviews the modern Supreme Court cases that provide the framework for review of agency legal decisions under the APA: *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>17</sup> *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*,<sup>18</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*; *United States v. Mead Corp.*; and *National Cable & Telecommunications Ass'n v. Brand X*

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<sup>13</sup> 318 U.S. 80 (1943).

<sup>14</sup> See, e.g., Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 971-72 (2007) ("The *Chenery* principle does not itself indicate how demanding a court will be in assessing the reason provided by the agency. A standard of review—such as the APA's mandate for reversing agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' and the judicial glosses on that mandate—determines how closely the court will scrutinize agency action." (footnotes omitted)).

<sup>15</sup> 323 U.S. 134 (1944).

<sup>16</sup> 323 U.S. 126 (1944).

<sup>17</sup> 401 U.S. 402 (1971).

<sup>18</sup> 463 U.S. 29 (1983).

*Internet Services*.<sup>19</sup> The focus of this brief review is on the importance of the locus of lawmaking authority.

#### A. *Chenery I*

*Chenery I* is most famous for establishing the principle that a court should allow an agency to exercise administrative discretion, rather than impose a result on the agency.<sup>20</sup> The case, however, also addressed issues of the source of applicable law that are important to understanding the standards of judicial review.<sup>21</sup> The case involved a challenge to an SEC decision to approve a plan of reorganization only if “preferred stock acquired by the respondents during the period in which successive reorganization plans proposed by the management of the company were before the Commission, was not permitted to participate in the reorganization on an equal footing with all other preferred stock.”<sup>22</sup> The SEC reviewed the reorganization plan pursuant to section seven of the Public Utility Holding Company Act of 1935.<sup>23</sup> The agency had to decide “whether the terms of issuance of the new common stock were ‘fair and equitable’ or ‘detrimental to the interests of investors’ within [section] 7 of the Act.”<sup>24</sup>

The Court concluded that Congress, when it enacted this provision, had given the agency “broad powers for the protection of the public.”<sup>25</sup> The delegation was broad because Congress had not clearly proscribed certain reorganizations. The Court’s decision in the case was a consequence of the source of the law that the agency purported to apply in reviewing the legality of the reorganization plan.<sup>26</sup> The Court stated:

[B]efore transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents’ purchases of preferred stock . . . . Established judicial doctrines do not condemn

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<sup>19</sup> 545 U.S. 967 (2005).

<sup>20</sup> See STRAUSS ET AL., *supra* note 2, at 563-64 (describing this “enduring proposition” of *Chenery I*).

<sup>21</sup> SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 87 (1943) (“Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

<sup>22</sup> *Id.* at 81.

<sup>23</sup> See ch. 687, 49 Stat. 803, 815-17 (repealed 2005).

<sup>24</sup> *Chenery I*, 318 U.S. at 85.

<sup>25</sup> *Id.* at 90-91 (citing legislative history).

<sup>26</sup> *Id.* at 89 (“Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked.”).

these transactions. Nor has the Commission . . . promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity.<sup>27</sup>

Accordingly, the Court reviewed the agency's decision to determine whether the company had properly applied the rules regarding the treatment of insiders in a reorganization that had been imposed by the common law.<sup>28</sup> The Court concluded that the agency's understanding of the judge-made law was incorrect.<sup>29</sup> The agency had the authority to define new standards pursuant to a delegation from Congress, but the agency had not exercised its lawmaking power.<sup>30</sup> The Court foreshadowed the development of judicial review standards when it stated that a court must not substitute its view of the law for an agency's when the agency is exercising lawmaking power delegated by Congress.<sup>31</sup> When, however, an agency is interpreting the law defined by another institution, in this case the courts, will review the agency's interpretation closely.<sup>32</sup>

Having decided that the agency misinterpreted the legal standard defined in the common law, the Court considered whether it should determine the standard on reorganization that applies under Section 7 of the Act.<sup>33</sup> The Court concluded that it should not determine the content of the applicable

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<sup>27</sup> *Id.* at 92-93.

<sup>28</sup> *Id.* at 93-94.

<sup>29</sup> The Court concluded that:

[The agency] explicitly disavowed any purpose of going beyond those [standards] which the courts had theretofore recognized. Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked. And judged by those standards, *i.e.*, those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established judicial principles.

*Id.* at 89-90. Justice Black argued in dissent that the Court should have focused only on whether the substance of the rule was consistent with the statute, rather than the source of the law on which the agency relied in defining the rule. *See Chenery I*, 318 U.S. at 100 (Black, J., dissenting).

<sup>30</sup> The Court stated:

Determination of what is "fair and equitable" calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents. Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law. But the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy.

*Id.* at 89 (majority opinion).

<sup>31</sup> *Id.* at 94 ("[T]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.").

<sup>32</sup> *See id.* ("[I]f the [agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law.").

<sup>33</sup> *Id.* at 90, 94.



legal standard.<sup>34</sup> Instead, the Court decided that the matter had to be remanded to the agency.<sup>35</sup> The agency would then have an opportunity to consider whether it should exercise the power delegated to it by Congress to define a new standard for reorganizations.<sup>36</sup> The Court decided, in short, that a court must not decide what Congress has authorized an agency to decide.<sup>37</sup>

*Chenery I*, therefore, embraced more than simply the principle that a court should remand a matter to an agency with delegated power so that the agency may exercise that power.<sup>38</sup> The case also established that an agency decision is reviewed by reference to the source of law that the agency relied upon as the basis for its decision, with the stringency of judicial review determined by that source of the law.<sup>39</sup> Finally, the *Chenery I* court accepted that an agency decision could be legally flawed even though the statute may permit the agency's substantive decision.<sup>40</sup>

## B. *Skidmore and Armour*

*Skidmore* and *Armour* were companion cases that both involved the question of whether employee waiting time may "constitute hours worked, for which overtime compensation is due [to employees] under the Fair Labor Standards Act [("FLSA")]."<sup>41</sup>

Two aspects of these decisions, in particular, help to illuminate the contemporary understanding of judicial review of agency legal determinations. First, these cases applied the core principle that a court must enforce the statutory meaning that is clearly fixed by Congress (provided that the meaning is constitutionally permissible). In *Armour*, the Court concluded that the FLSA, as enacted by Congress, had foreclosed an interpretation that would not permit compensation for *any* employee waiting time.<sup>42</sup> Having

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<sup>34</sup> *Id.* at 94.

<sup>35</sup> *Chenery I*, 318 U.S. at 95.

<sup>36</sup> *Id.* at 88 ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.").

<sup>37</sup> *See id.*

<sup>38</sup> *See id.* at 93-95.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1946).

<sup>42</sup> *Armour & Co. v. Wantock*, 323 U.S. 126, 134 (1944) ("We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging heavy on the employees' hands and because the employer and employee cooperated in trying to make the confinement and idleness incident to it more tolerable."); *see also Skidmore*, 323 U.S. at 136 ("For reasons set forth in the *Armour* case

reached this conclusion, the Court affirmed the judgment of the district court and the court of appeals that a portion of the employees' waiting time was "under the circumstances and the arrangements between the parties . . . working time."<sup>43</sup> Using modern terminology, the *Armour* Court rejected the conclusion that the FLSA had a clear meaning that barred compensation for waiting time.<sup>44</sup> The focus of the Court's analysis was on the statute enacted by Congress.<sup>45</sup> The Court did not consider the views of the administrative agency in interpreting how the statute resolved this legal issue.<sup>46</sup> The *Armour* decision, using the terminology of *Chevron*, is a step-one decision.<sup>47</sup>

*Skidmore*, *Armour*'s more famous companion case, illuminates the interpretative method of a court that must interpret an ambiguous statute when an agency has played no lawmaking role in the implementation of the statute.<sup>48</sup> The judgment that the Court reviewed in *Skidmore* followed from the lower court's decision that the FLSA *barred* compensation for any waiting time.<sup>49</sup> This is the legal interpretation that the Supreme Court rejected in *Armour* based on the FLSA's clear meaning.<sup>50</sup>

In the Court's view, Congress had given courts,<sup>51</sup> rather than an agency,<sup>52</sup> the role of making the legal determination about whether employees had to be compensated under the Act.<sup>53</sup> The Court recognized that an agency, in this case the Administrator of the Wages and Hours Division,<sup>54</sup>

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has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct with-

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decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time.").

<sup>43</sup> *Armour*, 323 U.S. at 134.

<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 132-34.

<sup>46</sup> *See id.* at 134.

<sup>47</sup> *See infra* Part II.B.

<sup>48</sup> *See Skidmore v. Swift & Co.*, 323 U.S. 134, 137-39 (1944).

<sup>49</sup> *Id.* at 136.

<sup>50</sup> *See supra* note 44 and accompanying text.

<sup>51</sup> *See Skidmore*, 323 U.S. at 137 ("The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."); *id.* at 136-37 ("We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.").

<sup>52</sup> *Id.* at 137 ("Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts.").

<sup>53</sup> *Id.*

<sup>54</sup> *See id.* (noting that Congress "did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations").

out the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.<sup>55</sup>

In these circumstances, where the statute's meaning is not clear (and is accordingly ambiguous) and an agency has *not* been delegated responsibility to define the law,<sup>56</sup> a court must decide how the statute applies to the uncertain circumstance. The *Skidmore* Court decided that a court's legal interpretation might be properly informed by the interpretation adopted by the agency that administers the statute.<sup>57</sup> The court looks to the agency's interpretation not because the agency's interpretation is formally binding, but rather because the agency's experience may be useful by providing "guidance," as the court itself decides what the statute means when applying the statute in a particular case.<sup>58</sup>

In sum, *Skidmore* and *Armour* established early on in the administrative era that Congress plays the critical role of providing clear statutory meaning when it wishes to do so, and binds both courts and agencies in that situation.<sup>59</sup> Congress also plays the critical role of defining whether courts or agencies will play the decisive role in giving legal meaning to an ambiguous statute.<sup>60</sup> When a court has the authority to define the legal rule, it

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<sup>55</sup> *Id.* at 137-38.

<sup>56</sup> The Court's judgment about the legal significance of an agency's interpretation of a statute is determined by Congress in the statute. Congress may directly define the deference that a court owes to an agency interpretation. *See Skidmore*, 323 U.S. at 139 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions."). The Court also suggested that judicial deference to an agency's legal determination may be a consequence of the formality of procedures that Congress has imposed on the agency's decisionmaking. *See id.* ("The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do.").

<sup>57</sup> *Id.* at 140.

<sup>58</sup> The *Skidmore* Court famously stated in this regard that:

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

*Id.*

<sup>59</sup> *See id.* at 137-39; *Armour*, 323 U.S. at 132-34.

<sup>60</sup> *See Skidmore*, 323 U.S. at 137-39.

may be persuaded by the agency, but the court does not defer to the agency's view of the law.<sup>61</sup>

### C. Citizens to Preserve Overton Park

The next important decision in the series is *Overton Park*. In *Overton Park*, the Supreme Court provided both a summary of the bases for judicial review as articulated in the APA and an initial description of “arbitrary or capricious” review.<sup>62</sup> The Court reviewed a decision of the Secretary of Transportation to permit a federal highway route to be constructed through a local park.<sup>63</sup> The provisions of two federal statutes,<sup>64</sup>

prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a “feasible and prudent” alternative route exists. If no such route is available, the statutes allow him to approve construction through parks only if there has been “all possible planning to minimize harm” to the park.<sup>65</sup>

The Court concluded at the outset that judicial review of the Secretary's decision was available because Congress had not precluded it,<sup>66</sup> and because the agency's decision was not “committed to agency discretion.”<sup>67</sup> In reaching this latter conclusion, the Court rejected the argument that the Secretary had broad discretion regarding the use of parklands for highways because a nonpark route was required only if “prudent,” as well as feasible.<sup>68</sup> The Court concluded:

Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or

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<sup>61</sup> See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) (“In my view this [*Skidmore* deference] doctrine (if it can be called that) is incoherent, both linguistically and practically. To defer is to subordinate one's own judgment to another's. If one has been persuaded by another, so that one's judgment accords with the other's, there is no room for deferral—only for agreement. Speaking of ‘*Skidmore* deference’ to a persuasive agency position does nothing but confuse.”); see also Bressman, *supra* note 7, at 1467 (“*Skidmore* deference, though phrased as ‘deference,’ actually allocates interpretive control to courts.”).

<sup>62</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-16 (1971).

<sup>63</sup> *Id.* at 406.

<sup>64</sup> Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, § 18(a), 82 Stat. 815, 823-24 (1968); Department of Transportation Act of 1966, Pub. L. No. 89-670, § 4(f), 80 Stat. 931, 934 (1966).

<sup>65</sup> *Overton Park*, 401 U.S. at 405 (footnotes omitted).

<sup>66</sup> *Id.* at 410.

<sup>67</sup> *Id.* at 413 (internal quotation marks omitted).

<sup>68</sup> See *id.* at 411 (internal quotation marks omitted) (“Respondents argue . . . that the requirement that there be no other ‘prudent’ route requires the Secretary to engage in a wide-ranging balancing of competing interests.”).

community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.<sup>69</sup>

In examining the development of judicial review of agency legal conclusions, two parts of the Court's discussion regarding the APA standards of review are important. Describing the review required by the APA, the Court said, "[t]he court is first required to decide whether the Secretary acted within the scope of his authority."<sup>70</sup> The Court relied on its earlier discussion of the statutory limits placed on the Secretary's decision in its "delineation of the scope of the Secretary's authority and discretion."<sup>71</sup> The Court then reiterated its view about the legal limits defined by the statute:

Congress has specified only a small range of choices that the Secretary can make. Also involved in this initial inquiry is a determination of whether on the facts the Secretary's decision can reasonably be said to be within that range. The reviewing court must consider whether the Secretary properly construed his authority to approve the use of parkland as limited to situations where there are no feasible alternative routes or where feasible alternative routes involve uniquely difficult problems. And the reviewing court must be able to find that the Secretary could have reasonably believed that in this case there are no feasible alternatives or that alternatives do involve unique problems.<sup>72</sup>

In the Court's view, the Secretary violated statutory requirements if his choice of highway route failed to comply with the standards that the Court itself decided had been defined by Congress.

The second significant aspect of *Overton Park* is its articulation of the meaning of "arbitrary or capricious" review under the APA:

To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.<sup>73</sup>

The Court's articulation of the standard reflects ambivalence toward substantive review. The focus is on how the agency reached its decision, although some substantive review authority is retained.

*Overton Park* accordingly recognized two components of judicial review of an agency's application of the law: the substantive limits imposed by the statute and the process of the agency's decisionmaking.

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<sup>69</sup> *Id.* at 412-13 (footnotes omitted). The Court famously stated, regarding Congress's intent, that "[b]ecause of this ambiguity [in the legislative history of the two statutes] it is clear that we must look primarily to the statutes themselves to find the legislative intent." *Id.* at 412 n.29.

<sup>70</sup> *Overton Park*, 401 U.S. at 415.

<sup>71</sup> *Id.* at 415-16.

<sup>72</sup> *Id.* at 416.

<sup>73</sup> *Id.* (citations omitted); see also 5 U.S.C. § 706(2)(A) (2006).

