# ABANDON *CHEVRON* AND MODERNIZE STARE DECISIS FOR THE ADMINISTRATIVE STATE

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ABSTRACT

*Critics including Justices Gorsuch and Thomas have recently condemned the* Chevron *doctrine, which requires courts to defer to an agency's reasonable construction of a statute that it administers, for undermining separation of powers and the rule of law. The House of Representatives, not to be left behind, has passed the Separation of Powers Restoration Act of 2016, which commands courts to conduct de novo review of agency statutory constructions.*

*The* Chevron *doctrine should indeed be abandoned, but not because it transfers tyrannical power to the executive. Over the last thirty years, an immense amount of confusing case law has evolved detailing whether and how to apply the* Chevron *two step—which may have one, two, three, or more steps. Viewed as a means to fine-tune deference, this effort has been largely a waste. Notwithstanding overheated charges, there is little reason to think that applying* Chevron*, as opposed to a supposedly tighter standard of review, such as* Skidmore *deference, is frequently outcome determinative in significant cases.*

*Although* Chevron*, with monumental irony, fails as a deference doctrine, it should not be abandoned without replacement because it serves the important function of protecting agencies' ability to change how they construe their enabling acts over time to reflect new learning. Rather than protect agency flexibility indirectly through the* Chevron *doctrine, however, it would be far better for courts to accomplish this end directly by limiting their opinions' precedential force. More specifically, courts reviewing agency statutory constructions should, contra* Chevron*, pick the constructions they deem best. They should also, however, refrain from giving binding horizontal stare decisis force to their precedents when reviewing later agency efforts to adopt different statutory constructions. Instead, when a court confronts a choice between following its precedent or affirming an agency's new construction, the court should adopt whichever one is better without stare decisis distorting the inquiry. This transformation of* Chevron *deference into a judicial duty to keep an open mind would not change many case outcomes, but it would greatly simplify an absurdly complex corner of administrative law.*

"Everything should be as simple as possible, but not simpler."[1]

## I. INTRODUCTION

A cast of villains including *Chevron*,[2] *Skidmore*,[3] *Mead*,[4] *Barnhart*,[5] *City of Arlington*,[6] *Brand X*,[7] and *King*,[8] among many others, stitches together a messy set of doctrines that tell judges how strictly to review an agency's construction of a statute that it is charged with administering. Simplifying, their ringleader, *Chevron*, instructs courts to approve such an interpretation so long as the agency's choice was reasonable.[9] *Skidmore*, by contrast, instructs courts to give such interpretations whatever "weight" they deserve in light of their "power to persuade."[10] The other five cases speak to what has come to be called "*Chevron* Step Zero," which instructs courts whether to apply *Chevron* or *Skidmore* deference.[11] For decades, this ever-expanding doctrinal maze has generated controversy and confusion, benefiting administrative law professors but burdening most everyone else.[12]

In recent years, this entire edifice has come under sharpened attack from powerful critics who contend that *Chevron* deference should be abandoned because it eats away at separation of powers and the rule of law.

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1. Remark commonly attributed to Albert Einstein. THE ULTIMATE QUOTABLE EINSTEIN 385 (Alice Calaprice ed., 2010). Also, a good goal for administrative law.

2. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (instructing courts to apply a form of rationality review to an agency's interpretation of a statute that it administers).

3. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (instructing courts to give "weight" to agency statutory interpretations according to their "power to persuade").

4. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (providing a "step zero" test for determining *Chevron*'s applicability).

5. Barnhart v. Walton, 535 U.S. 212, 222 (2002) (providing a multi-factor step zero test to determine *Chevron*'s applicability).

6. City of Arlington v. FCC, 569 U.S. 290, 296–97 (2013) (clarifying that *Chevron* deference applies to agency statutory interpretations bearing on the scope of the agency's authority or jurisdiction).

7. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) (holding that a judicial precedent blocks application of *Chevron* deference "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute").

8. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (applying an "extraordinary cases" exception to the applicability of *Chevron* deference (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))).

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

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

11. *See* cases cited *supra* notes 4–8; *see generally* Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753 (2014); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207–11 (2006).

12. *See Brand X*, 545 U.S. at 1019 (Scalia, J., dissenting) (characterizing the majority's gloss on *Chevron* as creating "a wonderful new world . . . full of promise for administrative-law professors in need of tenure articles and, of course, for litigators").

Justice Thomas is a zealous and recent convert to this camp,[13] and newly-installed Justice Gorsuch appears to be a member as well.[14] The House of Representatives gave legislative form to this deep concern by passing the Separation of Powers Restoration Act, which instructs courts to apply de novo review to agency statutory constructions.[15] This legislation is necessary, according to Senator Mike Lee of Utah, because "Chevron deference has become a direct threat to the rule of law and the moral underpinnings of America's constitutional order."[16] Given this sort of opposition, it seems fair to say that the possibility of abandoning *Chevron* has become more than academic.

A less breathless but far stronger argument condemns *Chevron* not for being so strong as to destroy America's moral underpinnings and constitutional order, but instead for being so weak that it cannot be worth all the legal trouble it creates.[17] On the cost side of this ledger, the plain fact that *Chevron* creates confusion that consumes considerable judicial and litigant resources is beyond reasonable dispute.[18] On the benefit side, *Chevron*'s core claimed advantage is that its form of deferential judicial review should generate better statutory interpretations than more aggressive judicial scrutiny because agencies, thanks to their greater expertise and political accountability, should be better than courts at resolving ambiguities in agency enabling acts.[19] This benefit's existence presupposes that the choice between *Chevron* and *Skidmore* deference should be outcome determinative in some significant set of cases—i.e., courts must

13. *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (castigating *Chevron* for "wrest[ing]" from the courts "the ultimate interpretative authority to 'say what the law is'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

14. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power").

15. Separation of Powers Restoration Act of 2016, H.R. 4768, 114th Cong. § 2 (2016) (amending 5 U.S.C. § 706 to provide that courts shall "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions").

16. *See* Press Release, Orrin Hatch, U.S. Senator, U.S. Senate, Release: Senate, House Leaders Introduce Bill to Restore Regulatory Accountability Through Judicial Review (Mar. 17, 2016), http://www.hatch.senate.gov/public/index.cfm/2016/3/release-senate-house-leaders-introduce-bill-to-restore-regulatory-accountability-through-judicial-review.

17. *See* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 850–51 (2010) ("*Chevron* . . . has not accomplished its apparent goals of simplifying judicial review and increasing deference to agencies, and has instead spawned an incredibly complicated regime that serves only to waste litigant and judicial resources."); *cf.* Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975) (expressing "suspicion that the rules governing judicial review have no more substance at the core than a seedless grape").

18. *See generally infra* Part II.E (discussing some of the many problems courts have encountered in defining and applying the three steps of the *Chevron* two step).

19. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (emphasizing the role of agency expertise and values in statutory construction).

uphold statutory constructions under *Chevron* that they would have rejected under *Skidmore*. The evidence that this effect occurs in enough significant cases to justify the complexities of the *Chevron* framework is, however, equivocal at best.[20] This observation suggests both that *Chevron* does not relax judicial review of agency action in a way that genuinely threatens separation of powers and that *Chevron's* efforts to fine-tune the deference dials lodged inside judges' heads are largely pointless.

There is, however, another important function that the *Chevron* framework demonstrably does serve, which is to preserve agency discretion to shift among statutory interpretations to further new policy choices.[21] Skipping past more complexities, once a court uses its *Marbury*-style power to declare the meaning of an agency's statute, the resulting judicial construction freezes the law into place until it is judicially or legislatively overruled.[22] During the first century or so of the republic's existence, this freezing effect was not as problematic as it would later become. During that earlier time, the administrative state was far smaller and less pervasive, and judicial review of agency action was very limited.[23] Under these premodern conditions, precedential freezes of the law were not likely to create large policy costs, and it was plausible to think that Congress, with a relatively small administrative state to manage, would fix problematic precedents through corrective legislation.[24] As the late nineteenth century marched into the twentieth, Congress delegated immense authority to agencies to make

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20. *See generally infra* Part III (examining whether the choice between *Chevron* and *Skidmore* deference substantially affects case outcomes).

21. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (observing that application of *Chevron* preserves agency interpretive flexibility and thus prevents unhealthy "ossification of large portions of our statutory law"); Beermann, *supra* note 17, at 809 (recognizing that "flexibility may be a virtue of *Chevron* but it does not provide a theoretical basis for the doctrine"; suggesting that the Supreme Court should develop alternative means to preserve flexibility "outside of the *Chevron* context"); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587 (2006) (observing that "[c]hanges in both facts and values argue strongly in favor of considerable executive power in interpretation" to handle "updating" or "adapt[ing] statutes to diverse domains").

22. This characterization ignores two complicating factors. First, there is the problem of "nonacquiescence," which occurs where an agency, although obeying a court's order resolving a particular case, declines to give the court's decision binding precedential effect in other agency proceedings. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989). Practically speaking, however, notwithstanding occasional nonacquiescence, judicial precedents still bind agencies indirectly insofar as they should expect courts to follow their own precedents during judicial review of agency action. Second, the Court's *Brand X* doctrine gives agencies limited power to use their *Chevron* authority to overrule some judicial precedents. *See infra* Part II.E.4 (discussing this doctrine).

23. *See* Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 CARDOZO L. REV. 2241, 2245 (2011) (discussing limited availability of judicial review of agency action in the nineteenth century).

24. *Cf.* Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1667–69 (2008) (discussing evolving congressional control of administration during the antebellum era).

legislative-style policy choices, and judicial review of agency action became widely available.[25] Under these new conditions, the potential costs of allowing judicial (or administrative) precedents to freeze agency law into place soared, and practical congressional power to correct such precedents through legislation lessened.

*Chevron* crystalized one path around these difficulties by adjusting the scope of judicial opinions. Applying *Chevron*, a court should not decide for itself how to resolve ambiguity in a statute an agency administers; rather, the court should limit itself to determining whether the agency's interpretation was "permissible" or reasonable.[26] This type of "*Chevron* Step Two" opinion assessing the reasonableness of one statutory interpretation does not preclude the possibility that an agency might offer a different reasonable construction at some later date.[27] *Chevron* deference, thus, licenses agencies to shift among reasonable resolutions of statutory ambiguity to advance their policy goals free from binding precedential force.

*Chevron*, considered as a device for preserving agency interpretive discretion from the freezing force of judicial opinions, is needlessly confusing, complex, and contentious. Rather than protect agency interpretive discretion by *Chevron*'s indirect means of adjusting the *scope* of judicial opinions, courts should take the more direct and simple approach of adjusting their *precedential force*. More specifically, courts should abandon the *Chevron* doctrine and adopt the following straightforward framework:

1. A court reviewing an agency's construction of a statute that it administers should adopt the best available construction. As a corollary, to justify rejecting an agency's construction, a court must explain why its construction and supporting analysis are *better* than the agency's.
2. A court should apply the preceding rule regardless of whether an agency's statutory construction contradicts the court's own precedent.

The first rule sweeps away *Chevron* in favor of a variant of *Skidmore*'s command that courts should choose the most persuasive statutory

25. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (providing canonical statement that judicial review is presumptively available), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977). *See generally* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1294–1309 (2014) (discussing evolution of presumption of reviewability).

26. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (explaining that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

27. *See* Beerman, *supra* note 17, at 807.

constructions.[28] Its corollary emphasizes that *Skidmore* deference, whatever else it might require, should demand that a court give a reasoned explanation for rejecting an agency's own construction of a statute that it administers. The second rule blocks horizontal stare decisis from distorting review of the merits of an agency's statutory construction. If an agency's new construction is more persuasive than the reviewing court's precedent, then the court should follow the former rather than treat the latter as binding law.[29]

Taken together, these changes would reconceptualize judicial deference to agency statutory constructions. Under the current regime, deference boils down to granting rationality review of dubious effectiveness to a poorly defined subset of agency statutory constructions. The proposed framework transforms "deference" into a continuing duty on the part of courts to keep an open mind regarding agencies' efforts to construe and implement the statutes that they administer. This open-minded approach gives expression to *Chevron*'s core insight that statutory construction partakes of policymaking and should be informed by evolving agency expertise and value judgments.[30] At the same time, this approach has the great virtue of avoiding the barnacles of doctrinal complexity that have encrusted the *Chevron* doctrine.

Part II lays conceptual and historical groundwork for this Article's proposal by examining the intertwined evolution of stare decisis and judicial deference to agency statutory constructions. Along the way, it also highlights how the *Chevron* doctrine has become an embarrassing monument to judicial scholasticism. Part III contends that the choice between *Chevron* and *Skidmore* standards of review has little demonstrable effect on the level of scrutiny that courts apply to agency statutory constructions. This conclusion suggests that efforts to determine when and how to apply *Chevron*'s form of rationality review are largely pointless and should be abandoned. Part IV takes up the second prong of the proposed framework, limiting the horizontal stare decisis force of judicial precedents to preserve ongoing agency interpretive discretion. And Part V concludes.

