COUNTING ON *CHEVRON*?

Heidi Marie Werntz[*]

Don't pick a fight, but if you find yourself in one, I suggest you make damn sure you win.

– John Wayne[1]

Synopsis: *Chevron* deference is a weighty phrase. Whether or not the reviewing court accords deference to the agency's interpretation of core statutes it implements and, if so, the degree of deference the agency receives, affects agency actions, regulatory stability and confidence in the rule of law. Critically important, *Chevron* deference impacts the agency's flexibility to change course and adapt to shifts in the social, political, and economic landscape. In today's politically-charged environment, where Congress is all too often deadlocked, an agency can often react more nimbly, reinterpreting statutory ambiguities where reasonable in order to meet the exigencies of changing circumstances – provided *Chevron* deference applies. And yet, a generation after the Supreme Court handed down the *Chevron* decision, there is heightened concern over the constitutionality of *Chevron* deference because it continues to raise separation of powers issues. Under the United States Constitution, the legislative branch (Congress) makes the law, the executive branch (the President) executes the law, and the judicial branch (the court) interprets the law. The "fourth branch" (agencies), not mentioned in the Constitution, but generally ascribed to the executive branch, exercises a combination of legislative, executive and judicial functions. May the court defer to the agency's reasonable interpretation of an ambiguous statute it administers without abdicating its judicial interpretive function? Is the agency's reasonable interpretation entitled to deference because the agency and its experts are more directly politically accountable for their interpretation than the courts are?

Of late, not only has *Chevron* seemingly lost its luster, along with its presumed constitutionality, but the simple *Chevron* two-step championed by the late Justice Scalia ("perhaps the foremost expositor of *Chevron*") has morphed into a more intricate foxtrot.[2] Adding to the once familiar two-step analysis (step 1, is the statute ambiguous, and, if so, step 2, is the agency's interpretation reasonable?) are what commentators have termed *Chevron* step zero (is the issue one of such deep economic and political significance that Congress would not have delegated it to the agency to decide and/or does the agency's interpretation lack the force of law?) and step 1.5 (did the agency mistakenly find no statutory ambiguity?). This

* Attorney-Advisor, Federal Energy Regulatory Commission. Special thanks to editors and colleagues for their invaluable support and thoughtful suggestions. The views expressed in this article are solely my own and do not necessarily reflect the views of FERC, any individual Commissioner, or the United States. Any mistakes are solely my own.

1. JOHN WAYNE OFFICIAL SITE: QUOTES, http://johnwayne.com/quotes (last visited Oct. 7, 2017).
2. Global Tel*Link v. FCC, 859 F.3d 39, 60 (D.C. Cir. 2017) (Silberman, J., dissenting).

article leads the energy and environmental practitioner through the steps of *Chevron* and its progeny, examines the pros and cons of *Chevron* deference, and battles to sustain *Chevron* deference, at least until a new framework of analysis emerges.

I. INTRODUCTION

On June 25, 1984, the Supreme Court issued an ostensibly ordinary, unanimous opinion, penned by Justice Stevens: *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[3] As any administrative law student will attest, however, this opinion rapidly established the two-step framework that reviewing courts use

3. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 840-42 (1984) (upholding Environmental Protection Agency (EPA) rules issued after notice and comment rulemaking that changed the agency's interpretation of "stationary source" in the Clean Air Act to count a cluster of facilities within an industrial plant as a single stationary source). Although the decision was unanimous, the court numbered only six justices, *see id.* at 866 (noting that Justices Marshall, Rehnquist and O'Connor did not take part).

to evaluate whether to defer to an administrative agency's interpretation of an ambiguous statute.[4] At step 1, the court asks whether Congress directly addressed the precise question at issue.[5] If the answer is yes, then the court declares what the statute means and the agency receives no deference for its statutory interpretation.[6] If the answer is no, then the court proceeds to step 2.[7] Under step 2, when the statute is silent or ambiguous with respect to the disputed question, the court evaluates whether the agency's interpretation was "based on a permissible construction of the statute."[8] If the answer is yes, then the agency's interpretation receives deference, even if, in the court's opinion, it is not the best interpretation.[9] Given the volume of administrative decisions that federal courts review every year, *Chevron*'s significance is not in doubt, although its usefulness may be waning.[10]

When *Chevron* was first issued, it provided a sorely needed framework for reviewing courts to use in order to analyze whether deference to an agency's statutory interpretation is appropriate. Prior to *Chevron*, there were at least two lines

4. *See, e.g.*, Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN L. REV. 253 (2014) (noting that "*Chevron* was almost instantly seized upon as a major decision by the D.C. Circuit" before it eventually became regarded as a landmark decision by the Supreme Court); *see also* Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 284 (1986) (describing *Chevron* as "one of a small number of cases that every judge bears in mind when reviewing agency decisions"). Notably, the *Chevron* opinion does not explicitly number the two-step framework, which was formally articulated by Judge Patricia Wald in Reting v. Pension Benefit Guaranty Corp., 744 F.2d 133, 141 (D.C. Cir. 1984) ("As we understand the Supreme Court's most recent pronouncements in *Chevron*, our inquiry consists of two steps").

Since its inception, there has been an ongoing debate about the scope of interpretations to which *Chevron* applies. Formal notice and comment rulemaking and formal adjudication warrant *Chevron* deference, as do other agency actions that have the "force of law," *see, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226-27 (2001), a murky standard. *See generally* Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193 (2006); *see also* Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273 (2011); Lisa Bressman, *How Mead Has Muddled Judicial Review of Agency Actions*, 58 VAND. L. REV. 1443 (2005) (arguing that limiting *Chevron* to interpretations rendered in formal rulemakings or adjudications supports the right to be heard as a check on coercive governmental power). *Chevron* or *Chevron*-like deference has been applied to regulations, tariffs, contracts, and other agency actions. *See, e.g.*, La. Pub. Serv. Comm'n v. FERC, 761 F.3d 540, 553-54 (according substantial deference to tariff interpretation and rate design in light of agency expertise and deference to contract interpretation if FERC relied on technical or factual expertise). *Chevron* generally does not apply to interpretive rules, policy statements, opinion letters, no-action letters, press releases, and policy manuals. *See generally* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (listing non-binding actions); *but see also* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (lack of notice and comment rulemaking is not critical; depends on "the interpretative method used and the nature of the issue").

5. *Chevron*, 467 U.S. at 842.

6. *Id.* at 842-43.

7. *Id.*

8. *Id.*

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

10. Emily Hammond, *Chevron's Generality Principles*, 83 FORDHAM L. REV. 655, 656 (2014) ("Thirty years after the 'quiet revolution' that was [*Chevron*], the doctrine bearing that decision's name is arguably the most cited of administrative law") (internal citation omitted); Kenneth Starr, *supra* note 4, at 284 (*Chevron* was evolutionary because it refined Supreme Court precedent reminding lower federal courts to defer to an agency's reasonable statutory construction and "revolutionary because it eliminated a significant ambiguity in the law and cast substantial doubt upon several well-established doctrines that had sometimes permitted courts to overturn agency interpretations"); Daniel S. Brookins, *Confusion in the Circuit Courts: How the Circuit Courts are Solving the Mead Puzzle by Avoiding it Altogether*, 85 GEO. WASH. L. REV. (forthcoming 2017) ("Chevron avoidance has increased dramatically"); Bressman, *supra* note 4, at 1464-66.

of precedent, one requiring courts to engage in full *de novo* review of agency decisions, and the other one according agencies deference under certain circumstances.[11] Courts chose which tack to take on a statute-by-statute basis, considering factors such as "the degree of the agency's expertise, the [technical] complexity of the . . . issue," whether the agency's interpretation was long-standing, consistently-held, and contemporaneous with the passage of the statute, and whether the agency had rulemaking authority.[12] Deference was meted out on a sliding scale, depending upon the various factors.[13] In contrast, *Chevron* provided an ostensibly straightforward, two-step analysis. Deference was either all (provided the agency's interpretation was reasonable) or nothing.[14] *Sotto voce*, *Chevron* shifted the theoretical underpinnings for deference from a pragmatic approach to one grounded in implied delegation of authority from Congress.[15] Arguably, it brokered a reasonable compromise between the judicial and agency spheres. Although courts still must say what the law is by declaring the clear meaning of the statute or declaring it ambiguous, and courts still must evaluate the reasonableness of the agency's interpretation of an ambiguity, at least Congress, agencies, and the public were on notice that agencies would have first dibs to apply their expertise to resolve statutory ambiguities reasonably.[16]

Over thirty years have elapsed since the unremarkable day that *Chevron* was issued, and time has eroded the simplicity that propelled the *Chevron* two-step to administrative law rock-star status. Scholars have discerned two additional steps in the current judicial approach to applying *Chevron*: a preliminary "step zero" (step 0), which uses various analytical tools to determine whether the *Chevron*

11. Justice Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 513 n.9 (1989) (internal citations omitted). *See, e.g.*, Theodore J. St. Antoine, *The NLRB, The Courts, The Administrative Procedure Act, Chevron: Now and Then*, 64 EMORY L.J. 1529, 1531 (2015); *see also* Thomas W. Merrill, *Article III, Agency Adjudication and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947-54 (2011). Pre-*Chevron*, courts reviewed pure questions of law *de novo*, and deferred to agency applications of law to fact, although the degree of deference varied and these standards were rebuttable presumptions. Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 9 (2013).

12. Scalia, *supra* note 11, at 516.

13. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that the "agency's rulings, interpretations and opinions . . . while not controlling . . . constitute a body of experience and informed judgment . . . for guidance," and "[t]he weight of [the agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"). *See also* Kristin Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1255-59 (2007) (describing *Skidmore* sliding scale).

14. *See generally Chevron*, 437 U.S. 837.

15. Merrill, *supra* note 4, at 255. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("*Chevron* is rooted in a background presumption of Congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered 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'" (internal citation omitted)). *But see Scalia*, *supra* note 11, at 516 ("In my view, the theoretical justification for *Chevron* is no different from the theoretical justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations").

16. *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

framework should even be used at all to evaluate the agency's statutory interpretation; and a half step between steps 1 and 2, (step 1.5).[17] At *Chevron* step 1.5, if a court determines that the agency failed to recognize that it was interpreting an ambiguous statutory provision, the court may remand the decision back to the agency to take first crack at interpreting the ambiguous provision.[18] Yet other scholars have suggested that the two-step framework is actually two ways of framing a single question: "whether the agency's construction is permissible as a matter of statutory interpretation."[19]

Moreover, and significantly, an Article III (judicial or "third branch") tempest is brewing, fueling a resurgent championing of judicial functions, generally, and a preference for judicial over agency interpretations, specifically.[20] There is concern over "the danger [of] the growing power of the administrative state."[21] Congress has introduced bills to eliminate *Chevron* deference, seeking to ensure that judicial interpretations of law will prevail over those expressed by the bureaucracy.[22] Courts have also jumped into the fray.[23] The elevation of Justice Neil Gorsuch, who is not a fan of *Chevron*, to the Supreme Court, has further catapulted *Chevron* into the public limelight.[24]

17. *See generally* Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017).

18. *Id.*

19. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009) (recommending jettisoning *Chevron*'s two-step framework because *Chevron* calls for a single inquiry into the reasonableness of the agency's statutory interpretation). *But see also Global Tel*Link*, 859 F.3d at 59 n.1 (arguing that the single inquiry approach "ignores the practical effect on future agency discretion of a court opinion either affirming or reversing an agency interpretation at step one versus step two" (citation omitted)) (Silberman, J., concurring).

20. *See generally* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017) (describing how recent Supreme Court decisions wrested interpretive power from the agency, realigned the relationship between courts and agencies as well as courts and Congress, and mask a judicial agenda hostile to the administrative state that has no basis in law). *See also* Waterkeeper Alliance v. EPA, 853 F.3d 527, 539 (D.C. Cir. 2017) ("An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name" (citation omitted)) (Brown, J., concurring).

21. *City of Arlington*, 569 U.S. at 315 ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed" (citation omitted)) (Roberts, C.J., dissenting).

22. *See, e.g.*, Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017) (rolling together a series of previously passed bills to end *Chevron* deference and require mandatory stays for new rules, among other reforms); *see also* Regulatory Accountability Act of 2017, S. 951, 115th Cong. (2017) (introduced Apr. 26, 2017) (proposing to replace *Auer* deference – deference to the agency's interpretation of its own rules – with a less deferential *Skidmore* deference standard but leaving *Chevron* intact and allowing courts to remand questions involving statutory ambiguities back to Congress). According to www.thomas.gov, the House has passed H.R. 5 but there has been no action in the Senate on H.R. 5 or S. 951. As of this writing, it is unlikely that the bill will be moved through the Senate floor as sixty votes are needed for cloture.

23. Troubled that some courts are skipping the *Chevron* step 1 inquiry altogether, where the judicial role is to declare the boundaries of delegated authority, one judge chastised: "Truncating the *Chevron* two-step into a one-step reasonableness inquiry lets the judiciary leave its statutory escort to blow at the agency's dice. 'It isn't fair. It isn't nice.'" *Waterkeeper Alliance*, 853 F.3d at 539 (quoting GUYS AND DOLLS (Samuel Goldwyn Productions 1955)) (Brown, J., concurring).

24. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth" (Gorsuch, J., concurring)). *See also* Emily Bazelon &

Where does this turmoil leave energy and environmental law practitioners? The way the *Chevron* framework is applied in a specific case can have a profound impact on the deference the agency receives, the outcome of the case, and whether the agency has any flexibility to reinterpret a statutory ambiguity going forward. The purpose of this article is to explain how the current amplified four steps of *Chevron* actually function, to garner a better understanding of *Chevron*, and how its steps have been and could be applied. It also advocates, nostalgically perhaps, for the "pure" *Chevron* two-step.

First, this article will "count the steps" of *Chevron* and its progeny, beginning with a discussion of traditional *Chevron* steps 1 and 2. In addition to highlighting the implications of each step, it will also provide examples of how the courts – particularly the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), which reviews the bulk of agency decisions – have applied *Chevron* step 1/step 2 analysis. It will explain *Chevron* step 1.5 and endeavor to make some sense of *Chevron* step zero. Next, this article will consider the pros and cons of *Chevron* deference, examining, among other arguments, how the *Chevron* framework arguably supports or detracts from Constitutional separation of powers. After defending the merits of deference, at least until the emergence of a new analytical paradigm, this article will conclude with a summary explanation of how *Chevron* may be used to achieve a potential range of results.

II. COUNTING *CHEVRON*'S STEPS

A. Chevron Step 1: Is the Statute Clear and Unambiguous?

1. Overview

At *Chevron* step 1, the reviewing court conducts a *de novo* review to determine whether a statute is ambiguous, and the agency receives no deference on the step 1 question of whether the statute is ambiguous.[25] If Congress has directly spoken to the issue, then Congress' word, as interpreted by the court, prevails, and the inquiry is at an end.[26] The court employs traditional tools of statutory construction to discern the plain meaning of the text, including dictionary definitions,

Eric Posner, *The Government Gorsuch Wants to Undo*, NEW YORK TIMES (Apr. 1, 2017), http://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html (stating that "[a]t his confirmation hearings, [Justice] Gorsuch hinted that he might vote to overturn *Chevron* without saying so directly"). Indeed, recently, in denying certiorari, Justice Gorsuch, joined by Chief Justice Roberts and Justice Alito, signaled skepticism for the rationales underlying *Chevron* deference, particularly with respect to whether *Chevron*-type deference should displace traditional rules of contract interpretation. Scenic America, Inc. v. DOT, No. 16-739, 2017 WL 4581902, at *1 (S. Ct. Oct. 16, 2017) (Statement of Gorsuch, J.). *Scenic America* raised the issue whether a court should, per *Chevron*, defer to the agency's interpretation of a disputed provision in a contract that the agency drafted; or, instead, follow the canon of contract interpretation (contra proferentum), which dictates that contractual ambiguities are construed against the drafter.

25. Cajun Elec. Power Coop. v. FERC, 924 F.2d 1132, 1136 (D.C. Cir. 1991) ("Benefit of the doubt, however, implies as a precondition a legitimate doubt, or in legal terms, an ambiguity. . . . We have always seen the first step as one conducted under *de novo* review. An agency is given no deference at all on the question whether a statute is ambiguous").

26. *Chevron*, 467 U.S. at 842.

canons of construction, and, to a lesser degree, legislative history.[27] Judges frequently spar over the approach used to determine whether the statute is clear or ambiguous.[28] While all judges use the same basic tools to interpret statutes – the statute's text and context, history, traditional usage, precedent, purpose, and consequences that flow from the interpretation – they differ in emphasis.[29] There are (at least) two camps, the textualists and the purposivists.[30] The textualists, who emphasize the language and structure of the law, lean heavily on dictionaries and canons of interpretation, but tend to eschew reliance on legislative history or the statute's broad legislative purpose.[31] Conversely, the purposivists avoid using canons of interpretation and search for Congressional intent in context and legislative history.[32] Recent scholarship describes how the two camps are converging or at least becoming less polarized: textualists are acknowledging the importance of legislative purpose and policy context and purposivists are recognizing the importance of semantic meaning.[33]

27. *Id.* at 843 n.9; *see, e.g.*, FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 777 (2016) (consulting Black's Law Dictionary and Oxford English Dictionary to elucidate meaning of "rate" under the Federal Power Act); King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (stating that "rigorous application of the canon [against surplusage] does not seem a particularly useful guide to a fair construction of the statute"). *King* was ultimately decided at *Chevron* step zero. *See also* Zuni Pub. Sch. Dist. No. 908 v. Dep't of Educ., 550 U.S. 81, 90, 93 (2007) (stating that a step 1 determination of ambiguity is "illuminate[d]" by the analysis of the statute's purpose and legislative history at *Chevron* step 2, although "[n]either the legislative history nor the reasonableness of the Secretary's method would be determinative if the statute's plain language unambiguously indicated Congress' intent to foreclose the Secretary's interpretation").

The initial rise of *Chevron* is associated with the rise of textualism and the decline of emphasis on legislative history. *See generally* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990) ("[T]here . . . exists a fully articulated and quite aggressive assault . . . on the use of legislative history in construing statutes," led by Justice Scalia). Courts recognized that the statements of an individual legislator do not necessary reflect the intent of the Congressional body. Brock v. Pierce Cty., 476 U.S. 253, 263 (1986) (suggesting that while floor statements should be considered, they are not controlling). Further, the rise of "designer-legislation" – i.e., 50 pages of legislative history inserted into the Congressional Record of the 1990 Clean Air Act Amendment comprising statements that were never made on the House or Senate floor – revealed the vulnerability of legislative history to fabrication and gaming. *See generally* 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 (2005).

28. *See generally* Wald, *supra* note 27 (discussing Supreme Court justices' differing views over the use of legislative history); *see also* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1025-1032 (1998) (contrasting textualists with intentionalists).

29. *See, e.g.*, Brown v. Gardner, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context").

30. Siegel, *supra* note 28, at 1025-26 (explaining that textualists, like Justices Oliver Wendell Holmes and Antonin Scalia, do not inquire what the legislature intended, but rather what the statute means; purposivists believe the role of the court is to discern what the legislature intended).

31. STEPHEN BREYER, ACTIVE LIBERTY 87 (2005).

32. *Id.*

33. *See, e.g.*, *The Rise of Purposivism and the Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1227 (2017) (describing the overlap in approaches and discussing how an inclination toward judicial empowerment, respect for the will of Congress, and impulse to treat major cases specially have moved the Supreme Court towards purposivism and away from *Chevron* and textualism); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2-3 (2006).

Chevron step 1 analysis is critical. It is chiefly (but not only) here that, under the *Chevron* paradigm, the court fulfills its judicial interpretive function per *Marbury v. Madison* to construe the disputed statutory meaning.[34] Justice Scalia, an early proponent of *Chevron*, singled out the importance of this step in his now famous Duke University School of Law (Duke Law School) lecture:

> One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for [] deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find an agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference.[35]

Judges used to think of statutes as "a package of instructions that, once decoded, would answer every conceivable question that might arise."[36] In *Chevron*, however, "the Court adopted the [] more realistic [perspective] that most members of Congress probably never even think about many questions that might [subsequently] arise under a statute they enact, much less form a consensus on them."[37]

The rise in textualism in the mid-1990s arguably made it less likely that a court would find a statute ambiguous at step 1, suggesting a decline in *Chevron* deference under step 2.[38] More recently, as noted above, scholars have argued that

34. *See Global Tel*Link*, 859 F.3d at 59 (D.C. Circuit Senior Judge Silberman's lament that *Chevron* step 2 was meant to be a meaningful limitation on agency interpretation) (Silberman, J., concurring). Some scholars contend that the Supreme Court has increasingly relied on step 1 to retreat from *Chevron* deference under step 2, at least informally. *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-82 (1992). Indeed, "the Supreme Court for some time after *Chevron* contributed to the step one winner-take-all narrative by neglecting to rely on step 2 even when it was really called for." *Global Tel*Link*, 859 F.3d at 60 (Silberman, J., concurring). Senior Circuit Judge Silberman cites MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) as an example where Justice Scalia used statutory structure and context to demonstrate that the agency's reliance on the word "modify" was unacceptable without conceding that the word was ambiguous. *Global Tel*Link*, 859 F.3d at 60.

35. Scalia, *supra* note 11, at 521 (emphasis omitted). While Justice Scalia strongly endorsed *Chevron*'s bright-line rule for most of his career, even he seemed to grow less enamored with the doctrine in his final years. *See, e.g.*, David Tarrien, *The Legacy of Justice Scalia: Liberal Lion? An Examination of Chevron Deference, Net Neutrality, and Possible Outcomes of A Supreme Court Decision on the Federal Communication Commission's Open Internet Order*, 17 TEX. TECH. ADMIN. L.J. 233, 245 (2016) ("In fact, by 2015, Scalia's own endorsement of *Chevron* deference seemed more nuanced and laced with express concern than it had been in 1989"); *see also* Stephen J. Leacock, *Chevron's Legacy, Justice Scalia's Two Enigmatic Dissents and his Return to the Fold in City of Arlington, Tex. v. FCC*, 64 CATH. U. L. REV. 133 (2014).

36. Elliott, *supra* note 27, at 7.

37. *Id.*

38. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinancy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 681 (2000) (citing sources supporting the notion that "the plain-language focus of the new textualism reduces the instances in which the courts will find a gap that administrative construction must fill").

Chevron steps 1 and 2 both ask the same single question: is the agency's interpretation reasonable?[39] Some judges have followed this single question approach.[40] Others have railed against the elision of *Chevron*'s two steps into one as denigrating textualism by omitting the critical first step of discerning whether or not the statute is ambiguous.[41] Additionally, a broader concern over agency overreach, coupled with Congressional deadlock, have now made it even more compelling for the reviewing court to declare the meaning of the statute at step 1, if at all possible. Failure of the court to declare the meaning at step 1 leaves the statutory interpretation vulnerable to agency interpretations, which, even if ostensibly reasonable, are not easily revised by an embattled Congress.