#### D. State Farm

Twelve years after *Overton Park*, the Supreme Court returned to the question of the nature of arbitrary or capricious review. *State Farm* involved a challenge to the efforts of the newly elected Reagan Administration to deregulate the area of passive restraints for automobiles.<sup>74</sup> The safety requirements that the National Highway Traffic Safety Administration ("NHTSA") rescinded had been established in the implementation of:

[T]he National Traffic and Motor Vehicle Safety Act of 1966 (Act). The Act, created for the purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," directs the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." In issuing these standards, the Secretary is directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute to carrying out the purposes" of the Act.<sup>75</sup>

The Court held that the rescission decision was subject to review under the arbitrary or capricious standard because the safety standards had been defined by informal rulemaking.<sup>76</sup> The Court's application of that review standard built upon the analysis in *Overton Park*. In particular, the Court's analysis retained the uncertain distinction that *Overton Park* had drawn between the substance of the agency decision and its decisionmaking process:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has 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 the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. We will,

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<sup>74</sup> See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 36-37 (1983). The agency had acted by regulation to rescind the requirement that auto manufacturers include passive restraints, comprised of either airbags or passive seatbelts, in their new models. *Id.* at 37-38.

<sup>75</sup> *Id.* at 33-34 (alteration in original) (citations omitted) (quoting 15 U.S.C. §§ 1381, 1392(a), 1392(f)(1), 1392(3)-(4) (1976 & Supp. V 1981)).

<sup>76</sup> See *id.* at 41.

however, “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>77</sup>

While applying this standard, the Court rejected the conclusion that the agency’s rescission was unlawful, because Congress, through its post-enactment actions, had required the use of passive restraints by acquiescing in prior administrative actions.<sup>78</sup> In the review terminology of *Overton Park*, the Court rejected the argument that the agency’s rescission had exceeded the scope of its legal authority.<sup>79</sup> In our modern review terminology, the Court rejected a claim that rescission was barred under the first step of *Chevron*.

After concluding that the statute did not bar the substance of the agency decision, the Court considered the adequacy of the agency’s decision-making process.<sup>80</sup> The Court concluded, unanimously, that the agency violated the arbitrary or capricious standard because it had failed to consider whether to mandate the exclusive use of either airbags or the continuous seatbelt.<sup>81</sup> This was arbitrary or capricious because despite the highway safety statute, the agency failed to account for the highway safety objective in rescinding the passive restraint requirement.<sup>82</sup> The agency rescinded the requirement without assessing whether safety would be promoted by simply

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<sup>77</sup> *Id.* at 43 (citations omitted) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974), *Overton Park*, 401 U.S. at 416, and *SEC v. Chenery Corp. (Chenery I)*, 332 U.S. 194, 196 (1947)). The arbitrary or capricious review standard does impose additional, general limits on an agency’s decision-making. See *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) (“[A]n agency may not treat like cases differently. And an agency’s unexplained departure from precedent must be overturned as arbitrary and capricious.” (citation omitted) (quoting *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008), and *Freeman Eng’g Assocs., Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997)) (internal quotation marks omitted)).

<sup>78</sup> See *State Farm*, 463 U.S. at 45 (“While an agency’s interpretation of a statute may be confirmed or ratified by subsequent congressional failure to change that interpretation, in the cases before us, even an unequivocal ratification—short of statutory incorporation—of the passive restraint standard would not connote approval or disapproval of an agency’s later decision to rescind the regulation. That decision remains subject to the arbitrary-and-capricious standard.” (citations omitted)); *id.* at 59 n.\* (Rehnquist, J., concurring in part and dissenting in part) (“[I]n this case, as the Court correctly concludes, Congress has not required the agency to require passive restraints.” (citation omitted)).

<sup>79</sup> *Id.* at 45 (majority opinion) (“Even were we inclined to rely on inchoate legislative action, the inferences to be drawn fail to suggest that NHTSA acted improperly in rescinding Standard 208.”).

<sup>80</sup> *Id.* at 48.

<sup>81</sup> See *id.* at 57-58 (Rehnquist, J., concurring in part and dissenting in part) (“I agree that, since the airbag and continuous spool automatic seatbelt were explicitly approved in the Standard the agency was rescinding, the agency should explain why it declined to leave those requirements intact. In this case, the agency gave no explanation at all. Of course, if the agency can provide a rational explanation, it may adhere to its decision to rescind the entire Standard.”).

<sup>82</sup> See *id.* at 48 (majority opinion).

requiring all manufacturers to use the same safety technology.<sup>83</sup> The statute, in other words, defined the factors that the agency had to consider in making its regulatory decisions.<sup>84</sup> The agency failed to implement the statute by failing to account for those factors.<sup>85</sup>

The Court's application of the arbitrary or capricious review standard was much more elaborate than in *Overton Park*. The *State Farm* decision retained, however, the uncertainty about whether arbitrary or capricious review is only concerned with the agency's decisionmaking process, or whether it is also concerned with the agency's substantive decision.<sup>86</sup> The Court indicated that employing the proper decisionmaking process will foreclose the permissibility of certain reasons for substantive decisions,<sup>87</sup> in particular the assessment of regulatory costs.<sup>88</sup>

In sum, *State Farm* retained the core view that Congress may itself define the content of the law for the agency.<sup>89</sup> In the absence of clearly defined law,<sup>90</sup> the agency's application of the law is reviewed under the arbi-

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<sup>83</sup> See *State Farm*, 463 U.S. at 48 ("Given the effectiveness ascribed to airbag technology by the agency, the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment. But the agency not only did not require compliance through airbags, it also did not even consider the possibility in its 1981 rulemaking. Not one sentence of its rulemaking statement discusses the airbags-only option.").

<sup>84</sup> *Id.* at 55 (discussing the factors necessary to consider).

<sup>85</sup> See *id.* at 56.

<sup>86</sup> See Strauss, *supra* note 12, at 816-17.

<sup>87</sup> See *State Farm*, 463 U.S. at 49 ("[T]he [Motor Vehicle Safety] Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be 'technology-forcing' in the sense of inducing the development of superior safety design. If, under the statute, the agency should not defer to the industry's failure to develop safer cars, which it surely should not do, *a fortiori* it may not revoke a safety standard which can be satisfied by current technology simply because the industry has opted for an ineffective seatbelt design." (citation omitted)).

<sup>88</sup> *Id.* at 54-55 ("The agency's conclusion that the incremental costs of the requirements were no longer reasonable was predicated on its prediction that the safety benefits of the regulation might be minimal. Specifically, the agency's fears that the public may resent paying more for the automatic belt systems is expressly dependent on the assumption that detachable automatic belts will not produce more than 'negligible safety benefits.' When the agency reexamines its findings as to the likely increase in seatbelt usage, it must also reconsider its judgment of the reasonableness of the monetary and other costs associated with the Standard. In reaching its judgment, NHTSA should bear in mind that Congress intended safety to be the pre-eminent factor under the [Motor Vehicle Safety] Act . . . ." (citation omitted)).

<sup>89</sup> *Id.* at 59 (Rehnquist, J., concurring in part and dissenting in part).

<sup>90</sup> See *id.* ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." (footnote omitted)); see also *id.* at 59 n.\* ("Of course, a new administration may not refuse to enforce



trary or capricious standard.<sup>91</sup> That standard is concerned primarily with the agency's decisionmaking process.

### E. Chevron

The next in this series of Supreme Court decisions is the most famous: *Chevron*. The Court reviewed a regulation promulgated by the Environmental Protection Agency ("EPA") that broadly defined a stationary source under the Clean Air Act.<sup>92</sup> This narrowed the circumstances under which modifications of an existing source would trigger the stringent requirements for a new stationary source.<sup>93</sup>

The decision is most famous<sup>94</sup> for defining the two-step approach for reviewing agency legal determinations:

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.<sup>95</sup>

In describing these steps and their application to the legal issues in *Chevron*, the Court established the foundations for the modern understanding of judicial review of agency legal interpretations.<sup>96</sup> The Court's view of the first step was quite clear: Congress has the power to define the applicable law.<sup>97</sup> When a court determines that Congress has defined the law because of the law's clarity,<sup>98</sup> that law governs.<sup>99</sup> Courts determine the clarity

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laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions.").

<sup>91</sup> See *id.* at 42-43 (majority opinion).

<sup>92</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839-40 (1984).

<sup>93</sup> *Id.* at 840 (describing the netting out effect of the so-called bubble concept).

<sup>94</sup> See *supra* note 2 and accompanying text.

<sup>95</sup> *Chevron*, 467 U.S. at 842-43 (footnotes omitted).

<sup>96</sup> See Sunstein, *supra* note 2, at 188 ("[T]he [*Chevron*] decision has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies.").

<sup>97</sup> *Chevron*, 467 U.S. at 842-43 ("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.").

<sup>98</sup> *Id.* at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

<sup>99</sup> *Id.* ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

of legislative directives by “employing traditional tools of statutory construction.”<sup>100</sup> The Court concluded in *Chevron* that Congress had no clear intent regarding a broad definition of stationary source.<sup>101</sup>

Accordingly, the Court proceeded to the second step of the analysis—the step at which deference is owed to an agency’s interpretation.<sup>102</sup> The Court’s motivation for granting deference to agencies came from the Court’s view that statutory ambiguity means that Congress has delegated interpretive authority<sup>103</sup> to agencies and not courts.<sup>104</sup>

The second part of the Court’s analysis, “whether the agency’s answer is based on a permissible construction of the statute,”<sup>105</sup> is less clear regarding the nature of the deference to the agency. Part of the Court’s discussion suggested that the agency’s interpretation was lawful because the agency considered the proper factors—“the economic interest in permitting capital improvements to continue and the environmental interest in improving air

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<sup>100</sup> *Id.*; see also *id.* at 851 (“The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the ‘bubble concept’ or the question whether a plantwide definition of a stationary source is permissible under the permit program.”); *id.* at 862 (“We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.”).

<sup>101</sup> *Chevron*, 467 U.S. at 845 (“[W]e agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases.”).

<sup>102</sup> Professor Elliott, who served as General Counsel at the EPA, see Elliott, *supra* note 2, at 9, has written that the deference to agencies required by step two of *Chevron* “reduced the relative power of lawyers within agencies and strengthened the voices of officials in other disciplines.” *Id.* at 2; *id.* at 3 (“In the environmental area, the [EPA] and other agencies gradually internalized and adapted to the additional interpretive discretion (i.e., the expanded power) that *Chevron* provided them. Accordingly, EPA and other agencies are now more adventurous when interpreting and elaborating statutory law.” (footnote omitted)); see also Bamberger, *supra* note 2, at 66 (“[A]fter *Chevron*, when a statute is unclear, the resulting discretion belongs generally to the agency charged with its administration. That agency—armed with the very expertise and political sensitivity courts lack—may (so long as it meets a requisite level of decisionmaking formality) adopt any policy permitted by the scope of statutory indeterminacy.”).

<sup>103</sup> *Chevron*, 467 U.S. at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” (footnote omitted)).

<sup>104</sup> See *id.* at 842 (“The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term ‘stationary source’ when it had decided that Congress itself had not commanded that definition.”); *id.* at 843 n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”).

<sup>105</sup> *Id.* at 843.

quality”—when it established the regulation.<sup>106</sup> Indeed, the Court suggested that it should not play any role in assessing policy judgments made by the political departments of the federal government.<sup>107</sup> Notwithstanding the Court’s abjuring a role in determining substantive policy, the Court’s decision contained language indicating that it based its decision to uphold the regulation on its own view that the regulation’s *substance* was reasonable.<sup>108</sup>

The Court’s discussion of *Chevron* deference also included suggestions for how this deference differs from *Skidmore* deference.<sup>109</sup> The difference is most striking in the Court’s discussion about the relevance of the agency’s change in position.<sup>110</sup> A change in agency position was a reason for reduced deference under *Skidmore*.<sup>111</sup> Under the *Chevron* regime, a court owes deference to an agency’s interpretation despite changes in position by the agency.<sup>112</sup> In other respects, however, the Court suggested that

<sup>106</sup> *Id.* at 851 (noting that the legislative history “plainly disclose[s] that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality”).

<sup>107</sup> The Court stated that:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”

*Id.* at 865-66 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

<sup>108</sup> See *Chevron*, 467 U.S. at 845 (“[W]e . . . conclude that the EPA’s use of that [bubble] concept here is a reasonable policy choice for the agency to make.”); *id.* at 865 (“[T]he Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests . . .”); *id.* at 866 (“We hold that the EPA’s definition of the term ‘source’ is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. ‘The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends . . . .’” (alterations in original) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961))).

<sup>109</sup> See *id.* at 863-65 (discussing the reasons for allowing greater deference to the agency in this case).

<sup>110</sup> See *id.* at 863 (“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be accorded the agency’s interpretation of the statute.”).

<sup>111</sup> See *supra* note 58 and accompanying text.

<sup>112</sup> The *Chevron* Court stated in this regard that:

*Chevron* deference is motivated by the same motivations that animated *Skidmore* deference: agency experience and expertise.<sup>113</sup>

In sum, *Chevron*'s creation of a deference approach to agency legal determinations provided clarity in some respects, but lacked clarity in others. It is noteworthy that the Court completely ignored the APA in its discussion of the deference owed to agencies.<sup>114</sup>

#### F. Mead

*Mead* is the next case in the jurisprudence defining the modern approach to judicial review of agency legal and discretionary determinations.<sup>115</sup> Decided more than fifteen years after *Chevron*, *Mead* determined the relationship between *Skidmore* deference and *Chevron* deference.<sup>116</sup> In resolving this question, the Court reiterated its consistent view that Congress has the authority to define the degree of deference owed to an agency decision.<sup>117</sup>

The *Mead* Court reviewed a tariff classification ruling by the Customs Service.<sup>118</sup> Mead Corp. imported day planners and the agency had to decide the customs classification for the product.<sup>119</sup> It selected the classification

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Our review of the EPA's varying interpretations of the word "source"—both before and after the 1977 Amendments—convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

*Chevron*, 467 U.S. at 863-64. Indeed, the Court indicates that an agency's changes in interpretation support a conclusion that the statute itself was not clear. *Id.* at 864 ("[T]he fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.").

<sup>113</sup> See *id.* at 865 ("[T]he Administrator's interpretation . . . is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." (footnotes omitted)).

<sup>114</sup> Although the Clean Air Act itself prescribes standards of judicial review for rulemaking by the EPA, see 42 U.S.C. § 7607(d)(9) (2006), those review standards are almost identical in relevant respect to the review standards in the APA, see 5 U.S.C. § 706 (2006).

<sup>115</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

<sup>116</sup> See *id.* ("We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore* . . . the ruling is eligible to claim respect according to its persuasiveness." (citation omitted)).

<sup>117</sup> See *id.*

<sup>118</sup> *Id.* at 221-22.

<sup>119</sup> See *id.* at 224-25.

that was subject to a tariff of 4 percent, as opposed to the alternative tariff-free classification.<sup>120</sup> The court of appeals had reversed the agency's decision, after granting no deference to the agency's ruling.<sup>121</sup>

In order to review the agency ruling, the Court had to decide the amount of deference to accord the agency decision.<sup>122</sup> The Court's decision developed from its view that Congress intended that only certain agency legal determinations would receive *Chevron* deference.<sup>123</sup> The Court concluded that Congress would not want such strong deference to be accorded to an agency determination that lacks the force of agency-defined law.<sup>124</sup> Agency-defined law is not present if either the agency lacked the delegated authority to make decisions with the force of law or the agency did not exercise its delegated lawmaking power.<sup>125</sup>

The Court suggested that there was a longstanding recognition that *Chevron* deference applied only when the agency was the source of law because it had acted in the exercise of lawmaking power delegated by Congress:

Since 1984, we have identified a category of interpretive choices distinguished by an additional reason for judicial deference. This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable; cf. 5 U.S.C. § 706(2) (a reviewing

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<sup>120</sup> See *id.*

<sup>121</sup> *Mead*, 533 U.S. at 226.

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* at 226-27.

<sup>124</sup> See *id.*

<sup>125</sup> The Court held that:

[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify . . . .