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28. For a proposal in a similar spirit, see William R. Andersen, *Against* Chevron*—A Modest Proposal*, 56 ADMIN. L. REV. 957, 964 (2004) (proposing that Congress adopt legislation that abandons *Chevron* but authorizes courts to defer to agency statutory constructions based on functional factors that overlap with *Skidmore* factors).

29. Note that this proposal alters only *horizontal* stare decisis force, which operates within one level of a hierarchical court system. It would not alter *vertical* stare decisis force—e.g., a circuit court would still have to regard Supreme Court precedents as binding, and an agency hoping to change such a precedent would need to persuade the Court or Congress to do so.

30. *See Chevron*, 467 U.S. at 865–66 (emphasizing the role of agency expertise and values in statutory construction).

## II. THE INTERTWINED EVOLUTION OF STARE DECISIS AND JUDICIAL DEFERENCE TO AGENCY STATUTORY CONSTRUCTIONS

### *A. Nineteenth-century judicial deference to agencies as common law stare decisis*

Many judicial opinions from the first hundred years or so of the republic "defer" to agency statutory interpretations. Unlike many of their later counterparts, however, these opinions did not generally justify deference by referring to agency policymaking expertise or delegated authority. Rather, deference was, in essence, a natural extension of common law principles of stare decisis to agency statutory constructions. Under this common law model, courts characterized their own precedents not as law but as evidence of law. Similarly, courts treated an agency's construction of a statute that it administered as evidence of the legislative intent underlying the statute. This approach especially favored agency statutory constructions that were longstanding, consistent, and adopted contemporaneously with the underlying statute.[31] Courts justified such favorable treatment both on the epistemological ground that early administrative interpreters were likely to have better insight into legislative intent and on the functional ground of preserving legal stability.

#### *1. Judicial precedents as evidence of law*

For a snapshot of the common law approach to stare decisis of a couple centuries ago, the most obvious place to turn is Blackstone's *Commentaries*, which was the primary source of legal knowledge for many early American students of law.[32] Blackstone recognized the same basic functional virtues of stare decisis that courts commonly recognize today. He explained that, by adhering to their precedents, judges "keep the scale of justice even and steady" and transform "what before was uncertain, and perhaps indifferent" into "permanent rule[s]."[33] In other words, this practice clarifies and stabilizes the law, encourages reliance, helps ensure

31. *See generally infra* Part II.A.2 (discussing nineteenth-century judicial opinions on deference to agency statutory constructions). For discussion of judicial deference to contemporaneous constructions and consistent administrative usage in general from fifteenth-century England through nineteenth-century America, see generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 930–65 (2017).

32. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1165 (9th Cir. 2001) (Kosinzki, J.) (observing that, during the early years of the Republic, "the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone"); *Ex parte* H.H., 830 So. 2d 21, 31 (Ala. 2002) ("Blackstone's *Commentaries* was the manual for law students in the United States during and after the revolutionary period . . . .").

33. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

equal treatment, and ratchets back judicial discretion—and thus the potential for its arbitrary application.[34] The basic policy judgment underlying this model is that legal stability in the courts is generally better for the world than legal innovation.

Blackstone's theoretical justification for stare decisis, however, is jarring to modern sensibilities. For most modern lawyers and judges, it is self-evident that the judicial practice of following precedents turns judges into gap-filling legislators—thus the phrase "case law." For Blackstone, by contrast, the role of the judge is "not . . . to pronounce a new law, but to maintain and expound the old one."[35] But this characterization raises an obvious question: If judges are not the sources of the common law, then who—or what—is? According to Blackstone, the common law is ultimately based on ancient custom as elucidated by judicial reason.[36] Judges, by virtue of their studies, are experts on custom and are therefore "the depositaries of the laws; the living oracles."[37] The best place to look for information concerning the law is therefore judicial opinions, which "are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."[38]

Evidence tends to have a cumulative effect—fifty witnesses offering identical testimony will generally have more persuasive force than just one. Accordingly, courts gave particular weight to precedents hewing to a "regular course of practice."[39] This approach values legal stability, but it does not require unthinking adherence. As the law, by hypothesis, must always be reasonable, unreasonable precedents must be bad evidence of law and should be rejected.[40] Still, respect for the wisdom of the past and the value of legal stability both require a very high bar for abandoning precedent, which "must be followed, unless flatly absurd or unjust."[41] Remarks in a similar vein can be found from American jurisprudential luminaries such as Chancellor Kent and James Madison, among others.[42]

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34. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

35. BLACKSTONE, *supra* note 33, at *69.

36. *Id.*; *see also* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 23 (2001) (noting that, in the late eighteenth century, "[m]uch of the common law was thought to rest on external sources" including natural reason, customs, and divine revelation).

37. BLACKSTONE, *supra* note 33, at *69.

38. *Id.*

39. Nelson, *supra* note 36, at 14.

40. *See* BLACKSTONE, *supra* note 33, at *69–70.

41. *Id.* at *70.

42. *See, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *475 ("A solemn decision upon a point of law . . . is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision . . . unless it can be shown that the law was

The declaratory theory of precedent requires minor adjustment as applied to statutory law. Where a case turns on a statute, the legislature has already "declared" the pertinent law, eliminating the need for courts to comb through precedents to determine and apply some other unwritten law. Still, the declaratory theory's evidentiary approach has room to apply where a statute is, as Blackstone noted they often are, "ambiguous, equivocal, or intricate."[43] Resolving the meaning of "dubious" words in a statute requires discovering "the will of the legislator . . . by exploring his intentions at the time when the law was made."[44] Once judges declare such discoveries of legislative intent in judicial precedents, these naturally function as a type of evidence of law that accumulate force with repetition.[45]

*2. Agency statutory constructions as evidence of legislative intent*

The advantages of stare decisis can apply with as much force to agency precedents as to judicial precedents—it can be extremely helpful, for instance, for a party with business before an agency to know that the agency will, in the future, stick to the legal determinations that it has made in the past. It therefore comes as little surprise that, during the nineteenth and early twentieth centuries, courts gave agency statutory interpretations a measure of precedential force, essentially treating them as strong evidence of legislative intent. Consistent with this approach, courts frequently declared that contemporaneous,[46] consistent,[47] and longstanding[48] agency

misunderstood or misapplied in that particular case."); Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 165 (1865) (explaining that accumulating precedents can authoritatively settle law but conceding that "cases . . . which transcend all authority of precedents must be admitted, but they form exceptions which will speak for themselves").

43. BLACKSTONE, *supra* note 33, at *60.

44. *Id.* at *59.

45. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 899 (1985) (observing that, in common law tradition, "judicial precedent served as the most important source of information about an act's meaning beyond its actual text"); *cf.* THE FEDERALIST NO. 37, at 236 (James Madison) (explaining that "a series of particular discussions and adjudications" is necessary to remove ambiguity from new laws).

46. *See, e.g.*, Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) (noting that "peculiar weight" should be given to a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion"); Schell v. Fauche, 138 U.S. 562, 572 (1891) ("In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."); United States v. Philbrick, 120 U.S. 52, 59 (1887) ("A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight . . . ."); Hahn v. United States, 107 U.S. 402, 406 (1883) ("[I]n the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."); United States v. Pugh, 99 U.S. 265, 269 (1878) ("It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the

statutory constructions were entitled to great weight and should not be overturned absent compelling reasons. Taking these factors in turn, contemporaneous constructions should provide particularly strong evidence of legislative intent because the agency officials who drafted them should have been especially well placed to understand the problems Congress sought to redress.[49] A consistent series of agency constructions of a statute is better evidence of legislative intent than a series of agency flip-flops—just as a fact witness who sticks to one story is better than one who keeps shifting.[50] Also, the fact that a long-standing agency statutory construction has stood the test of time is evidence of its underlying strength—and, in addition, makes it more likely to have engendered serious reliance interests.[51]

This evidentiary model strengthened agencies defending entrenched statutory constructions, but it also made it more difficult for agencies to abandon them, tending to freeze the law into place. One of the earliest opinions from the federal courts to discuss judicial deference to agency statutory constructions provides a nice illustration.[52] *United States v. Vowell* turned on whether salt was "imported" for the purpose of triggering

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contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

47. *See, e.g.*, *Norwegian Nitrogen*, 288 U.S. at 315 (1933) ("True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful."); Peabody v. Stark, 83 U.S. 240, 243 (1872) (deferring to agency's "uniform" construction where the members of the Court could not form a "clear conviction" on statutory meaning).

48. *See, e.g.*, Nat'l Lead Co. v. United States, 252 U.S. 140, 145–46 (1920) ("[I]t has been . . . settled law that when uncertainty or ambiguity . . . is found in a statute great weight will be given to the contemporaneous construction by department officials . . . especially where such construction has been long continued . . . ."); Logan v. Davis, 233 U.S. 613, 627 (1914) (noting "the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons"); United States v. Finnell, 185 U.S. 236, 244 (1902) (holding that, in case of "doubt," the long-standing interpretation of "the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons"); United States v. Alexander, 79 U.S. 177, 181 (1870) (upholding "long-standing construction of the act given by the department whose duty it was to act under it").

49. *See, e.g.*, United States v. Moore, 95 U.S. 760, 763 (1877) (noting that agency officials are "[n]ot unfrequently . . . the draftsmen of the laws they are afterwards called upon to interpret").

50. *Cf.* United States v. Healey, 160 U.S. 136, 145 (1895) ("[A]s the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the act of 1877, without reference to the practice in the Department"); Merritt v. Cameron, 137 U.S. 542, 552 (1890) (explaining that agency construction had not been uniform and that rule requiring "cogent and persuasive reasons" to displace it was not applicable).

51. United States v. Ala. G.S.R. Co., 142 U.S. 615, 621 (1892) (noting that courts "look with disfavor upon any sudden change" in a longstanding agency statutory construction "whereby parties who have contracted with the government upon the faith of such construction may be prejudiced"); United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 39–40 (1832) (deferring to practical construction given to statute by government because disturbing a "practice so long and so general" would "introduc[e] a train of serious mischiefs").

52. United States v. Vowell, 9 U.S. (5 Cranch) 368 (1810).

duties at the time a ship had arrived at the port of Alexandria or, as the Government argued, at the earlier time when the ship had sailed into the collection district for that port.[53] This distinction mattered because Congress had passed a statute eliminating the duty on salt for importations occurring after December 31, 1807, and the ship had entered the district on December 23 but had waited until January 1 to enter the port itself.[54] In a passage that sounds very promising for the Government if read out of context, Chief Justice Marshall wrote, "[i]f the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions."[55] This passage did not, however, refer to the Government's construction in *Vowell* that entry into the collection district was the triggering event. Rather, the Chief Justice was referring to the fact that the United States had, "in case of an increase of duty . . . always demanded and received the additional duty, if the goods have not arrived at the *port of entry*, before the time fixed for the commencement of such additional duty."[56] Given that the Government had uniformly construed the meaning of import one way for increases in duty, it was not free to adopt a new construction for decreases in duty.[57]

The pattern established by *Vowell* recurred with some frequency during the following century or so. Court cases reviewing agency action often turned on how much money some private party owed or was owed by the Government. In some of these cases, the Government had abandoned an earlier statutory construction in favor of a novel one more favorable to the Government. The private party would argue for application of the abandoned construction favoring its interests. Courts, consistent with an evidentiary understanding of precedents and solicitude for reliance interests, were often sympathetic to this argument and would reject the Government's self-serving flip-flop.[58]

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53. *See id.* at 372.

54. *Id.* at 368–69.

55. *Id.* at 372.

56. *Id.* (emphasis added).

57. *Id.*

58. *See, e.g.*, United States v. Finnell, 185 U.S. 236, 244 (1902) (rejecting effort by agency to abandon a longstanding and reasonable statutory construction regarding per diem payments to clerks of court); United States v. Ala. G.S.R. Co., 142 U.S. 615, 621 (1892) (holding that railroad was entitled to payment for delivery of mail under contemporaneous statutory construction that had lasted through six administrations even though it was "inconsistent with the literalism of the act"); United States v. Johnston, 124 U.S. 236, 253 (1888) (rejecting government's effort to reopen account of agent regarding sale of cotton where approval of agent's account of expenses was final under long prevailing, contemporaneous construction); United States v. Philbrick, 120 U.S. 52, 58 (1887) (holding that Navy officer was entitled to pay under an order based on long-standing statutory construction); Peabody v. Stark, 83 U.S. 240, 243 (1872) (relying on previously "uniform ruling of the office of the internal revenue commissioner" to conclude that distiller was not liable for tax); *see also* Bamzai, *supra* note 31

### *B. Tectonic shifts in governance increase the costs of precedential freezes*

The nineteenth-century approach to precedential force just described contemplated that Congress, rather than agencies or courts, should handle the task of altering entrenched constructions of agency statutes.[59] An obvious danger of this model is that courts and agencies might freeze "bad" law into place and that Congress might, due to lack of time or attention, fail to fix it. During the nineteenth century, however, this danger was less significant than it would later become. For one obvious thing, agencies had far less governance responsibility at the time[60]—there was no EPA to determine matters of high technocratic policy such as national ambient air quality standards, for instance.[61] Also, judicial review of agency action was the exception rather than the norm during this period.[62] The relatively small size of the pre-modern administrative state and the rarity of judicial review made the prospect of Congress fixing administrative and judicial "mistakes" more plausible than it would be in later years.