And what are the implications of a decision on *Chevron* step 1 grounds? The agency is forever foreclosed from interpreting the provision differently.[42] One of the key features of *Chevron* deference, for better or worse, is that it affords agencies flexibility. An agency can interpret an ambiguous provision one way in 1996 and another way in 2016, as long as its interpretations are permissible constructions of the statute and the agency has provided reasonable explanations for its interpretations, particularly for its change of interpretation.[43] If the court resolves the issue at step 1, however, the court's interpretation is definitive.[44] This is not

39. *See, e.g.*, Hemel & Nielson, *supra* note 17. Additionally, Professor Elizabeth Magill has explained the disconnection between the way *Chevron* step 1 operates in theory as opposed to in practice. At step 1, a court could in theory look to the statute to see whether, for example, the Clean Air Act provides a clear definition of air pollutant. If step 1 worked that way, then at step 2 the court would evaluate whether the interpretation the agency selected was in the range of possible interpretations under step 1. In practice, however, at step 1 the court compares the statute to the interpretation the agency has proffered. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, ABA ADMIN. L. SEC. (2001) (citations omitted). She points out that Chevron itself followed this approach at step 1: it did not ask whether the term "stationary source" was ambiguous, but rather whether the meaning permitted the agency's bubble concept. *Id.* at 8. She contends that "[s]tep one should be . . . understood to operate in the way it actually does" empirically in case law: evaluating whether the statutory materials permit the agency's interpretation. Step two would consist of examining the reasonableness of the agency's interpretation. *Id.*

40. *See, e.g.*, *Waterkeeper Alliance*, 853 F.3d at 539; Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 217-22, 226 (2009) (addressing the second prong of reasonableness before considering whether statute was ambiguous; holding EPA's use of cost-benefit analysis was permissible, but not required); Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 47-48 (2007) (concluding simply that the agency's regulation was "reasonable [and] hence . . . lawful").

41. *Compare Waterkeeper Alliance*, 853 F.3d at 534 (stating that the issue in the case is whether the agency's construction of the statute is reasonable) with *id*. at 539 ("If a court purports fealty to *Chevron* while subjugating statutory clarity to agency 'reasonableness,' textualism will be trivialized" (Brown, J., concurring)).

42. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) (holding that the agency is not bound to a prior court interpretation of a statute at *Chevron* step 2, and may reasonably reinterpret it; if, however, the prior precedent interpreted the statute at *Chevron* step 1, the agency is not free to reinterpret the provision). The downside to decisions under *Chevron* step 1 is that they "lead to the ossification of large portions of our statutory law," and preclude agencies from "revising unwise judicial constructions of ambiguous statutes." *Brand X*, 545 U.S. at 983 (internal citation omitted).

"[T]he reviewing court must make an initial determination whether the enacting Congress evinced an intent to guide the agency on the policy issue in question. If the court reads an intent into the language of the statute, that intent will be controlling." David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 427 n.86 (1997).

43. *See generally Brand X*, 545 U.S.

44. *Id.* at 982.

problematic, of course, if it is an interpretation that the agency would like to see binding on future agencies.[45]

Additionally, the reviewing court's step 1 analysis may also define the scope of the ambiguity and thereby limit reasonable agency interpretations at step 2.[46] For example, in *California Independent System Operator, Inc. v. FERC*, the D.C. Circuit limited the range of "practices affecting rates" under section 206 of the FPA to practices that directly affect rates.[47] Specifically, the Court found that FERC lacked authority to replace CAISO's governing board because the board's selection and composition did not directly affect rates.[48]

45. For a particularly keen recent example where a decision under step 1 is welcome, *see, e.g.*, *EPSA*, 136 S. Ct. 760 (reviewing FERC's final rule in Demand Response Competition in Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, 76 Fed. Reg. 16,658 (Mar. 24, 2011) (codified at 18 C.F.R. § 35.28 (g)(1)(v))).

46. *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Classification*, 124 HARV. L. REV. 1017, 1017 n.1, 1028-29 n.9 (2011) ("Intuitively, the range of a statute's judicially described ambiguity at step one should limit the interpretations available to an agency at step two, to some extent" (citation omitted)). Congress can explicitly or implicitly conscribe the agency's interpretive authority through its statutory language. *See, e.g.*, *City of Arlington*, 569 U.S. at 307 (admonishing that "[w]here congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow" (Scalia, J., dissenting)).

47. Cal. Indep. Sys. Operator v. FERC, 372 F.3d 395, 403 (D.C. Cir. 2004) (*CAISO*); 16 U.S.C. § 824e (2012). In the aftermath of the California energy crisis of 2000-01, FERC changed the method of selecting and the composition of CAISO's governing board. The FERC claimed that the board's composition and method of selection was a "practice . . . affecting [a] rate," per section 206. *CAISO*, 372 F.3d at 399. Concluding that CAISO's board composition and selection method was unduly discriminatory pursuant to section 206 of the FPA, FERC changed the board. San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. into Mkts. Operated by the California Indep. Sys. Operator, 93 F.E.R.C. ¶ 61,121, 61,362-64 (2000). The D.C. Circuit defined the question as whether, when Congress used the word "practices," Congress intended to empower FERC to remake the corporate governance of a regulated utility. *CAISO*, 372 F.3d at 400. Using a textualist approach, the Court relied on the canon of construction noscitur a sociis (a word is known by the company it keeps) to conclude that it did not. *Id.* at 400-01. The Court explained that section 206 of the FPA grants FERC "authority to regulate rates, charges, classifications and closely related matters." *Id.* at 400. None of the words surrounding "practice" in the FPA suggested to the Court that Congress was concerned with corporate structure or governance. *Id.* Looking to the structure of the statute, the court found that section 305 of the FPA, 16 U.S.C. § 825d, bolstered this interpretation because it gave FERC limited authority to resolve conflicts of interest among corporate directors, but said nothing about board composition and governance. *CAISO*, 372 F.3d at 401. The Court reasoned that section 305 of the FPA would be superfluous if FERC's reading of section 206(a) of the FPA were correct because section 206 alone would authorize FERC to resolve board conflicts by replacing the board if doing so would remedy undue discrimination. *Id.* Accordingly, the Court concluded that FERC's "construction of 'practice' in this context is therefore a sufficiently poor fit with the apparent meaning of the statute that the statute is not ambiguous on the very question before us." *Id. See also Gardner*, 513 U.S. at 120 (where "the text and reasonable inferences from it give a clear answer against the [g]overnment . . . that . . . is 'the end of the matter'") (emphasis added)). The Supreme Court subsequently approved this "common-sense construction of the FPA's language, limiting FERC's 'affecting' jurisdiction to rules or practices that 'directly affect the [wholesale] rate.'" *EPSA*, 136 S. Ct. 760, 774 (2016) (citation omitted).

48. *CAISO*, 372 F.3d at 401-04. The Court found its conclusion that FERC overstretched its authority to be supported by the history of the application of the FPA and similar statutes, such as the Interstate Commerce Act, as well as the implications of FERC's reading of the statute. *Id.* at 402. Highlighting the "drastic implications" of FERC's "amorphous" interpretation of the word "practices," *id.* at 403-04, the Court explained that FERC's interpretation could enable it to dictate the choice of a public utility's chief executive officer, chief operating officer, the method of contracting for services, or labor, or office space, as well as to replace the boards of all utilities. *Id.* at 403-04. The Court further contrasted FERC's lack of expertise in corporate matters with the Securities and Exchange Commission and state corporation commissions, which are legislatively authorized to engage in corporate matters. *Id.* at 404.

Next, this article will examine a few illustrative court opinions involving FERC and EPA rulemakings to illustrate how the reviewing courts apply *Chevron* step 1 and the difficulty inherent in discerning the clear and unambiguous meaning of a statute. This article will also briefly touch on the practical implications that flow from each of these opinions.

2. *FERC v. EPSA*

In *FERC v. EPSA*, the Supreme Court ruled in a 6-2 decision that FERC has jurisdiction under the Federal Power Act (FPA) to issue its demand response rule and regulate a wholesale market operator's compensation of demand response bids in centralized wholesale electricity markets.[49] The Court upheld, as reasoned decisionmaking, FERC's determination that centralized wholesale markets (independent system operators and regional transmission organizations) should provide the same compensation (market clearing price) to demand response resources and generators participating in the day ahead and real-time electricity markets.[50] Echoing original justifications for *Chevron* deference, the Court stated that the dispute "involves both technical understanding and policy judgment."[51] Noting that the Court "afford[s] great deference to the Commission in its rate decisions," the Court emphasized the fact that "[t]he Commission, not this or any other court, regulates [wholesale] electricity rates."[52]

Significantly, both Justice Kagan, writing for the Court, and Justice Scalia, dissenting, decided the issues (other than compensation) at *Chevron* step 1.[53] Each opinion found FERC's authority under the FPA to be "clear," and therefore never considered whether to afford *Chevron* deference to FERC's interpretation of its

49. *EPSA*, 136 S. Ct. at 784. "Demand response [is] a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy." 18 C.F.R. § 35.28(b) (2016); *EPSA*, 136 S. Ct. at 774, 776 (holding (1) market operators' payments for demand response commitments are practices directly affecting wholesale rates; and (2) federal regulation of wholesale demand response does not impermissibly regulate retail electricity sales).

50. *EPSA*, 136 S. Ct. at 782-84. Here, the Court's limited role was to ensure that FERC weighed competing views, chose a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that decision. *Id.* at 784. See 5 U.S.C. § 706 (2012); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court concluded that FERC's detailed, serious and careful discussion of the issue, responding to contrary views, satisfied the arbitrary and capricious standard. *EPSA*, 136 S. Ct. at 784.

51. *EPSA*, 136 S. Ct. at 784.

52. *Id.* at 782, 784 (quoting *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 542 (2008)).

53. *Id.* at 773 n.5, 785 (Scalia, J., dissenting). Notably, in the D.C. Circuit opinion that the Supreme Court reversed and remanded, the majority had also decided the issue at *Chevron* step 1, striking down the demand response rule as unauthorized direct regulation of retail rates, which the FPA unambiguously prohibits. EPSA v. FERC, 753 F.3d 216, 224 (D.C. Cir. 2014). The majority declared that it would reach the same result under *Chevron* step 2. *Id.* Dissenting Judge Harry T. Edwards decided the issue under *Chevron* step 2: "Because the [FPA] is ambiguous regarding FERC's authority to require [centralized wholesale electricity markets] to pay demand response resources, we are obliged to defer under *Chevron* to the Commission's permissible construction of 'a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction).'" *Id.* at 227 (citation omitted).

jurisdictional authority over demand response.[54] The fact that two opinions construed FERC's statutory authority so differently under the FPA, yet discerned no ambiguity, commands attention. Indeed, some have speculated that *EPSA* indicates "that the Court is growing less comfortable in giving agencies . . . deference," at least when it comes to the agency interpreting the scope of its authority, and where federalism concerns are implicated.[55]

Furthermore, the Court's conclusion at *Chevron* step 1 that FERC's authority to ensure that rules or practices directly "affecting wholesale rates are just and reasonable" encompassed demand response, means that the ruling stands until Congress amends the FPA.[56] The Court thus bound future Commissions to its interpretation of the FPA, ensuring that FERC has jurisdiction over rules governing demand response in wholesale markets.[57]

By creating a demand response program that is consistent with the FPA's underlying purpose, that is, ensuring just and reasonable rates and reliability, FERC was able to accommodate a practice – incorporating demand response into wholesale energy markets – Congress could hardly have envisioned when it passed the FPA in 1935.[58] Moreover, through this decision, the Court may have paved the way for FERC to regulate and provide incentives for other emerging energy "practices" – such as battery storage or net-metering – that blur the distinction between state-regulated retail sales and distribution and FERC-regulated wholesale sales and transmission.[59] Justice Kagan recognized that the wholesale and retail markets are "inextricably linked," and they are likely to become increasingly intertwined as new technologies proliferate.[60]

54. *EPSA*, 136 S. Ct. at 773 n.5 ("Because we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*"); *id.* at 785 ("Like the Majority, I think that deference under *Chevron* . . . is unwarranted because the statute is clear" (Scalia, J., dissenting)).

55. Mark Perlis, *U.S. Supreme Court Confirms FERC's Broad Reach Over Demand Response and Other Activities That Affect Wholesale Markets*, INSIDE ENERGY & ENV'T, (Jan. 28, 2017), http://www.insideenergyandenvironment.com/2016/01/u-s-supreme-court-confirms-fercs-broad-jurisdictional-reach-over-demand-response-and-other-activities-that-affect-wholesale-electricity-markets.

56. *EPSA*, 136 S. Ct. at 774, 784 (internal quotations omitted).

57. *Brand X*, 545 U.S. at 983 (holding that the agency is not bound to a prior court interpretation of a statute at *Chevron* step 2, and may reasonably reinterpret it; if, however, the prior precedent interpreted the statute at *Chevron* step 1, the agency is not free to reinterpret the provision).

58. *See* Matthew R. Christiansen, *FERC v. EPSA: Functionalism and the Electricity Industry of the Future*, 68 STAN. L. REV. ONLINE (2016) (arguing persuasively that FERC's efforts to draw jurisdictional boundaries consistent with the purpose of the FPA "is exactly the type of functional approach . . . that the Court endorsed in *EPSA*").

59. *Id.* at 4. *See generally* Robert R. Nordhaus, *The Hazy 'Bright Line' Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 206-13 (2015) (discussing the complicated relationship between recent technological developments and jurisdiction over energy transactions). In November 2016, in Docket No. RM16-23-000, FERC proposed to amend its regulations in order to remove barriers to the participation of energy storage resources in the organized capacity, energy, and ancillary service markets. *See* Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 157 FERC ¶ 61,121 at P 1 (2016).

60. *EPSA*, 136 S. Ct. at 766; *see* Perlis, *supra* note 55, at 3-4 ("[I]t is unclear how far FERC regulation of distributed energy resources . . . can go, since distributed energy resources are often physically integrated into state-regulated utilities' distribution systems and priced on a net basis under State retail tariffs. Again, time will

3. *Piedmont Envt'l Council v. FERC*

Another example where the case was resolved at *Chevron* step 1, with a less positive outcome for FERC, is *Piedmont Envt'l Council v. FERC*.[61] *Piedmont* involved the Fourth Circuit Court of Appeals' review of FERC's final rule interpreting its backstop transmission siting authority.[62] As new policies increased demand for electricity from renewable resources, Congress perceived a need for additional transmission to deliver renewable generation reliably to customers.[63] To address potential state obstacles to transmission development, Congress established federal backstop authority to site transmission lines.[64] Congress endeavored to accomplish this aim by adding section 216 to the FPA in the Energy Policy Act of 2005.[65] Section 216 of the FPA authorizes the Department of Energy (DOE) to designate National Interest Electric Transmission Corridors and gives FERC authority to site transmission lines within those corridors in five specific situations expressly listed in the statute.[66] One of those situations occurs when the state entity siting electric transmission has "withheld approval for more than 1 year after the filing of an application."[67] In its rulemaking to implement backstop siting authority, pressured by parties to declare its interpretation, FERC ultimately determined that "withholding approval includes denial of an application."[68]

The Fourth Circuit disagreed, and reversed and remanded FERC's rule, holding that "withheld approval for more than 1 year" excluded the explicit denial of an application.[69] The court explained that "the language itself, the specific context in which that language [was] used, and the broader context of the statute as a whole" governed the court's inquiry into the clarity of the statute.[70] The court held that all three measures determined that the statute unambiguously meant that withheld does not include denied.[71] Accordingly, the court resolved the issue at *Chevron* step 1. Notably, the court held that the term "withheld" can only be understood within the specific context of the phrase in which it is embedded: "withheld approval for more than 1 year."[72] The court ruled that this phrase indicated that the statute requires continuous withholding for the year, and not the "final act" of

tell how FERC and the courts develop criteria for demarking the absolute, but blurry, boundary between permissible FERC regulation of transformative transactions that directly affect wholesale markets and rates, and impermissible regulation of retail sales and rates").

61. Piedmont Envt'l Council v. FERC, 558 F.3d 304 (4th Cir. 2009) (Traxler, J., dissenting), *cert. denied* 130 S. Ct. 1138 (2010).

62. Final Rule, Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440 (Nov. 16, 2006) (codified at 18 C.F.R. pts. 50, 380).

63. *Piedmont*, 558 F.3d at 320 (Traxler J., dissenting).

64. *Id.* at 321.

65. *Id.* (Traxler, J., dissenting) (citation omitted). For more in-depth discussion of *Piedmont*, *see* Michael S. Dorsi, *Piedmont Envt'l Council v. FERC*, 34 HARV. ENVTL. L. REV. 93 (2010).

66. 16 U.S.C. § 824p (2006). In October 2007, DOE issued a final designation of two corridors, one in the Southwest and one in the Mid-Atlantic. *See generally* National Electric Transmission Congestion Report, 72 Fed. Reg. 56,992 (Oct. 5, 2007).

67. 16 U.S.C. § 824p (b)(1)(C)(i).

68. 71 Fed. Reg. at 69,476 (Kelly, Comm'r, dissenting).

69. *Piedmont*, 558 F.3d at 315.

70. *Id.* at 312-13 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

71. *Id.* at 313-15.

72. *Id.* at 313.

denying the application, in order to trigger FERC's backstop transmission siting authority.[73] The court explained that denial "*within* one year ends the application process, and there is nothing about that terminated process that would continue *for* more than one year."[74]

Significantly, using the same three-part analysis as the majority court, the dissenting judge in *Piedmont* reached the opposite conclusion at *Chevron* step 1.[75] First, scrutinizing the statutory text, the dissenting judge reasoned that a state withholds a permit if at the end of the year the state does not grant the permit, regardless of the reason the permit is not granted.[76] Next, as to specific context, he explained that a denial would not constitute withholding for more than one year, but rather the denial would be one event within the year, and the failure to reverse the denial by the end of the year would be the withholding.[77] Finally, as to broader context, he compared the withholding provision to the provision immediately following it (granting FERC backstop authority where states have imposed project-killing conditions) to conclude that Congress intended to allow FERC to overrule state siting decisions in a broad range of circumstances.[78] In contrast, the majority considered each of the statute's five circumstances under which FERC could exercise backstop transmission siting authority as only providing FERC with narrow, limited authority.[79] The majority viewed the authority FERC sought – the power to override an explicit state veto of a project – as expansive, and reasoned that if Congress had intended to grant FERC such authority, it would have done so clearly.[80]

It is telling that a statutory provision can be so "clear" that the majority and dissenting judges read it entirely differently, using the same, primarily textualist approach.[81] From a linguistic standpoint, it calls into question the limitations of language; a jaundiced eye might view it as manipulation of *Chevron* to meet a preconceived objective or results-based decision-making. From a practical standpoint, while the *Piedmont* decision preserved states' rights to expressly reject proposed transmission projects, it also dealt a crippling blow to FERC's backstop transmission siting authority.[82] Over a decade has passed since Congress granted FERC this authority, but FERC has never used it, and no transmission has been built in the now-defunct DOE-designated corridors.[83] Instead, the Commission

73. *Id.*

74. *Piedmont*, 558 F.3d at 315.

75. *Id.* at 320-26. The judge also added that, if the statute were not clear, FERC's interpretation was reasonable and should be accorded deference under *Chevron* step 2. *Id.* at 326.

76. *Id.* at 322.

77. *Id.* at 323.

78. *Id.* at 323-24.

79. *Piedmont*, 558 F.3d at 313-14.

80. *Id.* at 314-15.

81. Matthew R. McGuire, (*Mis*)*Understanding "Undue Discrimination:" FERC's Misguided Effort to Extend the Boundaries of the Federal Power Act*, 19 GEO. MASON L. REV. 549, 587 (2012) ("[The *Piedmont*] decision stands in stark contrast to the deference traditionally shown toward agency interpretations of their own authority").

82. *Piedmont*, 558 F.3d at 320.

83. Sandeep Vaheesan, *Preemption, Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 123-24 (2012) (noting that FERC never used its backstop authority and only one application, later withdrawn, was filed during that time). *See, e.g.*, Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed*

turned to other measures to facilitate transmission construction, such as transmission incentives (Order No. 679) or regional transmission planning, interregional coordination, and cost allocation (Order No. 1000).[84]

Not only do judges dispute which "clear meaning" of the statute should prevail, but the line between declaring a statutory provision to be clear or ambiguous can also be hazy.[85] Just as agencies have incentive to label a disputed statutory provision as ambiguous in order to obtain deference, courts may be tempted to strain text to declare a statute clear in order to avoid deferring to an agency interpretation, which, while reasonable, it does not like.

4. *Massachusetts v. EPA*

Turning to the hot-button issue of climate change, over a decade ago in *Massachusetts v. EPA*, the Supreme Court relied on *Chevron* to conclude that the capacious text of the Clean Air Act unambiguously includes greenhouse gases in the definition of air pollutant.[86] The majority ruled that the statute authorizes EPA to regulate greenhouse gas emissions from new motor vehicles if, in its judgment, based on statutorily-relevant factors, greenhouse gas emissions contribute to climate change.[87] *Massachusetts v. EPA* forced EPA's hand: EPA could not use policy reasons as a subterfuge to obscure the scientific opinions of its agency experts.[88]

The case arose when EPA denied a petition for a rulemaking on the basis that: (1) "the Clean Air Act does not authorize EPA to [regulate greenhouse gases] to address climate change;" and (2) "even if [EPA] had the authority, . . . it would

Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations, 81 U. COLO. L. REV. 705, 743-44 (2010). Moreover, the Ninth Circuit vacated the only two National Interest Electric Corridors that DOE designated, one in the Southwest and one in the Mid-Atlantic, for lack of environmental analysis and failure to consult with local governments. Cal. Wilderness Coal. v. Dep't of Energy, 631 F.3d 1072, 1107 (9th Cir. 2011); *see also* Alexander R. Obrecht, *Energy Policy Act of 2005 and Pseudo-Fed for Transmission Congestion*, 7 PITT. J. ENVTL. PUB. HEALTH L. 159, 188-90, 193 (2012).

84. Order No. 679, *Promoting Transmission Investment through Pricing Reform*, F.E.R.C. STATS. & REGS. ¶ 31,222, 71 Fed. Reg. 43,294 (July 20, 2006) (to be codified at 18 C.F.R. pt. 35), *order on reh'g*, Order No. 679-A, F.E.R.C. STATS. & REGS. ¶ 31,236, *order on reh'g*, 119 F.E.R.C. ¶ 61,062 (2007). FERC issued the regulations in Order No. 679 to implement section 1241 of the Energy Policy Act of 2005, which added new section 219 to the FPA (16 U.S.C. § 824s). *See* Notice of Inquiry, *Promoting Transmission Investment through Pricing Reform*, Docket No. RM11-26-000 (May 19, 2011) (seeking comment on scope and implementation of Order No 679 at five-year implementation mark); Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 F.E.R.C. ¶ 61,132, *order on reh'g*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012), *aff'd sub nom.* S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014). *See generally* Alexandra B. Klass & Elizabeth Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1823-25 (2012).

85. *See, e.g.*, *Brand X*, 545 U.S. 967, 986, 996-97, 1014 (2005) (majority found the definition of telecommunications service in the Federal Communications Act to be ambiguous; dissent found it to be clear).

86. Massachusetts v. EPA, 549 U.S. 497 (2007).

87. *Id.* at 528-35.

88. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA, From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007). *See id.* at 55 (noting allegations of widespread administrative tampering with agency experts' climate change data).

be unwise to do so at this time."[89] Petitioners sought review in the D.C. Circuit.[90] While each of the judges on the three-judge panel wrote a separate opinion, two judges agreed that in denying the petition for a rulemaking, the EPA Administrator had properly exercised his discretion under section 202(a)(1) of the Clean Air Act.[91]

The Supreme Court framed the first issue as "whether [section] 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change."[92] Finding "little trouble concluding that it does[,]" the Court explained that section 202(a) provides, in relevant part, that EPA shall issue regulations to provide "standards applicable to the emission of *any* air pollutants from . . . motor vehicle engines, which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[93] The Court emphasized the Clean Air Act's "sweeping definition" of "air pollution," which includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . ."[94] The Court explained that "the definition embraces all airborne compounds of whatever stripe."[95] Whereas EPA maintained that carbon dioxide is not an "air pollutant" under the statute because "EPA believe[d] that Congress did not intend it to regulate substances that contribute to climate change," the Court held that the statutory text foreclosed EPA's reading.[96]

At the same time that EPA was deciding it was inappropriate to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act, Congress was debating ways to the amend the Clean Air Act to increase regulation of greenhouse gases.[97] Dismissing EPA's reliance on Congressional actions and deliberations post-enactment of the Clean Air Act as indication of a Congressional command to refrain from regulating greenhouse gas emissions, the Court declared:

89. *Mass.*, 549 U.S. at 511 ("[T]he Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change . . . and . . . that even if the Agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time").

90. *Id.* at 514 (citing Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005)).

91. *Id.*

92. *Id.* at 528. Section 202(a)(1) of the Clean Air Act provides:

> The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7521(a)(1) (2007).

93. *Mass.*, 549 U.S. at 528 (citing 42 U.S.C. § 7521(a)(1) (emphasis added)).

94. *Id.* at 528-29 (citing 42 U.S.C. § 7602(g) (emphasis in original)).

95. *Id.* at 529.

96. *Id.* at 528.

97. Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito, Chevron, Auer and Chenery in the Supreme Court 2006 Term*, 57 CATH. U. L. REV. 1, 42 n.281 (2007) (citing Safe Climate Act of 2006, H.R. 5642, 109th Cong. (2006); Climate Stewardship Act of 2005, H.R. 759, 109th Cong. (2005); Climate Stewardship Act of 2005, S. 342, 109th Cong. (2005); Climate Stewardship Act of 2004, H.R. 4067, 108th Cong. (2004); Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003); Global Climate Security Act of 2003, S. 17, 108th Cong. (2003)).

> While the Congresses that drafted [section] 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of [section] 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.[98]

Next, the Court turned to EPA's alternative basis for not regulating greenhouse gas emissions, i.e., that even though EPA was authorized to regulate greenhouse gases it would be unwise to do so at that time.[99] The Court evaluated whether it was arbitrary, capricious or otherwise not in accordance with law for EPA to exercise its discretion to turn down the petition.[100] EPA provided "a laundry list" of reasons not to regulate, including several voluntary executive branch programs that were already in effect to respond to global warming, and concern that regulations might hinder international negotiations on global warming policy.[101] While acknowledging that the statute conditioned the exercise of EPA's authority on the Administrator's "judgment," the Court explained that the judgment must be tied to the statute; that is, it must relate to whether an air pollutant causes or contributes to air pollution that may reasonably be anticipated to endanger public health or welfare.[102] Recognizing that the Court had "neither the expertise nor the authority to evaluate these policy judgments," the Court nevertheless found EPA's reasons for refraining from acting on the petition inadequate because they had "nothing to do with whether greenhouse gas emissions contribute to climate change."[103]

Thus, the Court required EPA to address, head-on, the science of climate change: the only way that EPA could avoid taking further action under "the clear terms" of the statute was if EPA "determine[d] that greenhouse gases do not contribute to climate change or if it provide[d] some reasonable explanation as to why it cannot or will not exercise it discretion to determine whether they do."[104] While it left the door open that EPA could, on remand, decline to regulate greenhouse gases for reasons more adequately connected to the Clean Air Act, the majority

98. *Mass.*, 549 U.S. at 532. The government patterned its defense on the majority opinion in FDA v. Brown & Williamson Tobacco, Inc., 529 U.S. 120 (2000), which struck down Food and Drug Administration (FDA) efforts to regulate tobacco in part because it found subsequent Congressional action to regulate tobacco indicated that Congress did not intend FDA to regulate tobacco under the pertinent statute. Attempting to invoke the major questions doctrine, EPA essentially argued that climate change is so important that unless Congress explicitly authorized EPA to regulate climate change, it could not have intended EPA to do so. Not persuaded, the Court's response was that the significance of the statutory question alone did not indicate a presumption against agency authority. *Id.* (citing Penn. Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted))).

99. *Id.* at 532.

100. *Id.* at 534-35 (citing 42 U.S.C. § 7607(d)(9)(A) (1999)). This provision of the Clean Air Act provides for review under the arbitrary and capricious standard, akin to section 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (2017).

101. *Mass.*, 549 U.S. at 533.

102. *Id.* at 532-33 (admonishing EPA that "the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits").

103. *Id.* at 534 (adding that "[i]f the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so").

104. *Id.*

strongly suggested that greenhouse gases are "air pollutants" that EPA ought to regulate.[105]

Although the majority reversed and remanded to the agency under *Chevron* step 1, the dissent insisted that the statute was sufficiently ambiguous to merit deferring to EPA's "reasonable" interpretation under *Chevron* step 2 that greenhouse gases do not constitute air pollution agents.[106] The dissenters took the majority to task for conflating the statutory considerations the EPA Administrator must take into account when making the judgment whether or not to regulate greenhouse gases, on the one hand, with the reasons why the Administrator may *defer* making such a judgment at all, on the other hand.[107] Noting that the majority cited no authority for the proposition that the Administrator *is required* to make a judgment whenever a petition seeking a rulemaking is filed, Justice Scalia pointed out that the statute is silent regarding the reasons for deferring judgment.[108] Thus, Justice Scalia argued, the various EPA policy rationales for deferring judgment that the Court rejected "are not divorced from the statutory text."[109] Justice Scalia faulted the majority for narrowing the set of potential reasons for deferring action to whether the scientific uncertainty is too profound.[110] Justice Scalia contended that EPA's reasons for deferring action are considerations executive agencies regularly could and should consider when deciding whether to enter a new field.[111] Moreover, Justice Scalia insisted that EPA had already answered the court's remand "essay requirement" by determining that the science is too uncertain to allow the agency to form a judgment whether greenhouse gases endanger public welfare.[112]

In sum, *Massachusetts v. EPA* stands for the proposition that when the agency's statutory interpretation does not reflect the judgment of its experts or accord with contemporary Congressional intent, the agency's interpretation does not warrant deference.[113] Further, when the interpretation (and policy aim) of the politically accountable executive branch conflicts with the interpretation (and policy aim) of the politically accountable legislative branch, Congressional intent and policy, as embodied in the statute, prevails.[114] By finding that the Clean Air Act unambiguously allows EPA to regulate greenhouse gases, the Court in *Massachusetts v. EPA* ensured that this interpretation would persist until Congress amended the Clean Air Act.[115] It also implied that EPA and other agencies do not have unfettered discretion to avoid regulating under the statutes they administer.[116]

105. *Id.* at 528-32.

106. *Mass.*, 549 U.S. at 555-58 (Scalia, J., dissenting). Justice Scalia was joined in dissent by Chief Justice Roberts and Justices Thomas and Alito.

107. *Id.* at 550-53.

108. *Id.* at 549, 552.

109. *Id.* at 552.

110. *Id.*

111. *Mass.*, 549 U.S. at 552.

112. *Id.* at 553.

113. *Id.* at 528, 532-34.

114. *Id.* at 530, 533-34.

115. *Id.* at 529-30.

116. The ironic postscript is that, in response to *Massachusetts v. EPA*, the EPA promulgated greenhouse gas-based emission standards for new motor vehicles, but the Supreme Court struck them as an impermissible

B. Chevron Step 2: Is the Agency's Interpretation of an Ambiguous Statute Reasonable?

1. Overview

Chevron step 2 applies when Congress has left a gap or an ambiguity that an agency has filled. "If the statute is silent or ambiguous," the reviewing court is to defer to the agency's "permissible construction of the statute."[117] If Congress left an explicit gap, then a court must defer to the agency's construction unless it is "arbitrary, capricious, or manifestly contrary to the statute."[118] If, however, the gap is implicit, then a court must defer to a construction that is "reasonable."[119] Deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the [] gaps."[120]

The agency, rather than the court, is entrusted with resolving the policy disputes that fall within the zone of authority that Congress delegated to the agency because the agency is more politically accountable than the judiciary.[121] *Chevron*

interpretation of the Clean Air Act. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014). Recognizing that requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would dramatically expand those programs and make them administratively impossible, EPA tailored the programs by raising the statute's numerical permit triggering threshold for these new sources. In rejecting EPA's approach, the majority held that the statute did not compel a greenhouse-gas inclusive interpretation of permitting triggers, finding "no insuperable textual barrier to EPA's interpreting 'any air pollutant' in the permitting triggers [of the statute] to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written." *Id.* at 2442. The majority also found that EPA's interpretation was not a permissible exercise of discretion because it was inconsistent with the design and structure of the statute and would greatly expand EPA's regulatory authority without clear Congressional intent. *Id.* at 2442-44. The majority also explained that EPA lacked authority to "tailor" the unambiguous statutory numerical thresholds because the power to execute the law does not include the power to revise clear statutory terms that do not work in practice. *Id.* at 2444-46. Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, concurred in part and dissented in part. *Id.* at 2454 ("The Court's decision to read greenhouse gases out of the [permitting] program drains the Act of its flexibility and chips away at our decision in [*Mass. v. EPA*]. What sense does it make to read the Act as generally granting the EPA the authority to regulate greenhouse gas emissions and then to read it as denying that power with respect to the programs for large stationary sources at issue here?" (Breyer, J., dissenting)).

117. *Chevron*, 467 U.S. at 843.

118. *Id.* at 843 n.12 (citations omitted). This language is similar to section 706(a)(2) of the APA ("arbitrary and capricious an abuse of discretion or otherwise not in accordance with the law").

119. *Id.* at 844.

120. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. *See also Global Tel*Link*, 859 F.3d at 60.

121. *Chevron*, 467 U.S. at 866 ("[F]ederal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do"). Justice Scalia recognized in his Duke Law School lecture that Congressional delegation is essentially a legal fiction – sometimes Congress intentionally leaves gaps, sometimes it is just oversight. He nevertheless justified *Chevron* as an important background principle that Congress keeps in mind while drafting legislation. As Justice Scalia explained:

> And to tell the truth, the quest for the "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional presumed intent, and operates principally as a background rule of law against which Congress can legislate." Scalia, *supra* note 11, at 517 (emphasis in original).

also recognized the agency's relatively superior technical expertise as another basis for deference.[122] In addition, *Chevron* provided two clarifying nuggets. First, the court must defer to an agency's reasonable statutory interpretation, and not substitute its own judgment of what it might consider to be a better interpretation.[123] Second, the agency may change its interpretation, provided its explanation for the shift is reasonable.[124]

The traditional understanding of the court's role at *Chevron* step 2 is that it should compare the agency's interpretation to the statute.[125] For example, at *Chevron* step 1, the court would determine that the term "unduly discriminatory[] or preferential" in section 5 of the Natural Gas Act (NGA) is ambiguous.[126] At *Chevron* step 2, the court would consider whether FERC reasonably interpreted this (and other) ambiguous NGA provisions as broad authority to remedy unduly discriminatory behavior by imposing a generic open access requirement.[127] At this step, the court continues to perform the vital judicial function of establishing the range of permissible statutory interpretations.[128] D.C. Circuit Senior Judge Silberman asserts that "[m]uch of the recent expressed concern about *Chevron* ignores that *Chevron*'s second step can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion."[129] Using *Chevron* as an example, Silberman points out that the undefined statutory term in that

122. *Chevron*, 467 U.S. at 865-66 ("Judges are not experts in the field . . .," the statute is technical and complex and the agency is "charged with the administration of the statute in light of everyday realities").

123. *Id.* at 837-44 n.11. *See also* Holder v. Gutierrez, 566 U.S. 583, 591 (2012) (reversing Ninth Circuit's *Chevron* step 1 determination that the Immigration and Naturalization Act clearly imputes parent's residency period to child and holding that the agency's "position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best" (citation omitted)); *see also* Astrue v. Capato, 566 U.S. 541, 558 (2012) (reversing and remanding the case back to the Third Circuit Court of Appeals because the Social Security Administration's "interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference under *Chevron*").

124. *Chevron*, 467 U.S. at 863-64 ("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"). *See also* GenOn Rema, L.L.C. v. EPA, 722 F.3d 513, 525 (3d Cir. 2013) ("The EPA is not forever held to its prior interpretations, as the continued validity and appropriateness of agency rules is an evolving process"). *Chevron* is innovative on this point because the court previously considered longstanding and consistently held views as a factor warranting upholding the agency's interpretation. *See* Merrill, *supra* note 34, at 977.

125. *Chevron*, 467 U.S. at 843.

126. 15 U.S.C. § 717d; Associated Gas Distributors v. FERC, 824 F.2d 981, 1001 (1987) (citing NGA sections 5 (antidiscrimination), 7 (certification) and 16 (necessary and proper clause) and holding that Congress conferred broad authority on FERC to remedy undue discrimination and preference).

127. *Associated Gas*, 824 F.2d at 1001 (holding that FERC reasonably interpreted the NGA's ambiguous provisions as giving it broad authority to remedy unduly discriminatory behavior through imposing generic open access requirements). *See also* Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667, 687 (2000) (finding FERC has authority under sections 205 and 206 of the FPA (which are analogous to section 4 and 5 of the NGA) to remedy undue discrimination by requiring open access).

128. *UARB*, 134 S. Ct. at 2442 ("Even under *Chevron*'s deferential framework, agencies must operate 'within the bounds of reasonable interpretation'") (citation omitted). Further, reasonable statutory interpretation must consider both the specific statutory context in which the language is used and the broader context of the statute as a whole. *Id.* (citing *Robinson*, 519 U.S. 337).

129. *Global Tel*Link*, 859 F.3d at 59 (Silberman, J., concurring).

case, "stationary source," could have referred to a specific emitter of pollution or a factory complex, but it would have been unreasonable to interpret it as referring to a whole city.[130] In other words, *Chevron* "is not a wand by which courts can turn an unlawful frog into a legitimate prince."[131]

But *how* does a reviewing court decide whether the agency's interpretation of a statutory ambiguity is reasonable? Notwithstanding the relentless volume of *Chevron* scholarship, this "question has not received much attention" and there is relatively little authoritative guidance or agreement on this subject.[132] The *Chevron* opinion itself provided no guidance on how to evaluate the reasonableness of the agency's interpretation.[133]

Professor Elizabeth Magill has discerned two general ways courts evaluate the reasonableness of the agency's interpretation: (1) essentially duplicating *Chevron* step 1 analysis; or (2) tracking the arbitrary and capricious review of section 706(2)(A) of the Administrative Procedure Act (APA).[134] She posits that when courts look to statutory materials at step 2 to evaluate reasonableness, retreading step 1 analysis, their step 2 analyses may be awkward or terse.[135] She supports Professor Ronald Levin's suggestion to confine examination of statutory materials to step 1, so that step 2 focuses on examining the reasoning supporting the agency's interpretation.[136] This raises the question, what is the relationship between *Chevron* step 2 and section 706(2)(A) of the APA? Does the *Chevron* step 2 "reasonableness" analysis incorporate the *State Farm* reasonableness test?[137]

2. *Chevron* and the APA

What is the relationship between *Chevron* deference and the APA? The *Chevron* opinion does not answer this question directly; indeed, even though the APA predates *Chevron* by nearly forty years, the opinion does not even mention the APA, providing fertile ground for scholarly debate. Some scholars contend that *Chevron* step 2 reasonableness review is or should be coextensive with APA section 706(2)(A) arbitrary and capricious review, which is currently also called

130. *Id.*

131. *Associated Gas*, 824 F.2d at 1001.

132. *See* Anya Bernstein, Differentiating Deference, 33 YALE L.J. 1, 3 n.11 (2016) (noting the relative lack of attention to this issue); *see also* Ronald M. Levin, *The Anatomy of Chevron Step Two Reconsidered*, 72 CHI. KENT. L. REV. 1253, 1254 n.4 (1997) (voluminous literature on *Chevron* has little to say on the subject of the meaning and role of *Chevron* step 2); *see also* Elizabeth Magill, *supra* note 39, at 2 (asserting that the lack of guidance on how to evaluate reasonableness is partially due to the fact that the agency's interpretation is usually summarily sustained once a reviewing court reaches *Chevron* step 2).

133. *Chevron*, 467 U.S. at 842-44.

134. Magill, *supra* note 39, at 2; 5 U.S.C. § 706(2)(A).

135. Magill, *supra* note 39, at 2 (asserting that "when courts look to statutory materials at step two, their inquiry is awkward in large part because such analysis appears to duplicate the evaluation conducted at step one"). *See, e.g.*, *GenOn Rema*, 722 F.3d at 522 ("consider[ing] whether the EPA's interpretation is reasonable in light of the language, policies, and legislative history of the Clean Air Act").

136. Magill, *supra* note 39, at 2; Levin, *supra* note 132, at 1270.

137. *State Farm*, 463 U.S. at 43 (1983) ("[T]he 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'" (citation omitted)).

State Farm reasonableness review.[138] Others make a point of distinguishing the two analyses.[139] While the two analytical frameworks are not completely coextensive, they overlap like Venn diagrams.[140]

The historical backdrop behind the APA's passage indicates that Congress passed the APA to ensure judicial oversight of agency action.[141] The 1930s era legislation spawned a period of rapid agency expansion, which led to wariness of the growing power of the administrative state – not unlike today's climate – prompting Congress to pass the APA.[142] The APA provided agencies with standardized practices and procedures and prescribed general methods for judicial review.[143] Certain agency enabling acts may also specify judicial review, like the Clean Air Act.[144] Notwithstanding these origins, the APA did not become "a hammer" pounding agency actions until the D.C. Circuit re-invigorated it in the 1980s through rigorous *State Farm* hard look review.[145]

138. *See* Magill, *supra* note 39, at 2. *See also* Stephenson & Vermeule, *supra* note 19, at 604 n.28 (asserting that *Chevron* step 2 is "nothing more than standard arbitrary and capricious review" as mandated by APA section 706(2)(A)) (citation omitted); Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679 n.60 (2014) (an agency's arguments under both standards are likely to be the virtually the same, and the relevance of one or another standard is likely to turn on the way the plaintiff characterizes the issue) (citation omitted); Gary S. Lawson, *Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin*, 72 CHI. KENT L. REV. 1377, 1377-80 (1997). Scholars note "a growing consensus" that the *Chevron* "two-step analysis should entail arbitrary and capricious review." A GUIDE TO A POLITICAL AND JUDICIAL REVIEW OF FEDERAL AGENCIES at 95 (Michal E. Herz, Richard Murphy, and Kathryn Watts, eds. 2d ed. 2015). According to this view, "at step one, a court determines whether Congress has clearly foreclosed an agency's statutory construction; at step two, the court checks whether the agency has offered an explanation for its choice that satisfies the requirement of reasoned decisionmaking associated with arbitrariness review of policy choices." *Id.*

139. *See, e.g.*, Jack M. Beermann, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 FORDHAM L. REV. 731, 743-48 (2014) (criticizing the Supreme Court for lack of clear guidance distinguishing when to apply arbitrary and capricious review and when to apply *Chevron* step 2 deference); Kathryn A. Watts, *Proposing A Place For Politics In Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 n.15 (2009) (distinguishing between *Chevron* "reasonableness," which is used to judge how well the agency's interpretation fits the statute, with *State Farm* "reason giving," which is used to assess the rationality of the agency's reasoning process). *See also Brand X*, 545 U.S. at 1001 n.4 (differentiating between *Chevron* step 2 and arbitrary and capricious analysis, noting that an inconsistency in the agency's position "bears on whether the Commission has given a reasoned explanation for its current position, not on whether its interpretation is consistent with the statute").

140. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29 (1983); Verizon v. FCC, 740 F.3d 623, 635 (D.C. Cir. 2014) ("The *Chevron* inquiry overlaps substantially with that required by the [APA], pursuant to which we must also determine whether the Commission's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (citations omitted).

141. *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 (1989) ("Prompted by the perception that the New Deal's regulatory fervor had bred a chaotic and unaccountable world of administrative power, the APA represented a conscious Congressional determination to strengthen judicial control over the administrative system") (citations to legislative history omitted).

142. *See* Wong Yang Sung v. McGrath, 399 U.S. 33, 40-41 (1950) (describing backdrop of APA's passage, particularly concerns regarding administrative tribunals).

143. Congress passed the APA as a "working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards." Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982).

144. 42 U.S.C. § 7607(d)(9)(A).

145. For the first few decades under the APA, the Court "used an extremely deferential scope of review, asking only "whether the agency's decision had some hypothetical rational relationship to the agency's statutory mission." Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of*

Section 706 of the APA overarchingly requires that: "[t]o 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."[146]

Some interpret this provision to mean that Congress explicitly directed that only courts interpret the law, in direct conflict with *Chevron* step 2.[147] Supporters of this view highlight the words "all" and the equation of "statutory" with "constitutional" provisions, since the court is the final arbiter on constitutional matters.[148] Under this view, *Chevron* step 2 cannot be reconciled with the APA and reviewing courts should never defer to agency interpretations of ambiguous statutes.[149] Others, however, read this provision as consistent with *Chevron* deference, as long as Congress has granted the relevant authority to administrative agencies in particular statutes.[150] The court decides all relevant questions of law to the extent necessary and interprets statutory provisions to the extent necessary when it decides the statute is ambiguous and establishes the range of reasonable interpretations.[151]

Turning to the specific language of subsection 706(2)(A) of the APA, agency rules and actions are set aside if the court determines they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[152] This provision is the heart of *State Farm* reasonableness review. On one level, there is a conceptual difference between *Chevron* step 2 and *State Farm* reasonableness review. *Chevron* is more specific. It applies when the agency's action closely follows from its interpretation of the statute, such as whether the term "undue discrimination" in the Federal Power Act means treating similarly situated customers differently.[153] *State Farm* reasonableness review is more comprehensive. It is the default test courts apply to a wide range of agency actions, including those that do not hinge on statutory interpretations.[154] For example, in *EPSA*, the Supreme Court used the *Chevron* framework to evaluate whether implementation of centralized market demand response programs is a "practice" affecting rates under the FPA (albeit concluding that the statute was clear at step 1).[155] The Court used

Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L.J. 387, 410 (1987). Judge Leventhal has been credited with originating the hard look doctrine. *See also* Greater Boston Television Corp. v. FCC, 444 F.2d, 841, 851 (D.C. Cir. 1971). Hard look review, which today's practitioners are familiar with, asks the judge to scrutinize whether the agency's fact-finding is based on the record, whether the agency responded to opposing arguments and explained the reason for its decision. *See generally* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 532 (1985).

146. 5 U.S.C. § 706 (2012).

147. *See, e.g.*, John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193-99 (1988).

148. *Id.* at 193-95.

149. *Id.* at 194-95.

150. *Id.* at 197-98.

151. 5 U.S.C. § 706; Duffy, *supra* note 147, at 194.

152. 5 U.S.C. § 706(2)(A); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414, 416 (1971) (review should be "searching and careful").

153. 16 U.S.C. § 824q(k) (2005).

154. Magill, *supra* note 39, at 10.

155. *EPSA*, 136 S. Ct. at 782.