*Id.*

court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").<sup>126</sup>

In addition to identifying the usual characteristics of agency determinations that receive *Chevron* deference,<sup>127</sup> the Court enumerated several determinations that have not received such deference.<sup>128</sup> The Court then considered the nature of the Customs Service ruling at issue in *Mead* and concluded that *Chevron* deference was not appropriate.<sup>129</sup>

Having decided that *Chevron* deference was not proper, the Court considered whether the Customs Service ruling should receive any deference.<sup>130</sup> The Court elected to apply *Skidmore* deference.<sup>131</sup> *Skidmore*, of course, had

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<sup>126</sup> *Id.* at 229 (alteration in original) (citations omitted) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-46 (1984)). Note how the Court analogizes step two of the *Chevron* analysis to arbitrary or capricious review.

<sup>127</sup> *See Mead*, 533 U.S. at 230-31 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded. The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*." (citation and footnotes omitted)).

<sup>128</sup> *See id.* at 234 ("In sum, classification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale." (citation omitted) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000))); *id.* at 232 ("[P]recedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, and they enjoy no *Chevron* status as a class." (citation omitted)).

<sup>129</sup> *See id.* at 231 ("There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."); *id.* at 234 ("The statutory changes reveal no new congressional objective of treating classification decisions generally as rulemaking with force of law, nor do they suggest any intent to create a *Chevron* patchwork of classification rulings, some with force of law, some without.").

<sup>130</sup> *See id.*

<sup>131</sup> *See Mead*, 533 U.S. at 234 ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." (citation omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944))); *id.* at 235 ("There is room at least to raise a *Skidmore* claim here, where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case: whether the daily planner with room for brief daily entries falls under 'diaries,' when diaries are grouped with 'notebooks and address books, bound; memorandum pads, letter pads and similar articles,' and whether a planner with a ring binding should qualify as 'bound,' when a binding may be typified by a book, but also may have 'reinforcements or fittings of metal, plastics, etc.' A classification ruling in this situation may therefore at least seek a respect proportional to its 'power to persuade.' Such a ruling may surely claim the merit of its writer's thoroughness,

not involved an exercise of agency lawmaking authority, because the agency had lacked lawmaking power.<sup>132</sup> The *Mead* Court then remanded the case to the lower courts for further proceedings.<sup>133</sup> The Court's judgment reinforced the effect of applying *Skidmore* deference: it is the court that has the lawmaking power to interpret the statute.<sup>134</sup> Courts are to exercise that interpretive power after accounting for the agency determination and according it the proper deference based on the *Skidmore* factors.<sup>135</sup>

In sum, *Mead* reinforced the principle that Congress determines the degree of deference courts owe to agency legal interpretations.<sup>136</sup> This principle applies even though the judiciary is the institution that necessarily decides what Congress had intended as the proper amount of deference.<sup>137</sup> When an agency exercises delegated lawmaking power, the court must accept the agency's reasonable interpretation of the statute.<sup>138</sup> When an agency is not exercising delegated lawmaking power, the court interprets the statute giving appropriate deference, under the circumstances, to the agency's interpretation, but deciding for itself the meaning of the statute.

## G. Brand X

The last Supreme Court decision in this series is *Brand X*. This case is important because it reinforced many of the principles of deference that emerged through the line of cases reviewed so far. It also clarified the authority of an agency to interpret an ambiguous statute when a court has previously interpreted that same language without an agency's prior exercise of delegated lawmaking power.

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logic, and expertness, its fit with prior interpretations, and any other sources of weight." (citations omitted) (quoting Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, subsec. 4820.10.20 (1994 & Supp. I 1995), U.S. CUSTOMS SERV., HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM EXPLANATORY NOTES TO HEADING 4820, at 687, and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

<sup>132</sup> See *supra* note 58 and accompanying text.

<sup>133</sup> *Mead*, 533 U.S. at 238-39 ("Since the *Skidmore* assessment called for here ought to be made in the first instance by the Court of Appeals for the Federal Circuit or the [Court of International Trade], we go no further than to vacate the judgment and remand the case for further proceedings consistent with this opinion.").

<sup>134</sup> See *id.* at 227 ("The Customs ruling at issue here fails to qualify [for *Chevron* deference], although the possibility that it deserves some deference under *Skidmore* leads us to vacate and remand.").

<sup>135</sup> See *id.* at 227-28.

<sup>136</sup> See *id.* at 236-37 ("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, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference." (footnote omitted)).

<sup>137</sup> See *id.* at 227.

<sup>138</sup> See *id.*

The Court reviewed a regulation promulgated by the Federal Communications Commission ("FCC"), in which the agency provided that "cable companies that sell broadband Internet service do not provide 'telecommunications servic[e]' as the Communications Act defines that term, and hence are exempt from mandatory common-carrier regulation under Title II."<sup>139</sup> The court of appeals held that the regulation was unlawful due to its holding in an earlier action "that cable modem service was a 'telecommunications service.'"<sup>140</sup>

The order of the Court's analysis is noteworthy: rather than decide whether the legal issue is resolved at *Chevron* step one, the Court first considered whether the agency receives *Chevron* deference for its action.<sup>141</sup> The Court's analytic approach accordingly treated the *Mead* inquiry as step zero of the *Chevron* analysis, rather than as step one and a half.<sup>142</sup> The Court concluded that the FCC regulations properly received *Chevron*, rather than *Skidmore*, deference.<sup>143</sup>

In concluding that the *Chevron* regime applied, the Court rejected the argument that an agency should not receive deference from a court when its legal position has changed.<sup>144</sup> The Court reiterated its view that the *Chevron* regime provided agencies with the ability to change their interpretations of ambiguous statutes.<sup>145</sup> The agency must, however, accompany any change in legal interpretation with an adequate explanation of the reasons for the change.<sup>146</sup>

<sup>139</sup> Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973-74 (2005) (alteration in original).

<sup>140</sup> *Id.* at 979-80 (citing AT&T v. City of Portland, 216 F.3d 871, 877-80 (9th Cir. 2000)). The Supreme Court noted that "the court in that case was not reviewing an administrative proceeding and the Commission was not a party to the case." *Id.* at 980.

<sup>141</sup> *Id.*

<sup>142</sup> This order of analysis is discussed *infra* Parts III.A-B.

<sup>143</sup> See *Brand X*, 545 U.S. at 980-81 ("The *Chevron* framework governs our review of the Commission's construction. Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act. These provisions give the Commission the authority to promulgate binding legal rules; the Commission issued the order under review in the exercise of that authority; and no one questions that the order is within the Commission's jurisdiction. Hence, as we have in the past, we apply the *Chevron* framework to the Commission's interpretation of the Communications Act." (citations omitted) (quoting 47 U.S.C. §§ 151, 201 (2000), and AT&T v. Iowa Utils. Bd., 525 U.S. 366, 377-78 (1999))).

<sup>144</sup> See *id.* at 981.

<sup>145</sup> *Id.* ("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 Administrative Procedure Act.").

<sup>146</sup> See *id.* at 981-82 ("[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed



The Court also addressed the legal significance of a prior judicial interpretation of the statute now being interpreted by the agency in the exercise of delegated lawmaking authority.<sup>147</sup> The Court concluded that a court's decision forecloses an alternate agency interpretation only if the holding states that the statute unambiguously compels the court's interpretation.<sup>148</sup> The Court believed that Congress intended this limited legal effect of judicial interpretations and intentionally avoided a situation where the legal interpretation of a court may fix the legal interpretation merely because an agency had not yet exercised its lawmaking power.<sup>149</sup> The Court distinguished this legal effect, from the legal effect of a judicial interpretation of a statute when there is no basis for *Chevron* deference: there, the court's interpretation binds the agency.<sup>150</sup> In this context, Congress is the source of the law and the court is the institution that determines the intent of Congress. The Court concluded that the prior decision relied upon by the court of appeals did not bind the agency because the court had not held the statute to be unambiguous.<sup>151</sup>

Having resolved these preliminary issues, the Court proceeded to its *Chevron* analysis.<sup>152</sup> The Court concluded that the statute was ambiguous:

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factual circumstances, or a change in administrations. That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy." (second alteration in original) (citations omitted) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996), and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863-64 (1984)) (internal quotation marks omitted)).

<sup>147</sup> See *id.* at 982-83.

<sup>148</sup> See *Brand X*, 545 U.S. at 982-83 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . 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."); *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.").

<sup>149</sup> *Id.* at 983 ("A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.").

<sup>150</sup> *Id.* ("In all other respects [than the *Chevron* deference context], the court's prior ruling remains binding law (for example, as to agency interpretations to which *Chevron* is inapplicable).").

<sup>151</sup> See *id.* at 984-85 ("[The Court of Appeals's] prior decision in *Portland* held only that the *best* reading of § 153(46) was that cable modem service was a 'telecommunications service,' not that it was the *only permissible* reading of the statute. Nothing in *Portland* held that the Communications Act unambiguously required treating cable Internet providers as telecommunications carriers." (citation omitted)).

<sup>152</sup> *Id.* at 986.

Because the term "offer" can sometimes refer to a single, finished product and sometimes to the "individual components in a package being offered" (depending on whether the components "still possess sufficient identity to be described as separate objects"), the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering. This leaves federal telecommunications policy in this technical and complex area to be set by the Commission, not by warring analogies.<sup>153</sup>

The Court majority accordingly disagreed with Justice Scalia, who argued in dissent that the statute unambiguously foreclosed the FCC interpretation:

After all is said and done, after all the regulatory cant has been translated, and the smoke of agency expertise blown away, it remains perfectly clear that someone who sells cable-modem service is "offering" telecommunications. For that simple reason set forth in the statute, I would affirm the Court of Appeals.<sup>154</sup>

The Court then decided "that the Commission's construction was 'a reasonable policy choice for the [Commission] to make' at *Chevron's* second step."<sup>155</sup> The Court's analysis in this portion of the decision is difficult to characterize. The Court's discussion appeared quite similar to the *Chevron* step-one analysis in that the Court was focused principally on whether the agency's substantive conclusions were permitted by the statute: the Court was not concerned with the agency's decisionmaking process.<sup>156</sup>

The final portion of the Supreme Court's decision considered the industry's argument that the regulation was arbitrary or capricious because it "treat[s] cable modem service differently from [Digital Subscriber Line ("DSL")] service."<sup>157</sup> Here, the Court did engage in process-based review of the agency action, focusing on whether the agency had adequately explained the basis for its decision.<sup>158</sup> The Court concluded that the agency

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<sup>153</sup> *Brand X*, 545 U.S. at 991-92 (citation omitted) (quoting *id.* at 1006 (Scalia, J., dissenting)); see also *id.* at 988 (majority opinion) ("Seen from the consumer's point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access . . ."); *id.* at 989 ("['O]ffering' can reasonably be read to mean a 'stand-alone' offering of telecommunications, i.e., an offered service that, from the user's perspective, transmits messages unadulterated by computer processing. That conclusion follows not only from the ordinary meaning of the word 'offering,' but also from the regulatory history of the Communications Act.").

<sup>154</sup> *Id.* at 1014 (Scalia, J., dissenting).

<sup>155</sup> *Id.* at 997 (majority opinion) (alteration in original) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984)).

<sup>156</sup> See *Brand X*, 545 U.S. at 997-1000.

<sup>157</sup> *Id.* at 1000-01.

<sup>158</sup> See *id.* at 1001 n.4 ("Respondents vigorously argue that the Commission's purported inconsistent treatment is a reason for holding the Commission's construction impermissible under [*Chevron*]. Any inconsistency bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute.").

had provided a reasonable and sufficient explanation for its regulatory requirements and the distinctions drawn by them.<sup>159</sup>

In sum, *Brand X* confirmed the impact of *Mead* and applied the theory of *Mead* to considerations of the effects of statutory interpretation by the judicial branch.<sup>160</sup> The case also provided an application of the different steps of the *Chevron* analysis, as well as arbitrary or capricious review of the same agency action reviewed under the *Chevron* regime.

## II. UNCERTAINTY AND DISAGREEMENT REGARDING THE STRUCTURE OF JUDICIAL REVIEW OF AGENCY LEGAL DETERMINATIONS AFTER *BRAND X*

Although the previously summarized cases have defined the modern framework for review of agency legal determinations, subsequent decisions by the Supreme Court have shown that the framework is uncertain in a variety of respects. This Part uses post-*Brand X* Supreme Court decisions to illuminate uncertainties and inconsistencies in the Court's approach to judicial review. This Part is organized by reference to the structure of analysis that the cases described in the previous Part seem to have adopted.

### A. *The Order and Content of Mead Analysis*

*Brand X* applied the *Mead* analysis, used to determine whether the *Chevron* rule of deference applied to review of an agency decision, *before* the Court determined whether the statute had a clear meaning.<sup>161</sup> In two more recent decisions, the Court decided whether the statute had a clear meaning before performing the *Mead* analysis. One of these cases, *Massachusetts v. EPA*,<sup>162</sup> involved the EPA's decision not to regulate emissions of greenhouse gases from mobile sources under Section 202(a) of the Clean Air Act.<sup>163</sup> The Court concluded that "[t]he statutory text forecloses EPA's reading,"<sup>164</sup> and stated that deference was accordingly not relevant.<sup>165</sup> The other case, *Gonzales v. Oregon*,<sup>166</sup> involved the Court's review of an "Interpretive Rule issued by the Attorney General" that "determines that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under

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<sup>159</sup> See *id.* at 1000-02.

<sup>160</sup> See *id.* at 980-83, 996-97, 1001, 1003.

<sup>161</sup> See *supra* notes 141-43 and accompanying text.

<sup>162</sup> 549 U.S. 497 (2007).

<sup>163</sup> 42 U.S.C. § 7521(a) (2006).

<sup>164</sup> *Massachusetts*, 549 U.S. at 528.

<sup>165</sup> See *id.* at 529 n.26.

<sup>166</sup> 546 U.S. 243 (2006).

the [Controlled Substances Act].”<sup>167</sup> The Court there did engage in the *Mead* analysis, but only after it had summarily decided that the statute was ambiguous based on the following analysis:

If a statute is ambiguous, judicial review of administrative rulemaking often demands *Chevron* deference; and the rule is judged accordingly. All would agree, we should think, that the statutory phrase “legitimate medical purpose” is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense.”<sup>168</sup>

Having found ambiguity, the Court engaged in the *Mead* analysis.<sup>169</sup> In sum, the Court’s decisions reflect uncertainty regarding the order of analysis for determining the applicability of *Chevron* deference.

In addition to this uncertainty, the Court’s recent decisions are inconsistent in the analysis of when *Chevron* deference should apply; that is the result of the *Mead* analysis. In *Massachusetts*, the Court had concluded that the statute was clear in not prohibiting the regulation of greenhouse gases.<sup>170</sup> Justice Scalia wrote a dissenting opinion, joined by two other Justices, in which he asserted that the EPA should have received *Chevron* deference for its conclusion that the agency lacked authority to regulate greenhouse gases under the Clean Air Act.<sup>171</sup> The majority had rejected the argument for *Chevron* deference because the Court viewed the statute as being clear in not precluding the regulation of greenhouse gases.<sup>172</sup> The Court did not otherwise reject the call for *Chevron* deference.<sup>173</sup> This silence is notable because the agency’s decision declining to regulate greenhouse gas emissions from mobile sources was based on the agency’s view that *Congress* had intended that greenhouse gases must not be regulated under the EPA’s Clean Air Act authority.<sup>174</sup> The agency did not purport to be exercising delegated lawmaking power in making this decision.<sup>175</sup> Given that the agency did not view itself as the source of the law barring greenhouse gas regulation, the reasoning of *Mead* should plainly have precluded the use of *Chevron* deference. None of the Justices makes this very basic point about the inapplicability of *Chevron* deference to the agency’s decision.