The rise of the modern administrative state fundamentally changed all of these circumstances, creating pressure on courts to allow agencies, at least on occasion, to abandon precedents and shift interpretive course to advance new policies. The most obvious of these changes was the massive growth of agency government. Professor Jerry Mashaw has exploded the myth that the American administrative state was virtually nonexistent before Congress in 1887 created the first "modern" agency, the Interstate Commerce Commission (ICC).[63] It nonetheless remains true that, starting from a relatively small base in the late nineteenth century, the administrative state has grown exponentially over the last century or so, with major pulses of activity in the Progressive Era, the New Deal, and the 1960s and '70s.[64] This growth—together with the highly technical, expertise-driven nature of many agency functions—necessarily attenuated

(discussing cases in which courts blocked executive efforts to abandon established, contemporaneous constructions of statutes).

59. *See, e.g.*, *Finnell*, 185 U.S. at 244 ("Congress can enact such legislation as may be necessary to change the existing [administrative] practice, if it deems that course conducive to the public interests.").

60. *See generally* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (tracing growth in regulatory government from the late nineteenth century forward).

61. *Cf. id.* at 1196 (explaining that, with the notable exception of steamboat regulation, before the mid-1880s, "[f]rom a national perspective, commercial affairs took place in a world without regulation").

62. *See* MASHAW, *supra* note 60, at 302 (discussing the extremely limited availability of judicial review of agency action in the nineteenth century).

63. *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 85–90, 150 (2012).

64. *See, e.g.*, Rabin, *supra* note 61 (surveying the evolution of the administrative state from the Populist Era through the 1970s).

congressional monitoring and control of administration, and it also made judicial review far more challenging.

On a closely related point, as the scope of agency responsibilities grew, the policymaking element in the process of agency statutory construction became more obvious. Discharging broad and vague congressional commands, such as proscribing "[u]nfair methods of competition"[65] or distributing licenses to broadcast in the "public interest,"[66] requires agencies to make significant policy judgments. Especially in highly technical domains, an agency's understanding of the facts underlying such policy judgments should change as new knowledge develops. Value judgments, too, may evolve both as society changes generally and as executive power shifts at the ballot box. Under these circumstances, the notion that agency statutory construction is properly a matter of searching for some static congressional intent becomes far harder to maintain and, for many statutes, ridiculous.

In addition, the role of the courts as monitors and controllers of agency activity expanded radically. During the nineteenth century, courts assiduously avoided reviewing discretionary actions by the executive on the ground that such judicial control would usurp administrative functions in violation of separation of powers.[67] The Supreme Court's famous opinion from 1902's *American School of Magnetic Healing v. McAnnulty* marked a sea change in this attitude.[68] The plaintiff in this case claimed a power to cure disease through "proper exercise of . . . the brain and mind."[69] After the Postmaster General barred the plaintiff's use of the mails on the ground that its business was fraudulent, the plaintiff sought injunctive relief.[70] Rejecting the Government's defense that its administrative action was unreviewable, the Court roundly declared, "The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."[71] Review for legal error thus became presumptively available.[72]

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65. *See* 15 U.S.C. § 45(a) (2012).

66. *See* 47 U.S.C. §§ 307, 309 (2012).

67. MASHAW, *supra* note 62, at 306 (observing that judicial evaluation of the "exercise of administrative discretion was extremely rare" in the nineteenth century).

68. 187 U.S. 94 (1902).

69. *Id.* at 96.

70. *Id.* at 102.

71. *Id.* at 108; *cf.* MASHAW, *supra* note 62, at 248–49 (characterizing this passage as "sweeping language that seemed to reject virtually the whole of the mandamus and injunction jurisprudence of the nineteenth century").

72. *See generally* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 339–53 (rev. student ed. 1965) (tracing the development of a presumption of reviewability from *McAnnulty* forward).

Congress took advantage of the Court's willingness to superintend administration by adding "special statutory review" schemes to agency enabling acts, specifically authorizing (and channeling) judicial review of agency action.[73] In 1946, Congress went further in this direction by enacting the Administrative Procedure Act (APA), which creates a generally available cause of action for persons "adversely affected or aggrieved by agency action" to obtain judicial review of "final agency action."[74] Two decades later, the Supreme Court broadly characterized the APA's cause of action as "embod[ying] the basic presumption of judicial review" of agency action.[75] Most modern administrative lawyers likely regard this presumption as part of the natural order of things and think about it as much as fish think about water. Professor Mashaw, however, reminds us that this growth in judicial control over administration is "the most substantial change in our administrative constitution over these 200-plus years."[76]

Moreover, even as the range of agency decisions subject to judicial control vastly expanded, the freezing potential of judicial precedents increased as well. Again, according to the jurisprudence of the early years of the Republic, judicial precedents were evidence of law rather than binding law as such.[77] This relatively unambitious view of precedential force fit the infrastructure of a time in which case reporting was very spotty and hard to access.[78] It also reflected a legal culture that would have rejected the notion of judges as lawmakers as hubristic.[79] But, as the nineteenth century drew towards its close, the infrastructure necessary for a stricter approach to judicial precedents developed, notably including more comprehensive, available, and reliable case reporting.[80] Also, during the same general period, courts came to recognize and accept their own

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73. *See* Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 511 (2004) (noting that, beginning with the Interstate Commerce Commission in 1887, Congress established a practice of adding special statutory review schemes to the enabling acts of new agencies).

74. 5 U.S.C. §§ 701–706 (2012).

75. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) (describing the Administrative Procedure Act as reinforcing a basic presumption of judicial review), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

76. MASHAW, *supra* note 62, at 308.

77. *See supra* Part II.A (discussing the common law's treatment of judicial precedents as evidence of law).

78. *See* Hart v. Massanari, 266 F.3d 1155, 1168 (9th Cir. 2001). (characterizing early American case reports as "disorganized and meager").

79. *See generally id.* at 1163–64.

80. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 350 (5th ed. 1956) (noting that development of a strict judicial hierarchy and comprehensive reporting enabled development of a doctrine of strict precedent); Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 19–21 (1987) (discussing the development of systematic case reporting in the United States over the nineteenth century).

legitimacy as interstitial lawmakers.[81] In keeping with these shifts, courts began to regard some precedents as strictly binding law.[82] This approach gave judicial precedents more power, at least in theory, to freeze statutory constructions of agency statutes into place.

In sum, the rise of the modern administrative state fundamentally altered the costs and benefits of courts allowing judicial and administrative precedents to freeze agency statutory law into place subject to congressional correction. Before the late nineteenth century, judicial review of agency action was relatively rare and agencies themselves carried out far fewer and, broadly speaking, less vital functions. Given such circumstances, it was relatively cheap for courts to treat precedents resolving statutory ambiguities if not as law, then as powerful evidence of law that, as a practical matter, bound agencies. As Congress crafted the modern administrative state, it delegated more and more policymaking authority to agencies as well as more and more power to courts to review agency actions. As a result, Congress's ability to monitor and control the administrative state necessarily became more attenuated. These new circumstances inevitably heightened the risk that freezing agency law into place based on precedents would, at least on occasion, lock into place poor or outdated policy choices.

### *C. Rationality review as a license for interpretive change*

As courts carried out their new duties as superintendents of the expanding administrative state, they applied two inconsistent models for review of agency statutory interpretations.[83] One of these models, in good *Marbury* fashion, contemplated that courts would exercise independent judgment to determine statutory meaning.[84] The most prominent of the many cases taking this approach was 1944's *NLRB v. Hearst Publications, Inc.*, which insisted that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve," albeit after "giving appropriate weight to the judgment of those whose special duty is to

81. *See, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (recognizing "without hesitation that judges do and must legislate, but they can do so only interstitially"), *superseded by statute*, Longshore and Harbor Worker's Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424 (1927); *Hart*, 266 F.3d at 1168 ("Lawyers began to believe that judges made, not found, the law.").

82. *Hart*, 266 F.3d at 1168 (noting the development as the nineteenth century progressed of "[t]he modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy").

83. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985) ("Two competing traditions in American jurisprudence address the issue of the appropriate allocation of interpretive authority between agencies and courts.").

84. *Id.*

administer the questioned statute."[85] Another line of authority, however, long before *Chevron*, instructed courts to apply rationality review to an agency's interpretation of a statute that it administers.[86] Courts chose to live with this tension in the law for many decades rather than resolve it[87]—perhaps because the contradiction did not trouble them overmuch or perhaps because, at the end of the day, they found it convenient to be able to choose which model to deploy depending on the circumstances.

The following Parts explore three notable examples from the pre-*Chevron* era in which courts embraced rationality review. Together, they illustrate two ways in which this model created greater latitude for agencies to change interpretive course. First, this model abandoned the nineteenth-century courts' approach of treating agencies' statutory constructions as strong evidence of law with practical power to freeze the law into place. Instead, this model accepts that agency interpretations can and should evolve as agencies learn from experience. Second, rationality review limits the freezing force of judicial precedents by limiting their scope—i.e., a judicial decision declaring that one statutory interpretation is reasonable does not preclude the possibility that an agency could adopt a different reasonable interpretation at some later time.

### *1. Abandoning agency and judicial precedents to further tax policy*

The statutes and regulations governing taxes are legendarily difficult to parse.[88] It therefore comes as no shock that the Treasury Department and Internal Revenue Service have sometimes adopted interpretations of a tax statute, found them wanting, and then abandoned them in favor of new interpretations.[89] In the first half of the twentieth century, the reenactment doctrine posed a particular problem for such efforts to change course. In

85. 322 U.S. 111, 130–31 (1944) (citations omitted), *overruled in part by* Nationwide Mut. Ins. v. Darden, 503 U.S. 318 (1922). Although the *Hearst* line of authority asserted independent judicial control over pure issues of statutory meaning, it applied deferential review to mixed questions of law and fact involving "specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially." *Id.* at 131. The line between pure and mixed questions is hazy and easy to manipulate, which added to the confusion of deference doctrine over ensuing decades. *See* Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1068 (1995) (noting the ease with which courts manipulated this distinction).

86. *See* Diver, *supra* note 83, at 551 (describing a judicial conception of review that leaves interpretive "leeway" to agencies); *see also* Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 490–91 (1950) (providing an early discussion of a *Chevron*-style "rational-basis" approach to review of agency statutory interpretations).

87. *See generally* Shapiro & Levy, *supra* note 85, at 1051–52.

88. *See* Randolph E. Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L.J. 660, 660 (1940) (describing tax regulations as "a limitless source of joy for scholars and of confusion for taxpayers").

89. *See id.*

strong form, this doctrine holds that Congress, by reenacting a statute while aware of an agency's construction, implicitly approves that construction, giving it the force of law.[90] The reenactment doctrine had particular salience for tax law because, for several decades following introduction of the federal income tax in 1913, Congress would reenact the entire income tax statute every few years, making various adjustments.[91] The reenactment doctrine thus provided a handy tool for courts when they wished to reject an effort by the tax authorities to change statutory interpretations bearing on taxes.[92]

One can also find, however, cases in which the courts, choosing to favor legal flexibility, instead allowed the tax authorities to change interpretive course.[93] The Supreme Court's 1941 opinion in *Helvering v. Reynolds*, which turned on the meaning of the statutory term "acquisition," provides a nice example.[94] On his father's death in 1918, Reynolds received a contingent remainder interest in a testamentary trust.[95] He took full ownership on April 4, 1934, sold some shares, and then used their market value on this date to determine a basis for tax purposes.[96] The Commissioner determined that the proper dates for this purpose were instead the date of the decedent's death for those securities held by the trust at that time and the date of the trustee's purchase for later-acquired securities.[97] For statutory authority, the Commissioner relied on section 113(a)(5) of the Revenue Act of 1934, which provided that "the basis shall be the fair market value of such property at the time of such acquisition."[98] Reynolds countered that Treasury office decisions as well as a series of lower court precedents had, prior to 1934, construed the key

90. *See* Kristin E. Hickman, *The Need for* Mead: *Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1571 (2006) (discussing strong reenactment doctrine of the early twentieth century).

91. *Id.*

92. *Cf.* Paul, *supra* note 88, at 666–67 (observing that the "degree of compulsion in the reenactment rule is a matter of doubt" and that courts may use it to put "dress clothes" on their own opinions).