State Farm reasonableness review to evaluate whether the demand response price was reasonable.[156]

A further distinction between *Chevron* step 2 and APA reasonableness review is that *Chevron* step 2 evaluation focuses more on the result of the agency's action and *State Farm* reasonableness review focuses more on the agency's reasoning process.[157] At *Chevron* step 2, the judge asks whether the agency's interpretation is reasonable.[158] *State Farm* reasonableness review centers on the agency's logical process – whether there is a connection between the facts found in the record and whether the choice made is analytically satisfying.[159] Under *State Farm*, even if an agency's action reflects a reasonable interpretation of the statute, it will fail under reasonableness review if the agency failed to respond to a party's meaningful counterarguments.[160] The Court explained that:

> [N]ormally, 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.[161]

This distinction between the two concepts leads to different remedies. *Chevron* step 2 is black and white. Failure at *Chevron* step 2 is fatal – the agency does not receive another chance to persuade the court of the reasonableness of its interpretation.[162] *State Farm* reasonableness can be grey; the court may remand the case to give the agency a second chance to respond to a party's criticism or other evidence that it overlooked.[163]

Finally, *Chevron* step 2, originally (pre-step zero) was intended to be a strong rule of deference – the opinion explicitly reminded courts not to substitute their view of the best meaning of the ambiguity for the agency's reasonable interpretation.[164] In contrast, *State Farm* hard look review evolved during a period when the court was increasing scrutiny of agency actions.[165] All distinctions aside, the emerging trend in lower courts is to blur the distinction between these two sets of analyses.[166] Given the close relationship between examining the reasoning process (*State Farm*) and the validity of the result (*Chevron*), it makes sense to incorporate the *State Farm* reasonableness requirement drawn from arbitrary and capricious case law into the *Chevron* analysis. Most cases will raise both *Chevron*

156. *Id.* Although the Court used the *State Farm* standard, it also noted that it does not substitute its judgment of the best rate or even a better rate and that it affords "great deference" to FERC's rate determinations because rate design is highly technical. The emphasis on expertise and not substituting its own judgment echoes *Chevron* values.

157. Watts, *supra* note 139, 8 n.15.

158. *Id.*

159. *Id.* at 17.

160. *Id.* at 7.

161. *State Farm*, 463 U.S. at 43.

162. *Id.* at 42.

163. *Id.* at 43.

164. *Id.* at 42-43; *Chevron*, 467 U.S. at 844.

165. *State Farm*, 463 U.S. at 44.

166. *Id.* at 44-45.

and *State Farm* arguments anyway.[167] Since the *State Farm* test is broader, it will usually capture the significant elements that betray a lack of reasonableness.[168] In sum, it seems more efficient for the Court to use traditional tools of statutory construction (text, context, purpose, and legislative backdrop) to establish statutory meaning or range of ambiguity at *Chevron* step 1, and then use *State Farm* reasonableness review at *Chevron* step 2. The opinion can always cross-reference *Chevron* step 1 analysis if needed for its step 2 evaluation.

3. *Chevron* Deference and Win-Loss Rates

While most of the time the agency will prevail on a *Chevron* step 2 analysis, it depends on a number of factors, including the agency, whether the case involves interpretation of a governing statute or less formal rulings, and the reviewing court.[169] Nevertheless, the perception persists that "as a practical matter, under *Chevron*, either the case is decided at the first step or the agency prevails once it receives deference under step two."[170] But, as Senior Circuit Judge Silberman of the D.C. Circuit recently pointed out, this is not what *Chevron* itself required.[171]

4. Illustrative Opinions

Because the pool of case law on this subject is extensive and this is likely to be the most familiar *Chevron* step to agency practitioners, we will limit our discussion to two illustrative cases, *Michigan v. EPA* and *Brand X*.[172] The first case

167. Watts, *supra* note 139, at 7.

168. *State Farm*, 463 U.S. at 43.

169. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) (finding standard of review used at Supreme Court to make little difference to agencies' win rate, but at the circuit court review level, agencies' win rate under various standards varies as follows: *Chevron* deference applies, 77.4%; *Skidmore* deference, 56%; *de novo* review, 38.5%). Based on review of 1,558 circuit court decisions issued 2003-2013, when *Chevron* deference applied, the agency won the most often in the First Circuit (84.3% of cases) and the least often in the Ninth Circuit (72.3% of cases). *Id.* at 21. There also was a wide disparity among agencies and subject matter. Courts deferred most often in cases involving telecommunications and Indian affairs, and least often in cases involving tax, prison housing and civil rights. *Id.* at 22. Agencies had higher win rates when they interpreted the statutes they administer via formal adjudication or notice and comment rulemaking, rather than using less formal means. *Id.* at 16. Overall, independent agencies received more deference than executive agencies. *Id.* at 25. According to Barnett & Walker, in a comparison of 27 agencies' composite win rates (using certain specific criteria), FERC ranked 16th, EPA ranked 13th and DOE ranked 26th. *Id.* at 24. The Supreme Court has only found agency interpretations to be unreasonable in a handful of cases. *See also* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 392 (1999) (vacating rule because agency failed to interpret the terms of the statute "in a reasonable fashion"); *see also* Michigan v. EPA, 135 S. Ct. 2699, 2708 (2015) ("*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of the statutory context it likes while throwing away parts it does not"); *see also UARG*, 134 S. Ct. at 2432 (2014) (finding EPA's interpretation unreasonable because it would place excessive demands on governmental resources and "transformative[ly] expan[d] . . . EPA's regulatory authority without clear congressional authorization").

170. *Global Tel*Link*, 859 F.3d at 60. In *Global Tel*Link*, the D.C. Circuit held that while formal rules are presumptively subject to review pursuant to *Chevron*, *Chevron* deference is inapplicable when the agency subsequently disavows the rules (even if it has not formally withdrawn them). *Id.* at 50. When *Chevron* is inapplicable the judges "'must decide for ourselves the best reading' of the statutory provisions at issue in this case." *Id.* (citation omitted).

171. *Id.* at 60 (advocating a "muscular use of [*Chevron* step 2] analysis" as a "barrier to inappropriate administrative adventure" (Goldstein, J., dissenting)).

172. *See generally Michigan*, 135 S. Ct.; *see also Brand X*, 545 U.S.

is an example where the Supreme Court was less deferential than usual under *Chevron* step 2 and curtailed the agency's flexibility going forward.[173] The second case is a classic example where deference enabled multiple subsequent agency flip-flops.[174] We will also touch on *Chevron* deference for statutory interpretations concerning the scope of the agency's jurisdiction.

a. *Michigan v. EPA*

In *Michigan v. EPA*, the Court held, notably, for the first time, that EPA must consider cost even when Congress has not explicitly required it to do so at the threshold stage of deciding to regulate emissions.[175] Section 112(n) of the Clean Air Act instructs EPA to list power plants for regulation where appropriate and necessary after considering the results of a health study.[176] EPA considered it appropriate and necessary to list coal and oil plants for regulation because the health study revealed that mercury and other hazardous pollutants posed risks to public health and the environment, technology exists to reduce those emissions, and the statute's other requirements did not eliminate these risks.[177] While EPA determined that costs were irrelevant to its initial decision to regulate, it nevertheless considered costs throughout the rest of the rulemaking process.[178] Broad language like "appropriate" usually affords the agency vast leeway for interpretation under *Chevron*.[179] Excluding cost consideration at this stage could be considered reasonable because – as the agency conceded and all parties agreed – cost clearly

173. *See generally Michigan*, 135 S. Ct.

174. *See generally Brand X*, 545 U.S.

175. *Michigan*, 135 S. Ct. at 2707 ("EPA strayed far beyond those [*Chevron*] bounds when it read [the statute] to mean that it could ignore cost when deciding whether to regulate power plants. . . . Read naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost. One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits").

176. *Michigan*, 135 S. Ct. at 2707.

177. *Id.* at 2705.

178. *Id.* at 2706. Justice Scalia pointed out that according to EPA's estimate, the decision to regulate "ultimately cost power plants . . . nearly $10 billion a year," *id.*, which were "between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants." *But see id.* at 2724 ("[T]he majority disregards how consideration of costs infused the regulatory process, resulting not only in EPA's adoption of mitigation measures . . . but also in EPA's crafting of emissions standards that succeed in producing benefits many times their price" (Kagan, J., dissenting)). The dissent reasoned that "until EPA knows what standards it will establish, it cannot know what costs they will impose. Nor can those standards even be reasonably guesstimated at such an early stage." *Id.* at 2723. As Justice Kagan summed it up:

> EPA knew that when it decided what a regulation would look like – what emissions standards the rule would actually set – the Agency would consider costs. Indeed, EPA expressly promised to do so. And it fulfilled that promise. The Agency took account of costs in setting floor standards as well as in thinking about beyond-the-floor standards. It used its full kit of tools to minimize the expense of complying with its proposed emissions limits. It capped the regulatory process with a formal analysis demonstrating that the benefits of its rule would exceed the costs many times over. In sum, EPA considered costs all over the regulatory process, except in making its threshold finding – when it could not have measured them accurately anyway. That approach is wholly consonant with the statutory scheme. *Id.* at 2726.

179. *See id.* at 2707. As Justice Scalia explained:

> One does not need to open up a dictionary in order to realize the capaciousness of this phrase. In particular, "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally

comes into play when EPA sets emissions standards.[180] But, the Court struck down the listing as unreasonable under *Chevron* step 2.[181] Justice Scalia, writing for the majority in the 5-4 Court, held that EPA must consider cost earlier, at the listing stage.[182]

From an EPA regulatory standpoint, this signaled a radical shift: post-*Michigan v. EPA*, EPA should assume that cost considerations are relevant unless Congress expressly makes cost-benefit analysis or cost considerations unnecessary. This is a stark inversion of the way statutes are usually interpreted – silence is interpreted as omission, so cost considerations would be relevant only if the statute expressly required them. From an administrative law/*Chevron* standpoint, if the court does not allow the agency to interpret a broad term like "appropriate and necessary" in its governing statute, then the agency is no longer the primary interpreter of statutory ambiguity.

b. *Brand X*

An ambiguous statute enables the Federal Communications Commission (FCC) to repeatedly reinterpret the ambiguity, provided the FCC justifies each interpretation as reasonable at *Chevron* step 2, which is exemplified by the Supreme Court's decision in *Nat'l Cable & Telecom Ass'n v. Brand X Internet Service*.[183] *Brand X* is significant because it helped set the stage for the debate over "net neutrality."[184] Net neutrality is the principle that Internet service providers (and governments) should treat all data on the Internet equally, allowing nondiscriminatory access to all content and applications, regardless of the source and

includes consideration of all the relevant factors. . . . Although this term leaves agencies with flexibility, an agency may not "entirely fail to consider an important aspect of the problem" when deciding whether regulation is appropriate" (internal citations omitted).

180. *Michigan*, 135 S. Ct. at 2709.

181. Justice Scalia reasoned that the statutory context reinforced the relevance of cost. *Id.* at 2707. Turning to 42 U.S.C. § 7412(n)(1), Justice Scalia pointed out that whereas Subsection A of that provision "required EPA to study the hazards to public health posed by power plants and to determine whether regulation is appropriate and necessary," subsections (B) and (C) "called for two additional studies." *Id.* In particular, the study of "mercury emissions from power plants and other sources[] must consider "the health and environmental effects of such emissions, technologies which are available to control such emissions, *and the costs of such technologies*." *Id.* (emphasis in original). Finding "[t]his directive to . . . study cost" constituted "further indication of the relevance of cost to the decision to regulate," *Michigan*, 135 S. Ct. at 2708, Justice Scalia chastised EPA for ignoring it: "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps part of the statutory context it likes while throwing away parts it does not." *Id.*

182. *See, e.g.*, Stutzman v. Office of Wyo. State Eng'r, 130 P.3d 470, 475 (Wyo. 2006) ("A basic tenet of statutory construction is that omission of words from a statute is considered to be an intentional act by the legislature").

183. *Brand X*, 545 U.S. at 981 ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change 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'") (internal citations omitted).

184. "Net neutrality" is a term coined by Professor Tim Wu. *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH L. 141, 145 (2005) (describing net neutrality as an "Internet that does not favor one application (say, the world wide web) over others (say, e-mail)").

without favoring or blocking particular products or websites.[185] While critics contend that net neutrality impedes broadband investment and development, supporters champion open access as a structural remedy to protect against the erosion of network neutrality between competing content and applications.[186] The net neutrality Odyssey, particularly the open access remedy, may ring familiar to those acquainted with the quest for open access to gas pipelines and high voltage electric transmission lines.[187]

In *Brand X*, the Supreme Court considered whether the FCC had appropriately classified broadband cable Internet service under the Federal Communications Act.[188] The Act defines two categories of regulated entities: telecommunications carriers and information-service providers.[189] The Act regulates all telecommunications carriers as common carriers.[190] This means that, for example, telecommunications carriers must charge just and reasonable and non-discriminatory rates to their customers; design their systems so their carriers can interconnect with their transmission network; and contribute to the federal universal service fund.[191] In contrast, information-service providers are subject to more light-handed regulation, and are not regulated as common carriers under the Act, although the FCC has authority to impose additional regulatory obligations.[192] Regulating Internet service providers as telecommunication carriers would facilitate net neutrality, due to the common carrier obligation.[193]

When *Brand X* was decided, there were two types of broadband service, cable and digital subscriber lines (DSL).[194] While the FCC classified DSL broadband

185. Specifically, there should be no discrimination or charging of different fees based on user, content, website, platform application, type of equipment or modes of communication. *See* Cecilia Kang, *FCC Chairman Pushes Sweeping Changes to Net Neutrality Rules*, NEW YORK TIMES (Apr. 26, 2017), https://nyti.ms/2q6nOVb (explaining that FCC's 2015 net neutrality rules were designed to ensure an open Internet; that is, no content could be blocked by broadband providers, and the Internet would not be divided into pay-for-play fast lanes for Internet users and media that can afford these charges, on the one hand, and everyone else, on the other hand).

186. *Id.* For a critique of net neutrality, *see generally* Phil Weiser, *Paradigm Changes in Telecommunications Regulation*, 71 U. COLO. L. REV. 819 (2000); James B. Specta, *Handicapping the Race for the Last Mile? A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 77-90 (2000); Wu, *supra* note 184, at 141.

187. *See generally* Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L. J. 243, 245-46, 321 (2005) (examining the development of FERC's open access policies and contrasting them with the FCC's policy shift to hands-off regulation; questioning whether differences in the energy and communications industry structure or regulatory schemes justify the FCC's hands-off policy; and arguing that encouraging investment in new broadband technologies and promoting open access to broadband platforms are not mutually exclusive).

188. *See* Title II of the Communications Act of 1924, 48 Stat. 1064, as amended by the Telecommunications Act of 1996, 100 Stat. 56, 47 U.S.C. §§ 151-62; *Brand X*, 545 U.S. at 973-974.

189. *Brand X*, 545 U.S. at 973. "Telecommunications carriers" provide "telecommunications service," which the Act defines as "offering . . . telecommunications for a fee directly to the public . . . regardless of the facilities used." *Id.* (citing 47 U.S.C. § 153(46)). Information service providers are those "offering . . . a capability for [processing] information via telecommunications." *Id.* (quoting 47 U.S.C. § 153(20)).

190. 47 U.S.C. § 153(44).

191. *Brand X*, 545 U.S. at 975 (citing 47 U.S.C. §§ 201-09 (just and reasonable rates); *id.* at § 251(a)(1) (interconnection) and § 254(d) (universal service fund). While these provisions are mandatory, the Commission need not apply them if it determines that the public interest requires it. *Id.* (citing 47 U.S.C. §§ 160(a), (b)).

192. *Brand X*, 545 U.S. at 976 (citing 47 U.S.C. §§ 151-161).

193. United States Telecom Ass'n v. FCC, 855 F.3d 381, 385 (2017).

194. *Brand X*, 545 U.S. at 975.

service as a telecommunication service, it nevertheless subsequently classified cable broadband service as an information service.[195] Small independent service providers, such as Brand X, disputed the FCC ruling defining cable Internet service as an information service.[196] They sought to have cable broadband Internet service classified as a telecommunications service so they could have equal access to cable broadband facilities in order to compete with the cable companies who owned the broadband but refused to share it.[197] Without access to cable broadband facilities, Brand X and other similar companies were at a competitive disadvantage because they had to provide service to customers using the slower, dial-up, narrowband Internet access available at the time.[198]

The precise issue before the Supreme Court in *Brand X* was whether the FCC's determination that cable companies selling broadband Internet service do not provide "telecommunications servic[e]" (and consequently are exempt from mandatory common-carrier regulation) is a lawful construction of the Act under *Chevron* and the APA.[199] In a 6-3 decision authored by Justice Thomas, the Court sustained, on *Chevron* step 2 deference grounds, the FCC's classification of cable broadband service providers as information service providers, rather than telecommunications service providers.[200]

195. *Id.* at 975-76, 978.

196. *Id.* at 979.

197. Br. of Resp'ts Earthlink, Inc., Brand X Internet Service, and Center for Digital Democracy at 1-3, FCC v. Brand X, 545 U.S. 967 (2002) (Nos. 04-277, 04-281); *see also In re Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities, Internet over Cable Declaratory Ruling*, 17 FCC Rcd. 4798 at ¶ 47, n.176 (2002) (indicating that cable companies were unwilling to offer competing Internet service providers access to their cable lines) (Ruling and Notice of Proposed Rulemaking (NPRM)). Cable companies asserted that requiring open access was beyond the FCC's authority, Br. of Resp'ts at 2, and that open access would discourage investment in broadband. *See* Ruling and NPRM. at ¶ 73 ("We are mindful of the need to minimize both regulation of broadband service and regulatory uncertainty in order to promote investment and innovation in a competitive market" (citation omitted)).

198. Notice of Inquiry, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd. 19287 ¶¶ 6-9 (2000); AT&T Corp. v. Portland, 216 F.3d 871, 873-74 (9th Cir. 2000) (broadband is "fifty to several hundred times faster" than "plain old telephone service").

199. *Brand X*, 545 U.S. at 974. The salient ambiguity was the meaning of "offer" in the statutory definition of "telecommunications service." *Id.* at 987. (For the pertinent text of the definition of "telecommunications service," *see supra* note 189). The FCC determined that cable broadband service is not an offering of telecommunications because the consumer always uses the high-speed wire in connection with the information processing capabilities of Internet service. *Id.* Consequently, the FCC concluded that the integrated character of this offering is such that cable broadband service is not a "stand-alone, transparent offering of telecommunications." *Id.* at 988. The Court held that "the Commission's construction was a 'reasonable policy choice for the [Commission] to make'" at *Chevron*'s second step. *Id.* at 997 (quoting *Chevron*, 467 U.S. at 845). *But see id.* at 1008 ("Despite the Court's mighty labors to prove otherwise . . ., the telecommunications component of cable-modem service retains such ample independent identity that it must be regarded as being [an] offer – especially when seen from the perspective of the consumer or the end user, which the Court purports to find determinative" (Scalia, J., dissenting)).

200. *Brand X*, 545 U.S. at 967. When *Brand X* was decided, *Chevron* had been the governing precedent for 21 years. Notably, Justice Thomas relied on *Chevron* in *Brand X* to uphold the agency's interpretation, although he subsequently expressed grave doubts as to *Chevron*'s constitutionality. *See, e.g.*, *Michigan*, 135 S. Ct. at 2713 (stating that *Chevron* "wrests from courts the power to 'say what the law is,' and hands it over to the Executive" (internal citation omitted) (Thomas, J., concurring)). *See also Brand X*, 545 U.S. at 986.

"The Court . . . explained that it had 'no difficulty concluding that *Chevron* applie[d]' to the [FCC]'s decision to classify cable broadband service as an information service rather than a telecommunications service."[201] The Act's "silence" on the issue of which classification is appropriate for cable broadband gave the Commission "discretion to fill the consequent statutory gap."[202] This meant that the question "would be resolved, first and foremost, by the agency."[203] Highlighting the Commission's authority to use "its expert policy judgment to resolve these difficult questions," the Court ruled that the proper classification of cable broadband service turns "on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance."[204]

The Court concluded that the Act does not compel the FCC to classify cable broadband Internet service providers as telecommunications providers, and therefore common carriers, as it had done with DSL providers (which would have supported net neutrality).[205] This ruling under *Chevron* step 2 meant that the Act left the matter of the appropriate regulatory classification of cable Internet service providers and, therefore, net neutrality, to the agency's discretion.[206] This also left the door open for the FCC to change its mind, reinterpret the ambiguity, and reclassify cable broadband providers as telecommunications in the future.[207] In light of these holdings, the Court found that the Ninth Circuit Court of Appeals had "erred in refusing to apply *Chevron* to the Commission's interpretation of the definition of 'telecommunications service'" and in declining to defer to the agency's decision to treat cable broadband as an information service.[208]

Justice Breyer concurred, reasoning that the FCC's decision to classify cable broadband as an Internet service fell "within the scope of its statutorily delegated authority – though perhaps just barely."[209] Justices Scalia, Souter, and Ginsburg dissented.[210] The dissent argued that the statute permitted only one conclusion:

201. *U.S. Telecom Ass'n*, 855 F.3d at 384; *see also Brand X*, 545 U.S. at 982.

202. *Brand X*, 545 U.S. at 996-97.

203. *Id.* at 982 (internal quotation marks omitted).

204. *Id.* at 991, 1003.

205. *Id.* at 996.

206. *U.S. Telecom Ass'n*, 855 F.3d at 384.

207. *Id.* D.C. Circuit Judge Srinivasan, joined by Judge Tatel, found it clear from the Court's *Brand X* opinion that deference would have been equally appropriate if the FCC had reached the opposite conclusion and classified cable broadband providers as telecommunications carriers. The FCC could make only one of two classifications: "To affirm the FCC's statutory discretion to select between them was necessarily to countenance the agency's treatment of cable broadband as a telecommunications service." *Id.* (Srinivasan, J., concurring).

208. *Brand X*, 545 U.S. at 984.

209. *Id.* at 1003 (Breyer, J., concurring).

210. *Id.* at 972.

that cable broadband Internet service providers are subject to common carrier regulation, like their chief DSL competitors.[211] The dissent would have decided the issue at *Chevron* step 1.[212]

Brand X also attempted to resolve the tension between *Chevron* and *stare decisis*.[213] The Court explained that judicial determinations of the clear meaning of a statute bind the agency to the court's interpretation, and have a *stare decisis* effect, whereas judicial pronouncements of the "best" meaning of an ambiguous statute do not bind the agency.[214] Prior to the *Brand X* proceeding, in *AT&T Corp. v. Portland*, the Ninth Circuit considered whether a local cable franchising authority could condition its approval of a cable operator's merger on the operator providing competitive Internet service providers with open access to its cable broadband facilities.[215] Finding cable broadband service to be a hybrid – part information service, part telecommunications service – the Ninth Circuit held the answer was no.[216] The local franchising authority (Portland) could not condition the merger on non-discriminatory access to AT&T's broadband cable network because the Act prohibits local governments from regulating telecommunications service.[217] Post-*Portland*, the FCC issued the Declaratory Ruling classifying cable broadband service as information service, and parties appealed.[218] The Ninth Circuit declined to apply *Chevron* to the FCC's interpretation of telecommunications service under the Act, reasoning that the FCC's construction was foreclosed by *Portland*'s prior conflicting ruling classifying broadband cable as telecommunications service.[219]

The Supreme Court, however, found that the Ninth Circuit erred by following the statutory interpretation it had adopted in *Portland* rather than applying *Chevron* to the FCC's subsequent contrary statutory interpretation.[220] Distinguishing

211. *Brand X*, 545 U.S. at 1006 (Scalia, J., dissenting). "The upshot of *Brand X* with respect to the FCC's congressionally delegated authority over broadband [Internet service providers] is unmistakable and straightforward. All nine Justices recognized the agency's statutory authority to institute 'common carrier regulation of all [Internet service providers],' with some Justices even concluding that the Act left the agency with no other choice." *U.S. Telecom Ass'n*, 855 F.3d at 385. All nine justices in *Brand X* would have upheld net neutrality, had the FCC chosen to regulate Internet service providers as telecommunication service rather than information service. *Id.*

212. *Brand X*, 545 U.S. at 1008.