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<sup>167</sup> *Id.* at 249.

<sup>168</sup> *Id.* at 258.

<sup>169</sup> *See id.* at 258-69 (concluding that *Chevron* deference did not apply because the agency lacked delegated lawmaking power with regard to the rule’s limits on the use of controlled substances for physician-assisted suicide).

<sup>170</sup> *See supra* notes 162-65 and accompanying text.

<sup>171</sup> *Massachusetts v. EPA*, 549 U.S. 497, 560 (Scalia, J., dissenting).

<sup>172</sup> *See id.* at 528-29 & n.26 (majority opinion).

<sup>173</sup> *See id.*

<sup>174</sup> *See id.* at 511-14.

<sup>175</sup> *See id.*

A similar inconsistency is present in *Negusie v. Holder*.<sup>176</sup> In that case, the Board of Immigration Appeals (“BIA”) determined “whether an alien who was compelled to assist in persecution can be eligible for asylum or withholding of removal.”<sup>177</sup> This is identified as the “persecutor bar”<sup>178</sup> and the BIA “determined that the persecutor bar applies even if the alien’s assistance in persecution was coerced or otherwise the product of duress.”<sup>179</sup> In reviewing this decision, the Court exhibited a great deal of uncertainty in its approach. Initially, the Court did not employ the *Mead* analysis, deciding instead that the BIA receives *Chevron* deference “in interpreting ambiguous provisions of the [Immigration and Nationality Act].”<sup>180</sup> When the Court reviewed the agency’s decision, the Court recognized that the agency’s interpretation was determined by what the agency concluded Congress had provided in the statute.<sup>181</sup> The Court also found that the agency, as well as the court of appeals, had erred when it concluded that the legal issue had been resolved by a Supreme Court decision, which had adopted the persecutor bar under a different statutory regime.<sup>182</sup> In short, the Court held that the agency had viewed the statute itself as having a fixed legal meaning and the agency thus had not exercised the discretion that Congress had delegated to it via an ambiguous statute. This led the Court to its belated conclusion that *Chevron* deference indeed did *not* apply to this decision (without any citation to the *Mead* analysis).<sup>183</sup> The Court then employed *Skidmore* deference and remanded the legal issue to the agency without resolving the matter itself.<sup>184</sup> In sum, recent Supreme Court decisions have reflected uncertainty regarding the order and content of the analysis determining the applicability of *Chevron* deference.

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<sup>176</sup> 129 S. Ct. 1159 (2009).

<sup>177</sup> *Id.* at 1163.

<sup>178</sup> *Id.* at 1162 (internal quotation marks omitted).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1163.

<sup>181</sup> *See id.* at 1164 (“The Government . . . asserts that the statute does not allow petitioner’s construction. ‘The statutory text,’ the Government says, ‘directly answers that question: there is no exception’ for conduct that is coerced because Congress did not include one.” (quoting Brief for Respondent at 11, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499))).

<sup>182</sup> *See Negusie*, 129 S. Ct. at 1164-66 (discussing the applicability of *Fedorenko v. United States*, 449 U.S. 490 (1981)).

<sup>183</sup> *See id.* at 1166 (“The Government argues that ‘if there were any ambiguity in the text, the Board’s determination that the bar contains no such exception is reasonable and thus controlling.’ Whether such an interpretation would be reasonable, and thus owed *Chevron* deference, is a legitimate question; but it is not now before us. 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.” (citation omitted) (quoting Brief for Respondent at 11, *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (No. 07-499))).

<sup>184</sup> *See id.* at 1167-68.

## B. *The Nature of Chevron Step-One Analysis*

Recent Supreme Court decisions reflect the Court's inconsistency in determining during the step-one analysis whether the statute is ambiguous in *any* respect or whether the statute identifies a clear legal rule in regard to the agency's interpretation.<sup>185</sup> This difference in approaches to *Chevron* step one is apparent in the two previously described cases regarding the order of the *Mead* analysis.<sup>186</sup> In *Oregon*, the Court came very quickly to the conclusion that the statutory provision was ambiguous.<sup>187</sup> The Court's entire step-one analysis consisted of the following: "All would agree, we should think, that the statutory phrase 'legitimate medical purpose' is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense."<sup>188</sup> The Court thereafter spent several pages<sup>189</sup> examining the statute's structure and intent, deciding that "the [Controlled Substance Act]'s prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."<sup>190</sup> Although this is treated as the Court's employing *Skidmore* deference and putting forth its own interpretation,<sup>191</sup> the Court's statutory analysis actually supported the stronger conclusion that the statute clearly foreclosed the agency's interpretation. This means that the statute, although ambiguous in some respects, imposed clear limits that render some agency interpretations impermissible.

Indeed, this is how the Supreme Court majority interpreted section 202(a) of the Clean Air Act in *Massachusetts*.<sup>192</sup> In that case, the Court concluded under step one of *Chevron* that "[t]he statutory text forecloses EPA's reading," which was that regulation of emissions of greenhouses gases from mobile sources was not permitted.<sup>193</sup> This was a consequence of the statute's "sweeping definition of 'air pollutant.'"<sup>194</sup> The Court reached this holding of clear statutory meaning despite the provision's ambiguity regarding the exact pollutants that are to be regulated under the statute.<sup>195</sup> In short, the Court's use of step-one analysis is inconsistent.

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<sup>185</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007); *Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006).

<sup>186</sup> See *supra* Part III.A.

<sup>187</sup> *Gonzales*, 546 U.S. at 263-64.

<sup>188</sup> *Id.* at 258.

<sup>189</sup> See *id.* at 269-75.

<sup>190</sup> *Id.* at 268-75.

<sup>191</sup> See *id.*

<sup>192</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007).

<sup>193</sup> See *id.* at 528.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 557-58 (Scalia, J., dissenting).

### C. *The Nature of Chevron Step-Two Analysis*

The second step of *Chevron* is, of course, where the agency is accorded deference.<sup>196</sup> *Chevron* itself found the EPA's interpretation of a "stationary source" to be reasonable.<sup>197</sup> The Court, however, did not clearly state whether this review was substantive or process based (i.e., did the agency consider the proper factors when reaching its decision).<sup>198</sup> Dicta in *Mead* suggested that the step-two review was analogous to arbitrary or capricious review, which inquires into the agency's decisionmaking process.<sup>199</sup> The Court's decision in *Brand X* found that the agency interpretation was reasonable under *Chevron* step two, but the analysis focused on the substance of the agency decision.<sup>200</sup>

Recent decisions of the Supreme Court have not clarified this issue. In *Negusie*, Justice Scalia, in his concurrence, took the position that the BIA had discretion to interpret the ambiguous statute to impose the persecutor ban.<sup>201</sup> That interpretation was permissible, however, only if it was reached following a consideration of permissible factors:

[G]ood reasons for the agency's current practice exist—reasons adequate to satisfy the requirement that an agency act reasonably in choosing among various possible constructions of an ambiguous statute. The statute does not mandate the rule precluding the duress defense but does not foreclose it either; *the agency is free to retain that rule so long as the choice to do so is soundly reasoned, not based on irrelevant or arbitrary factors* (like the *Fedorenko* precedent).<sup>202</sup>

Justice Scalia concluded therefore that an agency interpretation is lawful if it is not substantively barred by the statute and is determined by a lawful process.

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<sup>196</sup> Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) ("*Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful. At the first step, we ask whether the statute's plain terms 'directly address[es] the precise question at issue.' If the statute is ambiguous on the point, we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'" (alteration in original) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 845 (1984))); Bamberger & Strauss, *supra* note 3, at 624-25.

<sup>197</sup> *Chevron*, 467 U.S. at 863 ("[W]e must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well.").

<sup>198</sup> See *id.* at 862-64.

<sup>199</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

<sup>200</sup> See *Brand X*, 545 U.S. at 997-1000 ("We also conclude that the Commission's construction was 'a reasonable policy choice for the [Commission] to make' at *Chevron*'s second step." (alteration in original) (quoting *Chevron*, 467 U.S. at 845)).

<sup>201</sup> *Negusie v. Holder*, 129 S. Ct. 1159, 1170 (2009) (Scalia, J., concurring) ("It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute.").

<sup>202</sup> *Id.* at 1168-69 (emphasis added).

The Court's recent decision in *Mayo Foundation for Medical Education & Research v. United States*,<sup>203</sup> however, continued the Court's ambivalence toward the nature of *Chevron* step-two review.<sup>204</sup> In that case, the Court reviewed a regulation promulgated by the Internal Revenue Service ("IRS") to establish "whether doctors who serve as medical residents are properly viewed as 'student[s]' whose service Congress has exempted from FICA taxes under 26 U.S.C. § 3121(b)(10)."<sup>205</sup> After concluding that the statute was ambiguous<sup>206</sup> and that the *Chevron* standard applied,<sup>207</sup> the Court engaged in a step-two analysis.<sup>208</sup> When summarizing its decision, the Court stated that "the Treasury Department's rule is a reasonable construction of what Congress has said"<sup>209</sup>—a conclusion that sounds substantive in nature. The Court's analysis, however, was more process based and addresses how the agency's interpretation followed from a consideration of factors that the statute defined as reasonable.<sup>210</sup>

In short, the Court continues to leave uncertain whether the *Chevron* step-two analysis is concerned with the substance or the process of the agency's decisionmaking.

#### D. *The Application of Skidmore Deference*

Once it has decided, employing the *Mead* analysis, that the agency interpretation is subject to *Skidmore* deference, the Court has been quite inconsistent in its practice of interpreting the statute. For example, in *Mead* itself, the Court held that *Skidmore* deference applied, but then remanded to the lower courts to interpret the statute (with appropriate deference to the agency).<sup>211</sup> In *Oregon*, the Court itself, according *Skidmore* deference to the agency position, "conclude[d] the CSA's prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."<sup>212</sup>

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<sup>203</sup> 131 S. Ct. 704 (2011).

<sup>204</sup> See *id.* at 712-13.

<sup>205</sup> *Id.* at 708 (alteration in original).

<sup>206</sup> See *id.* at 711-12.

<sup>207</sup> See *id.* at 714.

<sup>208</sup> See *id.*

<sup>209</sup> *Mayo*, 131 S. Ct. at 716.

<sup>210</sup> See *id.* at 715 (discussing how the IRS reasonably "[f]ocus[ed] on the hours an individual works and the hours he spends in studies"; "improve[d] administrability"; and "further[ing] the purpose of the Social Security Act and comport[ing] with this Court's precedent." (second internal quotation marks omitted) (quoting Student FICA Exemption, 69 Fed. Reg. 76,404, 76,405 (Dec. 21, 2004))).

<sup>211</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 238-39 (2001).

<sup>212</sup> *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006).



In *Negusie*, however, the Court declined to resolve the statutory meaning itself and also did not remand the issue to the lower courts for their decision.<sup>213</sup> Instead, the Court remanded the legal issue to the agency to allow the agency to make its own decision with the understanding that it had committed legal error in its previous understanding of what the statute had required.<sup>214</sup> This resolution appears consistent with the fundamental principle of *Chenery I*.<sup>215</sup> Still, *Brand X* has now made it clear that a court's interpretation of an ambiguous statute will not bind an agency when the agency subsequently interprets the statute in an exercise of delegated law-making authority.<sup>216</sup> A legal interpretation of a court will, therefore, not have the effect of removing an agency's interpretive authority, which was the Court's concern in *Chenery I*.<sup>217</sup>

The Court's decisions thus raise the question of when a court itself should decide an interpretive issue (employing *Skidmore* deference and subject to being superseded by a later agency exercise of lawmaking authority), as opposed to remanding the matter to the agency following the correction of a legal error. Moreover, the Court pursued its approach in *Negusie* without describing the reasons for its decision. Indeed, the Court did not seem aware of the varied approaches it had taken.

#### E. *The Application of Arbitrary or Capricious Review*

One major Supreme Court decision applied the arbitrary or capricious review standard to an agency's change in position. In *FCC v. Fox Television Stations, Inc.*,<sup>218</sup> the Supreme Court reviewed the FCC's decision in a formal adjudicatory proceeding to modify its indecency standard to permit

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<sup>213</sup> *Negusie v. Holder*, 129 S. Ct. 1159, 1168 (2009).

<sup>214</sup> *Id.* ("Because of the important differences between the statute before us and the one at issue in *Fedorenko*, we find it appropriate to remand to the agency for its initial determination of the statutory interpretation question and its application to this case.").

<sup>215</sup> See *supra* Part I.A.

<sup>216</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . 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."); *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.").

<sup>217</sup> See *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 88 (1943) ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.").

<sup>218</sup> 129 S. Ct. 1800 (2009).

the imposition of penalties for the use of fleeting expletives by broadcasters.<sup>219</sup> Prior to this change, the FCC had required that expletives be used repetitively to result in legal violations.<sup>220</sup>

The Court's application of the review standard reinforced the understanding of arbitrary or capricious review that had evolved in *Overton Park* and *State Farm*.<sup>221</sup> The Court's decision reiterated that arbitrary or capricious review focuses on the process, rather than the substance, of the agency's decision.<sup>222</sup> In particular, the Court distinguished between the issue of whether the agency exercised its discretion reasonably, which is the subject of arbitrary or capricious review, and the substantive limits that the statute imposes on the agency.<sup>223</sup> The majority also chided the dissenters for seeking to load substantive review into arbitrary or capricious review, which the majority viewed as resolving only whether the agency exercised its discretion reasonably:

[T]he broadcasters' arguments have repeatedly referred to the First Amendment. If they mean to invite us to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties, we reject the invitation. The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. We know of no precedent for applying it to limit the scope of authorized executive action. In the same section authorizing courts to set aside "arbitrary [or] capricious" agency action, the Administrative Procedure Act separately provides for setting aside agency action that is "unlawful," 5 U.S.C. § 706(2)(A), which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon judicial review of authorized agency action. If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's "arbitrary [or] capricious" standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.<sup>224</sup>

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<sup>219</sup> *Id.* at 1805 ("This case concerns the adequacy of the Federal Communications Commission's explanation of its decision that this sometimes forbids the broadcasting of indecent expletives even when the offensive words are not repeated.").

<sup>220</sup> *See id.* at 1806.

<sup>221</sup> The Court in *Fox* did clarify how arbitrary or capricious review applied to a change in an agency interpretation: "We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard." *Id.* at 1810; *see also id.* at 1811 (stating that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate").

<sup>222</sup> *See id.* at 1810-11.

<sup>223</sup> *See Fox*, 129 S. Ct. at 1818 n.7 ("We do not believe that the dead hand of a departed Congressional oversight Committee should constrain the discretion that the text of a statute confers—but the point is in any event irrelevant in this appeal, which concerns not whether the agency has exceeded its statutory mandate but whether the reasons for its actions are adequate.").

<sup>224</sup> *Id.* at 1811-12 (second and third alterations in original) (citations omitted).

The Court's decision, in short, supports the principle that, if a statute permits the agency's substantive interpretation, the agency interpretation is invalid under the APA only if the agency's decisionmaking process was flawed.

Having summarized the principal decisions establishing and applying the review regime for agency legal interpretations, the next Part attempts to identify a workable approach to judicial review. This Part identifies an approach that accepts the principles identified by the Court's decisions, and resolves the questions and uncertainties that remain as lower courts and the Court itself have tried to apply the framework for judicial review.

### III. A CLARIFIED AND INTEGRATED METHOD OF JUDICIAL REVIEW OF AGENCY LEGAL INTERPRETATIONS

This description of the judicial review method follows the example of *Chevron* itself and presents a step-by-step approach to the review of agency applications of law. This method begins where *Chevron* began: the consideration of the clarity of the statute.