93. *See* Comm'r v. Wilshire Oil Co., 308 U.S. 90, 101 (1939) (observing that agencies need to retain rulemaking power to change interpretations to preserve "some of [the] most valuable qualities" of the administrative process, including "ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations"); Morrissey v. Comm'r, 296 U.S. 344, 354–55 (1935) (observing that Treasury's power to "supply rules for the enforcement of the act within the permissible bounds of administrative construction" was not "so restricted that the regulations, once issued, could not later be clarified or enlarged so as to meet administrative exigencies or conform to judicial decision").

94. 313 U.S. 428 (1941).

95. *Id.* at 429.

96. *Id.*

97. *Id.*

98. *Id.* at 430 (quoting Revenue Act of 1934, Pub. L. No. 73-216, § 113(a)(5), 48 Stat. 680, 706 (1934)).

statutory term "acquisition" as excluding contingent interests.[99] When Congress reenacted this language in the 1934 Act, it must have done so with this meaning in mind.[100] Therefore, thanks to the reenactment doctrine, this construction "had become embedded in the law so that it could be changed not by administrative rules or regulations but by Congress alone."[101]

The Court rejected this argument as "not tenable."[102] Although the reenactment doctrine is "useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can effect a change."[103] The agency, too, could change its prior construction, making use of its "continuing rule-making power."[104] Foreshadowing the *Chevron* two step, the Court then explained that the term "acquisition" was ambiguous, the new regulatory approach was fair to the taxpayer, and this approach provided an "apt interpretation to make this part of the statute fit efficiently and consistently into the scheme of the revenue system as a whole."[105] Treasury, in short, was bound neither by its own administrative precedents nor by lower court precedents, and it was instead free to adopt a new interpretation of "acquisition" provided it was reasonable.

*2. Judge Learned Hand on agency flip-flops and rationality review*

As we have seen, especially during the first hundred years or so of the Republic, courts placed great stress on the importance of adhering to consistent agency statutory interpretations.[106] Under this approach, litigants (and courts) could use an agency's old statutory construction to undermine its efforts to shift to a new one. In *Niagara Falls Power Co. v. Federal Power Commission*, the great Judge Learned Hand turned this approach on its head, relying on concepts of rationality review and agency expertise to explain why courts should not give weight to an abandoned agency statutory construction when determining whether to uphold a new one.[107]

The petitioner in *Niagara Falls*, or its corporate predecessors, had operated power plant facilities on the Niagara River since 1878 based on a

99. Helvering v. Reynolds, 313 U.S. 428, 431 & nn.3–4 (1941).

100. *See id* at 431.

101. *Id.* at 431.

102. *Id.*

103. *Id.* at 432.

104. *Helvering*, 313 U.S. at 432.

105. *Id.* at 434 (quoting Augustus v. Comm'r, 118 F.2d 38, 43 (6th Cir. 1941)).

106. *See generally supra* Part II.A.2 (discussing weight given to agency precedents by nineteenth-century courts).

107. Niagara Falls Power Co. v. Fed. Power Comm'n, 137 F.2d 787 (2d Cir. 1943).

series of state and federal licenses.[108] On June 10, 1920, Congress enacted the Federal Water Power Act, which terminated the petitioner's federal license.[109] In 1921, the Federal Power Commission granted a new fifty-year license to the petitioner.[110] This license provided that, for ratemaking purposes, the petitioner's projects would be appraised at "fair value."[111] This provision conflicted with the Act's instructions to determine values according to "actual legitimate original cost."[112] The Commission determined that the petitioner's project was exempt from this provision because the project had been constructed before the Act's passage under a "permit . . . heretofore granted."[113] Decades later, the Commission reversed course and ordered the petitioner to reduce its capitalization based on its original construction costs.[114]

On review, Judge Hand offered some terrifically sensible observations concerning the judicial task of reviewing agency statutory interpretations:

> In spite of the plenitude of discussion in recent years as to how far courts must defer to the rulings of an administrative tribunal, it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course,—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched, will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.[115]

In short, courts should, after considering all relevant information, uphold agency statutory constructions so long as they survive rationality review.

Turning to the merits, Judge Hand concluded that, had the issue arisen as a "new question," the petitioner would not have been entitled to the "fair value" appraisal that it had received in 1921.[116] The question was not new, however, in light of the Commission's 1921 decision, which raised the issue of whether the Commission could properly abandon this precedent in later proceedings. Examining the significance of this reversal, Judge Hand observed:

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108. *Id.* at 789.
109. *Id.* at 790.
110. *Id.*
111. *Id.* at 792.
112. *Niagara Falls*, 137 F.2d at 792–93 (quoting 16 U.S.C. § 797(b)).
113. *Id.* at 791 (ellipsis in original) (quoting 16 U.S.C. § 816).
114. *Id.* at 794.
115. *Id.* at 792.
116. *Id.* at 791–92.

> The conventional reason for the deference exacted from courts for such rulings has always been the advantage possessed by such tribunals in a background of specialized experience and understanding, gathered from a long acquaintance of the members with the subject matter, either while they are in office or before. The continuity of this experience is assumed to build up an acquaintance inaccessible to others—courts included.[117]

This conventional reasoning for deference did not apply to the Commission's 1921 construction because it was a "single ruling, made shortly after the tribunal [was] set up" and thus before the Commission had generated much relevant experience.[118] More generally, Judge Hand added that respect for agency expertise "forbids" a court from "undertaking to say that a later [administrative] ruling is mistaken when it reverses the earlier one" because courts should assume that an agency can identify "past error better than we can do ourselves."[119]

Judge Hand's case for treating agency interpretive flip-flops so charitably departs from the nineteenth-century approach in a revealing way. Earlier cases emphasized that contemporaneous constructions are more likely to be reliable because the agency officials drafting them should possess special insight into legislative intent.[120] Judge Hand, by contrast, suggested that contemporaneous constructions might be *less* trustworthy because, at the time of their adoption, an agency will not yet have had time to learn from experience.[121] This change in attitude marks a pronounced shift from regarding statutory construction as a backward-looking exercise in locating a preexisting legislative intent to regarding it as a forward-looking exercise that values agency learning and policymaking.

#### *3. A very good pre-*Chevron *example of the Supreme Court applying* Chevron *review*

Almost a decade before issuing its *Chevron* opinion, the Supreme Court extolled rationality review, as well as the potential virtues of agency interpretive flip-flops, in *NLRB v. J. Weingarten, Inc.*[122] Weingarten operated retail stores with lunch counters.[123] A manager and a loss

117. *Niagara Falls*, 137 F.2d at 792.

118. *Id.*

119. *Id.*

120. *See, e.g.*, United States v. Moore, 95 U.S. 760, 763 (1877) (noting that agency officials are "[n]ot unfrequently . . . the draftsmen of the laws they are afterwards called upon to interpret").

121. *Niagara Falls*, 137 F.2d at 792.

122. 420 U.S. 251 (1975).

123. *Id.*

prevention specialist interrogated an employee, Collins, regarding whether she had improperly taken food without paying for it.[124] The interrogators rejected Collins's requests that a union representative attend the interview.[125] The National Labor Relations Board (Board) later concluded that this denial constituted an unfair labor practice that violated Collins's right guaranteed by section 7 of the National Labor Relations Act "to engage in . . . concerted activities for . . . mutual aid or protection."[126] The Board based this conclusion on two decisions that it had issued in 1972 construing section 7 as "creat[ing] a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline."[127] The Fifth Circuit refused to enforce the Board's order, rejecting its construction of section 7 as inconsistent with the Fifth Circuit's own precedent, *Texaco, Inc., Houston Producing Division v. NLRB*.[128] The Fifth Circuit also adverted to a "long line of Board decisions, each of which indicates—either directly or indirectly—that no union representative need be present" at the type of investigatory interview that Collins endured.[129]

The Supreme Court reversed the Fifth Circuit and upheld the Board's holding as "a permissible construction . . . by the agency charged by Congress with enforcement of the Act."[130] Along the way, the Court specifically rejected the notion that the Board's earlier administrative precedents blocked its new approach to applying section 7:

> To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking. "'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."[131]

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124. *Id.* at 254–55.

125. *Id.*

126. *Id.* at 252 (ellipsis in original) (quoting 29 U.S.C. § 157).

127. *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 256 (1975) (citing Quality Mfg. Co., 195 N.L.R.B. 197 (1972); Mobil Oil Corp., 196 N.L.R.B. 1052 (1972)).

128. NLRB v. J. Weingarten, Inc., 485 F.2d 1135, 1137–38 (5th Cir. 1973) (citing Texaco, Inc., Hous. Producing Div. v. NLRB, 408 F.2d 142 (5th Cir. 1969)), *vacated by* 420 U.S. 251 (1975).

129. *Id.* at 1137 (collecting Board authority).

130. *J. Weingarten*, 420 U.S. at 260.

131. *Id.* at 265–66 (quoting NLRB v. Seven-Up Co., 344 U.S. 344, 349 (1953) (ellipsis in original).

Thus, like Judge Hand in *Niagara Falls*, the Court took the view that agencies should learn from experience and that such learning can justify an agency abandoning its own precedents.

The determination that the Board's precedents did not bind the Board did not resolve the issue of whether the Fifth Circuit's *Texaco* precedent might do so. In other words, even if agencies can overrule their own precedents, they might find themselves bound by *judicial* precedents. The Supreme Court addressed this problem in two ways. First, in the *Weingarten* matter itself, the Supreme Court's ruling obviously superseded the Fifth Circuit's holding.[132] Second, and more broadly, the Court chided the Fifth Circuit for issuing a categorical opinion in *Texaco* on the meaning of section 7 of the Act. It was the Board's job to make such determinations—and construe the Act—"in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations."[133] In light of the agency's "special competence," courts, although they should not "rubber stamp" an agency's construction of a statute it administers, should affirm such constructions so long as they are "permissible."[134]

### *D.* Chevron *protects agency interpretive freedom from agency and judicial precedents*

The Supreme Court's opinion in 1984's *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* is famous—at least in administrative law circles—for instructing courts to apply a form of rationality review when reviewing an agency's construction of a statute that it administers.[135] As the discussion above demonstrates, a considerable amount of pre-*Chevron* case law supported this approach, and the six justices who decided the case, led by the opinion's author, Justice Stevens, did not intend or expect to revolutionize this corner of administrative law.[136] Rather, Justice Stevens included his now canonical statement of the *Chevron* two step, which he regarded as an unremarkable statement of existing law, because it fit neatly into his argument that judicial precedents ought not deprive agencies of ongoing discretion to shift among reasonable constructions.[137]

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132. *Id.* at 264.

133. *Id.* at 266.

134. *Id.* at 266–67.

135. 467 U.S. 837 (1984).

136. *See id.* at 845 (purporting to rely on "well-settled principles"); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 399, 420 (Peter L. Strauss, ed., 2006).

137. *See Chevron*, 467 U.S. at 845.

*Chevron* itself turned on interpretation of a provision in the Clean Air Act Amendments of 1977 requiring "new or modified major stationary sources" of pollution to undergo a stringent permitting process in "nonattainment" states (i.e., states that had not achieved compliance with national ambient air quality standards established under the Clean Air Act).[138] The basic interpretive problem required determining whether "stationary source" could refer to entire industrial plants or instead should refer to pollution-emitting components within those plants.[139] Industrial interests favored the former approach that, metaphorically speaking, encases an entire plant in a bubble.[140] Application of the "bubble concept" allows a firm to make changes to polluting devices inside a plant without obtaining a permit so long as the total amount of pollution that escapes the bubble encasing the plant does not increase.[141] Environmental interests favored the more granular approach regarding individual polluting devices as "stationary sources."[142]

Prior to the *Chevron* case itself, the EPA's efforts to use the bubble concept generated two important D.C. Circuit cases. In 1978's *ASARCO, Inc. v. EPA*, the D.C. Circuit rejected use of the bubble concept in a rule implementing a provision of the Clean Air Act of 1970 based in part on the court's conclusion that doing so would undermine the Act's environmental purpose.[143] In 1979's *Alabama Power Co. v. Costle*, by contrast, the D.C. Circuit affirmed the legality of applying the bubble concept in a rule implementing the Prevention of Significant Deterioration (PSD) program established by Clean Air Act Amendments of 1977 (1977 Amendments).[144] The court reasoned that the bubble concept was acceptable in this context in part because Congress designed the PSD program to maintain rather than improve air quality in "attainment" states already complying with national air quality standards.[145]

In 1979, EPA began a series of flip-flops regarding application of the bubble concept to a program under the 1977 Amendments designed to improve air quality in "nonattainment" states. The agency's first rule, adopted in 1979, provided that the bubble concept could apply in nonattainment areas where authorized by an approved State Implementation Plan but not otherwise.[146] The agency changed course a

138. *Id.* at 840.
139. *Id.*
140. Merrill, *Story*, *supra* note 136, at 403.
141. *Chevron*, 467 U.S. at 840.
142. Merrill, *supra* note 136, at 403.
143. 578 F.2d 319, 329 (D.C. Cir. 1978).
144. 636 F.2d 323, 401 (D.C. Cir. 1979).
145. *Id*.
146. *Chevron*, 467 U.S. at 854.

year later in 1980, adopting a rule that categorically barred application of the bubble concept in nonattainment areas based on the agency's understanding of the combined import of *ASARCO* and *Alabama Power*.[147] In 1981, under the new Reagan administration, the EPA flip-flopped yet again, issuing a rule that allowed states to apply the bubble concept in both attainment and nonattainment areas.[148]

This last rule prompted the *Chevron* litigation itself. In rejecting this rule, the D.C. Circuit conceded that the relevant statutory language did not "explicitly define" the phrase "stationary source"[149] and that the available legislative history was "at best contradictory."[150] Notwithstanding these problems, the court, gauging "the purposes of the nonattainment program" in light of its *ASARCO* and *Alabama Power* decisions, held that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality.[151] The EPA therefore could not legally apply the bubble concept in a program designed to improve air quality in nonattainment areas.[152]

Notably, the Supreme Court's very first move in its legal analysis in *Chevron* was to protect agency interpretive flexibility from the potential freezing effects of judicial precedents. To this end, the Court declared, "The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[153] This negative description of what courts *should not* do when reviewing agency statutory constructions naturally begged for a positive description of what courts *should* do instead. The Court filled this gap with the famous *Chevron* two step:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its

147. *Id.* at 857 (citing 45 Fed. Reg. 52697 (Aug. 7, 1980)).