213. *Brand X*, 545 U.S. at 984-86; Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity in the Administrative State*, 69 MD. L. REV. 791, 797 (2010).

214. *Brand X*, 545 U.S. at 982-83.

215. *Portland*, 216 F.3d at 871.

216. *Id.* at 878. The Ninth Circuit reasoned that the cable company consists of two elements: a "pipeline" akin to telephone lines (cable broadband) and the Internet service transmitted over that pipeline. It held that, to the extent the cable company is like a conventional Internet service provider, its activities constitute information service. However, because the cable company controls all of the transmission facilities between its subscribers and the Internet, to the extent it provides its subscribers Internet transmission over its cable broadband facilities, it is providing telecommunication service as defined in the Act. *Id.*

217. *Id.* at 880. The FCC participated in the *Portland* proceeding as amicus curiae; it did not provide its interpretation of how cable broadband should be classified under the Act.

218. *Brand X*, 545 U.S. at 979. Numerous parties sought judicial review in various circuits, and the Ninth Circuit was selected by judicial lottery. *Id.*

219. *Brand X Internet Servs. v. FCC*, 345 F.3d 1120, 1127-32 (9th Cir. 2003).

220. *Brand X*, 545 U.S. at 982-83.

between prior court rulings concerning clear versus ambiguous statutes, the Supreme Court held that a prior judicial determination of the statute's clear meaning forecloses alternative agency interpretations because the statute is not ambiguous and there is only one reading of the statute.[221] In contrast, a prior judicial determination of an ambiguous statute provides just one reasonable interpretation among potential alternative reasonable determinations. Thus, consistent with the *Chevron* framework, prior judicial interpretations of ambiguous statutes leave the agency free under *Chevron* step 2 to reinterpret the ambiguity, provided the agency justifies its alternative interpretation.[222] Since the *Portland* precedent that the Ninth Circuit relied on had held that the best (but not the only) reading of the statutory provision was that cable broadband service is telecommunication service, the statute was ambiguous.[223] Therefore, the FCC was not bound by *Portland* and the FCC could reinterpret the ambiguity, provided it justified its alternative interpretation.[224] The Court explained that:

> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.[225]

In sum, only a judicial declaration of the clear and unambiguous meaning of the statute precludes subsequent alternative agency interpretations.[226] Since the Ninth Circuit had previously interpreted a statutory ambiguity, the Supreme Court held that neither the courts nor the agency were bound by that interpretation; thus, the FCC was free to provide its own subsequent interpretation of the ambiguous

221. *Id.* at 982 ("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"); *see also id.* at 982-83 ("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").

222. *Id.* at 983 ("[T]he agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such [ambiguous] statutes"). Notably, *Brand X*'s rule distinguishing the *stare decisis* effect of a prior judicial determination of the clear meaning of a statute (implicating *Chevron* step 1) as opposed to a judicial interpretation of the best meaning of an ambiguous statute (implicating *Chevron* step 2) appears to be easier to articulate than to apply. Scholars point out that lower courts are struggling to distinguish between prior court rulings interpreting a statutory ambiguity versus judicial declarations of the plain meaning of a clear statute, and therefore lower courts have been applying the *Brand X* rule inconsistently. *See generally* Robin K. Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L.J. 1, 18-24 (2011) (comparing courts that deferred to agency regulation rather than court precedent to courts that did not do so).

223. *Brand X*, 545 U.S. at 979-80, 982, 984-86 ("[O]ur conclusion that it is reasonable to read the . . . Act to classify cable modem service solely as an 'information service' leaves untouched *Portland*'s holding that the Commission's interpretation is not the best reading of the statute").

224. *See generally id.*

225. *Id.* at 985 (explaining that the court ruling remains binding law in other respects).

226. *Brand X*, 545 U.S. at 985 (stating that "[b]efore 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. *Portland* did not do so").

term "telecommunications service" in the Act.[227] And, by finding the statute ambiguous under *Chevron* step 2, the *Brand X* Court left the door open for the FCC to reclassify cable broadband service as telecommunications service in the future, as long as it provides a reasonable explanation for the change.[228] Indeed, in 2015, after reviewing submissions from over four million commenters, the FCC changed course and issued new rules reclassifying broadband as telecommunications service, which were upheld by the D.C. Circuit.[229] And, recently in February 2017, the FCC voted yet again to issue new rules retreating from net neutrality.[230]

c. Jurisdictional Matters (*City of Arlington*)

Finally, it is worth noting that for years there was an ongoing debate about whether *Chevron* deference extends to the agency's interpretation of the scope of its jurisdiction. *City of Arlington* answered this question in the affirmative: courts must give *Chevron* deference to agency interpretations of ambiguities that concern the scope of their jurisdiction.[231] Justice Scalia, writing for the majority, declared that there is no meaningful distinction between interpreting an ambiguous statutory provision, generally, and interpreting an ambiguous statutory provision that pertains to the agency's jurisdiction, in particular, because the inquiries overlap so extensively.[232] He considered this ruling a necessary defense against judicial inroads on *Chevron* – controlling courts tempted to make public policy under the

227. *Id.* at 982-85.

228. *Id.*

229. *U.S. Telecom Ass'n*, 855 F.3d at 383; *id.* at 382 (denying rehearing en banc "[i]in light of the uncertainty surrounding the fate of the [2015 FCC Final Rule]" because the FCC was already planning to revise the rule yet again, replacing it with a "markedly different one," and possibly reverting back to light-handed regulation of cable Internet service as information service). Significantly, Judge Srinivasan, joined by Judge Tatel, wrote specifically to address dissents by Judge Kavanaugh and Judge Brown, *see id.* at 382 (Srinivasan, J., concurring), each of whom would have struck down the 2015 Final Rule under the major questions doctrine (Judge Kavanaugh refers to it as the major rules doctrine). The concurrence argues that the major rules doctrine does not preclude the FCC from classifying cable broadband service as telecommunications service because "the Supreme Court, far from precluding the [2015 FCC Final Rule] due to any supposed failure of congressional authorization, has pointedly recognized the agency's authority under the governing statute to do precisely what the [2015 FCC Final Rule] does [that is, change the classification of cable Internet service]." *Id.*

230. Notice of Proposed Rulemaking, *In the Matter of Restoring Internet Freedom*, Docket No. FCC17-60, 32 FCC Rcd. 4434, 2017 WL 2292181 ¶ 5 (May 23, 2017).

231. *City of Arlington*, 569 U.S. at 307 ("Those who assert that applying *Chevron* to 'jurisdictional' interpretations 'leaves the fox in charge of the henhouse' overlook the reality that a separate category of 'jurisdictional' interpretations does not exist").

232. *Id.* at 1868 ("[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*").

guise of prescribing the meaning of ambiguous statutory commands.[233] Chief Justice Roberts, dissenting, disagreed.[234] Reiterating that *Chevron* deference was based on and limited by Congressional delegations, Chief Justice Roberts argued that "a court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue."[235] Chief Justice Roberts' dissent set up the reasoning he would later reprise when upholding the Affordable Care Act, albeit at step zero.[236] Given the blurred, "hazy bright line" between state and federal jurisdiction on energy matters, *City of Arlington* raises the question whether deference on jurisdictional matters will have any significant or unique implications for FERC going forward.[237]

C. Chevron Step 1.5: Did the Agency Spot the Ambiguity?

1. Overview

As discussed above, *Chevron* generated the "pure" two-step analysis: (1) step 1, is the statute clear? And, if the statute is not clear, then (2) step 2, is the agency's interpretation of the ambiguity reasonable?[238] As Professors Hemel and Nielson elucidate, however, the D.C. Circuit inserts an intermediate question between steps 1 and 2: did the agency recognize that the pertinent statutory provision is ambiguous?[239] If the answer is no, then, instead of proceeding directly to step 2, the D.C. Circuit (usually) will remand the case to the agency, so the agency may interpret the ambiguity.[240] Dubbed "*Chevron* step one-and-a-half" because it is a "way station" between steps 1 and 2, Hemel and Nielson assert that this practice harks back over thirty years and appears to stem from the D.C. Circuit's decision

233. *Id.* at 1872-73. Peppering his zestful prose with allusion to a Sherlock Holmes classic, Justice Scalia elaborated:

> The false dichotomy between "jurisdictional" and "nonjurisdictional" agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake – the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the 'jurisdictional' card in every case. . . . The effect would be to transfer any number of interpretive decisions – archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests – from the agencies that administer the statutes to the federal courts. *Id.* (internal citation omitted).

234. *City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting) ("An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by the court, without deference to the agency").

235. *Id.* at 1879-80.

236. Hemel & Nielson, *supra* note 17.

237. *City of Arlington*, 569 U.S. at 305 (rejecting "faux-federalism arguments"); *see also id*. at 308 (Breyer, J., concurring). *See generally Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (holding that federal law preempts state actions that "intrude on FERC's authority over interstate wholesale rates").

238. *See* discussion *supra* Parts II.A, B.

239. Hemel & Nielson, *supra* note 17.

240. *Id.* at 760. While Hemel and Nielson refer to these remands as agency losses, *id.* at 762, they are not necessarily counted as full-fledged losses because they are remands rather than reversal and remands. *Chevron* step 1.5 remands offer the agency another chance to justify its original decision. Viewed in this light, these remands are more akin to voluntary remands, where the court, prior to its review of the case, grants the agency's request to take it back for further consideration. PDK Labs, Inc. v. DEA, 362 F.3d 786, 799-800 (D.C. Cir. 2004) (noting that it is clear how the agency will interpret the alleged ambiguity upon remand).

in *Prill v. NLRB*.[241] Chief Justice Roberts, while still a member of the D.C. Circuit, explained:

> The *Prill* line of cases stands for the proposition that when an agency reads a statute in a particular way based on the erroneous belief that the reading was mandated by the statute (and thus the agency had no latitude to adopt a different interpretation), the case will be remanded so that the agency – now freed from its confined view of its own discretion – can reconsider its interpretation of the statute.[242]

While the Supreme Court arguably applied a similar rule in *Negusie v. Holder*, courts are not uniformly enamored with the step 1.5 practice and other circuits have expressly declined to embrace step 1.5.[243] But the D.C. Circuit generally adheres to step 1.5.[244] Because the D.C. Circuit remains the reviewing court for the majority of FERC and EPA orders, this additional half-step merits exploring.

First, why would the D.C. Circuit remand cases rather than decide them under *Chevron* step 2? As step 1.5 critics hasten to point out, the extra half-step elevates form over substance, prolongs litigation, fritters administrative resources, and rarely, if ever, results in a different outcome.[245] In most, if not all, cases that are remanded under step 1.5, the agency does not change the result, but rather expands the reasoning for its justification.[246] Where there is no doubt as to the agency's

241. Hemel & Nielson, *supra* note 17, at 761, 778; Prill v. NLRB, 755 F.2d 941, 948 (D.C. Cir. 1985) ("[A]n agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the [agency's] own judgment but rather on the unjustified assumption that such [a regulation is] desirable'") (citation omitted). Others read the *Prill* decision more narrowly to stand for the proposition that where the agency relies on a court's interpretation of a statute, *Chevron* deference is unavailable because the agency has not applied its *own* interpretation of the rule. *See* Harvey L. Reiter*, Appellate Review of Federal Administrative Agency Decisions*, Presentation to Mich. State Univ. Inst. of Pub. Utils., slide 38 (Aug. 11, 2015) (emphasis added), in conjunction with e-mail correspondence and telephone conference with Professor Reiter on July 10, 2017.

242. *PDK Labs*, 362 F.3d at 804 (D.C. Cir. 2004) (citing *Prill*, 755 F.2d at 947-48) (Roberts, C.J., concurring).

243. Negusie v. Holder, 555 U.S. 511 (2009) ("'If an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see'") (quoting *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)). *See* Hemel & Nielson, *supra* note 17, at 761, 786 n.135. At last tally, the Second and Third Circuits have yet to address whether deference is only appropriate when the agency exercises its own judgment, rather than what it believes Congress required it to do; the Sixth Circuit rejected the doctrine; the Seventh Circuit may have changed its position to follow step 1.5 after issuance of *Negusie*; the Ninth Circuit appeared to adopt it in 2013 but has not applied it since; and the U.S. Court of Appeals for the Tenth Circuit and the Federal Circuit have noted the D.C. Circuit's practice but have not remanded any cases back to the agency on step 1.5 grounds. *See also* Hemel & Nielson, *supra* note 17, at 787-88 nn.137-142.

244. *See, e.g.*, Cajun Elec. Power Coop. v. FERC, 924 F.2d 1132, 1136 (D.C. Cir. 1991) ("An agency is given no deference at all on the question whether a statute is ambiguous, and, if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see"); *see also* Hemel & Nielson, *supra* note 17, at Appendix (analyzing 21 D.C. Circuit step 1.5 cases).

245. Even step 1.5 defenders Hemel & Nielson concede: "[W]e understand why some readers might conclude that *Chevron* Step One-and-a-Half is nonsense twice over – nonsense in that no sensible agency should ever find itself ensnared by the doctrine, and nonsense in that the doctrine itself accomplishes nothing." Hemel & Nielson, *supra* note 17, at 771.

246. *See* Hemel and Nielson, *supra* note 17, at 806.

interpretation on remand, a *Prill* remand arguably "outstrips its rationale," and "'convert[s] judicial review of agency action into a ping-pong game.'"[247]

The rationale behind step 1.5 remand is that the agency's failure to recognize the ambiguity leads to larger *Chevron* problems: the agency will also fail to explain its interpretation of the ambiguity the court recognized, and the court will have no way to evaluate the reasonableness of the agency's interpretation under *Chevron* step 2.[248] Remanding to give the agency the opportunity to interpret the statute in the first instance "is consistent with *Chevron* deference, and with the respect due Congress's delegation of interpretive authority to the agency."[249] Remanding to enable the agency to interpret the ambiguity and explain it reasoning echoes the *State Farm* principle – the agency must show "'a rational connection between the facts found and the choice made.'"[250] Step 1.5 is also closely related to the *Chenery* principle – reviewing courts may affirm an agency order based only on the reasoning provided by the agency itself.[251] If the court determines that the agency's reasoning is in error, then the court cannot affirm it.[252] Also, for all the reasons why the court defers to the agency when a statute, regulation, tariff, or contract provision is ambiguous, the court would also be compelled to remand the case back to the agency for its consideration. These reasons include, but are not limited to, the concern that Congress delegated the ambiguity for the agency to determine, in the first instance, in light of the agency's expertise and/or because the agency is more politically accountable than the court.

Curiously, given that *Chevron* step 1.5 has been around for decades, the question arises why *Chevron* step 1.5-based decisions persist. Because agencies receive deference when statutory provisions are ambiguous, they have incentive to find statutes ambiguous where possible.[253] One would expect FERC and EPA, for example, to at least issue decisions in the alternative. That is, if FERC were to find the relevant statutory (or regulation or tariff or contract) provision to be clear and unambiguous, it would also declare that, in the event that the provision were held to be ambiguous, FERC's preferred interpretation of the ambiguity would

247. *PDK Labs*, 362 F.3d at 808-09 (Roberts, C.J., concurring) (citations omitted).

248. Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1353 (D.C. Cir. 2006) (explaining that the court could not uphold the agency's interpretation under *Chevron* step 1 because the statutory text was ambiguous, nor could it review under step 2, so "[w]e must therefore remand for the [agency] to interpret the statutory language anew"). *See PDK Labs*, 362 F.3d at 808 (Roberts, C.J., concurring) ("The rationale that animates all *Prill* remands is real and genuine doubt concerning what interpretation the agency would choose if given the opportunity to apply 'any permissible construction'").

249. *PDK Labs*, 362 F.3d at 808 (Roberts, C.J., concurring) ("I have no quarrel with the basic proposition – expressed in *Prill* and the other cases cited by the majority. . . . But this rule should not be extended beyond its rationale. The rationale that animates all *Prill* remands is real and genuine doubt concerning what interpretation the agency would choose if given the opportunity to apply 'any permissible construction'").

250. *State Farm*, 463 U.S. at 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also State Farm*, 463 U.S. at 48 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner").

251. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). *But see PDK Labs*, 362 F.3d at 809 (quoting *Illinois v. ICC*, 722 F.2d 1341, 1348 (7th Cir. 1983)) ("*Chenery* does not require futile gestures").

252. 5 U.S.C. § 706(2)(A); *cf.* Fisher v. Bowen, 869 F.2d 1055, 1057 (7th Cir. 1989) ("No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result").

253. *See generally* Old Dominion Elec. Coop. v. FERC, 518 F.3d 42 (D.C. Cir. 2008).

still be the same as the clear meaning FERC had already discerned.[254] Chief among the reasons why an agency would characterize a statutory provision as clear is the desire to lock in an interpretation of a statute, which would make it impossible for a subsequent agency decision to override without Congressional amendment of the relevant statute, as discussed in the step 1 section above.

Less clear is why the agency would not make an alternative finding. One reason for not providing an alternative finding is that the agency strives to find ambiguities because ambiguities yield deference. Consequently, on the relatively rare occasions when the agency concludes that the relevant statutory provision is clear, it does so because it really is convinced that the statute is clear.[255] In such circumstances, the agency might not provide an alternative rationale for a number of reasons, including: (1) it does not occur to the agency; (2) the agency fears doing so could signal waffling, possibly undercutting the certainty of its finding of lack of ambiguity; or (3) the agency believes that providing alternative reasons smacks of being disingenuous.[256] A statute is either clear (yellow) or ambiguous (blue) but not both at the same time (green).

2. *NextEra*

The recent D.C. Circuit opinion, *NextEra Desert Center Blythe, L.L.C. v. FERC*, neatly illustrates the close relationship between *Chevron* step 1.5, *Chenery* and *State Farm*.[257] The *NextEra* decision also indicates that the court adheres to *Chevron* step 1.5 even in the FERC tariff and contract interpretation context, which (at least currently) receives "*Chevron*-like" deference.[258] In *NextEra*, the D.C. Circuit held that FERC had erred in finding that the terms of an interconnection agreement between NextEra Desert Center Blythe, L.L.C. (NextEra), Southern California Edison Company (Edison), and the California Independent System Operator (CAISO) clearly and unambiguously precluded NextEra from receiving financial instruments called Congestion Revenue Rights (CRRs) for interim transmission project (Interim Project) upgrades.[259] Describing the dispute as implicating "a tangle of provisions within an intricate regulatory scheme," the D.C. Circuit

254. *Cf. id.* at 47-48. In *ODEC*, the D.C. Circuit resisted a step 1.5 remand because FERC had "considered policy concerns and extrinsic evidence proffered by Petitioners, demonstrating that it recognized that the Tariff and [Transmission Owner Agreement] were ambiguous and exercised its discretion to resolve ambiguities." FERC's ODEC orders, however, did not clearly indicate alternative holdings. *See CED Rock Springs*, 114 F.E.R.C. ¶ 61,285, *reh'g denied*, 116 F.E.R.C. ¶ 61,163 (2006).

255. Hemel & Nielson, *supra* note 17, at 28.

256. For a comprehensive list of possible reasons, *see* Hemel & Nielson, *supra* note 17, at 28-37 (suggesting agency ignorance, agency ambivalence, intra-agency politics, intra-executive branch politics, inter-branch politics, and inter-administration politics).

257. NextEra Desert Center Blythe, L.L.C. v. FERC, 852 F.3d 1118 (D.C. Cir. 2017).

258. *Id.* at 1121 (explaining that, when evaluating a challenge to FERC's interpretation of a tariff and related contracts, the court reviews the Commission's interpretation under the Administrative Procedure Act's arbitrary and capricious standard of review, using a two-step, *Chevron*-like analysis). *But see Scenic America*, *supra* note 24, indicating that at least three justices prefer to use canons of contract interpretation in lieu of the *Chevron* framework in the contract interpretation context.

259. *Id.* at 1123. Energy costs more in areas where transmission lines are congested. CRRs are financial hedging instruments that are generally intended to enable the holder to avoid paying congestion costs. The holder of a CRR is entitled "to be paid the congestion costs associated with transmitting a given quantity of electricity between two specified points." *Id.* at 1121 (quoting *Sacramento Municipal Util. Dist. v. FERC*, 616 F.3d 520, 527 (D.C. Cir. 2010)). By holding a CRR, a party that pays for transmission will receive back from CAISO the

characterized its resolution as "straightforward: we find ambiguity where FERC found none."[260] Accordingly, consistent with its step 1.5 practice, the D.C. Circuit remanded the case to FERC for consideration in light of the ambiguity that the court identified but FERC missed.[261]

Writing for the Court, Judge Tatel reiterated the *Chevron* framework, explaining that the court first considers *de novo* whether the relevant language unambiguously addresses the issue; if so, the language controls and the court must give effect to the unambiguously expressed intent of the parties.[262] If there is ambiguity, the Court defers to the Commission's construction, as long as it is reasonable.[263] Emphasizing the court's practice of inserting *Chevron*-like step 1.5, Judge Tatel explained: "[i]mportantly, if FERC's decision rests on 'an erroneous assumption that the plain language of the relevant wording is unambiguous[,] we must remand' to the Commission so that it may 'consider the question afresh in light of the ambiguity we see.'"[264]

Finding "a simple logical flaw" in FERC's interpretation of the interconnection agreement, the court remanded it to the Commission, in light of the ambiguity the court detected in the agreement.[265] Additionally, FERC had declined to address one of NextEra's tariff arguments because it deemed it unnecessary in light

amount it paid for congestion, as well as the congestion costs paid by other users of transmission between those same two specified points. *Id.* at 1120-21. The pertinent agreement governed the interconnection of two NextEra solar plants to Edison facilities that CAISO operates. *Id.* at 1120. Concerned that the permanent network upgrades identified in the agreement would not be completed on time, NextEra and Edison agreed to a short-term fix, called the Interim Project. *Id.* NextEra asserted that it was entitled to receive CRRs associated with the Interim Project pursuant to section 36.11 of the CAISO tariff, which provides for allocation of CRRs to Project Sponsors of Merchant Transmission Facilities. *Id.* at 1121. CAISO and Edison disagreed, prompting NextEra to file a complaint with FERC. *Id.* FERC denied the complaint, finding that the "clear and unambiguous" terms of the interconnection agreement barred NextEra's attempt to receive CRRs under CAISO tariff section 36.11. *NextEra Desert Center Blythe, L.L.C. v. CAISO*, 151 F.E.R.C. ¶ 61,198 at P 22. (*reh'g denied* 153 F.E.R.C. ¶ 61,208 at PP 12-13 (2015)). FERC explained that Article 11.4.1 of the Interconnection Agreement entitled NextEra to a refund for Network Upgrades. *NextEra*, 852 F.3d at 1122. Article 11.4 of the Interconnection Agreement provided that under the CAISO tariff, CRRs are only available in lieu of a refund of the cost of Network Upgrades. *Id.* FERC reasoned that because the Interim Project does not qualify as a Network Upgrade under the CAISO tariff, NextEra was not eligible for a refund; and, therefore, NextEra was not eligible for CRRs in lieu of a refund. *Id.* The Commission expressly declined to address whether NextEra would otherwise be entitled to CRRs because it meets the qualification for merchant transmission project sponsor under section 36.11 of the CAISO tariff. 151 F.E.R.C. ¶ 61,198 at P 24. FERC denied rehearing based on the same rationale. 155 F.E.R.C. ¶ 61,208 at PP 12-22.