#### A. *Step 1: Determination of Whether the Statute Itself Clearly Defines the Law*<sup>225</sup>

The first step in judicial review accepts and gives effect to the key principle defined in the core Supreme Court cases: if Congress itself is the source of clear law that conflicts with the agency's interpretation, the law as defined by Congress governs and the contrary agency interpretation must be rejected. In this regard, the agency interpretation is unlawful without regard to whether the agency believed that it was merely giving effect to the statute enacted by Congress or the agency had purported to exercise lawmaking power delegated to it by Congress.<sup>226</sup> Although this principle properly views Congress as providing the source of law that must trump an inconsistent agency interpretation, the judiciary is the governmental institution that plays the key role in discerning the content of the law that Congress has established.<sup>227</sup> The judiciary determines the content of the law defined by

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<sup>225</sup> In order to minimize confusion with the *Chevron* review regime, this Article will use numerals (e.g., step 1) when referring to the steps it has identified. The Article will use written numbers (e.g., step one) when referring to *Chevron*'s steps.

<sup>226</sup> For this reason, there is no need to engage in the *Mead* analysis, which determines whether the agency has acted in the exercise of delegated lawmaking power, prior to the step-one analysis.

<sup>227</sup> See Bamberger & Strauss, *supra* note 3, at 624, where the authors state that: At *Chevron*'s first step, courts reviewing administrative constructions should begin by identifying whether congressional instructions clearly either require or preclude the choice the agency has made or, instead, whether the agency's choice falls within a range of possibilities permitted by language that Congress has left ambiguous. If the former, statutory meaning is

Congress using traditional tools and methods of statutory construction.<sup>228</sup> Those tools include the canons of construction<sup>229</sup> and those methods vary among jurists.<sup>230</sup> Some judges will focus this analysis on whether the statutory text is clear,<sup>231</sup> while other judges will focus this analysis on the intent of the legislature, and may account for legislative history, as well as statutory purpose.<sup>232</sup>

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set; consistent agency interpretations should be upheld on the court's own authority, while contrary constructions must be rejected. If the latter, agency interpretations that do not fall within the zone of indeterminacy permitted by the statute's language must be struck down. This constitutes the scope of the independent judicial task.

*Id.*; see also Strauss, *supra* note 12, at 818 ("Defining the areas of ambiguity within which, *Chevron* says, agencies have presumptively the leading oar is a part of the independent judicial task of step one. In the *Hearst* situation, to be concrete about it, a court would properly identify any classes of worker who *must* be regarded as 'employees,' and any classes of worker who *may not* permissibly be so regarded.").

<sup>228</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); Levin, *supra* note 3, at 1283 ("[*Chevron*] [s]tep one should be defined to encompass all contentions that a court seeks to resolve using the 'traditional tools of statutory construction.'").

<sup>229</sup> *But cf.* *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (per curiam) (declining to give canon of *expressio unius* effect of fixing clear meaning of statute delegating authority to agency, because "[s]ilence . . . may signal permission rather than proscription"); *Mich. Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292 (D.C. Cir.) (stating that courts should not "reverse an agency decision merely because it failed to rely on any one of a number of canons of [statutory] construction that might have shaded the interpretation a few degrees in one direction or another"), *aff'd*, 493 U.S. 38 (1989). See generally Bamberger, *supra* note 2, for a detailed discussion of the use of normative canons and their relation to the *Chevron* step-one analysis.

<sup>230</sup> See Strauss, *supra* note 12, at 819 ("If, then, *Chevron* step one is the terrain of independent (albeit perhaps influenced) judicial judgment, cases resolved at that level have more in common with other judicial judgments about statutory interpretation than with agency review, as such. Judges will accept the use of legislative history or not; will be open to liberal or constrained views of the reach of statutory language; will tend to focus on purposes or on text; and will perhaps be more generous with the work of Republican-dominated legislatures than Democratic, or vice versa, across the broad range of statutory interpretation issues.").

<sup>231</sup> See, e.g., *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225-29 (1994) (Scalia, J.) (finding that text clearly foreclosed agency interpretation); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (stating that the majority's consideration of legislative history reflects "an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.").

<sup>232</sup> See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 90 (2007) (Breyer, J.) ("Considerations other than [statutory] language provide us with unusually strong indications that Congress intended to leave the Secretary free to use the calculation method before us . . ."); *cf.* *Catawba Cnty.*, 571 F.3d at 35 ("To be sure, a statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque.").

The relevance of the agency's interpretation to this judicial determination of the statute's clear meaning is limited.<sup>233</sup> If the agency has itself engaged in an analysis of the meaning of the text or the intent of the legislature, a court may find the agency's inquiry useful as the court itself resolves the issue of the statute's clarity.<sup>234</sup> Moreover, a consistent interpretation of the statute by an agency provides evidence that the statute does, indeed, have a clear meaning.<sup>235</sup> If the court were to agree with the agency that the statute was, indeed, clear in the respect that the agency found it to be, the court would affirm the agency's interpretation simply because the agency

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<sup>233</sup> For an example of the Court's reliance on consistent agency practice to interpret a statute's clear meaning, see *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2641-42 (2010) ("[O]ur interpretation is consistent with the longstanding practice of the Board. . . . Although the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case, the Board has not (until recently) allowed two members to act as a quorum of a defunct three-member group. Instead, the Board concedes that its practice was to reconstitute a delegee group when one group member's term expired. That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view." (footnotes and citations omitted)). See also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1333 (2010) (concluding that the statute had clear meaning, Court relied on the "functional consideration[]" that the agency had consistently interpreted the statute to have that same meaning); Strauss, *supra* note 12, at 818 ("As part of its step one determination, a court might well turn to a responsible agency's judgment about the matter as one weight to be considered on the scales the court is using. That is, *Skidmore* deference is one of those 'traditional tools of statutory interpretation' that bear on a court's independent conclusion about the extent of agency authority.").

<sup>234</sup> See Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 603 n.237 (2001) (discussing value of agency's views in discerning legislative intent when the agency has played a significant role in drafting legislation); cf. *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740-41 (1996) ("[A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist. But neither antiquity nor contemporaneity with the statute is a condition of validity. We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather 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.").

<sup>235</sup> See Healy, *supra* note 234, at 583-84 (discussing how agency's and legal community's understanding of the meaning of a statute is important evidence about the meaning of the statute). But cf. *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (Scalia, J., concurring in part) ("I do not believe . . . that 'particular deference' is owed 'to an agency interpretation of 'longstanding' duration.' That notion is an anachronism—a relic of the pre-*Chevron* days, when there was thought to be only one 'correct' interpretation of a statutory text. A 'longstanding' agency interpretation, particularly one that dated back to the very origins of the statute, was more likely to reflect the single correct meaning. But once it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference." (citations omitted) (quoting *id.* at 220 (majority opinion))).

was correct in discerning the legal rule clearly defined by the statute.<sup>236</sup> If, on the other hand, the agency has been inconsistent in how it has interpreted the legal rule defined by Congress in the statute, that inconsistency may be viewed by the court as evidence that the statute has no clear meaning or intent (and is accordingly ambiguous).<sup>237</sup>

Experience with judicial application of step one of the *Chevron* analysis shows that judges have become increasingly adept at finding clarity in a statute's text,<sup>238</sup> structure, or intent,<sup>239</sup> especially when a court is aided by the canons of construction.<sup>240</sup> In particular, the Supreme Court's use of clear statement rules has had the effect of making facially ambiguous statutes

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<sup>236</sup> See Bamberger & Strauss, *supra* note 3, at 615-16 ("[A]n agency interpretation may be permissible for two reasons: because it precisely maps a singular congressional intent on the issue at hand, or because it constitutes an agency policy determination that falls within the scope of agency discretion that is accorded by statutory ambiguity. The first of these reasons is of lesser interest in our judgment, given the rarity of point judgments by Congress, particularly in the context of administrative law. One may note, however, that in this context, the interpretation is properly the responsibility of judicial judgment, perhaps informed by agency views but nonetheless independent.").

<sup>237</sup> See Healy, *supra* note 234, at 583-84; *cf. Smiley*, 517 U.S. at 739 ("In light of the two dissents from the opinion of the Supreme Court of California, and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here." (footnote and citation omitted)).

<sup>238</sup> See Elliott, *supra* note 2, at 2 ("*Chevron* is not the only trend that occurred in statutory construction over the last three decades. There has also been a pronounced rise in textualism, perhaps fueled at least in part by the first step of the *Chevron* analysis." (footnote omitted)).

<sup>239</sup> See Bamberger, *supra* note 2, at 76 ("*Chevron* states that courts should utilize the 'traditional tools' for the construction of statutes when discerning, at step one, whether Congress actually spoke to the issue at hand. Inquiries into the statute's text, structure, and purpose, as well as traditional textual construction canons, fit well within that step's positive inquiry, and their continued application to regulatory statutes is uncontroversial." (footnote omitted)).

<sup>240</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) ("The Court first implies that courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*." (alteration in original) (citation omitted) (quoting *id.* at 446 (majority opinion))); Bamberger, *supra* note 2, at 122 ("At present, courts possess significant leeway to manipulate canons to reach desired substantive ends. Indeed, the variability with which canons are applied—and the unpredictability as to whether they will be applied at all—has rendered courts vulnerable to criticism from both sides of the political spectrum."); *cf. Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 77-78 (2007) (Thomas, J., dissenting) ("The majority suggests that deference under [*Chevron*] compels its conclusion that a carrier's refusal to pay a payphone operator is unreasonable. But 'unjust or unreasonable' is a statutory term, § 201(b), and a court may not, in the name of deference, abdicate its responsibility to interpret a statute. Under *Chevron*, an agency is due no deference until the court analyzes the statute and determines that Congress did not speak directly to the issue under consideration . . .").

insufficient to authorize some administrative actions.<sup>241</sup> When a clear statement rule applies, the Court has held that Congress must have provided an agency with clear authority to take administrative action or the agency's exercise of regulatory authority will be viewed as contrary to the law defined by Congress.<sup>242</sup>

Key to understanding this step 1 analysis is that a statute may be ambiguous in some, perhaps many respects, even though it may be clear in precluding the agency's interpretation of the statute.<sup>243</sup> As we have seen,<sup>244</sup>

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<sup>241</sup> Sunstein, *supra* note 2, at 244 (discussing Court's "discretion-denying decisions," in which the Court concluded that Congress had not clearly granted agency authority to decide "major questions": "They do not say that courts, rather than agencies, will interpret ambiguities. They announce, far more ambitiously, that ambiguities will be construed so as to reduce the authority of regulatory agencies. . . . Agencies would not receive deference when they attempt to exercise their authority in ways that produce large-scale changes in the structure of the statutory programs that they are administering"); *id.* at 248-49 ("[F]uture courts should downplay the Court's unnecessary emphasis on what Congress could not have meant to delegate. That emphasis threatens to give courts a kind of interpretive primacy with respect to the very questions for which the *Chevron* framework is best suited."); *see also* Morales-Izquierdo v. Gonzales, 486 F.3d 484, 500 (9th Cir. 2007) (en banc) (Thomas, J., dissenting) ("Ultimately, 'the judiciary is the final authority' in interpreting statutes, and courts must employ all 'traditional tools of statutory construction' under *Chevron* step one to ascertain whether Congress's intent is 'clear.' In this case, the text and structure of the INA are clear . . . . But even if the statute were ambiguous, the Attorney General's interpretation would be precluded by the canon of constitutional avoidance . . . pursuant to which we must presume that Congress did not intend to permit any interpretation that, like the Attorney General's, raises serious constitutional questions." (citation omitted) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984))); Bamberger, *supra* note 2, at 92 ("Clear statement rules, then, may permit expansive interpretive authority to diverge from existing indicia of legislative will in service of judicial restraint."); Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673, 682-86 (2002).

<sup>242</sup> In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Court held that the Clean Water Act did not permit the agency's exercise of regulatory authority over isolated wetlands, because the statute failed to clearly authorize that authority, the exercise of which raised constitutional questions:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

531 U.S. 159, 172-73 (2001) (citations omitted) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). For a discussion of the Court's use of clear statement rules in the administrative context, *see generally* Michael P. Healy, *Textualism's Limits on the Administrative State: Of Isolated Waters, Barking Dogs, and Chevron*, 31 ENVTL. L. REP. 10,928 (2001).

<sup>243</sup> *See* *Cuomo v. The Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2715 (2009) ("There is necessarily some ambiguity as to the meaning of the statutory term 'visitorial powers' . . . . The Comptroller can give authoritative meaning to the statute within the bounds of that uncertainty. But the

the Supreme Court has been inconsistent in this understanding of step 1 analysis: in *Oregon*, the Court concluded initially that the statute was ambiguous and then later effectively decided that the statute clearly barred the agency's interpretation.<sup>245</sup> In such a case, the agency interpretation should be rejected at step 1 of the analysis. Indeed, a statute will rarely be unambiguous in all respects.<sup>246</sup> The implication of this nature of statutes is that, even though a court has found a statute to be ambiguous in some respects, an agency interpretation may nevertheless be foreclosed by step 1 analysis.<sup>247</sup> Because of this characteristic of statutes, a court may prematurely determine that a statute is ambiguous and treat as traditional *Chevron* step-two analysis what ought to be step 1 analysis.<sup>248</sup>

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presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term 'visitorial powers' even through the clouded lens of history. They do not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law."); *Cardoza-Fonseca*, 480 U.S. at 448 ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling 'any gap left, implicitly or explicitly, by Congress,' the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the 'well-founded fear' test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical." (footnote and citation omitted) (quoting *Chevron*, 467 U.S. at 843)); cf. Levin, *supra* note 3, at 1283 ("*Chevron* . . . declares that the court should initially focus its attention on whether Congress has 'directly addressed the precise question at issue.' That language, however, gives reviewing courts quite a bit of latitude in determining what the 'precise question' in a given case really is. . . . [I]f an opinion writer frames the 'precise question at issue' as being whether Congress has clearly ruled out an option the agency has chosen, or a premise on which the agency has sought to act, the stage may be set for reversal at step one." (footnote omitted) (quoting *Chevron*, 467 U.S. at 843)).

<sup>244</sup> See *supra* Part II.B.

<sup>245</sup> See *supra* notes 166-69 and accompanying text.

<sup>246</sup> See Bamberger, *supra* note 2, at 70-71 ("Even strong defenders of interpretive fidelity to legislative instructions, then, recognize that beneath a description of statutory construction as the vindication of legislative choices lies the reality that statutory ambiguity will always leave discretion in the hands of those assigned the interpretive task."); cf. Bamberger & Strauss, *supra* note 3, at 615-16 (stating that there is a "rarity of point judgments by Congress, particularly in the context of administrative law").

<sup>247</sup> Cf. Stephenson & Vermeule, *supra* note 3, at 600-02 (arguing that *Chevron* analysis fundamentally involves a court defining the "Range of Permissible Interpretations ('Zone of Ambiguity')" and determining whether the agency interpretation is within that zone).

<sup>248</sup> See Levin, *supra* note 3, at 1284 ("[S]o long as the issue at hand is whether an element of the agency's argument conflicts in some way with the unambiguous intentions of the legislature, the court's inquiry should not be fragmented into two discrete steps. It should be resolved in a unified fashion at step one."). For additional examples of the Court treating as traditional *Chevron* step-two analysis what should properly have been step-one analysis, see *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 55 (2007), *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 388-92 (1999), and *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744-45 (1996).