148. *Id.* at 857–59 (citing 46 Fed. Reg. 50766 (Oct. 14, 1981)).

149. Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 723 (D.C. Cir. 1982), *rev'd sub nom* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

150. *Id.* at 726.

151. *Id.*

152. *Id.*

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

> own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the [second] question for the court is whether the agency's answer is based on a permissible construction of the statute.[154]

To justify this deferential framework, the Court characterized statutory ambiguity as an "implicit" delegation of authority by Congress to an implementing agency to resolve that ambiguity.[155] In addition to relying on this transparent fiction,[156] the Court, near the end of its opinion, added the traditional justifications that agencies are better placed than courts to resolve statutory ambiguities because of their subject area expertise and greater political accountability.[157]

In addition to using rationality review to preserve agency interpretive discretion by limiting the scope of judicial precedents, the Court also found occasion to protect this discretion from the potential freezing force of agency precedents. The environmental groups challenging the 1981 rule had argued that the EPA's construction of "stationary source" did not merit any deference at all in light of the agency's series of interpretive flip-flops.[158] In essence, courts should not look for special interpretive insight to an agency that cannot figure out for itself how to interpret its statute. The Court rejected this argument with a ringing endorsement of ongoing agency interpretive flexibility, declaring, "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."[159] Judicial deference to an agency's statutory interpretation is therefore in order even if "the agency has from time to time changed its interpretation."[160] Of course, this aspect of *Chevron*'s analysis was far from new, fitting neatly into the line of authority including cases such as *Reynolds*, *Niagara Falls*, and *Weingarten* discussed above.[161]

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154. *Id.* at 842–43 (footnotes omitted).

155. *Id.* at 844.

156. *See, e.g.*, Mark Seidenfeld, Chevron's *Foundation*, 86 NOTRE DAME L. REV. 273, 281 (2011) (explaining that *Chevron* is best understood as relying not on actual congressional intent but instead on "factors that would make it reasonable for Congress to have intended that agencies enjoy interpretive primacy").

157. *Chevron*, 467 U.S. at 865–66.

158. *Id.* at 862.

159. *Id.* at 863–64.

160. *Id.* at 863.

161. *See supra* Part II.C (discussing this line of authority foreshadowing *Chevron* deference).

### *E. A small handful of* Chevron*'s many complications*

Again, the justices who decided *Chevron* were relying on an established line of authority instructing courts to apply rationality review to agency statutory constructions, and they did not think that they were making a major change to an important administrative law principle.[162] The pre-*Chevron* case law on standards of review was, however, confused and contradictory, and another important line of authority supported independent judicial control over agency statutory constructions.[163] In the years following *Chevron*'s issuance, influential actors including the D.C. Circuit, Justice Scalia, and the Department of Justice seized on *Chevron* as a chance to impose clarity, characterizing it as establishing a general rule that courts should apply rationality review to an agency's construction of a statute it administers.[164] Instead of delivering clarity, however, *Chevron* has instead inspired decades of effort to develop fine-grained, formalistic rules to govern the messy, intuitive process of statutory interpretation.[165] As a result, more than three decades after *Chevron*'s issuance, its doctrine remains deeply confused and confusing.[166] A full accounting of the controversies this doctrine has generated is far beyond the scope of a single law review article, but a brief summary of some of the more notable problems follows.

#### *1. Step zero*

On the maximalist view long held by Justice Scalia, *Chevron* stands for the proposition that all authoritative constructions by an agency of a statute it administers warrant *Chevron* deference.[167] For the other justices on the Court, however, the idea that all agency statutory constructions deserve such favorable treatment proved too much to tolerate,[168] and they

162. *See Chevron*, 467 U.S. 844–45 (relying on "long recognized" and "well-settled" deference doctrine).

163. *See, e.g.*, Diver, *supra* note 83, at 551 (describing confused state of law governing standards for review of agency statutory constructions; noting two competing lines of authority).

164. *See* Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 33–59 (2013) (discussing in detail the evolution of *Chevron* into a major doctrine among the lower courts, especially the D.C. Circuit, over the course of several years); *see also* Merrill, *supra* note 136, at 422–27 (identifying the actors involved in transforming *Chevron* into a transformative opinion).

165. *See* Andersen, *supra* note 28, at 969, 971–72 (observing that futile efforts to base deference on formal categories rather than functional factors have "led to our present [*Chevron*] predicament").

166. *See, e.g.*, Lawson & Kam, *supra* note 164, at 73 ("One could easily fill an entire article simply listing, much less trying to resolve, the many important operational questions that still swirl around *Chevron*.").

167. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

168. *Id.* at 236 (majority opinion) ("J[ustice] S[calia]'s first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety.").

accordingly developed step zero doctrines for determining which agency statutory constructions warrant *Chevron* deference.[169] Where *Chevron* deference does not apply, a reviewing court, generally speaking, should instead apply *Skidmore* deference.[170] *Skidmore* instructs a reviewing court to give an agency's statutory construction such weight as "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" might warrant.[171]

The two most important Supreme Court step zero cases are *United States v. Mead Corp.*[172] and *Barnhart v. Walton*.[173] *Mead* instructs that *Chevron* should apply where Congress grants an agency the authority to imbue its statutory constructions with the "force of law," and the agency invokes that authority.[174] Congress can signal this type of delegation by authorizing an agency to act using relatively elaborate, transparent procedures that promote deliberation—e.g., notice-and-comment rulemaking, formal adjudication, or similar procedures.[175] The underlying intuition is that agency statutory interpretations produced through such means deserve the force of law, and Congress would therefore expect them to possess such force.[176] The Court also, however, conceded that Congress might signal a delegation of *Chevron* power through "other" unidentified means.[177] This concession left open the possibility that *Chevron* deference can apply to agency statutory constructions generated with very little or no procedure.

Just a year after *Mead*, the Court issued *Barnhart v. Walton*, which took a very different approach to the step zero problem.[178] After first stressing that *Mead* had expressly rejected procedural formalism as an absolute prerequisite for *Chevron* deference, the *Barnhart* Court declared that *Chevron*'s applicability should turn on a multifactor test that examines "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the

169. For general discussions of step zero, see, for example, Thomas W. Merrill, *Step Zero after* City of Arlington, 83 FORDHAM L. REV. 753 (2014) or Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207–11 (2006).

170. *See Mead*, 533 U.S. at 234–35.

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

172. 533 U.S. 218 (2001).

173. 535 U.S. 212 (2002).

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

175. *Id*.

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

177. *Id.* at 227 (noting that Congress can signal delegation of *Chevron* authority "by some other indication of a comparable congressional intent").

178. 535 U.S. 212 (2002).

complexity of that administration, and the careful consideration the Agency has given the question over a long period of time."[179] These are, of course, factors that a court might deploy to determine an agency statutory construction's "power to persuade" under *Skidmore*.[180] *Barnhart* thus instructs reviewing courts to apply something akin to *Skidmore* at step zero to determine whether to apply *Chevron* or *Skidmore* to the substance of an agency's statutory construction.

The combined effect of *Mead* and *Barnhart* is that, although courts almost always apply *Chevron* deference to statutory interpretations produced through notice-and-comment rulemaking or formal adjudication,[181] they lack clear guidance regarding whether to apply *Chevron* to agency statutory interpretations produced via less formal means. That said, in keeping with the general tenor of *Barnhart*, courts are more likely to apply *Chevron* to an agency's statutory construction if it appears to be the product of careful analysis and appropriate procedures.[182] More slapdash efforts are more likely to fall into the *Skidmore* pile.[183] This tendency does not, however, eliminate uncertainty in many cases regarding which standard of review to apply, leading litigants and courts to waste resources wrangling over a threshold issue divorced from the substantive merits.[184] To minimize this waste, courts sometimes deploy "*Chevron* avoidance"—i.e., they decline to choose between *Chevron* and *Skidmore* after concluding that the choice will not affect the outcome of the case.[185]

Other step zero problems that have bubbled through case law and commentary include, among others: (a) *Chevron* can apply to an agency's interpretation of the scope of its own power;[186] (b) *Chevron* does not apply

179. *Id.* at 222.

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

181. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017) (manuscript at 37–38) (finding that circuit courts applied *Chevron* to 91.9% of statutory interpretations produced through informal (notice-and-comment) rulemaking and to 85.2% of statutory interpretations produced through formal adjudication if immigration decisions are excluded), http://ssrn.com/abstract=2808848.

182. *See, e.g.*, Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1241–50 (9th Cir. 2013) (applying *Chevron* deference to a decision by the Secretary of Health and Human Services to approve state plan amendments for Medicaid submitted by California; observing that the "agency is the expert in all things Medicaid," that implementing Medicaid is a "colossal undertaking," and that interested outsiders had "offered extensive input" in the process).

183. *See, e.g.*, Fox v. Clinton, 684 F.3d 67, 77–78 (D.C. Cir. 2012) (refusing to apply *Chevron* to a letter that "offered little more than uncited, conclusory assertions of law in a short, informal document that does not purport to set policy").

184. Beermann, *supra* note 17, at 836.

185. *See, e.g.*, Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1127–30 (2009) (discussing cases where courts engaged in *Chevron* avoidance).

186. City of Arlington v. FCC, 569 U.S. 290, 299–301 (2013) (rejecting as nonsensical efforts to distinguish between "jurisdictional" and "non-jurisdictional" interpretations of agency authority and thus ending long debate over whether *Chevron* applies to jurisdictional determinations).

to "extraordinary cases";[187] (c) *Chevron* does not apply to statutory interpretations produced through defective procedures;[188] (d) *Chevron* does not apply to statutory interpretations that are mere litigating positions;[189] (e) *Chevron* does not apply to interpretations of criminal statutes;[190] (f) *Chevron* does not apply to an agency's interpretation of generally applicable statutes, such as the Administrative Procedure Act;[191] and (g) *Chevron* does not apply to statutes that are jointly administered by agencies with overlapping enforcement authority.[192]

*2. Step one*

*Chevron*'s step one instructs courts reviewing an agency's statutory construction to check "whether Congress has directly spoken to the precise question at issue" and to give effect to Congress's "clear" and "unambiguously expressed intent."[193] In a footnote, Justice Stevens added that courts should use "traditional tools of statutory construction" to ascertain whether Congress had an intent regarding any given "precise issue."[194] Commenting on the vagaries of step one, Professor John Manning

187. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (declining to apply *Chevron* deference to the issue of availability of subsidies for insurance on the federal exchange established by the Affordable Care Act, characterizing the matter as an "extraordinary case" with "deep economic and political significance" (internal quotations omitted)).

188. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) (declining to apply *Chevron* to a statutory interpretation where the agency had failed the procedural requirement of offering a reasoned justification for its interpretive change).

189. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (noting that the Court has never applied *Chevron* deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice").

190. George v. Junior Achievement of Cent. Ind., Inc., 694 F.3d 812, 816 (7th Cir. 2012) (Easterbrook, J.) (noting that *Chevron* does not apply where an agency "has no delegated rulemaking or adjudicative authority" and instead acts solely as prosecutor). *But see* Sash v. Zenk, 428 F.3d 132, 135 (2d Cir. 2005) (Sotomayor, J.) (applying *Chevron* deference to criminal statute because "the provision interpreted . . . defines neither the scope of criminal liability nor the penalty applicable to criminal punishment").

191. Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1253 (D.C. Cir. 2003) (explaining that *Chevron* deference does not apply to agency interpretations of statutes such as the Administrative Procedure Act because their "sprawling applicability undermines any basis for deference").