260. *NextEra*, 852 F.3d at 1121.

261. *Id.* at 1121 (citing Cajun Elec. Power Coop. v. FERC, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (remanding a settlement agreement to FERC so that it may "consider the question afresh in light of the ambiguity that we see")).

262. *Id*. (citing Ameren Servs. Co. v. FERC, 330 F.3d 494, 498 (D.C. Cir. 2003)).

263. *Id.* (citing Koch Gateway Pipeline Co. v. FERC, 136 F.3d 810, 814-815 (D.C. Cir. 1998)).

264. *NextEra*, 852 F.3d at 1121 (quoting *Cajun*, 924 F.2d at 1136).

265. *Id.* at 1122. The pivotal provision, Article 11.4, provides that NextEra may receive CRRs as defined and as available under the CAISO Tariff "in lieu of a refund of the cost of Network Upgrades." FERC interpreted this to mean that NextEra may receive CRRs only if it is eligible for a refund for a Network Upgrade; but, since the Interim Project did not qualify has a Network Upgrade, it was not eligible for a refund for a Network Upgrade or CRRs. The Court, however, reasoned that Article 11.4 only clearly forecloses receipt of both CRRs and a refund for Network Upgrades. The phrase "in lieu of" does not unambiguously mean that Network Upgrades are the only means to obtain CRRs; indeed, NextEra argued that section 36.11 of the CAISO tariff provided

of its interpretation of the interconnection agreement.[266] On appeal, intervenors addressed and attempted to debunk NextEra's tariff argument.[267] Invoking the *Chenery* doctrine, the D.C. Circuit declared that "[w]hatever the merits of [intervenors'] argument, it is a well-worn principle that 'reviewing courts may affirm [an agency order] based only on reasoning set forth by the agency itself.'"[268] Writing for the court, Judge Tatel explained how both *Chenery* and *Chevron* honor agency expertise:

> Hardly a fussy insistence that the agency show its work, this doctrine reflects the respect courts have for agency expertise. Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze the relevant contracts, and because the Commission has greater technical expertise in this field than does the Court, we accord deference to the Commission's interpretation[s]. . . . As such, it is altogether appropriate that we decline to reach issues of tariff interpretation without first receiving the benefit of FERC's considered judgment.[269]

While FERC acknowledged that D.C. Circuit precedent requires remand when its decision rests on the erroneous conclusion that a tariff is unambiguous, it nevertheless asserted that the court may "deny the petition based on an alternative *Chevron* step 2 analysis . . . in its order denying rehearing."[270] Unable to discern the *Chevron* step 2 analysis "lurk[ing]" in the rehearing order, the court was not persuaded that FERC recognized the ambiguity that the court had identified.[271] Echoing *State Farm*, the D.C. Circuit added that, "even if we were to consider FERC's alternative analysis, we would conclude that the Commission 'fail[ed] to provide an intelligible explanation' for its decision, which 'amounts to a failure to engage in reasoned decisionmaking.'"[272]

3. Limits of Step 1.5

Another recent (albeit unpublished) D.C. Circuit opinion indicates that, when both sides argue that an agreement is clear, but arrive at opposite conclusions over what the agreement clearly means, and no party argues in the alternative that the contract is ambiguous and invokes *Chevron* step 1.5, then the D.C. Circuit may determine *de novo* under *Chevron* step 1 which party had the better reading.[273] The lesson here is that access to *Chevron* step 1.5 is not guaranteed, even in the

another way to obtain CRRs for the Interim Project, but FERC dismissed this argument as "inapposite" and "irrelevant" without further explanation. *Id.* at 1122.

266. *Id.* Specifically, the Commission expressly declined to address whether NextEra would otherwise be entitled to CRRs because it meets the qualification for merchant transmission project sponsor under section 36.11 of the CAISO tariff, reasoning that section 36.11 is "inapposite" and "does not apply" to the interim project. 151 F.E.R.C. ¶ 61,198 at P 24.

267. *NextEra*, 852 F.3d at 1122-23.

268. *Id.* at 1122.

269. *Id.* at 1122-23 (internal quotations and citations omitted).

270. *Id.* at 1123. FERC tried to rely on *ODEC*, 518 F.3d at 47-48, arguing that even though it had labeled the interconnection agreement as clear and unambiguous, its consideration of extrinsic evidence (CAISO tariff) on rehearing indicated that it had considered the possibility the language might be ambiguous.

271. *NextEra*, 852 F.3d at 1123.

272. *Id.* (quoting *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 448 (D.C. Cir. 2005)).

273. Transmission Agency of Cal. v. FERC, No. 15-1057, Slip Op. at 3 (D.C. Cir. 2017) ("With both sides maintaining that the contract is clear on its face, our only task is to determine *de novo* which has the better reading").

D.C. Circuit, so if the agency wishes to improve the odds that its interpretation will prevail, it is probably better off either arguing in the alternative (that is, that the statute is clear, but if not, its interpretation would nevertheless remain the same) or that the statute is ambiguous. The challenging party is likely best served arguing that the statute is clear because, if the court agrees, it will interpret it afresh, at least raising the odds that the party's interpretation, rather than the agency's interpretation, will prevail.

D. Chevron Step Zero: Does Chevron Even Apply? (Major Question? Informal Interpretation?)[274]

1. Overview

Like *Chevron* step 1.5, not every court, justice, or judge dances the step zero.[275] Step zero refers to a preliminary assessment whether the court should even apply the *Chevron* framework to the agency's statutory interpretation.[276] There are two relatively distinct lines of step zero precedent, one involving "major questions" and the other inquiring whether the agency's issuance has the force of law.[277] The first, jazzy, controversial line of step zero precedent involves major questions of great economic and political significance.[278] For major questions (usually addressed in major rules), the Supreme Court carves out an exception to *Chevron*'s presumption that Congress has authorized the agency to resolve a statutory ambiguity.[279] To issue a major rule addressing a major question that has great economic and political significance, the Court requires the agency to possess express statutory authorization; implied authorization is insufficient.[280] Major

274. Thomas W. Merrill & Kristen E. Hickman, *Chevron's Domain*, 85 GEO. L.J. 833, 835 (2001) (coined the moniker "step zero").

275. For example, Justices Roberts and Breyer ascribe to it; Justice Scalia did not. *See, e.g., City of Arlington*, 569 U.S. at 306 ("[T]he dissent proposes that even when general rulemaking authority is clear, *every* agency rule must be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion. It offers no standards to guide this open-ended hunt for Congressional intent"). *See also id.* at 310 (stating that when the statute is ambiguous, "the judge will ask whether Congress would have intended the agency to resolve the resulting ambiguity" (Breyer, J., concurring in part and concurring in the judgment)); *id.* at 326 ("My point is simply that before a court can defer to the agency's interpretation of the ambiguous terms in either Act, it must determine for itself that Congress has delegated authority to the agency to issue those interpretations with the force of law" (Roberts, C.J., dissenting)). Moreover, the confusion surrounding step zero analysis appears to have driven some circuit courts to avoid *Chevron* analysis. *See generally* Bressman, *supra* note 4, at 1464-66; Brookins, *supra* note 10, at 2, 14-23.

276. *See* Merrill & Hickman, *supra* note 274, at 873 ("Somewhat fancifully" the threshold inquiry whether the court should apply the *Chevron* framework can be called step zero); *see id.* at 856 (identifying numerous questions regarding the scope of the *Chevron* framework's applicability).

277. Christenson v. Harris Cty., 529 U.S. 576, 587 (2001).

278. *U.S. Telecom Ass'n*, 855 F.3d. at 383.

279. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288 (2016). Professor Eskridge explains that the "Supreme Court has carved out a potentially important exception to delegation, the major questions canon. Even if Congress has delegated an agency general rulemaking or adjudicator power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions." *Id.*

280. The major questions (or major rules) doctrine "is said to embody the following understanding about the scope of agencies' delegated authority: while agencies are generally assumed to possess authority under [*Chevron*] to issue rules resolving statutory ambiguities, an agency can issue a major rule – i.e, one of great

questions include regulating cigarettes,[281] banning physician-assisted suicide,[282] eliminating telecommunications rate filing requirements,[283] sweeping regulation of greenhouse gas emissions,[284] and providing tax credits for individuals in states with federal health insurance exchanges.[285] The second line of precedent involves evaluating the degree of formality of the agency's interpretation and deciding which types of agency actions warrant *Chevron* deference and which do not.[286] We will examine each of these distinct lines of precedent in turn.

2. Major Questions Doctrine

At *Chevron* step zero, the court asks "whether the *Chevron* framework applies at all or whether instead the lack of clarity in a statute should be treated as calling for judicial rather than agency clarification."[287] As major question doctrine adherents explain, the court applies the *Chevron* framework to ordinary agency rules,[288] and *Chevron* step 2 deference applies to reasonable, authoritative agency interpretations of statutes that they administer.[289] *Chevron* deference rests on the (ostensibly irrebuttable) presumption that Congress delegated authority to the agency to interpret statutory ambiguities.[290] As we have discussed, "a statutory ambiguity or gap reflects Congress's implicit delegation of authority for the agency to make policy and issue rules within the reasonable range of the statutory ambiguity or gap."[291] However, "in a narrow class of cases" involving major questions of "great economic and political significance" (usually addressed in major agency rules), the Supreme Court has applied a countervailing canon, which constrains the agency and, some argue, helps maintain the Constitution's separation of powers.[292] For major questions, at step zero, the court independently evaluates whether Congress actually (and not presumably) "delegated to the agency the authority to interpret" the statutory ambiguity in question before deferring to the

economic and political significance – only if it has clear congressional authorization to do so." *U.S. Telecom Ass'n*, 855 F.3d at 383 (citing *id.* at 418-19 (Kavanaugh, J., dissenting)).

281. *Brown & Williamson*, 529 U.S. at 159, 160 (citing Stephen J. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 370 (1986)).

282. Gonzales v. Oregon, 546 U.S. 243, 262 (2006).

283. *MCI*., 512 U.S. at 231.

284. UARG, 134 S. Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159, 160 (citation omitted)).

285. *King*, 135 S.Ct. at 2489.

286. Merrill & Hickman, *supra* note 274, at 858.

287. Michael Dorf, *The Triumph of Chevron Step Zero*, DORF ON LAW (July 27, 2015), http://www.dorfonlaw.org/2015/07/the-triumph-of-chevron-step-zero.html.

288. *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

289. *Id.*

290. *Smiley*, 517 U.S. at 740-741 ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"). *See, e.g., City of Arlington*, 569 U.S. at 296 ("*Chevron* [deference] is rooted in a background presumption of congressional intent"); *Mead*, 533 U.S. at 241 ("The doctrine of *Chevron* – that all *authoritative* agency interpretations of statutes they are charged with administering deserve deference – was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches" (Scalia, J., dissenting)).

291. *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting).

292. *See generally id.*

agency's reasonable interpretation of the ambiguity.[293] To address a major question, pursuant to step zero, the agency must have *clear* Congressional authorization. If a statute only *ambiguously* supplies authority for the agency to address the major question by issuing a major rule, the rule is unlawful.[294]

The *Chevron* step zero premise is that because *Chevron* deference is based on and legitimized by Congressional delegation of interpretive authority, an agency's interpretation warrants deference only if Congress has delegated authority to interpret definitively a particular ambiguity in a particular manner.[295] Chief Justice Roberts asserts that *Chevron* step zero is consistent with the *Chevron* opinion because "*Chevron*'s rule of deference was based on – and limited by – Congressional delegation."[296]

The rationale for step zero is as follows: the court gives "binding deference to permissible agency interpretations of statutory ambiguities because Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'"[297] Agencies, as creatures of Congress, have no authority to act unless Congress authorizes them to do so by statute.[298] Accordingly, at step zero, the court searches for proof that Congress has authorized the agency to interpret the ambiguity.[299] Judge Kavanaugh of the D.C. Circuit sums up the major questions doctrine (which he calls the major rules doctrine) this way:

> In short, while the *Chevron* doctrine allows an agency to rely on statutory ambiguity to issue ordinary rules, the major rules [or major questions] doctrine *prevents* an agency from relying on statutory ambiguity to issue major rules.[300]

According to Judge Kavanaugh, the major questions doctrine is based on "two overlapping and reinforcing presumptions:" (1) a presumption against the delegation of major lawmaking authority from Congress to the executive branch, which is based on separation of powers; and (2) a presumption that Congress intends to make its own policy decisions and not delegate those decisions to agencies to decide.[301] Professor Eskridge asserts that the chief reason for the major questions doctrine "is the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those policies."[302] He asserts that this presumption in favor of continuity is consistent with

293. *City of Arlington*, 569 U.S. at 317; *see also id.* at 312 (Roberts, C.J., dissenting) ("A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference"); *see also id.* at 317 (stating that "before a court may grant . . . deference, it must on its own decide whether Congress – the branch vested with lawmaking authority under the Constitution – has in fact delegated to the agency lawmaking power over the ambiguity at issue"). *See also id.* ("[A] precondition to deference under *Chevron* is a congressional delegation of administrative authority," which, according to the major questions doctrine, only the court can discern.).

294. *U.S. Telcom Ass'n*, 855 F.3d at 419.

295. *City of Arlington*, 569 U.S. at 325.

296. *Id.* at 318.

297. *Id.* at 317.

298. *Id.* at 317.

299. *Id.*

300. *U.S. Telecom Ass'n*, 855 U.S. at 419.

301. *Id.*

302. Eskridge, *supra* note 279, at 288.

democratic values: Congress should make major policy changes because legislation pursuant to U.S. Const. Article 1, section 7 is the most democratically accountable process.[303] Additionally, the *Chevron* step zero "major questions" line of precedent reflects distrust of *Chevron*'s presumed delegation. This distrust stems, at least in part, from concern over agencies' vast power.[304] *Chevron* deference is premised on the notion that it is appropriate for agencies to resolve competing interests and make policy choices because, even if agencies are not directly accountable to the people, the President is.[305] *Chevron* step zero reflects the (realistic) concern that "with hundreds of federal agencies poking into every nook and cranny of daily life," Presidential oversight is not always an effective check.[306] Step zero further recognizes that agency power is amplified by *Chevron* deference, which broadly applies to all ambiguities, large and small, technical or not.[307] Today, agencies have many opportunities to interpret gaps or ambiguities and in so doing make law and further aggrandize the power they exercise over many aspects of life. To counteract this state of affairs, at step zero, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved."[308] Rather, the court must first independently decide whether Congress intended to delegate to the agency the authority to interpret the ambiguity.[309]

A major question associated with the major questions doctrine is how the court discerns which issues are major questions of great economic and political significance. There is no bright-line test to identify major questions.[310] The Supreme Court has indicated that a variety of factors are relevant, such as: (1) the financial impact on regulated and affected entities,[311] the overall impact on the economy,[312] the number of people impacted,[313] and the amount of Congressional and public attention to the issue.[314] Additionally, relying on an old statute as the

303. *Id.*

304. *City of Arlington*, 569 U.S. at 313.

305. *Chevron*, 467 U.S. at 865-66.

306. *City of Arlington*, 569 U.S. at 315.

307. "When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations are often ambiguous – expressing "a mood rather than a message." *Id*. at 312 (Roberts, C.J., dissenting) (quoting Harry Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1311 (1962)).

308. *Gonzales*, 546 U.S. at 258. *Chevron* step zero reflects the view that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill." *City of Arlington*, 569 U.S. at 308-09 (Breyer, J., concurring).

309. *See generally Gonzales*, 546 U.S. at 258.

310. *U.S. Telecom Ass'n*, 855 F.3d at 422 (Kavanaugh, J., dissenting).

311. *UARG*, 134 S. Ct. at 2443-44 (EPA's regulation would impose steep compliance costs on millions of previously unregulated greenhouse gas emitters).

312. *See King*, 135 S. Ct. at 2492-93 (discussing how tax credits for individuals on federal exchanges are necessary to make health insurance affordable and how health insurance is a billion-dollar industry. D.C. Circuit Justice Kavanaugh also used this argument as one reason to justify labeling net neutrality a major question: "The financial impact of the rule – in terms of the portion of the economy affected, as well as the impact on investment in infrastructure, content, and business – is staggering."). *U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh J., dissenting).

313. *See King*, 135 S. Ct. at 2487 (noting number of states that established federal exchanges).

314. *Gonzales*, 546 U.S. at 267 (physician assisted suicide is an issue of "earnest and profound debate" in this nation).

source of a new interpretation is suspect.[315] This rule of thumb is anathema to orthodox *Chevron* doctrine, which champions reinterpretation of ambiguous statues, provided the new interpretations are justified. Viewing new interpretations of old statutes with enhanced skepticism reinvigorates a pre-*Chevron* predilection for deferring to longstanding, unchanging, agency interpretations.[316]

Justice Breyer, arguably the originator of the major questions doctrine,[317] has suggested that "sometimes" context-specific factors prove relevant.[318] He asserts that the same context-specific factors that "are relevant in determining whether the statute is ambiguous . . . can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law."[319] These factors are statutory text, context, "structure of the statutory scheme, and canons of textual construction."[320] Among other factors that the court may consider are the following: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time;" and "[t]he subject matter of the relevant provision – for instance, its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority – has also proved relevant."[321] These factors reprise pre-*Chevron* precedent.

315. *See, e.g., U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting) ("Court's concern about an agency's issuance of a seemingly major rule is heightened, moreover, when an agency relies on a long extant statute to support the agency's bold new assertion of regulatory authority.") (citing *UARG*, 134 S. Ct. at 2444); *see also Brown & Williamson*, 529 U.S. at 126-27 (Food and Drug Administration's interpretation of existing statute as source of authority to regulate tobacco would give it expansive authority over the tobacco industry, which was previously unregulated under the statute); *MCI*, 512 U.S. at 230 (rate-filing requirements are "utterly central" to the statutory scheme of the Communications Act). *See also* Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399h (2012).

Indeed, a key challenge to EPA's 2015 Clean Power Plan (the familiar name for EPA's final rule entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric General Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015)) is that it relies on a relatively obscure provision of the Clean Air Act, section 111(d), to "aggressively transform" the domestic energy industry, without clear Congressional authorization. *See* Pet'rs' Opening Br. on Core Issues at 3, West Virginia, et al. v. EPA, Docket No. 15-1363 (filed D.C. Cir. Feb. 15, 2016) ("Frustrated with Congress, EPA now purports to have discovered sweeping authority in section 111(d) of the Clean Air Act – a provision that has been used only five times in 45 years – to issue a [Clean Power Plan] that forces States to fundamentally alter electricity generation throughout the country."). Petitioners argue that the Clean Power Plan is "precisely the kind of 'transformative expansion in EPA's regulatory authority' based on a 'long-extant statute' that requires 'clear congressional authorization.'" *Id.* at 23 (quoting *UARG*, 134 S. Ct. at 2444; *King*, 135 S. Ct. at 2489).

316. *See Barnhart*, 535 U.S. at 226 (Scalia, J., concurring in part) (critiquing notion that "'particular deference'" is owed a "'longstanding'" agency interpretation as "an anachronism – a relic of the pre-*Chevron* days when there was thought to be only one 'correct' interpretation of a statutory text"); *see also* Richard J. Pierce, 84 GEO. WASH. L. REV. 1293, 1302 & nn.61-62 (Sep. 2016) (highlighting Scalia's concurrence in *Barnhart*, which criticized majority's reference to "longstanding" agency interpretation as anachronistic and pointed out that "the *Chevron* case itself was a recent change from a prior interpretation") (citing *Barnhart*, 535 U.S. at 225) (Scalia, J., concurring)).

317. *See* Stephen J. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 370 (1986).

318. *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring).

319. *Id.* at 309.

320. *Id.* at 389 (Breyer, J., concurring).

321. *Barnhart*, 535 U.S. at 222; *City of Arlington*, 569 U.S. at 309 (Breyer, J., concurring).

Chevron step zero first emerged in cases in which the court struck down administrative interpretation of statutes.[322] While ostensibly decided at *Chevron* step 1, *FDA v. Brown & Williamson Tobacco* presaged the advent of *Chevron* step zero and the major questions exception to the *Chevron* doctrine.[323] In *Brown & Williamson*, a 5-4 majority Court affirmed the Fourth Circuit's decision to invalidate FDA regulations issued under the Food, Drug and Cosmetic Act (FDCA) governing tobacco marketing.[324] The Court affirmed on the basis that Congress had not delegated authority to the FDA to regulate tobacco products under the FDCA.[325] Justice O'Connor, writing for the Court, explained that while "agencies are generally entitled to deference in the interpretation of statutes that they administer," Congress "clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[326] The Court held that FDA lacked jurisdiction to regulate tobacco under the FDCA based on "the intent that Congress has expressed in the [] overall regulatory scheme and in the [FDCA's] tobacco-specific legislation that it has enacted subsequent to the FDCA."[327]

This pre-*Mead* (and pre-recognition of *Chevron* step zero) case purported to reach its determination under *Chevron* step 1, articulating an exception to *Chevron* that precluded deference.[328] Under *Chevron*, deference to an agency's reasonable interpretation of a statute it administers is premised on the notion that Congress implicitly delegated to the agency the authority to interpret the statutory gaps or ambiguity.[329] The Court held that in "extraordinary cases, [] there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[330] The Court found that *Brown & Williamson* was "hardly an ordinary case" based on the tobacco industry's important economic role, the FDA's history of restraint in this field, and the distinct regulatory scheme Congress established for tobacco products.[331] In sum, this case laid the foundation for the "major questions" doctrine.[332] Chief Justice Roberts drew from this line of reasoning in his *City of Arlington* dissent and his majority opinion in *King v. Burwell*.[333]

322. *See generally City of Arlington*, 569 U.S. 290; *see also Brown & Williamson*, 529 U.S. 120.

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

324. *Id.* at 161.

325. *Id.* at 160-61.

326. *Id.* at 125-26 (citing *Chevron*, 467 U.S. at 842-843).

327. *Brown & Williamson*, 529 U.S. at 126.

328. *Id.* at 142 ("Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction"); *id.* at 156 ("[I]t is clear that Congress' tobacco-specific legislation has effectively ratified the FDA's previous position that it lack jurisdiction to regulate tobacco"); *id.* at 161 ("Reading the FDCA as a whole, as well as in conjunction with Congress' subsequent tobacco-specific legislation, it is plain that Congress has not given the FDA the authority that it seeks to exercise here").

329. *Id.* at 159.

330. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration")).

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

332. *See generally id.*

333. *See generally City of Arlington*, 569 U.S. at 312-28; *see generally King*, 135 S. Ct. at 2488-89.