When a court reaches the conclusion of its step 1 analysis, it should find either clear statutory meaning or relevant statutory ambiguity,<sup>249</sup> because the statute does not bar the agency's substantive interpretation.<sup>250</sup>

#### B. *Step 2: The Mead Analysis*<sup>251</sup>

After the court has determined that the statute is ambiguous regarding the legal issue resolved by the agency, the court must identify the review regime that applies to the agency determination. This is the *Mead* analysis, which implements the principle that a court must accept an agency's reasonable exercise of delegated lawmaking power, because Congress intends such judicial deference.<sup>252</sup>

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<sup>249</sup> See Bamberger, *supra* note 2, at 74 ("At step one of the analysis, then, judges should use 'traditional tools of statutory construction' to ascertain 'whether Congress has directly spoken' on an issue." (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984))).

<sup>250</sup> In reaching this interpretive conclusion, the court is exercising the "decider" function described by Professor Strauss. See Bamberger & Strauss, *supra* note 3, at 618 ("[F]udging language permits a court to uphold an agency's construction and even to suggest that it constitutes the 'best' interpretation of statutory language, without any prior determination as to whether it is acting in its 'decider' role regarding the bounds of agency discretion or is simply acting as an overseer of a judgment committed to agency decision. The regrettable consequence is to obscure whether the court's construction binds further agency decisionmaking conclusively or leaves future decisionmaking to agency interpretive authority."'). A court's decision at this step of the analysis has gained importance because the Court has held in *Brand X* that a judicial determination of clear statutory meaning is binding on and may not be superseded by an agency in the exercise of delegated lawmaking authority. See *supra* notes 147-51; see also Bamberger & Strauss, *supra* note 3, at 620 ("So while judicial bounding of agency discretion has precedential value, any judicial judgment on a question within that discretionary area—that may be required because the agency has not yet definitively acted—does not. Such a reality suggests that doctrine should be clarified, if at all, to *strengthen Chevron's* indication that interpreting courts must address the existence of ambiguity first as a means for ensuring recognition of the appropriate judicial role, rather than to orient judicial decisionmaking towards a touchstone of interpretive reasonableness." (footnote omitted)); cf. Levin, *supra* note 3, at 1290 ("[T]he court must decide *how far* it will express its views 'as a matter of law' on the substantive issues in the case, and *how far* it will, instead, treat the issues as a matter of discretion and consider whether the agency used that discretion rationally. The court has to draw this line regardless of whether it prefers to characterize its 'interpretive' role as a step one or step two exercise. The line it draws has real-world significance, because to the extent that the court expresses its position in 'legal' terms, the agency would have much more difficulty departing from that position afterwards."').

<sup>251</sup> See *supra* Part I.F (discussing the Supreme Court's decision in *Mead*).

<sup>252</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173-74 (2007) ("[T]he ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' 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."').

The key judicial determination yielded by this step is the identification of the source of the law that the court is reviewing. That source is either the agency itself, when the agency has exercised lawmaking power delegated to it by Congress, or Congress, when the agency has simply decided what it believes the ambiguous statute means in the particular setting for the agency's decision. *Mead*<sup>253</sup> established, and cases like *Oregon*<sup>254</sup> and *Brand X*<sup>255</sup> confirmed, that there are two requirements for an agency to be seen as the source of lawmaking power: Congress must have delegated lawmaking power to the agency and the agency must actually have exercised that delegated lawmaking power. The agency must have been able to make law and must have intended to make law.<sup>256</sup> In the absence of an agency properly making law, Congress itself is the source of the law.<sup>257</sup>

The *Mead* analysis is conducted at this stage of review, rather than prior to step one.<sup>258</sup> If the agency's interpretation conflicts with clearly defined statutory law, the focus of the step-one analysis, the judicial review process, is at an end because Congress has defined clear law.<sup>259</sup> Moreover, the issue of whether a statute clearly defines the applicable law has new importance after the Court's decision in *Brand X*. *Brand X* held that an agency continues to have discretion to exercise lawmaking power delegated by Congress even after a court interprets the meaning of an ambiguous statute.<sup>260</sup> If, however, the statute is determined to be unambiguous at step 1, the agency has no power to define the law.<sup>261</sup>

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<sup>253</sup> See *supra* Part I.F.

<sup>254</sup> See *supra* notes 166-69 and accompanying text.

<sup>255</sup> See *supra* Part I.G.

<sup>256</sup> See *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (according *Skidmore* deference to agency's view that its regulations preempt state law because "[w]hile agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

<sup>257</sup> As discussed *supra* Part II.A, Justice Scalia ignored this consideration in his dissent in *Massachusetts*, where he relied on *Chevron* deference even though the agency believed it was following Congress's dictates, rather than itself making law. In *Negusie*, also discussed *supra* Part II.A, the Court failed to connect this analysis of the agency's interpretation of a statute to the *Mead* analysis.

<sup>258</sup> Professor Sunstein discussed *Mead* review in his article entitled, *Chevron Step Zero*. See Sunstein, *supra* note 2, at 213-16. Professor Sunstein did not discuss the proper locus of the *Mead* analysis. He appeared to locate it at step zero because the analysis determines the applicability of *Chevron* deference. Such deference is applicable, however, only after a court concludes that the statute itself does not preclude the agency interpretation—the traditional *Chevron* step-one analysis. The *Mead* analysis should therefore be pursued only after the step-one analysis has been completed, rather than before it.

<sup>259</sup> The order of the Court's analysis was accordingly proper in *Massachusetts* and *Oregon*, see *supra* Part II.A, but was not proper in *Brand X*, where the Court engaged in the *Mead* analysis prior to the step-one analysis, see *supra* Part I.G.

<sup>260</sup> See *supra* notes 147-49 and accompanying text.

<sup>261</sup> See *supra* notes 150-51 and accompanying text.

An exception to this view of the proper order of the steps comprising judicial review is present when a court has previously interpreted the relevant part of the statute. In this circumstance, conducting the step 2 analysis prior to the step 1 analysis will avoid unnecessary judicial decisionmaking if the court concludes that the agency has not acted in the exercise of delegated lawmaking power. In this circumstance, the prior judicial interpretation would bind the agency, regardless of whether the statute is clear.

A related issue is whether a court should, if the court agrees that the agency interpretation is a proper interpretation of the statute, forego the *Mead* analysis and assume for purposes of the decision the less deferential *Skidmore* review standard. Indeed, courts have decided to avoid the *Mead* analysis in “many cases.”<sup>262</sup> A reviewing court might find this to be an attractive option because the *Mead* analysis is often uncertain.<sup>263</sup> The problem

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<sup>262</sup> Bressman, *supra* note 7, at 1464-65 (“In many cases, the courts express their uncertainty about *Mead* by refraining from deciding clearly whether *Chevron* deference applies. Instead, they find an easier way out. Some refuse to choose between *Chevron* deference and *Skidmore* deference and simply determine that lower-level *Skidmore* deference supports the agency’s interpretation. Others refuse to choose and simply determine that both *Chevron* deference and *Skidmore* deference support the agency’s interpretation.” (footnote omitted)); *see also* *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2479-80 (2009) (Scalia, J., concurring in part) (“*Mead*’s . . . incomprehensible criteria for *Chevron* deference have produced so much confusion in the lower courts that there has now appeared the phenomenon of *Chevron* avoidance—the practice of declining to opine whether *Chevron* applies or not.” (footnote omitted)); Bressman, *supra* note 7, at 1469 (“[L]ower courts have not made progress toward answering the question when an interpretation generated through an informal procedure is entitled to *Chevron* deference because they have chosen to avoid the question.”); *cf.* Sunstein, *supra* note 2, at 229 (“For most cases, the choice between *Chevron* and *Skidmore* is not material, and hence it is not worthwhile to worry over it.”). For examples of cases in which the court declines to engage in the *Mead* analysis, *see PDK Laboratories, Inc. v. United States Drug Enforcement Administration*, 438 F.3d 1184, 1197-98 (D.C. Cir. 2006), and *Springfield, Inc. v. Buckles*, 292 F.3d 813, 817-18 (D.C. Cir. 2002).

<sup>263</sup> We know that informal, and no doubt formal, rulemaking, as well as formal adjudication, involves the exercise of lawmaking power (assuming that Congress has delegated such power to the agency). *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”). Whether an informal adjudication has involved agency lawmaking is less clear. *See* Bressman, *supra* note 7, at 1445 (“[C]ourts adopt inconsistent approaches to the issue of *Chevron* deference when an agency does not use notice-and-comment rulemaking or formal adjudication. Without fully recognizing their differences, courts vacillate from one set of considerations to another to determine whether an agency has issued an interpretation with the force of law.” (footnote omitted)); *id.* at 1458-59 (“After *Mead*, courts diverge as to what evidence demonstrates that Congress intended an agency to issue an interpretation with the force of law and that the agency exercised its authority to do so. . . . [S]ome courts concentrate on whether an interpretation binds more than the parties at hand; some broaden this analysis to ask whether, in addition to binding effect, the interpretation reflects public participation; some limit their focus to whether an agency interpretation reflects careful consideration; and some expand this focus, weighing careful consideration along with agency expertise and statutory complexity.” (footnote omitted)). Because of this uncertainty, a court may wish to avoid the analysis. *See, e.g., Tripoli Rocketry Ass’n, Inc. v. U.S. Bureau of Alcohol, Tobacco, & Firearms*, 337 F. Supp. 2d 1, 7-8 (D.D.C. 2004) (applying both *Chevron* and *Skidmore* regimes to review of regulation); *Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1, 9 (D.D.C. 2003) (declining to decide on applicability of

with this approach is that, by avoiding the *Mead* analysis, the court fails to identify the source of the law being reviewed by the court. On the other hand, the agency would retain the authority to change the legal interpretation in the exercise of delegated lawmaking power, assuming Congress had delegated that authority, because the court would not have held the statute to be unambiguous.<sup>264</sup>

The *Mead* analysis must, in any event, be completed prior to the next step in the analysis, because the outcome of the *Mead* analysis determines the nature of further review of the agency decision. Further review is, of course, necessary because the statute has been determined to be ambiguous (at step 1). That further review moves in one of two importantly different directions based on the outcome of the *Mead* analysis.<sup>265</sup>

### C. *Step 3(A): Arbitrary or Capricious Review of Agency Exercise of Delegated Lawmaking Power When Statute Is Ambiguous*

This is the point of the judicial review process at which the path of decisionmaking splits. Assume that the court has decided both that the statute does not substantively foreclose the agency's interpretation<sup>266</sup> and that the agency has acted in the exercise of lawmaking power that Congress has delegated to the agency.<sup>267</sup> This is the context in which, using the traditional nomenclature, the court accords *Chevron* step-two deference to the agency legal determination. This nomenclature is, at best, misleading:<sup>268</sup> the court will instead, at this step 3(A), engage solely in arbitrary or capricious review of the agency determination.<sup>269</sup>

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*Chevron* deference because agency decision was lawful applying *Skidmore* deference). Consideration of the body of law that determines the applicability of the *Chevron* regime is beyond the scope of this Article.

<sup>264</sup> See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005).

<sup>265</sup> The *Mead* analysis determines whether the *Chevron* regime or the *Skidmore* regime applies to review of the agency decision. See *supra* Part I.F.

<sup>266</sup> See *supra* Part III.A (step 1).

<sup>267</sup> See *supra* Part III.B (step 2).

<sup>268</sup> Cf. Levin, *supra* note 3, at 1295 ("After more than a dozen years, the second step in the *Chevron* standard of review remains ill-defined. Undoubtedly a major part of the explanation for this haziness is that . . . the internal logic of the *Chevron* formula made it directly relevant to judicial review of exercises of administrative discretion . . . . The sweep of the *Chevron* test has made it difficult to implement, because the Court made no serious effort to integrate its two-step formula with the arbitrariness standard of the APA, which covers much of the same territory."); *id.* at 1261 ("*Chevron* left the very meaning of the second step ill-defined; further clarification was going to be necessary.")

<sup>269</sup> The approach described by the text is consistent with the approach advocated by Justice Scalia in his concurrence in *Negusie*. See *supra* notes 201-02 (stating that a permissible agency interpretation under *Chevron* step one must nevertheless be reached through a reasonable decisionmaking process). The Court, however, focused on the substance, rather than the process, of the agency's decision under step two of *Chevron* in *Brand X*. See *supra* notes 157-59 and accompanying text. Most recently, the

Step 1 of the analysis has already determined that the statute is ambiguous with respect to the agency's substantive legal decision. This decision is equivalent to holding that the agency has discretion under the statute to reach its substantive decision (because it is not barred by the statute). Moreover, step 2 of the analysis has, we have assumed, yielded a conclusion that the agency has been delegated by Congress and has exercised lawmaking authority with regard to the determination being challenged. The remaining issue relating to the legality of the agency position is, therefore, whether the agency has properly exercised its discretion: the proper exercise of discretion is the subject of arbitrary or capricious review.<sup>270</sup> This step 3(A) review is quite different from the step 1 review. At step 1, the court is inquiring into statutory meaning, a substantive determination, while the step 3(A) inquiry reviews reasonable implementation of an ambiguous statute, which constitutes a review of decisionmaking process.<sup>271</sup>

This understanding of *Chevron* step-two review has been recognized on occasion by the Supreme Court,<sup>272</sup> as well as by prominent legal com-

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Court in *Mayo Foundation* was ambiguous regarding the focus of its *Chevron* step-two analysis. See *supra* notes 204-10 and accompanying text.

<sup>270</sup> See Levin, *supra* note 3, at 1260-61 ("Under the structure of the *Chevron* formula, a court should not reach step two unless it has already found during step one that the statute supports the government's interpretation or at least is ambiguous with respect to it. In other words, the agency's view is not clearly contrary to the meaning of the statute. If the court has made such a finding, one would think that the government's interpretation *must* be at least 'reasonable' in the court's eyes."); Strauss, *supra* note 12, at 823 ("The 'arbitrary, capricious, an abuse of discretion' formula applies not only to factual matters, but to all the stuff that lives in between fact and law—to judgments about law application, exercises of discretion, and so forth.").

<sup>271</sup> See Levin, *supra* note 3, at 1270 (discussing how, after the Court of Appeals for the District of Columbia Circuit "had resolved to make consistent use of *Chevron* as the focus of its review of the substance of agency actions, it had to find a role for the second *Chevron* step that would set it apart from the work of the first step. The use of abuse of discretion arguments at step two has alleviated the problem. . . . [S]tep one asks whether the agency violated a clear mandate in the statute itself, and step two asks whether the agency used acceptable reasoning to get *from* the statute to its ultimate result."); Strauss, *supra* note 12, at 826 ("The *Chevron* step two issue is whether the agency's judgment, on a matter *within what the reviewing court has found to be the agency's delegated authority*, is a 'reasonable' judgment. That is to say, in APA terms, it is a matter respecting which the court's responsibility is to say whether it is 'arbitrary, capricious, [or] an abuse of discretion.'" (alteration in original) (footnote omitted)); cf. Elliott, *supra* note 2, at 8 ("This second step of the *Chevron* Two-Step is subject only to the weak judicial check that the agency's decision must be 'reasonable,' a standard that applies anyway to virtually all aspects of administrative decisions that are subject to judicial review."). But cf. Bamberg-er, *supra* note 2, at 111, 117 (contending that courts should engage in review at *Chevron* step two that accounts for normative canons and reviews the agency's substantive view).

<sup>272</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); see also *Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (Stevens, J., concurring in part and dissenting in part) ("[O]ur opinion [in *Chevron*] reaffirmed both that '[t]he judiciary is the final authority on issues of statutory construction,' and that courts should defer to an agency's reasonable formulation of policy in response to an explicit or implicit congressional delegation of authority. The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction can be subtle does not lessen its

mentators.<sup>273</sup> This understanding of the proper review regime yields two important effects. The first effect is that the court does *not* review the sub-

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importance.” (third alteration in original) (citation omitted) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984))); *id.* at 1171 n.1 (“[In *Chevron*,] the EPA argued that its regulation defining ‘stationary source’ as an entire plant was permissible under the Clean Air Act, but the agency treated its rulemaking as a matter of fashioning sound policy, not of discerning the meaning of ‘stationary source’ in the statute.”); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (“As *Chevron* itself illustrates, the resolution of ambiguity in a statutory text is often more a question of policy than of law.”). *But see, e.g., Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 173-76 (D.C. Cir. 2010) (engaging in substantive *Chevron* step-two review, after concluding that the statute was ambiguous).