192. DeNaples v. Office of Comptroller of Currency, 706 F.3d 481, 487 (D.C. Cir. 2013) (noting that the court has repeatedly held that none of the agencies that share authority to enforce the Federal Deposit Insurance Act are entitled to *Chevron* deference). *See generally* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 219–29 (discussing the problem of *Chevron* and shared agency jurisdiction). *But see* Loan Syndications & Trading Ass'n v. SEC, 223 F. Supp. 3d 37 (D.D.C. 2016) (extending *Chevron* deference where "six agencies with overlapping expertise were explicitly tasked by Congress to jointly draft and adopt regulations as part of a coordinated endeavor").

193. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

194. *Id.* at 843 n.9; *cf.* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 618 (2014) (noting that the "problem" is that the

has observed that it "would take a book" to address three decades of debate regarding "how to determine whether Congress has spoken directly to the precise question at issue or left the matter for agency resolution."[195]

Given step one's ironic ambiguity regarding how to search for statutory clarity, it is not surprising that courts have applied it in varying ways with varying levels of intensity. Elaborating on this problem, Professor Jack Beermann has identified four different approaches that the Supreme Court has taken to applying step one: (1) a highly deferential "original directly spoken *Chevron*" that seeks to determine if Congress has "directly spoken" to a "precise" statutory issue; (2) a less deferential "traditional tools *Chevron*" that uses the full panoply of statutory construction devices to determine congressional intent without regard to its precision; (3) an aggressive "plain meaning *Chevron*" that uses just one of the traditional tools, the plain meaning rule, to identify congressional intent; and (4) an "extraordinary cases *Chevron*" that eschews deference for especially important issues.[196] A large part of the problem here, of course, is that the nature of the step one task depends considerably on the eye of the judicial beholder.[197]

Courts and commentators continue to debate over the role that various interpretive aids should play in eliminating apparent statutory ambiguity at step one. Proper use of legislative history, for instance, remains subject to argument.[198] Also, the role of normative canons of construction, such as the "avoidance canon," which instructs courts to construe statutes to avoid serious constitutional issues, is problematic. A majority of courts treat normative canons as "traditional tools" that can resolve ambiguity at step one, but a minority of courts disagree.[199]

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Court instructs the use of "traditional tools of statutory construction" to resolve ambiguity but does not identify them, "likely because it could not agree on them if it wanted to" (emphasis omitted)).

195. *See, e.g.*, John F. Manning, Chevron *and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1529–30 (2014).

196. Beermann, *supra* note 17, at 817–22.

197. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (suggesting that he, more than many other judges, found determination of statutory meaning to be a relatively straightforward matter based on a statute's text and relationship to other laws).

198. *See* Manning, *supra* note 195, at 1539–40 (describing judicial practices on use of legislative history at step one; observing that "a number of the circuits have acknowledged that the role of legislative history under *Chevron* is a matter of debate").

199. *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 77–84, 111 (2008) (documenting this split and contending courts should incorporate normative canons into step two analysis of agency reasonableness).

*3. Step two*

The most remarkable problem that *Chevron*'s step two raises is whether it exists. Applying step one, a court determines whether Congress has, by directly speaking to a precise issue, precluded an agency's statutory construction. A statutory construction can survive this scrutiny only if it is consistent with some reasonable understanding of congressional intent. If, however, step one actually tests statutory constructions for rationality, it might seem to leave no work for step two to do when checking whether a statutory construction is "permissible."[200]

One down-and-dirty response to this conundrum is that step two does not, in fact, do much work as a practical matter. If an agency prevails at step one, then it will almost always go on to prevail at step two.[201] Step two might therefore be regarded as a rhetorical flourish that courts add to their opinions, but no one should worry about it too much.[202]

A more conceptually ambitious response has been to find meaning for step two by regarding it as a form of arbitrariness review. Under modern administrative law, arbitrariness review of an agency's discretionary action examines whether the agency based its choice on "reasoned decisionmaking."[203] This standard, as applied to policymaking, inquires whether an agency actually considered all "relevant factors" and avoided a "clear error of judgment" in choosing its action.[204] On this view, step one determines whether a statutory construction falls within a zone of ambiguity such that an agency could have reasonably chosen it. Step two then examines the agency's actual explanation for its statutory construction to ensure that the agency did in fact rely on reasoned decision making (as opposed, to say, throwing darts). Professor Ronald Levin proposed that courts adopt this approach to step two about twenty years ago,[205] and the Supreme Court has recently suggested that it agrees.[206] Leading

200. *See* Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1260–61 (1997) (explaining the problem that step two seems "superfluous").

201. *See* Barnett & Walker, *supra* note 181 (manuscript at 33) (finding that agencies prevail at step two at the circuit court level 93.8% of the time).

202. *Cf.* Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 86 (John F. Duffy & Michael Herz eds., 2005) (noting that reviewing courts sometimes conduct "perfunctory" step two analyses).

203. *See generally* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (providing the canonical statement on review for arbitrariness of significant policy decisions).

204. *Id.*

205. Levin, *supra* note 200, at 1276; Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 129 (1994) (contending that courts should apply "something akin to hard look review" for reasoned decision making at *Chevron*'s step two).

206. *See* Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011) (noting, in dicta, that, "under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance" (quotation marks omitted) (quoting Mayo Found. for Med. Educ. & Research, 562 U.S. 44, 53 (2011))).

administrative scholars continue to wrangle, however, over whether step two should be regarded as a form of arbitrariness review or should be discarded as a confusing redundancy.[207] Also, courts that regard step two as a form of arbitrariness review have sometimes struggled mightily to determine what, precisely, such review should entail.[208]

### *4. The Brand X problem—reconciling* Chevron *and stare decisis*

The last item in this partial tour of *Chevron* puzzles has special salience for this Article's project as it involves reconciling *Chevron* deference with judicial stare decisis principles. Applying stare decisis principles to a judicial precedent that applied *Chevron* is not generally problematic. A step one decision establishes a precedent regarding Congress's clear intent for a statutory provision; a step two decision establishes a precedent regarding whether a particular agency statutory interpretation was reasonable. The latter, unlike the former, leaves an agency with ongoing interpretive flexibility to adopt a different statutory interpretation later, but this freedom is a function of the scope of step two decisions, not a weakened adherence to stare decisis.

Not every judicial precedent construing an agency statute applies *Chevron* deference, however. Many judicial opinions that predate *Chevron*, naturally enough, fall into this category, and so do many post-*Chevron* opinions thanks to the operation of *Mead*-style step zero principles.[209] Suppose, for instance, that a particular provision in an agency's enabling act might reasonably be construed as meaning either *X* or *Y*. The agency announces that it prefers *X*, but it does so by informal means, such as by a letter to a regulated party. Later, a court resolves a case that turns on the meaning of this statutory provision. Applying *Mead*'s step zero, the court determines that the agency's favored construction *X* is not *Chevron* eligible. The court then applies *Skidmore* to determine which statutory construction is most persuasive, and the court rejects the agency's choice of

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207. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 622–23 (2009) (contending that *Chevron* should be regarded as having two distinct steps and that step two entails a distinct form of review for arbitrariness fitted to statutory interpretation). *But see* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 604 (2009) ("Trying to save *Chevron*'s two steps by reading one of them as equivalent to arbitrary and capricious review serves no useful purpose and creates additional problems . . . .").

208. For an excellent and recent example, see Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA, 846 F.3d 492, 520–24 (2d Cir. 2017) (providing a detailed, scholarly, and almost impenetrable analysis of the differences between arbitrariness review under *State Farm* and *Chevron* step two).

209. *See supra* text accompanying notes 167–176 (discussing United States v. Mead Corp., 533 U.S. 218 (2001)).

*X* in favor of *Y*.[210] In response, the agency promulgates a rule through notice and comment that again adopts *X*, contradicting the court's precedent. Petitioners challenge the rule in the same court that preferred *Y*. At this point, the court must confront a clash between judicial stare decisis principles and agency *Chevron* authority. A court favoring the former might simply follow its own precedent declaring the "best" meaning of the statute. A court favoring the latter might allow an agency to use its *Chevron* authority to adopt a reasonable construction that overturns the court's precedent declaring the statute's "best" meaning.

The Supreme Court resolved this clash by choosing *Chevron* over stare decisis in 2005's *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[211] Under the Communications Act, entities that provide "telecommunications servic[e]" may be subject to pervasive regulation as common carriers.[212] In 2000, the Ninth Circuit held in *AT&T Corp. v. City of Portland* that providers of broadband cable modem service did provide such a "telecommunication service."[213] The court exercised independent judgment on this point because the case involved a private party's challenge to action by Portland and did not implicate any authoritative construction by the FCC.[214] Later, in 2002, the FCC adopted a rule that, contrary to the Ninth Circuit, concluded that cable broadband was not a "telecommunications service."[215] Many petitioners challenged the rule, and as luck would have it, a lottery determined that the suit would proceed in the Ninth Circuit.[216] It concluded that the binding force of its own precedent from *City of Portland*, rather than the FCC's *Chevron*-eligible rule, should control the issue.[217]

The Supreme Court overruled, holding that the Ninth Circuit should have applied *Chevron* rather than mechanically hewing to its own precedent. Writing for the majority, Justice Thomas explained:

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210. *See* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (holding that *Skidmore* deference should apply to agency statutory interpretation that was not eligible for *Chevron* deference).

211. 545 U.S. 967, 979–80 (2005).

212. *Id.* at 973 (alteration in original) (quoting former 47 U.S.C. § 153(44), now at 47 U.S.C. § 153(51) (2012)) (citing 47 U.S.C. §§ 201–221).

213. 216 F.3d 871, 878 (9th Cir. 2000), *abrogated in part by* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 979 (2005).

214. *See id.* at 879 ("Thus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation.").

215. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 F.C.C.R. 4798, 4802 (2002), *aff'd in part and vacated in part*, Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 979 (2005).

216. *Brand X*, 545 U.S. at 979.

217. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131–32 (9th Cir. 2003), *rev'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . .
>
> A contrary rule would produce anomalous results. It would mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue: If the court's construction came first, its construction would prevail, whereas if the agency's came first, the agency's construction would command *Chevron* deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur. The Court of Appeals' rule, moreover, would "lead to the ossification of large portions of our statutory law," by precluding agencies from revising unwise judicial constructions of ambiguous statutes. Neither *Chevron* nor the doctrine of *stare decisis* requires these haphazard results.[218]

This *Brand X* framework requires a court to engage in imaginative reconstruction to determine whether a judicial precedent that did not apply *Chevron* would have presented a step one case or a step two case if *Chevron* had applied. If the precedent relied, step one-style, on unambiguous legislative intent, then the agency will be stuck with the court's statutory construction. If, however, the precedent amounted to a step two-style effort by the court to resolve statutory ambiguity, then the agency can, as in *Brand X* itself, use its *Chevron* authority to overrule the judicial precedent and adopt a different, reasonable statutory construction. Particularly in older, pre-*Chevron* cases, this characterization game can be tricky because the court that drafted the precedent would have had no reason to include language tracking the *Chevron–Brand X* framework.[219] The court would have had no reason, for instance, to include language such as, "Just in case it helps, future courts, we can see how another interpreter might reasonably have chosen a different statutory interpretation."

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218. *Brand X*, 545 U.S. at 982–83 (Scalia, J., dissenting) (citations omitted) (quoting United States v. Mead Corp. 533 U.S. 218, 247 (2001).

219. *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 488–89 (2012) (plurality opinion) (explaining that although the Supreme Court had conceded in *Colony, Inc. v. Commissioner*, 357 U.S. 28, 33 (1958), that a statutory provision was not "unambiguous," the Colony Court's construction of this provision reflected a step one-style conclusion that left no residual ambiguity for the application of *Brand X*).

Justice Scalia, though in other respects a *Chevron* maximalist, penned an outraged dissent that identified a variety of problems that the new *Brand X* framework would raise in implementation.[220] His chief objection, however, was that the Court had created a "breathtaking novelty: judicial decisions subject to reversal by executive officers."[221] He characterized this outcome as both "bizarre" and "probably unconstitutional."[222]

The majority's response rested heavily on *Chevron*'s core premise that agencies, not courts, have "authoritative" power to resolve statutory ambiguities in agency enabling acts.[223] Because a court's resolution of this type of statutory ambiguity is not "authoritative," an agency can adopt a different statutory construction without implying that the court's preferred construction was "legally wrong."[224]

### *F. A summary of Part II's long, strange trip*

The idea that courts should defer to reasonable agency statutory constructions predates *Chevron* in American law by at least two centuries.[225] During the early years of the Republic, however, such "deference" was rooted in a policy preference for legal stability expressed in a doctrinal framework that, in effect, regarded both judicial and agency precedents as "evidence" of law. Consistent with this understanding, courts frequently declared that, absent a compelling case for overruling, they would affirm an agency's consistent, longstanding construction of a statute that it administers. The task of fixing precedents that entrenched mistaken or outdated policies was left to Congress, the legislative branch, to correct with new law.