3. Informal Agency Actions

In addition to the "major questions" doctrine, a second line of step zero precedent – the *Christensen-Mead-Barnhart* trilogy – focuses on the scope of deference for informal agency actions.[334] Informal agency actions are those that do not involve formal adjudication or notice and comment rulemakings (so-called non-legislative rules).[335] Examples of informal agency actions that would fall under this *Chevron*-related inquiry include interpretations contained in opinion letters, policy statements, agency manuals and enforcement guidelines, informal adjudications and amicus briefs.[336]

In *Christensen*, the Supreme Court considered whether an opinion letter signed by the acting director of the Department of Labor's Wage and Hour division warranted *Chevron* deference.[337] The Court held that "[in]terpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."[338] Instead, they should be accorded *Skidmore* deference.[339]

"*Skidmore* is [a] less deferential [standard] than *Chevron*."[340] *Skidmore* accords agency interpretations deference "to the extent [they] ha[ve] the 'power to persuade.'"[341] In turn, whether an interpretation carries the power to persuade is contingent on the following factors: "the thoroughness evident in [the agency's] 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."[342] *Skidmore* is a sliding scale pursuant to which deference varies, depending on consideration of these various factors.[343]

Christensen seems to have announced that agency interpretations imbued with the force of law (that is, rules issued pursuant to notice and comment rulemakings and decisions in formal adjudications) receive *Chevron* deference and all others receive *Skidmore* deference.[344] The clarity of that declaration was obscured one year later by the Supreme Court's ruling in *Mead*.[345]

334. *See generally Christensen*, 529 U.S. 576; *see also Mead*, 533 U.S. 218; *see also Barnhart*, 533 U.S. 212.

335. INFORMAL AGENCY ACTION, http://dictionary.findlaw.com/definition/informal-agency-action.html (last visited Oct. 7, 2017).

336. *See, e.g., Christensen*, 529 U.S. at 587.

337. *Id.*

338. *Id.*

339. *See, e.g.,* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

340. Hickman & Krueger, *supra* note 13, at 1235, 1237; *see also* Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1109-16 (*Skidmore* is "weak deference" and a "lesser degree of deference than *Chevron*").

341. Hickman & Krueger, *supra* note 13, at 1245; *see also Skidmore*, 323 U.S. at 140.

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

343. Hickman & Krueger, *supra* note 13, at 1236-37, 1237 n.3 ("*Skidmore* called upon reviewing courts to assess multiple factors to decide on a case-by-case basis what deference, if any, to afford agency legal interpretations").

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

345. Hickman & Krueger, *supra* note 13, at 1237.

The issue in *Mead* was "whether a tariff classification . . . by the United States Customs Service [should receive] *Chevron* deference."[346] Specifically, Mead Corporation challenged a United States Custom Service ruling that classified the corporation's day planners as "diaries, notebooks and address books, bound . . . [making them] subject to a [4%] tariff."[347] The Supreme Court stated that the "category of interpretive choices" to which *Chevron* deference applies is defined by Congressional intent.[348] The Court held that Customs Service or any "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[349] The Court did not defer to the Customs Service's views but instead determined that Congress had not delegated interpretive authority to the Customs Service to definitively construe the tariff schedule.[350] In the Court's view, neither the statutory authorization for the classification rulings, nor the agency's practice in issuing rulings, reasonably suggested that Congress ever thought of such classification as deserving deference.[351] In the absence of such a delegation, the Supreme Court concluded that the interpretations adopted in those rulings were "beyond the *Chevron* pale."[352] *Mead* was confusing, though, because the Court stated (in dicta) that "the fact that the tariff classification . . . was not a product of [] formal [rulemaking] process does not alone . . . bar the application of *Chevron*."[353] Plus, it vacated and remanded the Customs ruling because, while lacking the force of law, it may have the "power to persuade" under *Skidmore*.[354] These statements undercut the bright line test that *Christensen* had seemed to draw, exempting informal agency actions from *Chevron* (or *Auer*) deference.

The following year, in *Barnhart*, the Supreme Court addressed the question of whether to accord *Chevron* deference to the Social Security Administration's definition of the term "disability" in regulations that it promulgated pursuant to a formal notice and comment rulemaking proceeding.[355] Citing *Chevron*, the Court upheld the regulations as statutory interpretations that fell within the agency's interpretive authority.[356] Additionally, because the agency had originally disclosed its interpretation through less formal, non-rulemaking proceedings, the Court also attempted to clarify (in dicta) that *Mead* had denied the suggestion in *Christensen*

346. *Mead*, 533 U.S. at 221.

347. *Id.* at 224.

348. *Id.* at 229.

349. *Id.* at 226-27.

350. *Id.* at 231-33.

351. *Id.* at 234.

352. *Id.*

353. *Id.* at 231.

354. *Id.* at 220, 227, 235 (noting that "the regulatory scheme is highly detailed" and Customs has specialized experience that can bear on the subtle questions in this case).

355. *Barnhart*, 535 U.S. at 217-18. The agency formalized its longstanding interpretation in a formal regulation after the litigation commenced.

356. *Id.* at 221.

that agency interpretations derived from less formal process would never be entitled to *Chevron* deference.[357] The Court pointed out that *Mead* had indicated that deference depends "in significant part upon the interpretive method used and the nature of the question at issue."[358] Plus, "[*Mead*] had discussed at length why *Chevron* did not require deference in the circumstances" of that particular case, "a discussion that would have been superfluous had the presence or absence of notice-and-comment rulemaking been dispositive."[359] Finally, before according the interpretations *Chevron* deference and sustaining them, the Court engaged in its independent, step zero evaluation of a variety of factors that it deemed relevant to that particular case, reprising some factors the Court had examined pre-*Chevron*.[360]

4. Illustrative Cases

MCI involved the Communications Act of 1934, which gave the FCC authority to "modify" rate-filing requirements.[361] The FCC issued a rule exempting certain telephone companies from all rate-filing requirements.[362] Concluding that the FCC's authority to modify statutory requirements was not broad enough to allow the FCC to eliminate them entirely, the Court vitiated the rule.[363] In the Court's view, it was "highly unlikely" that Congress would leave to the agency's discretion "the determination of whether an industry will be entirely, or even substantially, rate regulated."[364]

Gonzales v. Oregon involved the Controlled Substances Act, which gave the Attorney General authority to deregister physicians, if the Attorney General concludes that de-registration is in the public interest.[365] Deregistration would preclude deregistered physicians from issuing prescriptions for certain drugs. The Attorney General issued an interpretive rule of the Controlled Substances Act, declaring that physicians could not prescribe controlled substances for assisted suicides.[366] "Oregon became the first [s]tate to legalize assisted suicide when" it passed the Death With Dignity Act in 1994.[367] Physician assisted suicide was a subject of national "earnest and profound debate," which invites the major questions doctrine.[368] In a 6-3 decision, the *Gonzales* Court held that an interpretive ruling by the Attorney General is not entitled to *Chevron* deference because it was

357. *Id.*

358. *Id.*

359. *Id.*

360. *See, e.g., id.* at 222.

361. *MCI*, 512 U.S. at 220.

362. *Id.* at 222.

363. *Id.* at 223-34.

364. *Id.* at 231.

365. *See generally Gonazles*, 546 U.S.

366. Because the case involved interpretation of an existing rule, it was not a formal rulemaking, but rather implicated Auer deference. The Court evaluated the issue under both *Auer* and *Chevron*. *Id.*

367. *Gonzales*, 546 U.S. at 249.

368. *Id.* at 255-56, 267 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

beyond the scope of the official's statutory authority.[369] The precise question before the Court was "whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."[370] The Attorney General, however, interpreted the phrase "legitimate medical purpose" in the Controlled Substance Act and its implementing regulations as allowing him to issue regulations that prevented prescribing and dispensing controlled substances for assisting suicide.[371] The Attorney General claimed his interpretation was reasonable under *Chevron* step 2.[372] No one disputed the ambiguity of the phrase "legitimate medical purpose."[373] The Court stated, however, that the regulation advancing the interpretation of "legitimate medical purpose" must have been promulgated pursuant to authority Congress delegated to the official.[374] Under the Controlled Substances Act, Congress delegated to the Attorney General specific authority to issue regulations "relating to the registration and control of the manufacture, distribution and dispensing of controlled substances," or "for the efficient execution of his functions under [the Act]."[375] The Court independently reviewed the text, structure and purpose of the statute, ultimately concluding that "legitimate medical purpose" did not fall under either delegation:

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Id.* at 267 (citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").[376]

Because the regulation "was not promulgated pursuant to the Attorney General's authority," the majority did not give its interpretation of "legitimate medical purpose" *Chevron* deference.[377] Applying the fallback *Skidmore* factors, the Court stated that deference in this case was tempered by the Attorney General's lack of

369. *Id.* at 268. The Court also held that the interpretive ruling was not entitled to deference under *Auer* (administrative rule interpreting the issuing agency's own ambiguous regulation may receive substantial deference; *Auer*, 519 U.S. at 461-63) for three reasons: first, because the language of the regulation that the Attorney General interpreted parroted the statute, so it shed no light on the central issue in the case; second, because "the regulation was enacted before [the] amendments [that gave the Attorney General authority to register and deregister physicians based on the public interest], the [i]nterpretive [r]ule cannot be justified as indicative of some intent the Attorney General had [when issuing the regulation];" and third, the current interpretation is counter to the intent at the time the regulation was promulgated. *Gonzales*, 546 U.S. at 256-58.

370. *Gonzales*, 546 U.S. at 248-49.

371. *Id.*

372. *Id.* at 254.

373. *Id.* at 255.

374. *Id.* at 268.

375. 21 U.S.C. §§ 821, 871(b) (1970).

376. *Gonzales*, 546 U.S. at 269.

377. *Id.* at 268.

expertise in this area and apparent failure to consult with anyone outside the Department of Justice, who might aid in a reasoned judgment.[378] The Court stated that, under *Skidmore*, it "follow[s] an agency's rule only to the extent it is persuasive," and found the rule unpersuasive.[379] Accordingly, the Court struck down the interpretive rule, explaining that it "would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside the course of professional practice.[380]

Justice Scalia, joined by Justices Roberts and Thomas, dissented, insisting that the Attorney General's interpretation should be entitled to deference: "[i]f the [phrase] '*legitimate* medical purpose' has any meaning, it surely excludes the prescription of drugs to produce death."[381]

While *Chevron* step zero first emerged in cases like *Mead*, in which the court struck down administrative interpretations of statutes, more recently, *Chevron* step zero has been used in cases upholding agency interpretation of statutes. A prime example of this is *King v. Burwell*, which is quintessential *Chevron* step zero.[382] The Affordable Care Act (ACA) provides for purchase of health insurance on exchanges that may be run by either the state or by the federal government.[383] It also authorizes a tax credit for low and middle-income participants who purchase insurance on the exchanges.[384] The Treasury Department issued a regulation (erroneously referred to as the Internal Revenue Service (IRS) regulation in the court opinions) making the tax credit available to all eligible participants, regardless whether they purchased insurance on a state-run or federally-run exchange.[385] In *King*, the question before the Court was whether the statute authorized the IRS to create a regulation extending the tax credits the ACA expressly authorized for state

378. *Id.* ("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") (quoting *Skidmore*, 323 U.S. at 140).

379. *Id.* at 269. Combining precedent, the Court set forth the following step zero standard for evaluating the interpretive rule:

> An administrative rule may receive substantial deference if it interprets the issuing agency's own ambiguous regulation. An interpretation of an ambiguous statute may also receive substantial deference. Deference in accordance with *Chevron*, however, is warranted only "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." Otherwise, the interpretation is "entitled to respect" only to the extent it has the "power to persuade." *Id.* at 255-56 (internal citations omitted).

380. *Id.* at 262; *see also id.* at 267 ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substance Act's] registration provision is not sustainable.").

381. *Gonzales*, 546 U.S. at 299 (Scalia, J., dissenting).

382. *See generally King*, 135 S. Ct.

383. *Id.* at 2482.

384. *Id.*

385. *Id.* at 2480. *See* Treas. Reg. § 1.36B-2 (2012); *see also* Leandra Lederman & Joseph C. Dugan, *King v. Burwell: What Does it Portend for Chevron's Domain?*, 2015 PEPP. L. REV. 72, 73 n.7 (noting that the Treasury Department issued the regulation, which the Eastern District of Virginia, Fourth Circuit and Supreme Court mistakenly refer to as the IRS regulation).

exchanges to federal exchanges as well.[386] In an opinion authored by Chief Justice Roberts, the Court said yes, the ACA allows tax credits to be made available to individuals in states utilizing a federally-run exchange, as well as to those using a state-run exchange.[387] First, the Court determined that the pertinent statutory phrase (the source of the agency rulemaking) "an Exchange established by the State" is ambiguous.[388] The Court did not, however, defer to the IRS' interpretation of the statutory ambiguity under *Chevron* step 2.[389] Instead, at *Chevron* step zero, the Court decided that Congress did not delegate authority to the IRS to determine whether the tax credits are available through both state-created and federally-created exchanges.[390] Reprising the *Chevron* step zero theme that Congressional intent is not lightly presumed for major matters, the Court reasoned:

> Whether those credits are available on Federal Exchanges is thus a question of *deep* "*economic and political significance*" that is *central to this statutory scheme*; had Congress wished to assign that question to an agency, it surely would have done so expressly. . . . It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.[391]

Accordingly, the Court instead independently reviewed the broader text and structure of the ACA.[392] The Court concluded that when the plain language of the pertinent section is considered in the context of the statute as a whole, there is no meaningful difference between federally-created and state-created exchanges.[393] The Court further found that this interpretation is consistent with Congressional intent to cover as many people as possible, and holding otherwise would disrupt the interlocking reforms Congress put in place to achieve its objective of affordable health care for all Americans.[394]

First, why did the Court not find the statutory provision clear under *Chevron* step 1? The statutory text only refers to state exchanges.[395] If the Court had remanded to the agency under *Chevron* step 1, it would have been up to Congress to amend the statute, if it so chose, and expressly declare that it had intended for the credit to apply to both state and federal exchanges. However, the ACA had been difficult to enact, and by the time the case reached the Court, the composition of Congress had already changed dramatically (swung parties) and deadlock was

386. *King*, 135 S. Ct. at 2480.

387. *Id.* at 2482.

388. *Id.* at 2491.

389. *Id.* at 2480.

390. *Id.*. at 2489.

391. *Id.*

392. *Id.* at 2492-96.

393. *Id.* at 2489 (quoting *UARG*, 134 S. Ct. at 2444) (emphasis added).

394. *Id.* at 2493-94, 96; *see also id.* at 2496-507. Justice Scalia dissented, contending that the plain language of the statute clearly limits the tax credits to state-created exchanges, and chastising the Court for usurping its authority. Justice Scalia argued that the majority's use of context to justify an interpretation that directly conflicts with the clear meaning of the text distorts statutory interpretation and effectively rewrites the statute. Pointing out that some parts of the statute refer to both types of exchanges and some do not, he argued, based on canons of construction, that reading state-run into the salient provision of the statute fails to give effect to the provisions where Congress deliberately chose to conflate the two terms (federal and state) and those where it did not. He further argued that the majority's use of Congressional intent to support its holding erred by focusing on only one of the goals of the legislation to the exclusion of others.

395. 42 U.S.C. §§ 19031, 18041.

a daily phenomenon. How could a Congress that would not have passed the ACA in the first place be expected to provide the appropriate political check and act consistently with the intent of the ACA?[396] Possibly this was a consideration, although it is speculative. Next, why did the Court resist deferring to the agency's interpretation as reasonable under *Chevron* step 2? At first glance, it seems the answer could be that the Court did not afford deference because the IRS (Treasury) lacked health policy expertise. But the IRS (Treasury) regulation was actually based on (and exactly the same as) the Health and Human Services regulation's definition of "Exchange," which "includes insurance markets for qualified individuals 'regardless of whether the Exchange is established and operated by a State . . . or by HHS.'"[397] More profoundly, the Court could not imagine that Congress would delegate to the agency the authority to resolve this "ambiguity" that is so crucial to the success of the statutory endeavor.[398] The Court could not let Congress off the hook because it was a major question, and because Congress could not get its "act" together (pun intended), the Court "stepped" in to declare a definitive interpretation at step zero.[399] *King* locked in the Court's interpretation of the statute, preventing subsequent agency reinterpretation on this point.[400] Only Congress can change this ruling (and, despite repeated attempts in 2017, so far Congress has been unable to repeal and replace the ACA).[401]

396. *See generally* Medical Freedom Act of 2015, H.R. 1234, 114th Cong. (1st Sess. 2014); *see also* Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction at 23-37, *King v. Burwell*, 135 S. Ct. 2480 (2015) (some indication in the legislative history that the credit for state only was to encourage state exchanges); *see also* U.S. CONST. art. I, § 1 (Just as agencies reinterpret ambiguous provisions and pass new regulations, Congress can revise statutes by amending them – but it may be harder for Congress to reach consensus). Moreover, scholars continue to debate whether Congress intended to limit credits to state exchanges. *Compare* Timothy Stoltzfus Jost, *Yes, the Federal Exchange Can Offer Premium Tax Credits*, HEALTH REFORM WATCH (Sept. 11, 2011) (asserting that the limitation is a drafting error), http://www.healthreformwatch.com/2011/09/11/yes-the-federal-exchangecan-offerpremium-tax-credits *with* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 141-143, 150-51, 156 (arguing that the text, context and legislative history indicate Congress' intended to make credits and subsidies available solely through state-run Exchanges), http://scholarlycommons.law.case.edu/healthmatrix/vol23/iss1/23.

397. Lederman & Dugan, *supra* note 385, at 74 n.14. *See* 45 C.F.R. § 155.20 (2014) (providing that "Exchange" includes insurance markets for qualified individuals "regardless of whether the Exchange is established and operated by a State . . . or by HHS").

398. *King*, 135 S. Ct. at 2489. After framing the question, the Chief Justice quickly dispensed with *Chevron* analysis: "When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach 'is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.' This is one of those cases." *Id.* at 2488-89 (internal citations omitted) (quoting *Brown & Williamson*, 529 U.S. at 159). *King* relies on *Brown & Williamson*, which (pre-*Chevron*) freed the Court from assuming implicit delegation. The ACA, however, contained an explicit delegation.

399. *See generally King*, 135 S. Ct. at 2489-96.

400. *See generally id.*

401. Seung Min Kem et al., *GOP Already Eyeing Next Chance to Revive Obamacare Repeal*, POLITICO, http://www.politico.com/story/2017/09/25/obamacare-repeal-republicans-budget-243125 (last visited Oct. 12, 2017).

E. Debating the Merits of Chevron

Having examined how the *Chevron* steps operate, we will take a step back and examine the arguments that underlie the case for and against *Chevron* deference.

1. Anti-*Chevron*

The case against *Chevron* goes something like this: harking back to Montesquieu and Locke, the case against *Chevron* is primarily rooted in the separation of powers doctrine.[402] Focusing on the text and original meaning of the Constitution, Article III of the Constitution accords the judiciary the power to decide "*all* Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[403] *Marbury v. Madison*, interpreting the Constitution, held that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[404] The Constitution does not expressly authorize federal judges to delegate their power to interpret the law to other branches, and so, by interpreting ambiguities, agencies are improperly exercising the judicial function.[405] Moreover, separation of powers ensures that the executive branch that enforces the law is separate from the branch that has the final say over its interpretation.[406] Separation of powers enables the judiciary to serve as an effective check on the power of the other branches of government (Article I, Legislative; Article II, Executive).[407] Agencies, the "fourth branch," perform a quasi-legislative function when they issue rulemakings, and quasi-judicial function when they adjudicate individual cases, but their authority is derived from the executive branch.[408]

At the time the Constitution was ratified, the founding fathers could not have envisioned that the executive branch would burgeon into today's vast bureaucracy

402. See PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 347 (2017) (asserting that administrative law's consolidation of the three branches of government – collapsing the Constitution's separation of powers – threatens liberty by "depriv[ing] Americans of legislative and judicial processes, including much that is guaranteed in the Bill of Rights"); Thomas W. Merrill, *supra* note 34, at 998 (arguing that *Chevron* deference eliminates a crucial judicial check on administrative action); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994) ("The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body").

403. U.S. CONST. art. III, § 2 (emphasis added).

404. *Marbury*, 5 U.S. at 177; *see also* CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting).

405. *See generally* U.S. CONST. art. III.

406. *Gutierrez-Brizuela*, 834 F.3d at 1149 ("A government of diffused powers, [the founders] knew, is a government less capable of invading the liberties of the people" (Gorsuch, J., concurring)) (citing JAMES MADISON, THE FEDERALIST NO. 47 (1788) ("No political truth is . . . stamped with the authority of more enlightened patrons of liberty" than separation of powers)); *see also* ALEXANDER HAMILTON, THE FEDERALIST NO. 78 (1788) ("[L]iberty can have nothing to fear from the Judiciary alone" but "ha[s] everything to fear from [the] union" of the judicial and legislative functions).

407. *See generally* U.S. CONST. art. III.

408. *See* Cynthia Farina, *supra* note 141, at 455, 484, 500 (observing that *Chevron* deference shifts interpretive authority to the executive).

that pervades so many aspects of life. Agencies, *Chevron* skeptics argue, are issuing regulations that only tenuously relate to statutory authorization.[409] In so doing, they are actually making law, usurping Congress' Constitutional legislative function. The Constitution forbids Congress (like it forbids the judiciary) from delegating its authority to agencies (or anyone else).[410] Therefore, Congress, under the non-delegation clause of the Constitution, could not have delegated to the agency the authority to interpret statutory ambiguities. The rise of the modern administrative state has not changed the court's Constitutional duty to interpret all federal law.[411]

Even if Congress could have delegated its authority, it is unreasonable to assume that Congress delegated to agencies authority to interpret statutory ambiguities. Section 706 of the APA, which governs most agency action, instructs reviewing courts to "decide *all* relevant questions of law."[412] It also places the interpretation of statutes on par with the Constitution, and, since agencies do not receive deference for their Constitutional interpretations, section 706 of the APA indicates that Congress intended that courts would have the last word on statutory interpretation as well.[413] When the APA was passed, there was concern over the growing power of the agencies established in the New Deal era.[414] Accordingly, the APA was intended to recalibrate the balance of power among the three branches, by giving courts clear authority to evaluate agency decisions by ensuring that they are based on substantial evidence and not arbitrary and capricious.[415]

Finally, from a pragmatic perspective, *Chevron* is antithetical to the rule of law and fosters uncertainty. *Chevron* deference allows an agency to reverse its statutory interpretation completely, anytime, based on the shift of political winds, and still prevail in court if it can make a case that the change is "reasonable." Nothing in *Chevron* dictates how reasonableness is to be evaluated. Furthermore, allowing easy administrative flip-flops undermines the stability that business, government, and individuals need to plan their affairs. A new administration should not be able to make sweeping changes in law merely by having its new agency officials reinterpret it. Not only is this clearly usurping the legislative function, but, as a practical matter, particularly in this polarized political climate, agencies should not be able to change course with each new administration. Changing

409. *See generally id.*

410. *See generally* U.S. CONST. art. I, § 1.

411. *City of Arlington*, 569 U.S. at 316 ("The rise of the modern administrative state has not changed that duty [to say what the law is]" (Roberts, C.J., dissenting)).