<sup>273</sup> See Bamberger, *supra* note 2, at 114 (“For a growing consensus of prominent administrative law scholars, courts’ role at step two should be conceived principally as procedural, and the reasonableness inquiry akin to that provided under the Administrative Procedure Act’s prohibition against policy-making that is ‘arbitrary and capricious.’”); Bamberger & Strauss, *supra* note 3, at 623-24 (“Step Two analysis considers whether agencies have permissibly exercised the interpretive authority delegated to them by reasonably employing appropriate methods for elaborating statutory meaning. Such review, albeit not the type of ‘hard look’ review conventionally associated with *State Farm*, fits comfortably within the framework of Section 706(2)(A). These questions lend themselves to consideration within the *Chevron* framework because their answers implicate the resolution of statutory ambiguity, the appropriate scope of agency discretion in light of the governing statute’s meaning, and the boundary between the judicial decision and judicial oversight functions. Yet when their determination involves judicial oversight of agency choices rather than independent judicial judgment, the outcomes should not fix statutory meaning but rather leave a range of interpretive authority in agency hands. This is *Chevron*’s Step Two.”); Levin, *supra* note 3, at 1254-55 (“If the courts would define the scope of the *Chevron* step one inquiry and of arbitrariness review as broadly as they should, there would be no need for a separate and distinct *Chevron* step two, and that test could simply be absorbed into arbitrariness review. If this notion were generally accepted, analysis of merits issues during judicial review could immediately become less complicated, without any necessary alteration in the *substance* of the court’s tasks. At the same time, this solution would make application of *Chevron* step two more administrable, because courts and litigants could look directly to the vast body of case law and commentary on abuse of discretion review as a guide to the meaning of that aspect of the *Chevron* standard.”); *see also* Bamberger & Strauss, *supra* note 3, at 621 (“Courts and commentators have converged on an emerging consensus that the ‘arbitrary, capricious, and abuse of discretion’ standard set forth in Section 706(2)(A) supplies the metric for judicial oversight at *Chevron*’s second step.”). This is the court’s oversight role, as contrasted with the decider role, which is described by Professors Bamberger and Strauss. See Bamberger & Strauss, *supra* note 3, at 625 (“Once courts determine, however, that the existence of ambiguity has placed primary authority for a matter in agency hands and that the scope of that ambiguity permits the agency choice, the judicial role moves from decision to oversight, and thus to *Chevron*’s second step. At this step, Section 706(2) of the Administrative Procedure Act sets the general standard, and courts inquire as to whether the agency’s judgment on a matter within its delegated authority is ‘reasonable.’ While the statutory language defining that inquiry is the same language that governed *State Farm*, the emphasis may vary. The focus may be on interpretive method, as opposed to the fact-intensive judgments at issue in *State Farm*.” (footnote omitted)); Elliott, *supra* note 2, at 12 (“Because of the nature of the ‘*Chevron* deference’ that courts now give to agencies, the answer is usually that whether an agency’s interpretation of its authority will be upheld depends on how strong its reasons are; it depends on what justifications the agency would be able to give for a policy. In other words, whether a court will uphold an agency’s interpretation of its authority depends on contingent, consequentialist justifications. It depends on what one can write into a preamble justifying an interpretation in terms of factual support and policy justifications.”).

stance of the agency's lawmaking interpretation beyond the decision (already made at step 1) that the interpretation is not clearly foreclosed by the statute.<sup>274</sup> The second effect is that the *Chevron* deference nomenclature amounts to a misnomer, because the *Chevron* theory's actual effect involves the reviewing of an agency's permissible lawmaking only to determine whether the agency's decisionmaking process was "arbitrary or capricious."<sup>275</sup> When properly understood, the effect of the *Chevron* regime is accordingly to remove courts altogether from the substantive interpretation of ambiguous statutes when the agency has engaged in delegated lawmaking. The other, earlier component of *Chevron* analysis (step 1) withdraws the agency from the statute-focused aspect of the case, except to the extent the agency's conduct provides the court with a reason for concluding that the statute has a particular clear meaning or intent.<sup>276</sup>

The nature of how agency lawmaking is reviewed, if not substantively foreclosed by the statute, is also compatible with the structure of APA standards of review.<sup>277</sup> The court has decided by this point (through the step 1 analysis) that the agency has not acted beyond its statutory authority, as reviewed under section 706(2)(C) of the APA.<sup>278</sup> The remaining question is whether the agency's lawmaking process was reasonable, which is reviewed under the arbitrary or capricious standard defined by section 706(2)(A).<sup>279</sup>

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<sup>274</sup> Some courts have designated such review as *Chevron* step-two review. See *supra* Part II.C. This Article has discussed why such decisions are properly understood as step-one decisions. See *supra* notes 258-59 and accompanying text.

<sup>275</sup> This review is affected by the statute at issue, because the statute determines the factors that are relevant to the agency's exercise of discretion. See *supra* notes 78-85 and accompanying text. Professor Levin has written that:

[A]rbitrariness review in administrative law has always overlapped statutory construction to some extent. Issues that, analytically speaking, might be better seen as questions of law (determining how much authority an agency had) are allowed to shade into questions of discretion (determining whether the agency misused its authority). Some of our leading precedents defining abuse of discretion review confirm this overlap: Under *Overton Park* abuse of discretion review asks in part whether the agency considered the "relevant factors," and under *State Farm* one consideration bearing on whether a rule is arbitrary and capricious is whether the agency "has relied on factors which Congress has not intended it to consider."

Levin, *supra* note 3, at 1285-86 (footnote omitted) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>276</sup> See *supra* notes 233-37 and accompanying text.

<sup>277</sup> Part V of this Article reorganizes the Article's proposed structure of judicial review by reference to the APA. See *infra* Part V.

<sup>278</sup> 5 U.S.C. § 706(2)(C) (2006).

<sup>279</sup> *Id.* § 706(2)(A); see also Levin, *supra* note 3, at 1267 ("[C]ourts have for many years been accustomed to reviewing legislative regulations through a two-step process in which the judge would initially ask whether the agency had stayed within the bounds of its delegated discretion (in *Chevron*'s terms, was the agency's view 'manifestly contrary to the statute?'), and then whether the agency had abused its discretion. One of *Chevron*'s most important innovations was to extend this model to agencies' statutory interpretations generally."); Strauss, *supra* note 12, at 826 ("*Chevron* step two and *State*

In sum, the arbitrary or capricious review undertaken at step 3(A) evaluates whether a legal determination that is substantively permissible under the statute is nevertheless unlawful because the decision was made in an improper manner. The proper focus is on the agency decisionmaking process, not the substance of the decision itself, which has previously been found to be permissible as a substantive matter.<sup>280</sup> At the conclusion of the step 3(A) process, a court should either uphold the agency interpretation or remand to the agency for reconsideration.

D. *Step 3(B)(1): Court's Provisional Determination of Meaning of an Ambiguous Statute Accounting for Skidmore Deference*<sup>281</sup>

The step 3(B)(1) analysis identifies the alternate route of review for a court, based on the result of the step 2 (*Mead*) analysis.<sup>282</sup> If the reviewing court, having applied the *Mead* analysis, determines that the agency did *not* act to make law based on the delegation of lawmaking authority to the agency, the court itself must determine a substantive meaning of the ambiguous statute, using *Skidmore* deference. Step 3(B)(1) is accordingly the second of the two decisional paths that diverge based on the outcome of the *Mead* analysis.<sup>283</sup>

This step of the review requires the court to make its best judgment about the substantive meaning of the ambiguous statute enacted by Congress. Accordingly, this review is sharply different from the decisionmaking process review engaged in at step 3(A).<sup>284</sup> In reaching its judgment about the substance of the law enacted by Congress, the court may be aided

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*Farm* issues are both decided under APA § 706(2)(A). The *Chevron* step two issue is whether the agency's judgment, on a matter within what the reviewing court has found to be the agency's delegated authority, is a 'reasonable' judgment. That is to say, in APA terms, it is a matter respecting which the court's responsibility is to say whether it is 'arbitrary, capricious, [or] an abuse of discretion.' This is the identical language as underlay *State Farm*. . . . How one assesses what is 'arbitrary, capricious, [or] an abuse of discretion' does vary with context. Still, 'President Clinton demanded it' will not count as a 'reasonable' basis for action under § 706(2)(A) unless the statute makes that a dispositive factor; the agency must have reasons that satisfy its statutory charge." (alterations in original) (emphasis omitted) (footnotes omitted)).

<sup>280</sup> See *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 39-40 (D.C. Cir. 2009) (per curiam) (accepting legal permissibility of agency's "nine-factor test," but recognizing that agency acted unlawfully if test had been applied "inconsistently, resulting in similar counties being treated dissimilarly" or "applied . . . so erroneously in a particular case that it could not have reasonably concluded that a county was contributing to nearby violations").

<sup>281</sup> The text employs the common expression of *Skidmore* deference, even though that expression is a misnomer. A more accurate expression would be *Skidmore* guidance or *Skidmore* persuasion. See *supra* note 61.

<sup>282</sup> Step 2 analysis is discussed *supra* Part III.B.

<sup>283</sup> The other route was step 3(A), discussed *supra* Part III.C.

<sup>284</sup> See *supra* Part III.C.



by the agency's experience and expertise to the extent that the court finds them to be helpful and persuasive.<sup>285</sup> The nature of this judicial determination is, however, at the core of the judiciary's law-determining function.<sup>286</sup> The Supreme Court's decision in *Oregon* is an example of a substantive judicial interpretation employing *Skidmore* deference.<sup>287</sup>

A court fails to conform to its proper role if it fails to make its own independent judgment about the substance of the congressional enactment and instead simply accepts the agency's substantive view of the law<sup>288</sup> or focuses on the adequacy of the agency's decisionmaking process rather than

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<sup>285</sup> This is the core of *Skidmore* deference: the court is interpreting the statute, with the agency offering assistance in understanding what the statute provides. See *supra* notes 56-61 and accompanying text; see also Bressman, *supra* note 7, at 1446 ("While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference means just the opposite."); cf. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) ("While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

<sup>286</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to [s]ay what the law is."). By employing the *Skidmore* review regime, the court necessarily exercises greater lawmaking power that arises from the court, rather than an agency, having the authority to interpret the statute. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) ("The question whether Congress intended the two standards to be identical is a pure question of statutory construction for the courts to decide."); cf. Bressman, *supra* note 7, at 1449 ("Justice Scalia's proposal [for broad application of *Chevron* deference] also has a larger theoretical advantage. It promotes political accountability of agency action. It removes from judicial control and remits to presidential control all authoritative agency interpretations, not just those rendered through certain procedures.").

<sup>287</sup> See *supra* notes 243-50 and accompanying text. Because the Court concluded that the Attorney General lacked the delegated authority to promulgate regulations barring doctors from prescribing prescription drugs for use in physician assisted suicide, see *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006), the agency would lack authority to promulgate a new and different rule, see *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005). For another example of a court employing the *Skidmore* regime to interpret a statute, see *Landmark Legal Foundation v. IRS*, 267 F.3d 1132, 1136 (D.C. Cir. 2001) ("*Chevron* being inapplicable here in light of *Mead*, we must decide for ourselves the best reading of the modifying clause . . . . We conclude that indeed the statutory phrase—'the existence, or possible existence, of liability'—naturally encompasses the issue of tax-exemption *vel non*.").

<sup>288</sup> For examples of courts failing to play the proper judicial role in the *Skidmore* regime, see *Wells Fargo Bank, N.A. v. FDIC*, 310 F.3d 202, 208-09 (D.C. Cir. 2002) (stating "doubt" about the applicability of *Chevron* deference and holding ambiguously that the agency interpretation "is a reasonable—if not the most reasonable—interpretation of the statute."), *Ass'n of Civilian Technicians, Inc. v. United States*, 601 F. Supp. 2d 146, 163-64 (D.D.C. 2009) (indecisively regarding the applicable review regime and appearing to rely on the agency's interpretation based on its view that "Congress has not specifically spoken on a particular question, and Congress has generally delegated to the agency the power to administer the statute and to make decisions carrying the force of law."), *aff'd*, 603 F.3d 989 (D.C. Cir. 2010), and *Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1, 9 (D.D.C. 2003) (explaining that "the Court need not delve into" applicable review standard because the agency interpretation was lawful "even under the less-deferential *Skidmore* analysis or the Court's own determination").

the statute itself.<sup>289</sup> At this point a court has already determined that the agency did not exercise delegated lawmaking power, so the only law is the law that Congress itself defined in the statute; the court is responsible for determining the content of that law.

To be sure, the legal stakes of the court's statutory decision are reduced because the court may be determining only the provisional meaning of the statute (under *Brand X*).<sup>290</sup> The court-determined meaning, however, is provisional only if the agency does, in fact, have lawmaking authority that the agency may exercise at a later time and, thereby, supersede the court's legal interpretation.

Step 3(B)(1) thus further clarifies that the impact of so-called *Chevron* deference is actually to avoid entirely a court's interpretation of an ambiguous statute and, rather, to proceed directly to arbitrary or capricious review, the step 3(A) described above. When an agency has met the threshold requirements for so-called *Chevron* deference, a court is precluded from engaging in an independent interpretation of the substantive meaning of an ambiguous statute. For litigants who are challenging agency action, the benefit of this step 3(B)(1) review is that the party has the chance to convince a court of its preferred substantive interpretation of the ambiguous statute.<sup>291</sup> The incentive for agencies, of course, moves in the opposite direction. If the agency wishes to avoid a court's trumping interpretation of an ambiguous statute, it should engage in lawmaking, which is usually accomplished by rulemaking or formal adjudication.<sup>292</sup>

It is important to recognize that the Supreme Court has effectively established an exception to the judicial determination of statutory meaning, despite an agency's failure to engage in delegated lawmaking authority with respect to an ambiguous statute. When an agency believes that clear statutory law binds it, the agency will decline to exercise its own lawmaking authority. If a court later concludes that the statute is actually ambiguous with respect to the legal issue, a court may not wish to impose its construction of

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<sup>289</sup> For an example of this type of flawed approach, see *Brown v. United States*, 327 F.3d 1198, 1205 (D.C. Cir. 2003) ("Treasury's methodology for calculating locality pay increases satisfies the requirements for *Skidmore* deference.").

<sup>290</sup> See *supra* notes 147-50 and accompanying text.

<sup>291</sup> An agency can then change that law only if it later acts in the exercise of delegated lawmaking power.

<sup>292</sup> See Stephenson, *supra* note 7, at 533-34 ("[C]ourts defer more to formal agency decisions than to informal decisions because procedural formality is a proxy for other things that courts care about, thereby rendering textual plausibility relatively less important."); cf. *id.* at 533 ("Increasing the weight the court attaches to agency policy views causes agencies to use formal procedures more frequently and for relatively less important issues."). Such administrative procedures do, however, impose costs on the agency. See *id.* at 546 ("[F]ormal procedures are more costly for the agency. The costs associated with procedural formality include delay, staff time, money, and perhaps more intensive scrutiny from Congress or other overseers. It is widely believed that these procedural costs are substantial and that they are often a significant consideration in agency decisionmaking." (footnote omitted)).

the ambiguous statute on the agency.<sup>293</sup> This judicial restraint conforms to the *Chenery I* principle, because it permits the agency to deploy its expertise and experience in interpreting the statute with the benefit of the judicial elaboration of the statute's ambiguity.<sup>294</sup> Despite the understandable allure of the *Chenery I* principle, the importance of an *initial* legal determination by the agency, rather than the court, is reduced as a consequence of the Court's decision in *Brand X* that a court's interpretation of an ambiguous statute is only provisional and may be superseded by the agency's later exercise of its delegated lawmaking power.