With the rise of the modern administrative state, the circumstances underlying this policy choice to favor interpretive stability shifted radically.[226] The modern administrative state created a wealth of powerful agencies charged with regulating important, dynamic aspects of the economy pursuant to vague statutory mandates. Necessarily, agency efforts to "interpret" these mandates often obviously partook of policymaking. Also, Congress and the Supreme Court combined forces to make judicial

220. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1018–19 (2005) (Scalia, J., dissenting).

221. *Id.* at 1016 (Scalia, J., dissenting).

222. *Id.* at 1017.

223. *Id.* at 983 (majority opinion).

224. *Id.* at 983–84 (explaining that where an agency uses *Chevron* authority to displace a judicial precedent, "[t]he precedent has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law").

225. *See generally supra* Part II.A (supporting this summary paragraph).

226. *See generally supra* Part II.B (supporting this summary paragraph).

review of agency action the norm rather than the exception. Under these changed circumstances, it was inevitable that courts would find themselves confronting cases in which agencies could make attractive, policy-based arguments that they ought to be able to shift from one statutory construction to another.

One judicial response to this pressure was to strip *agency* statutory constructions of their common law-style precedential force.[227] Rather than regard agency statutory constructions as evidence of the one true and static legislative intent hidden in an ambiguous statute, courts began, at least in some cases, to characterize them as policy-infused efforts to determine how best to implement a statute. This shift implied that agencies ought to be able to learn from experience when construing their enabling acts, which in turn suggested that agencies ought to be able to shift from one reasonable statutory construction to another based on new learning.

Courts addressed the potential for *judicial* precedents to freeze agency law quite differently. By the time that the administrative state began to expand in the late nineteenth century, courts had moved toward regarding judicial precedents as binding law.[228] It is not surprising that, during a time when courts were generally hardening the force of judicial precedents, they did not consider protecting agency interpretive discretion by eliminating their force. Instead, courts protected agency interpretive discretion from the freezing force of judicial precedents by deploying rationality review.[229] In short, courts changed the *scope* of their precedents rather than their *force*. This approach found its canonical expression in the *Chevron* case.[230]

A couple of decades after *Chevron*, however, in part due to difficulties arising from the evolution of *Chevron* step zero, the Supreme Court did find it necessary to reduce the *force* of some judicial precedents as well. In *Brand X*, to Justice Scalia's outrage, the Court held that an agency could use its *Chevron* authority to overrule a judicial precedent representing a court's best interpretive effort to resolve a statutory ambiguity.[231] Notwithstanding the majority's effort to minimize the significance of this result, *Brand X* surely marked a substantial change in stare decisis principles by holding that an agency can use *Chevron* to displace a court's best *Marbury* effort "to say what the law is."[232]

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227. *See generally supra* Part II.C (supporting this summary paragraph).

228. *See supra* notes 77–82 and accompanying text (discussing nineteenth-century shift toward regarding precedents as binding law).

229. *See supra* Part II.C (discussing courts' pre-*Chevron* use of rationality review) and Part II.D (discussing *Chevron*).

230. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (discussed *supra* Part II.D).

231. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (discussed *supra* Part II.E).

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

## III. THE MOUNTAINOUS *CHEVRON–SKIDMORE* FIGHT OVER A DEFERENCE MOLEHILL

As Part II.E's partial list demonstrates, *Chevron* has been causing trouble for decades as courts and commentators have tried to figure out how to implement it. On a deeper level, *Chevron* has also been controversial because of the way it seems to shift *Marbury*-style power "to say what the law is" from courts to agencies.[233] This critique, which lay dormant to some degree for decades, has gained new prominence recently as Justice Thomas and Justice Gorsuch have condemned *Chevron* from the bench and the House of Representatives has passed a bill overturning it for undermining separation of powers and the rule of law.[234]

To be worth all these costs, *Chevron* should produce substantial benefits. The primary benefit suggested by the *Chevron* case itself is that agencies should be better than courts at resolving ambiguities in agency statutes because agencies enjoy comparative advantages of greater expertise and political accountability.[235] *Chevron* can produce this particular advantage, however, only if application of its deferential stance causes judges to affirm agency statutory constructions that they would reject under *Skidmore*'s supposedly more aggressive standard. More than thirty years after the issuance of *Chevron*, however, it is far from clear how much its doctrine actually affects judicial decision making and outcomes. On one extreme, one might think it self-evident that *Chevron* deference has greatly lessened the intensity of judicial review and thus transferred power to agencies.[236] On the other, it is plausible to think that *Chevron* may control how judges write about (and perhaps rationalize) their conclusions, but it does not have much effect on the deeper cognitive processes that actually determine outcomes. The ideal way to determine where the truth lies between these poles might be to run a massive experiment in which, holding all other variables constant, statutory constructions are tested under both *Chevron* and *Skidmore* in parallel proceedings. As Earth 2 is not available for this test, we must instead draw our conclusions from more equivocal data—some qualitative and some quantitative. On balance, this evidence does not demonstrate that courts are significantly more likely in

233. *Id.*

234. *See supra* notes 13–16 and accompanying text (noting the authorities' hostility to *Chevron* on separation-of-powers and rule-of-law grounds).

235. *See Chevron*, 467 U.S. at 865–66 (noting agencies have comparative advantages over courts in terms of expertise and political accountability).

236. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power . . . .").

important cases to affirm an agency's statutory construction when applying the *Chevron* lens for deference than the *Skidmore* lens.

### *A. Qualitative arguments that* Chevron *and* Skidmore *are not so different*

Again, *Skidmore* instructs courts to give an agency's statutory construction such weight as it deserves in light of "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."[237] Some cases characterize this approach as requiring courts to exercise independent judgment regarding statutory meaning; a majority, however, characterize it as demanding a "sliding scale" of deference that varies the intensity of review according to the quality of the agency's construction.[238] In any event, the core requirement of *Skidmore* deference is a duty of attention—as a court construes a statute that an agency administers, the court has an obligation to assess the merits of the agency's own statutory construction and supporting arguments.[239] After a fashion, this duty necessarily creates a self-executing sliding scale for determining *Skidmore* "weight." To justify displacing an agency's statutory construction, a reviewing court should explain why the agency's construction is wrong and why the court's construction is better. To discharge this task rationally, a court must give due consideration to any comparative advantages that the agency might enjoy in carrying out this interpretive task—especially if the statute in question is highly complex and technical.[240] The stronger the evidence that an agency has deployed such comparative advantages in fashioning its statutory construction, the more a court should hesitate before concluding that the agency's statutory construction is wrong and that the court has a better one.[241] More concretely, if an agency's thorough, expert explanation for its statutory

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

238. *See* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1235 (2007) (italics omitted) (concluding, based on empirical study of *Skidmore* opinions issued over five years by the federal courts of appeals "that the appellate courts overwhelmingly follow the sliding-scale approach" (italics omitted)).

239. *See* Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1155–56 (2012) (characterizing *Skidmore* as standing for a long-established proposition that courts, when called upon to construe an agency statute, must determine how much "weight" to give to "meanings attributed to it by prior (administrative) interpreters, their stability, and the possibly superior body of information and more embracive responsibilities that underlay them").

240. *See id.* at 1147 (characterizing *Skidmore* as "grounded in a construct of the agency as responsible expert, arguably possessing special knowledge of the statutory meaning a court should consider in reaching its own judgment").

241. *See* Hickman & Krueger, *supra* note 238, at 1294 (explaining that application of *Skidmore* should focus on "the extent to which agencies have deliberately employed their superior expertise and resources in evaluating the statutory ambiguity at hand.").

construction leaves a court with the impression that the agency knows its business better than the court does, then the court should hesitate before declaring the agency either to be "wrong" under *Skidmore* or "unreasonably wrong" under *Chevron*.

Given this much, some judges take the view that *Skidmore*, at bottom, really calls for the same level of scrutiny as *Chevron*'s rationality review. Judge Frank's dissenting opinion in *Duquesne Warehouse Co. v. Railroad Retirement Board*, which was issued just a year after *Skidmore* (and almost forty years before *Chevron*), provides an especially interesting discussion of this equation.[242] The majority, expressing a traditional fear that the administrative state threatens the rule of law, breathlessly accused the Board of pressing the "heresy" that "where a statute has defined a term, courts must, though they do not agree with it, follow the administrator's opinion as to its meaning."[243] Judge Frank's dissent chided the majority for failing to follow the Supreme Court's instructions in *Skidmore*, which he characterized as requiring courts "to give more respect to [an agency's statutory construction] than to that of an ordinary litigant, a lower court, or a court in another jurisdiction."[244] Foreshadowing *Chevron* quite precisely, he explained that, to give effect to this requirement of greater respect, courts should affirm an agency's statutory construction so long as it is "rationally permissible."[245]

Justice Breyer has long been skeptical that differences between *Skidmore* and *Chevron* are functionally meaningful. One of the Court's first efforts to clarify the step zero problem of *Chevron*'s applicability came in 2000's *Christensen v. Harris County*.[246] In this case, the Court determined that a Department of Labor (DOL) opinion letter interpreting a provision of the Fair Labor Standards Act was entitled only to *Skidmore* rather than *Chevron* deference because the latter should apply only to those agency interpretations that enjoy the "force of law."[247] Justice Scalia, concurring in part, objected that *Skidmore* deference is an "anachronism, dating from an era in which we declined to give agency interpretations . . . authoritative effect."[248] Justice Breyer wrote a short dissent in response. After defending the continuing vitality of the *Skidmore* standard, he concluded that it did not matter which form of deference applied in *Christensen* because "the

242. *See* 148 F.2d 473, 479–90 (2d Cir. 1945) (Frank, J., dissenting), *rev'd*, 326 U.S. 446 (1946).

243. *Id.* at 479 (majority opinion).

244. *Id.* at 481 (Frank, J., dissenting).

245. *Id.* at 487; *cf.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (stating that under the step two standard, "the question for the court is whether the agency's answer is based on a permissible construction of the statute").

246. 529 U.S. 576, 586–87 (2000).

247. *Id.* at 587.

248. *Id.* at 589 (Scalia, J., concurring).

Labor Department's position in this matter is eminently reasonable, hence persuasive, whether one views that decision through *Chevron's* lens, through *Skidmore's*, or through both."[249] Thus, for Justice Breyer, *Chevron* and *Skidmore* both reduce to rationality review.[250]

Just two years later in the step zero case of *Barnhart v. Walton*, Justice Breyer seized the opportunity to move deference doctrine in his preferred direction by further blurring the distinction between *Chevron* and *Skidmore*.[251] As discussed above, in an 8–1 majority opinion, he explained that courts should determine whether to apply *Chevron* deference to statutory constructions that agencies adopt via informal means by examining factors including agency expertise, the importance of the issue, administrative complexity, and consistency.[252] In other words, courts should use *Skidmore*-style factors to determine whether to apply *Chevron* or *Skidmore*. Not long after, another legal luminary, Judge Posner, opined that *Barnhart*'s approach "suggest[ed] a merger between *Chevron* deference and *Skidmore*'s . . . approach of varying the deference that agency decisions receive in accordance with the circumstances."[253]

Most judges, however, obediently following the Supreme Court's guidance in *Mead Corp.*,[254] seem to take as a given that *Chevron* and *Skidmore* are functionally distinct.[255] The *sliding scale* terms in which courts commonly discuss *Skidmore*, however, suggest that this is often a distinction without much meaningful difference. Judge Chagares's opinion in 2012's *Hagans v. Commissioner of Social Security*, which includes a lengthy effort to make sense of the relevant Supreme Court precedents, nicely illustrates this point.[256] Judge Chagares characterized *Skidmore* as

249. *Id.* at 597 (Breyer, J., dissenting).

250. For a Supreme Court majority accepting that *Skidmore*, like *Chevron*, is a form of rationality review, see *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 487, 493 (2004) (affirming the agency's construction under *Skidmore* as a "rational interpretation" that "is surely permissible"). This move did not pass without objection. *See id.* at 517 (Kennedy, J., dissenting) ("So deficient are its statutory arguments that the majority must hide behind *Chevron's* vocabulary, despite its explicit holding that *Chevron* does not apply.").

251. Barnhart v. Walton, 535 U.S. 212, 212–25 (2002).

252. *Id.* at 220–22 (discussed *supra* Part II.E.1).

253. Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002). *But see id.* at 882 (Easterbrook, J., concurring) (citation omitted) (declaring that he did "not perceive in *Walton* any 'merger' between *Chevron* and *Skidmore*").

254. United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (distinguishing *Chevron* and *Skidmore* deference).

255. *See, e.g.*, McGraw v. Barnhart, 450 F.3d 493, 500–01 (10th Cir. 2006) (distinguishing *Chevron* and *Skidmore* deference; concluding that *Skidmore* was applicable); *Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring) (insisting that, where an agency "abjures the APA's procedures for making decisions, courts owe" that agency *Skidmore*'s deference of "careful attention" rather than *Chevron* deference).