412. 5 U.S.C. § 706 ("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" (emphasis added)). *See also* Duffy, *supra* note 147, at 193-94 (asserting that *Chevron* appears to conflict with section 706 of the APA).

413. *See* 5 U.S.C. § 706 (requiring the reviewing court to "interpret constitutional and statutory provisions"); United States v. Nixon, 418 U.S. 683, 703-05 (1974) (according no deference to agencies' construction of constitutional principle at stake).

414. Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 310 (1983). *See* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 452-53 (1986) (describing APA as compromise forged between New Deal Democrats with ardent faith in technocratic administration, on the one hand, and Republicans and conservative Democrats who feared rise of administrative absolutism, on the other).

415. 5 U.S.C. § 706(1), (2).

course leads to uncertainty and instability, undermining investor confidence and eroding faith in the rule of law. Also, Congress has had such difficulty passing legislation, it is no longer an adequate check on agency authority.

Granted, an individual judge may have a particular bias, but judges as a whole can make more rational statutory interpretations because they are tenured for life, and so more insulated from partisan conflict and regulatory capture. Moreover, because judges serve for life, appointments turn over only very gradually. Therefore, they are more stable in their views and less likely to be swayed for political gain than agency officials are.

The twin rationales supporting *Chevron* deference, agency expertise and political accountability, have an inherent tension. What happens when the agency experts' opinion differs from the President's policy goal? Courts are supposed to defer to agencies because of their relative expertise, but political pressure on the agency to interpret a statute in a certain way can muffle the agency experts' guidance. The agency is not directly answerable to the people, and thus is in danger of succumbing to Presidential pressure, and suppressing experts' advice to appease the President. Further problematic, agency expertise is simply assumed.

In sum, overturning *Chevron* would help restore the appropriate role of judges as interpreters of the law, curtail agency intrusion on Congressional legislative/policy-making authority, and check the dangerous concentration of power in the executive branch, as implemented through ever-expanding agencies.[416]

2. Pro-*Chevron*

And now, the case for *Chevron*. Perhaps ironically, the case for *Chevron* deference is also rooted, in part, in separation of powers.[417] Statutes inevitably have gaps and ambiguities – intentionally or unintentionally. No one can foresee all possible applications of a statute. For example, when it passed the FPA in 1935, Congress arguably could not have foreseen the advent of centralized markets or demand response.[418] Congress delegated authority to the agency to interpret the ambiguity because agencies, while not directly accountable to the public, are part of the executive branch, which is.[419] Congress delegated authority to the agency to interpret statutory ambiguity in recognition of the fact that resolving ambiguities means making policy choices, and judges, who are not politically accountable, are constitutionally tasked with interpreting laws, not making them.[420]

Practical considerations also support *Chevron* deference. Unlike judges, who tend to be generalists, agencies are specialized experts, entrusted by Congress to fulfill long-term objectives established in their respective governing statutes.[421]

416. New York v. United States, 342 U.S. 882, 884 (1951) (Black, J., dissenting) ("Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal").

417. *See generally The Two Faces of Chevron*, 120 HARV. L. REV. 1562 (2007).

418. J.B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783 (2015).

419. *Chevron*, 467 U.S. at 865-66.

420. *Id.* at 865.

421. *See, e.g.*, BREYER, *supra* note 31, at 105.

Agencies work with their respective core governing statutes on a daily basis, and they have to live with the consequences of their decisions – e.g., transmission for renewable resources is built or not, capacity markets provide sufficient compensation for resources to be constructed and remain in the market or not, electricity service is reliable or not, air pollution is harmful or it is not, water is potable or poisonous. At the end of the day, when the court has moved on to its next case, the agency will be judged – by the President, Congress, the Office of Management and Budget or the court of public opinion – on whether it has fulfilled its statutory mission.

Second, unlike individual judges, agency decisions are usually the result of group evaluation and consensus. Notwithstanding "groupthink" concerns, this approach nevertheless helps preclude any individual perspective or prejudice from skewing the interpretive decision.[422] At FERC, for example, significant issues are first thoroughly analyzed by teams of experts (lawyers, economists, engineers, accountants, biologists, geologists, archeologists), who work closely with the primary materials.[423] Next, these issues are reviewed through at least several layers of more experienced experts, discussed in meetings, memorialized in memos, until a recommendation or options are presented to the Commissioners for their consideration.[424] Through this process, the agency aims to ensure that it makes the best decision from a technical, legal and policy perspective.[425] As the former General Counsel of EPA has pointed out, an important consequence of *Chevron* is that it enhanced the role of technical experts within the agency to inform, and hopefully improve, policy decisions.[426] In stark contrast, thirteen different Courts of Appeals "would render the binding effect of agency rules [and adjudicative orders] unpredictable," undermining the "stabilizing purpose of *Chevron*."[427] If appellate judges do not adhere to *Chevron*, the excessive agency power *Chevron* naysayers fear "would be replaced by chaos."[428]

Third, even when deference is appropriate, courts do not simply rubber-stamp the agency's decisions. Rather, the court must evaluate the agency's reasonableness. This is a critical step, which Congress requires under the APA.[429] When the judge evaluates the reasonableness of the agency's interpretation, the judge is performing a judicial function at least as important as ferreting out an ambiguous statute's meaning. In judging the reasonableness of the agency's decision, the judge should not have to "reinvent the wheel" and search for expressly delegated

422. Groupthink is a term coined by Irving L. Janis in 1972 that refers to the psychological phenomenon that occurs when decisionmaking groups are pressured for unanimity, leading to suppression of disagreement, failure to thoughtfully consider alternatives, and irrational decisions. Scholars assert that groupthink is more likely when groups lack diversity, they are insulated from outside opinions, and decisionmaking rules are unclear. *See generally* PAUL HART, GROUPTHINK IN GOVERNMENT: A STUDY OF SMALL GROUPS AND POLICY FAILURE 4, 6-11(Johns Hopkins Univ. Press 1994).

423. Allison Murphy, Todd Hettenbach, & Thomas Olson, *The FERC Enforcement Process*, 35 ENERGY L.J. 283, 293 (2014).

424. *See generally id.*

425. *See generally id.*

426. *See generally* E. Donald Elliott, *supra* note 27, at 2.

427. *City of Arlington*, 569 U.S. at 307.

428. *Id.*

429. Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. OF LEGAL STUD. 85, 86 (2011).

authority, however. Doing so not only unravels the elegant solution that the *Chevron* framework provided, but invites judges to superimpose their policy opinions – to guess what Congress intended, without the benefit of institutional knowledge and expertise that the agency provides.

Allowing agencies to reinterpret ambiguous statutes, provided their interpretations are reasonable, enables the agency to remain nimble and adapt the law to changing circumstances. Particularly during periods when Congress is deadlocked, this flexibility makes it possible for government to continue to function.

The ultimate check is a democratic check (back to separation of powers). Congress delegates authority to the agency to interpret ambiguities and Congress provides a check on agency interpretations. If Congress disagrees with the agency's interpretation, Congress can pass a statute changing the law.[430] If Congress fails to amend the statute to invalidate the interpretation, or if the public does not approve of Congress or the administration's policies, the public can elect new representatives.

Finally, from a pragmatic perspective, *Chevron* reasonably allocates interpretive responsibility as between the agency and the court in a way that allows each to perform its key function – judge, interpreter, and agency policy-maker – and serve the public. As Justice Scalia mused:

> I tend to think, however, that in the long run *Chevron* will endure and be given its full scope – not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.[431]

3. Winning the *Chevron* Debate

Contrary to rising sentiment, *Chevron* deference does not abrogate the judicial branch's authority to interpret the law. At *Chevron* step 1, the reviewing court determines whether the statute is clear or ambiguous and establishes the range of possible interpretations when it is ambiguous.[432] At *Chevron* step 2, the court evaluates whether the agency's interpretation is reasonable.[433] The court examines whether the agency's interpretation is supported by the text, context and purpose of the statute, and whether, in accordance with APA section 706(2)(A), it has justified its interpretation as reasonable.[434] From a statutory perspective, the APA

430. Leon Friedman, *Overruling the Court*, AMERICAN PROSPECT (Dec. 19, 2001), http://prospect.org/article/overruling-court. Congress can also disagree with a court's interpretation. In *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158 (2009), the Ninth Circuit declared that the Federal Power Act prevented FERC from requiring non-jurisdictional entities to pay refunds. Congress subsequently amended the FPA to allow FERC to require non-jurisdictional entities to pay refunds in certain circumstances. *See* 16 U.S.C. § 824e(d) (2012) (non-jurisdictional entity subject to FERC refund authority if it voluntarily makes a short-term sale through an organized market that violates a FERC-approved tariff or other Commission rule in effect at the time of the transaction).

431. Scalia, *supra* note 11, at 521.

432. *Id.* at 515.

433. *Id.* at 516.

434. *Id.* at 515-16.

supports the position that judicial review need not be *de novo* in all circumstances.[435] The APA requires the court to interpret the law "to the extent necessary," which qualifies the breadth of review.[436] Because Congress has delegated authority to the agency to execute and therefore also interpret the statute, "to the extent necessary" encompasses allowing the court to defer to the agency's reasonable interpretation of an ambiguous statute, without violating the APA.[437] *Marbury v. Madison*, the case that established that courts are to interpret the law, also recognized that the judiciary should exercise restraint when it comes to political questions that have been vested in the political branches.[438] The Supreme Court has repeatedly (if not perfectly consistently) honored this political question exception to review.[439] Deference to the agency's reasonable interpretation of a statutory ambiguity is simply another context in which it is advisable that the court exercise judicial restraint – because Congress has delegated the legislative function of making policy choices and resolving ambiguities to agencies, not courts.[440]

Next, *Chevron* is practical. It provides a relatively straightforward rule of thumb.[441] Even though, as we have seen, reasonable judges can differ over whether a statute is clear or ambiguous, in either case, the court must still justify its opinion. *Chevron* also recognizes the value that the agency's quotidian familiarity with the statutes it administers can bring to bear on the interpretation of statutory ambiguities. Given the plethora of agencies and statutes, *de novo* review in all circumstances would present an enormous burden to judges. Not every proceeding is a Supreme Court case, with the luxury of amici and experts filing briefs and weighing in on complicated technical matters. It is perhaps not too farfetched to imagine that without *Chevron* deference, courts would need to hire a fleet of clerks who are experienced subject matter experts, ballooning into mini-agencies.

Finally, the beauty of *Chevron* is its flexibility. When a statutory ambiguity qualifies for *Chevron* deference, it can be reinterpreted (reasonably) to suit societal preferences and technical advances. This is "*Chevron*'s very point."[442] Flexibility is also linked to political accountability. Contrary to naysayers, *Chevron* does not permit the agency to change policy direction, willy-nilly, based on the "agency's mood at the moment," upsetting "settled expectations."[443] The agency's shifts are shaped by the elected officials who set policy and choose the agency's leaders to execute that policy, even if it means choosing among competing policy choices when interpreting the law. Granted, *Chevron* deference can be less appealing when deference supports an unpopular (or personally repugnant) interpretation/

435. *See generally* 5 U.S.C. § 706(1); *see also* Scalia, *supra* note 11, at 514.

436. 5 U.S.C. § 706.

437. Scalia, *supra* note 11, at 516; *see also* 5 U.S.C. § 706.

438. *Marbury*, 5 U.S. at 149-50.

439. *See generally* Baker v. Carr, 369 U.S. 186 (1962); *see also* Powell v. McCormack, 395 U.S. 486 (1944); *see also* Nixon v. United States, 506 U.S. 224 (1993); *see also* Vieth v. Jubelirer, 541 U.S. 267 (2004).

440. Scalia, *supra* note 11, at 521.

441. *See generally Chevron*, 467 U.S. 837. There may be some lingering kinks syncing up *Chevron* with current legislative drafting practices, including how it applies when multiple agencies are charged with administering a particular statute. *See generally* Amanda Shami, *Three Steps Forward: Shared Regulatory Space, Deference, and the Role of the Court*, 83 FORDHAM L. REV. 1577, 1598 (2014).

442. *Gutierrez-Brizuela* at 1158 (10th Cir. 2016) (Gorsuch, J., concurring).

443. *Id.*

policy choice. But *Chevron* is no less predictable. And, the alternative would be transferring archetypal *Chevron* questions to judges who are "to refrain from substituting their own interstitial [policymaking or] lawmaking" for that of Congress.[444] Would *that* be constitutional?[445]

F. Recommendations and Conclusion

To recap, at *Chevron* step 1, the court exercises its authority under the Constitution, as interpreted by *Marbury v. Madison*, and under the APA, to determine whether the law is clear or ambiguous. If the reviewing court determines the statute is clear, then the meaning the court declares is final and persists until Congress amends the statutory provision. If the court decides the statute is ambiguous, then, at *Chevron* step 2, the court defers to the agency's interpretation of the statute, provided it is reasonable. This is "pure *Chevron*."[446]

The court, however, defers to the agency's reasonable interpretation under the theory that Congress delegated to the agency the authority to interpret statutory ambiguities, recognizing that resolving ambiguities may require the agency to make policy decisions that Congress did not envision or chose to ignore because it could not resolve them. But all ambiguities are not created equal. The resolution of some statutory ambiguities have powerful social and/or economic implications: for example, regulating tobacco; precluding the use of medications to effectuate a state's assisted suicide statute; allowing a tax credit for insurance purchased on state and federal health exchanges – which can make the difference between ensuring Americans are covered by health care insurance or not; and arguably even the question of net neutrality, i.e., whether there should be open access to the Internet. Not content to leave significant statutory ambiguities to agencies to resolve without hard evidence that Congress intended the agency to resolve such questions, the Court first created an exception to *Chevron* (*Brown & Williamson*; *MCI*), and then more explicitly a third inquiry, *Chevron* step zero, where, if there is an ambiguity, the court independently evaluates whether Congress intended to delegate to the agency interpretive authority to resolve the ambiguity before deferring to the agency's interpretation, if it is reasonable.[447]

If the court determines that the statutory text is clear, then the court can define the text for all time. This is what Justice Kagan did when she held at *Chevron* step 1 that the FPA phrase "practices 'affecting rates'" clearly gives FERC jurisdiction over programs implementing demand response in wholesale energy markets.[448] But, what if the statute, taken literally, yields a result that is not what the court thinks Congress intended? That is *King v. Burwell*.[449] One would be hard-pressed

444. *City of Arlington*, 569 U.S. at 304-05 ("We have cautioned that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency"). *See also* Asher Steinberg, *Judge Gorsuch and Chevron Doctrine Part III: the Gutierrez-Brizuela Concurring Opinion*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 29, 2017), http://yalejreg.com/nc/judge-gorsuch-and-chevron-doctrine-part-ii-the-gutierrez-brizuela-concurring-opinion-by-asher-steinberg.

445. *City of Arlington*, 569 U.S. at 305 ("That is precisely what *Chevron* prevents").

446. *See generally id.*

447. *See generally Brown & Williamson*, 529 U.S.; *Mead*, 533 U.S.; *MCI*, 512 U.S.; *Gonzales*, 546 U.S.

448. *EPSA*, 136 S. Ct. at 772, 774.

449. *See generally King*, 135 S. Ct. 2480.

to find a better example of text that, on its face, standing alone and without consideration of its context, appears to have only one clear meaning. As Justice Scalia pointed out in dissent, applying pure *Chevron*, at *Chevron* step 1, the court would have struck down the IRS regulation as not authorized by the Affordable Care Act and left it up to Congress to amend the statute.[450] Instead, presented with what it reasonably deemed a major question, the court independently considered the provision in the context of the statute as a whole, and in light of Congress' purpose in enacting the statute, to uphold the IRS regulation.[451] By deciding the issue at *Chevron* step zero, the Court ensured that its declaration of the statute's meaning persists until Congress amends the statute.[452] If the Court had decided the issue at *Chevron* step 2, it would have left open the possibility that the statute could subsequently be reinterpreted by the IRS to eliminate the tax credit for individuals who purchased their insurance on the state's federal exchange. Similarly, when the statute is ambiguous, by deeming it an issue that Congress would not have left to the agency to decide, the court can strike down the agency's interpretation.[453] That is, for example, *Gonzales*, or *U.S. Telecom Ass'n*.[454]

When the court defers to an agency's reasonable interpretation at step 2, the determination is vulnerable to change.[455] That is *Michigan v. EPA* and *Brand X*.[456] Curiously, the *Brand X*-related net neutrality issue, arguably one of the most deeply divided and far-reaching economic and political issues of our day, has not been labeled a major question, although the dissenters in *U.S. Telecom v. FERC* attempted to do so in May 2017.[457] If the FCC's next set of revised regulations are subject to Supreme Court review, could or would the Court ever recant and declare that, upon further reflection, net neutrality has become a question of deep political and economic significance, requiring explicit Congressional delegation of interpretive authority as a prerequisite for deference?[458] Could the Court ever re-categorize an issue, moving it from step 2 back to step zero? What role would *stare decisis* (and the Court's possible relative freedom from adherence to *stare decisis*, as opposed to circuit courts, who are bound by *stare decisis*) play here? Certainly the dissenters in *United States v. Telecom* have teed up this question – whether or not it will be answered in a later proceeding remains to be seen.

450. *Id.* at 2505 (Scalia, J., dissenting).

451. *Id.* at 2494.

452. *See generally id.*

453. *Gonzales*, 546 U.S. at 274-75.

454. *Id.*; *see generally U.S. Telecom Ass'n*, 855 F.3d 381 (2017) (Kavanaugh, Brown, J.J., dissenting).

455. *See generally Brand X*, 545 U.S.; *see generally Michigan*, 135 S. Ct.

456. *Brand X*, 545 U.S.; *Michigan*, 135 S. Ct.

457. *U.S. Telecom Ass'n*, 855 F.3d.

458. Any party who seeks to characterize net neutrality as a major question will face an uphill battle, as Judges Srinivasan and Tatel have argued persuasively that: (1) the Supreme Court already decided in *Brand X* that Congress conferred on the FCC the authority to treat broadband cable Internet service providers as common carriers (and thus decide the net neutrality issue); (2) *Brand X* was issued after the Supreme Court had already issued two of the seminal major questions doctrine cases; and (3) denying the FCC the authority conferred on it by Congress to decide whether to regulate broadband cable Internet service providers as common carriers (telecommunications service) would disserve the separation of powers that the major questions doctrine is said to promote. *See U.S. Telecom. Ass'n*, 855 F.3d at 384-88 (Srinivasan, J., concurring).

As we have discussed, *Chevron* steps have balance of power and political implications with potentially far-reaching consequences. Fundamentally, whoever (agency or the court) has the final say in interpreting the statute's meaning has power. The steps are flexible enough that they can be played like chess strategies. If the court wants to reject an interpretation, it can use either step zero, step 1, or step 2 (although it is hardest at step 2 because the court must find the agency's interpretation to be unreasonable). If the court wants to lock in an interpretation, it can use step 1 if the text is clear, or step zero if the text is clear or ambiguous and a major question is at stake. If the court does not want to lock in an interpretation, the court can defer or strike down the interpretation at step 2, although, as noted above, it can only do so if the interpretation is unreasonable. The *Chevron* steps (including step zero and step 1.5) are sufficiently malleable to enable a reviewing court to override virtually any agency decision that does not reflect the agency's expertise, contemporary Congressional intent, or the larger public interest (well, at least the court's view of these). As for the agency, if it wants its interpretation to receive deference, it should assert that the statute is ambiguous; if it wants to lock in an interpretation, it might want to take a remand risk under *Chevron* step 1.5, and contend that the statute is clear. It is probably better served arguing in the alternative that, even if the court were to find the provision at issue ambiguous, the agency's interpretation would remain the same, to avoid the time and trouble of remand.

When *Chevron* was decided in 1984, it seemed to make sense to allocate to the court the chief responsibility for declaring the meaning of a statute, when the meaning is clear, and for overseeing the reasonableness of the agency's interpretation of statutory ambiguities. Over time, the administrative state continued to grow, and *Chevron* deference augmented agencies' authority to make policy through interpreting statutory ambiguities. While the Supreme Court might be content to use the *Chevron* framework in routine cases, when major questions of far-reaching political and social consequence are at stake, at least some of its members are not so sanguine. Neither the President, nor Congress, with its frequent deadlocks and legislative paralysis, appears to be as reliable a check on agencies' actions at they may have been back in the last century.

It could be that what we are observing with *Chevron* is akin to the end of a Chinese dynastic cycle, when the dynasty is dissolving into warring states: everyone has their own preferred take on *Chevron*. The *Chevron* decision evolved from a preceding chaos, the haphazard application of either *de novo* review or a deference to the agency's statutory interpretation, depending on a sliding scale of circumstances. *Chevron* provided an analytical framework that reigned for a time, until the Supreme Court was presented with momentous questions of far-reaching political and economic significance, involving agencies that were compelled to interpret ambiguous or imprecise language.

Now, it could turn out that the major questions will be few and far between, and *Chevron* will continue to bump along as before. Even so, the troubling matter remains, how to identify the major questions that are the exception to the *Chevron* rule?[459] Over time, the major questions, and all the other threshold obstacles that

459. Chief Justice Roberts would likely object that this is not the proper framing of the question: rather, the appropriate inquiry should be whether Congress delegated the authority to resolve the ambiguity to the agency

the court must step over before even reaching *Chevron* step 1, may prove the exception that swallows the rule.[460] Even when the threshold to step 1 is crossed, the current emphasis on judicial function may pressure courts to declare the meaning of the statute, either at step 1 or step zero or simply pursuant to APA section 706, without reference to *Chevron*.[461]

Although, from a pragmatic, agency standpoint, a pure *Chevron* approach without step zero is preferable, for the moment, *Chevron*'s four steps are the moves to be made. Understanding how the steps relate to each other better enables us to hone our arguments and take aim so they land on the step that counts the most in a specific case.[462] Good luck – oh, and make damn sure to win.

or not. *See, e.g., City of Arlington*, 569 U.S. at 312, 328 (Roberts, C.J., dissenting). This framing of the issue does not seem to make it much easier to resolve. The Court uses pretty much the same tools to determine both whether the statute is clear (at step 1) and whether Congress intended to delegate the *ambiguity* to the agency at step zero. When major questions are at stake, it is easy to understand why the Court would want to expand the scope of its review and independently consider what Congress intended. An extra judicial check may even seem valuable under certain circumstances. That said, the reviewing court can take advantage of an ambiguity to advance its agenda at least as well as an agency can. And, the downside is, unlike the agency's exercise of reasonable discretion, when the court interprets the ambiguous major question, its decision is permanent (unless Congress can reach agreement, amend the statute, and overrule it).

460. *Cf.* Abbe R. Gluck & Lisa Schultz Bressman*, Statutory Interpretation from the Inside – an Empirical Study of Congressiona Drafting, Delegation, and the Canons: Part I*, 65 STAN L. REV. 901, 1003 (2013) (noting that contrary to *Chevron*'s "simple presumption of delegation," the major questions doctrine "supports a presumption of *non*delegation in the face of statutory ambiguity" associated with regulation concerning "major policy questions or major questions of political or economic significance.").

461. Brookins, *supra* note 10 (arguing that *Chevron* avoidance is now the norm in the circuit courts).

462. For a "hip" and earnest review, *see* Lewie Briggs, *The Chevron Two Step*, YOUTUBE, https://www.youtube.com/watch?v=uHKujqyktJc (New York University Law School students' performance of the *Chevron* two-step).