In sum, step 3(B)(1), when it is applicable, requires the court itself to discern the substantive meaning of an ambiguous statute, according *Skidmore* deference to the agency's interpretation. An agency avoids this substantive review when it acts to define ambiguous law by exercising lawmaking power delegated by Congress.

E. *Step 3(B)(2): Review of the Process of an Agency Legal Determination that the Court Has Adopted Employing Skidmore Deference*

In the event that the court decides at step 3(B)(1) of its review that the agency was correct in its interpretation of the ambiguous statute (having employed *Skidmore* deference), the court completes its review of the agency's decision by employing arbitrary or capricious review. This review ensures that the agency's decisionmaking process was proper. As with step 3(A), in which the court reviews the process of an agency's exercise of delegated lawmaking power that has been found to be substantively permissible,<sup>295</sup> this step ensures that the process of agency interpretation was adequate.<sup>296</sup>

Arbitrary or capricious review properly supplements the court's step 3(B)(1) determination that the agency's decision was not "in excess of statutory jurisdiction,"<sup>297</sup> by ensuring that it was reached in a reasonable manner.<sup>298</sup> Arbitrary or capricious review is generally understood to be applicable when an agency action is either assumed to be, (e.g., *Overton Park*) or

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<sup>293</sup> See *supra* notes 213-14 and accompanying text (discussing *Negusie*).

<sup>294</sup> The *Chenery I* principle is relevant, however, only when an agency does have delegated lawmaking power, because the law otherwise is only what Congress has defined (as determined by the judiciary).

<sup>295</sup> See *supra* notes 270-71 and accompanying text.

<sup>296</sup> This understanding of arbitrary or capricious review is consistent with the Court's understanding of this review in *Fox*: arbitrary or capricious review does not concern itself with the substances of the agency's decision and looks at only at the process of decisionmaking. See *supra* Part II.E.

<sup>297</sup> 5 U.S.C. § 706(2)(C) (2006).

<sup>298</sup> See *supra* notes 277-79 and accompanying text (describing by reference to Section 706 the two ways in which an agency legal interpretation may be found unlawful).

determined to be, within the agency's scope of statutory authority (that is, not substantively foreclosed by the statute).

#### IV. INTEGRATED REVIEW AND CHANGES IN AN AGENCY'S LEGAL POSITION

Having described an integrated regime for the review of agency legal interpretations, we will consider how that regime would approach review when an agency has changed its interpretation. Changed agency interpretations have been at issue in several of the Court's foundational judicial review decisions, including *State Farm*,<sup>299</sup> *Chevron*,<sup>300</sup> and more recently *Fox*.<sup>301</sup>

A change in an agency's legal interpretation may be accomplished in two ways that are relevant to this discussion. The agency may change its position in the exercise of delegated lawmaking authority, or it may change its position as to its understanding of what the statute itself provides. In either case, the court will determine initially whether the agency position conflicts with the clear dictates of the statute. This decision would be determined by the court's view of the law clearly defined by Congress. Assuming that the statute is sufficiently ambiguous to permit the agency's interpretation, the court would turn to the step 2 analysis of whether the agency has exercised delegated lawmaking power. If the agency has exercised lawmaking power, the court would turn to step 3(A) of its review and determine whether the agency's new position, already found to be substantively permissible, was determined by a lawful decisionmaking process. In particular, a court would want to ensure that the agency came to its new position by a consideration of factors that the statute makes relevant to the agency's substantive determination. This is the process-based review prescribed by *Overton Park*<sup>302</sup> and *State Farm*.<sup>303</sup> This review process is consistent with the Supreme Court's view that the change in agency position does not affect the applicability of *Chevron* deference, but instead is evaluated by reference to arbitrary or capricious review.<sup>304</sup>

Consider, however, the alternate judicial review regime, if the agency's change in position is not undertaken in the exercise of delegated law-

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<sup>299</sup> See *supra* Part I.D.

<sup>300</sup> See *supra* Part I.E.

<sup>301</sup> See *supra* Part II.E.

<sup>302</sup> See *supra* Part I.C.

<sup>303</sup> See *supra* Part I.D.

<sup>304</sup> See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("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 or capricious change from agency practice under the Administrative Procedure Act."); see also *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011).

making power. Step 1 of the review would be the same as the review in the earlier scenario: a court would determine whether the statute clearly bars the agency's new interpretation. If the new interpretation is not barred, the court would determine under step 2 what was already assumed: the new interpretation is not the result of an exercise of delegated lawmaking power. This conclusion has the effect of moving the court to step 3(B)(1), which requires the court itself to interpret the ambiguous statute, according *Skidmore* deference to the agency's position. The fact that the agency has changed its interpretation would mean that the new interpretation is likely to be less persuasive to the court. Indeed, the court might find the previous interpretation more persuasive. The court would then reach its own independent judgment about the statute's meaning.

If the court were to reach a different conclusion about the content of the substantive law, the agency, if it had delegated lawmaking power, would have the ability to exercise that authority to change the judicial interpretation through its own lawmaking authority, which would thereafter be reviewed in the manner described above. If the court were to reach the same substantive decision as the agency following the step 3(B)(1) review, the court would review the agency decision pursuant to step 3(B)(2) to determine whether it is lawful under arbitrary or capricious review by focusing on the agency's rationale in support of its change in position.

## V. INTEGRATING REVIEW STANDARDS WITH SECTION 706 OF THE APA

*Chevron* is acknowledged as a foundational decision in administrative law.<sup>305</sup> One lingering effect of the decision is the framing of the understanding of judicial review by reference to steps, as in *Chevron*'s two-step review process.<sup>306</sup> An alternate way to define the structure of judicial review is by reference to the standards of review defined in Section 706 of the APA.<sup>307</sup> That provision has two subsections that are directly relevant to the permissibility of an agency's legal determination. The agency decision is unlawful under Section 706(2)(C) if the decision is beyond the agency's statutory authority. The agency decision is also unlawful if it is arbitrary or capricious under Section 706(2)(A).<sup>308</sup> The fact that the APA has these two

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<sup>305</sup> See *supra* note 2 and accompanying text.

<sup>306</sup> This Article also takes a step-by-step approach. See *supra* Part III.

<sup>307</sup> 5 U.S.C. § 706 (2006).

<sup>308</sup> The Supreme Court has also employed Section 706(2)(A) to implicate the scope of the agency's statutory authority. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2469 (2009) ("A second question remains: In issuing the permit did the Corps act in violation of a statutory mandate so that the issuance was 'not in accordance with law'?" (quoting 5 U.S.C. § 706(2)(A))).

standards would give rise to the conclusion that they are expected to have different effects.<sup>309</sup>

The excess of statutory authority standard (Section 706(2)(C)) is focused on the statute, with the court deciding whether the statute forecloses the agency interpretation. Under step 1, this result is present if the statute is clear in that regard. An agency interpretation would also be foreclosed under step 3(B)(1) if the court, having applied *Skidmore* deference, interprets an ambiguous statute as inconsistent with the agency interpretation. After the statute-centered question of the statutory permissibility of the agency interpretation, the APA tasks the court with reviewing the permissibility of the agency's decisionmaking process under arbitrary or capricious review, an agency-centered inquiry.<sup>310</sup> This review ensures that the agency, although reaching a substantive interpretation that the statute does not foreclose, has reached the decision in a proper way.<sup>311</sup>

The Article now describes how the legal review regime already described in Part III may be understood as implementing these review standards. Relating the steps of judicial review to the standards of review de-

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<sup>309</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 865 (4th ed. 2007) ("Under the whole act rule, the presumption is that every word and phrase adds something to the statutory command.").

<sup>310</sup> In many cases, courts will proceed directly to arbitrary or capricious review, with its focus on agency decisionmaking, without engaging in the statute focused analysis of steps 1, 2, or 3(B)(1). Such review is applied when a statute plainly grants an agency broad discretion. For example, in *Comcast Corp. v. FCC*, the plaintiff challenged an FCC regulation. Congress's delegation of rulemaking authority was quite broad:

The Cable Television Consumer Protection and Competition Act of 1992 directed the FCC, "[i]n order to enhance effective competition," to "prescrib[e] rules and regulations . . . [to] ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer." The Commission is to "make such rules and regulations reflect the dynamic nature of the communications marketplace."

*Comcast Corp. v. FCC*, 579 F.3d 1, 3 (D.C. Cir. 2009) (alterations in original) (citations omitted) (quoting 47 U.S.C. §§ 533(f)(1)-(2)(A), (f)(2)(E) (2006)). There was no claim that the agency had acted beyond its statutory authority, and the court held that the agency was arbitrary or capricious in promulgating a regulation that established a 30 percent market share limit on the subscribers a single cable television operator may serve. *Id.* at 9-10.

<sup>311</sup> See *Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543, 551 (D.C. Cir. 2009) ("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.'" (quoting 5 U.S.C. § 706(2)(A))). In *American Equity*, the court initially determined that the substance of the agency's interpretation was permissible under steps one and two of *Chevron*. See *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 173 (D.C. Cir. 2010) (concluding that statute is ambiguous thus satisfying step One); *id.* at 174-76 (holding that the agency's substantive interpretation was reasonable thus satisfying step Two). The court then concluded that the agency promulgation of the regulation was arbitrary or capricious because the agency did not properly consider factors that the statute required the agency to consider. *Id.* at 177-79.

fined by Congress in the APA may facilitate greater uniformity in this area of the law—an effect that the Supreme Court has identified as important.<sup>312</sup>

A. *Legal Determinations Beyond the Agency's Statutory Authority*

There are four circumstances in which a court may hold that an agency has exceeded its statutory authority. The most obvious situation is when the agency's legal determination conflicts with the clear meaning or intent of a statute.<sup>313</sup> If a court determines that Congress has clearly foreclosed the agency's legal interpretation, the agency has plainly acted in excess of its statutory authority. In this situation, it does not matter whether the agency purported to be exercising lawmaking power delegated by Congress. A court has determined that the statute clearly forecloses the agency's interpretation. This determination is analogous to a step 1 decision.

An agency also acts in excess of its statutory authority when it has purported to exercise lawmaking power that Congress has not delegated to the agency.<sup>314</sup> Under the Part III nomenclature, this legal error would be identified in the first part of the step 2 analysis.<sup>315</sup> Such an action by the agency exceeds its statutory authority because a court has concluded that Congress did not give the agency the authority to make law, so that the agency had to have erred in seeking to exercise this nonexistent power. In this circumstance, the court must itself give meaning to the otherwise ambiguous statute, because the agency has no lawmaking power. The court interprets the statute giving *Skidmore* deference to the agency's substantive determination.<sup>316</sup> This second part of the court's decision is reflected in step 3(B)(1) of Part III.

The third way in which an agency acts in excess of its statutory authority is when the agency has not acted in the exercise of delegated lawmaking power, and the agency is determined to have misinterpreted an otherwise ambiguous statute. In this situation, the agency has not exercised the lawmaking power that Congress had delegated to it. The court itself must interpret the ambiguous statute, employing *Skidmore* deference so that the

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<sup>312</sup> See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“[W]e have expressly ‘[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.’” (second and third alterations in original) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999))); see also *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 222-23 (1989) (rejecting application of “a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power”).

<sup>313</sup> This type of decision is discussed *supra* Part III.A (step 1 analysis).

<sup>314</sup> E.g., *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 798-99 (D.C. Cir. 2002) (holding that agency lacked delegated authority to promulgate video description regulations).

<sup>315</sup> See *supra* Part IV.

<sup>316</sup> *Oregon v. Gonzales*, discussed *supra* notes 166-69, 187-91, 212 and accompanying text, is an example of this type of court review.

agency can aid the court in determining how the statute should apply. This decision is made at step 3(B)(1) of the integrated review process.<sup>317</sup>

The final way in which an agency acts in excess of statutory authority is when the agency concludes that the statute itself clearly requires a particular legal rule, and a reviewing court concludes that the statute is ambiguous with regard to the legal issue. Various Supreme Court opinions suggest that in this type of case a court ought to remand the matter to the agency if Congress has delegated lawmaking power to the agency. In the absence of an agency possessing lawmaking power, though, a court's determination of the ambiguous statute's meaning would be informed by the agency's expertise and experience. In the latter situation, a court should refrain from freezing the content of the law without the agency having an initial opportunity to decide the matter based on its expertise and experience.<sup>318</sup> The legal ossification concern arises here because an agency would not be able to supersede the court's interpretation of the ambiguous statute, because (we have assumed) the agency lacks lawmaking authority.

One critical characteristic that is common to each of these four types of agency actions beyond statutory authority is the congressional source of the law being interpreted by the court. In this circumstance, the court is playing its key function as interpreter of legislation.<sup>319</sup> An agency may help in persuading the court about the statute's meaning, but Congress is the sole source of the law.

#### B. *Arbitrary or Capricious Agency Determinations*

There are two circumstances in which an agency's legal conclusions will be determined to have been arbitrary or capricious. The first circumstance occurs when an agency has acted in the exercise of delegated lawmaking power in interpreting a statute that does not foreclose the agency interpretation, but the agency's decisionmaking process was unlawful. This circumstance is discussed in step 3(A) of Part III, and reflects a better understanding of step two of *Chevron* analysis.<sup>320</sup>

The second type of arbitrary or capricious decisionmaking occurs when the agency's interpretation and application of an ambiguous statute is found by a court to be substantively permissible (under step 3(B)(1) of Part III), but was the result of an unlawful process. This is step 3(B)(2) of Part III. This type of case is most likely to emerge when the party challenging

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<sup>317</sup> See *supra* Part III.D.

<sup>318</sup> The agency interpretation would then be subject to later review with the agency determination accorded *Skidmore* deference.

<sup>319</sup> See Bamberger & Strauss, *supra* note 3, at 612 (describing "bounding agency authority" as "an essential judicial function").

<sup>320</sup> See *supra* Part III.C.



the agency action concedes that the statute permits the substantive decision, but challenges the decisionmaking process.<sup>321</sup>

## CONCLUSION

The Supreme Court's seminal decision in *Chevron* had suggested simplicity—a straightforward two-step process—in the standards for judicial review of agency legal decisions. The case, however, did not deliver that simplicity. Its approach to review, for example, failed to define clearly the role of courts in reviewing the substance of an agency's legal determination and obscured the relevance of arbitrary or capricious review. The review scheme became far more complicated after the Court's decision in *Mead*, which established that the older *Skidmore* review regime applied to the review of many legal determinations.

This Article sought to untangle the different components of review of agency legal determinations by focusing principally on the source of law being reviewed by the court, as well as on the role being played by the court in determining the applicable law. It also sought to define a clear step-by-step process of review, as well as relating the review regime to the key review standards defined by the APA.

The Article's most important conclusion is that, when an agency has exercised delegated lawmaking power to interpret an ambiguous statute, a reviewing court should review only the permissibility of the agency's decisionmaking process, rather than the agency's substantive interpretation. If, however, an agency has not exercised delegated lawmaking power to interpret an ambiguous statute, the court must itself determine the statute's substantive meaning, with the agency's views accounted for through *Skidmore* deference. So-called *Chevron* deference, accordingly, has the effect of removing the judiciary from making a substantive interpretation of an ambiguous statute when the agency has engaged in lawmaking.

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<sup>321</sup> See *supra* Part IV.