256. 694 F.3d 287 (3d Cir. 2012).

requiring "a lesser degree of deference" than *Chevron*.[257] Consistent with *Barnhart*, however, he also noted that "many of the same circumstances we found relevant for determining whether to apply *Chevron* deference" to informally developed agency statutory constructions "are also useful for deciding the level of deference due under *Skidmore*."[258] Applying this sliding-scale approach to a ruling by the Social Security Administration (SSA), he explained that "the relative expertise of the SSA in administering a complex statutory scheme and the agency's longstanding, unchanging policy regarding this issue counsel[ed] towards a higher level of deference."[259] Of course, as *Skidmore* deference grows "higher," it becomes increasingly difficult to sustain the notion that it can be functionally different from *Chevron*. Also, statutory constructions that agencies support with thorough, expert analysis are more likely to speak to genuinely significant policy concerns than those statutory constructions that agencies support less carefully. Thus, generally speaking, we should expect courts to apply a high level of sliding-scale *Skidmore* deference—that in theory should near *Chevron* deference—when reviewing cases with broad policy import. In short, the more important the issue of statutory construction, the more *Chevron* and *Skidmore* should tend to resemble each other.

### *B. About the numbers*

The preceding analysis suggests that endless debates over *Chevron* and *Skidmore* have more to do with lawyers' fascination for labels than with controlling the actual cognition that underlies judicial decision making. Scholars have tried to test this suspicion by conducting empirical studies that compare affirmance rates across various standards of review applicable to agency action. The results of these studies have left some leading administrative law scholars convinced that standards of review have little effect on outcomes. For instance, Professor Richard Pierce, assessing the literature in 2011, flatly declared, "[t]here is no empirical support for the widespread belief that choice of doctrine plays a major role in judicial review of agency actions."[260] Similarly, Professor David Zaring, writing in a 2010 law review article that comprehensively reviewed this subject, concluded, "the variance of the validation rates of agency action, regardless of the standard of review, is small."[261]

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257. *Id.* at 294–95.

258. *Id.* at 304–05.

259. *Id.* at 305.

260. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 93 (2011).

261. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 135 (2010) (italics omitted).

Such conclusions must now, however, take account of an extensive empirical study published in 2017 by Professors Kent Barnett and Christopher J. Walker.[262] They find that, at the circuit court level, "agency interpretations were significantly more likely to prevail under *Chevron* deference (77.4%) than *Skidmore* deference (56.0%) or, especially, de novo review (38.5%)."[263] The Barnett–Walker study provides a treasure trove of information concerning the implementation of standards of review by courts of appeals. Ultimately, however, it does not demonstrate that the differing affirmance rates that they report for *Chevron* and *Skidmore* are attributable to differences in the intensity of review that these standards require as a matter of doctrine.

Earlier studies have found that the Supreme Court affirms under *Chevron* and *Skidmore* at remarkably similar rates. In their exhaustive 2008 study, Eskridge and Baer found that the Court affirms under *Chevron* 76.25% of the time and under *Skidmore* 73.5% of the time.[264] These figures at least suggest that, by the time an agency's statutory construction is filtered through lower courts and reaches the discretionary docket of the Supreme Court, the difference between *Chevron* and *Skidmore* is likely trivial. Judging the Court based on its actions rather than words, it might agree. One of the more striking findings of the Eskridge–Baer study was that the Court does not apply *Chevron* "in nearly three-quarters of the cases where it would appear applicable under *Mead*."[265]

Gathering good data about affirmance rates at the courts of appeals is both more difficult and far more important given the large number of administrative law cases that they resolve. Notable studies of *Chevron* affirmance rates conducted over the last quarter century have found a range varying from 64% (Miles–Sunstein)[266] to 81.3% (Schuck–Elliott).[267] This last figure, however, is from 1985—during the initial *Chevron* adjustment

262. Barnett & Walker, *supra* note 181.

263. *Id.* at 6.

264. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1142 (2008) (analyzing Supreme Court opinions issued between 1983 and 2005); *see also* Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 849–50 (2006) (finding that Supreme Court justices vote to affirm under *Chevron* 67% of the time, but also noting that this 67% figure masks wide variation among the justices).

265. Eskridge & Baer, *supra* note 264, at 1125.

266. Miles & Sunstein, *supra* note 264, at 849. This study examined all published circuit court opinions issued from 1990 through 2004 reviewing interpretations of law by the EPA or the NLRB. *Id.* at 825.

267. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1030 tbl.3, 1039 tbl.8 (1990). This study of affirmance rates examined a sample of 738 cases for 1984, 938 cases for 1985, and 147 cases for 1988. *Id.* The affirmance rates for these periods were 70.9%, 81.3%, and 75.5%, respectively. *Id.*

period over thirty years ago.[268] The next highest *Chevron* affirmance rate reported is 75.5% (Schuck–Elliot).[269] Other studies have found broadly similar numbers.[270] The most substantial study in recent years on *Skidmore* found an affirmance rate in the courts of appeals of 60.4%.[271] These figures suggest that courts of appeals may indeed affirm under *Chevron* at about a 10% higher rate than under *Skidmore.*

The Barnett–Walker study, in addition to being very recent, cast an impressively broad net, examining 1,558 instances of judicial review of agency statutory constructions published over an eleven-year period.[272] Viewed one way, their findings are broadly consistent with the preceding data. Their *Chevron* affirmance rate of 77.3% (902 of 1,166 applications) is within the range of preceding studies, albeit on the high end; their *Skidmore* affirmance rate of 56% (94 out of 168 applications) is not so far from the 60.4% rate found by Hickman and Krueger.[273] But the effect of combining these high-end and low-end findings is to stretch the difference between the *Chevron* and *Skidmore* rates to an impressive 21.3%.

The Barnett–Walker study also reports, however, that in 107 instances courts declined to choose a standard of review, usually because it was immaterial to the outcome.[274] Excluding cases in which a court indicates that the choice of standard of review does not matter to the outcome will yield affirmance rates that tend to magnify the importance of this choice. One can adjust for this problem by counting instances in which the court refused to choose a standard both as *Chevron* applications and as *Skidmore* applications for the purpose of determining affirmance rates. Performing

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268. *Id.* at 1030 tbl.3.

269. *Id.* at 1039 tbl.8.

270. *See, e.g.*, Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 784, 796 (2008) (finding that judges voted to affirm under *Chevron* 69.55% of the time in 70 environmental law cases); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 18, 30 (1998) (finding an affirmance rate of 73% in every published opinion issued by the courts of appeals from 1995 to 1996 that applied *Chevron*).

271. Hickman & Krueger, *supra* note 238, at 1275. This study examined 106 applications of *Skidmore* in 104 cases from the appellate courts issued between 2001 and 2006. *Id.* at 1259–67.

272. The Barnett–Walker study collected 2,272 decisions from the Westlaw database by searching for "*Chevron*" with various relevant terms ("agency," "ALJ," etc.) over an eleven-year period covering 2003 through 2013. Barnett & Walker, *supra* note 181 (manuscript at 5). Review of these cases found 1,558 instances in which courts reviewed agency statutory constructions spread out across 1,327 judicial opinions. *Id.* (manuscript at 23).

273. *See* Hickman & Krueger, *supra* note 238, at 1275 (reporting approximately a 60% affirmance rate); *see also* Barnett & Walker, *supra* note 181 (manuscript at 30 fig. 1) (reporting affirmance rates by standard of review and number of applications of those standards).

274. *See* Barnett & Walker, *supra* note 181 (manuscript at 29) (noting that in 107 instances of review, "the courts declined to choose a deference standard, usually holding that the answer would have been the same under any standard").

this exercise knocks down the difference between the affirmance rates for these two standards from about 21.3% to a still quite notable 16.4%.[275]

More important than the precise size of this gap is the fact that its existence does not demonstrate that *Skidmore* review is functionally tougher than *Chevron* review. Judicial affirmance rates should depend not just on standards of review but also, of course, on the legal strength of the agency statutory constructions at issue, and there are strong grounds for concluding that agency interpretations subject to *Skidmore* are, taken as a group, weaker than those subject to *Chevron.* Holding other factors equal, it would therefore be surprising if *Skidmore* affirmance rates were *not* lower than *Chevron* rates.

Immigration orders, which are the source of a large number of *Skidmore* applications, provide strong evidence of this potential confounding effect.[276] The issuer of these orders, the Board of Immigration Appeals, is notoriously understaffed and often subject to scathing judicial rebukes.[277] To speed through its overwhelming docket, the Board has developed streamlined procedures for resolving cases through unpublished, nonprecedential orders, generally issued by one member of the Board.[278] If one were trying to design a system for administrative appeals to undermine judicial trust, it might resemble this streamlined BIA process. In response, courts of appeals have held that statutory constructions developed through this process should be subject to *Skidmore* rather than *Chevron* review.[279] Of course, this approach has the natural consequence of weakening the pool of statutory constructions subject to *Skidmore* review and strengthening the pool subject to *Chevron.*

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275. Agencies prevailed under *Chevron* combined with "No Regime Selected" 973 out of 1,273 times, for a win rate of 76.4%. *See* Barnett & Walker, *supra* note 181 (manuscript at 30 fig.1) (providing win-rates by standard of review as well as the number of applications of each standard). Agencies prevailed under *Skidmore* combined with "No Regime Selected" 165 out of 275 times, for a win rate of 60%. *Id.*

276. A search of the Westlaw database for "Chevron & Skidmore & (Board /3 "immigration appeals")" during the time period covered by the Barnett–Walker study found 83 published cases from the courts of appeals. Coding applications of standards of review in these cases is not an exact science. That said, review of these cases identified 40 applications of *Skidmore,* with 15 affirmances and 25 rejections. In addition, there were 5 instances of judicial review (with 2 affirmances and 3 rejections) that might plausibly be characterized as applying *Skidmore* insofar as the court purported to apply de novo review only after first examining the agency's statutory interpretation for persuasive value. *Spreadsheet on file with author.* These figures suggest that immigration orders composed a substantial fraction of the 168 *Skidmore* applications examined by the Barnett–Walker study.

277. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) ("[C]riticisms of the Board [of Immigration Appeals] and of the immigration judges have frequently been severe.").

278. *See* COMM'N ON IMMIGRATION, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY 32–33 (2010) (describing and critiquing BIA's streamlined procedures; observing that "short opinions by single members are now the dominant form of decision making").

279. *See, e.g.*, Rodriguez-Avalos v. Holder, 788 F.3d 444, 449 n.8 (5th Cir. 2016) (stating that courts should apply *Skidmore* deference to single-judge decisions by the BIA as well as unpublished three-judge decisions).

Moreover, quite apart from the special but important category of immigration orders, the Supreme Court's step zero case *Barnhart* instructs that factors such as agency expertise, technical complexity, extensive deliberation, and consistency all favor application of *Chevron* to informally developed statutory constructions.[280] Interestingly, the Barnett–Walker study finds that courts cite *Barnhart*-style factors such as agency expertise and the longstanding status of an agency statutory construction relatively rarely.[281] Nonetheless, one can certainly find many cases in which courts have relied on such factors to shove promising agency statutory constructions toward *Chevron*[282] and weaker ones away from it.[283]

Still, although step zero effects tend to weaken the *Skidmore* pile and strengthen the *Chevron* pile, there is another dynamic that may pull in the opposite direction. Suppose an agency is confident both that a reviewing court would apply *Chevron* review to the agency's statutory interpretation and that *Chevron* review is, in fact, less strict than *Skidmore* review. In that case, the agency might maximize its "payoff" by adopting a statutory interpretation that the agency believes is weaker on its legal merits in order to further the agency's policy preferences. This type of trading of legal risk for policy benefit likely exists to some indeterminate degree.[284] It bears

280. Barnhart v. Walton, 535 U.S. 212 (2002) (discussed *supra* Part II.E.1).

281. Barnett & Walker, *supra* note 181 (manuscript at 64 fig.14) (observing that courts referenced agency expertise in 18.4% of the 1,558 instances of judicial review examined; courts referenced whether an interpretation was longstanding in 10.7% of these instances).

282. *See, e.g.*, Fournier v. Sebelius, 718 F.3d 1110, 1119–22 (9th Cir. 2013) (applying *Barnhart* factors to justify *Chevron* deference for longstanding agency interpretation of Medicare Act); Managed Pharmacy Care v. Sebelius, 716 F.3d 1235, 1242, 1247–48 (9th Cir. 2013) (applying *Chevron* deference to a decision by the Secretary of Health and Human Services to approve state plan amendments for Medicaid submitted by California; observing that the "agency is the expert in all things Medicaid," that implementing Medicaid is a "colossal undertaking," and that interested outsiders had "offered extensive input" in the process) AstraZeneca Pharm. LP v. FDA, 713 F.3d 1134, 1139 (D.C. Cir. 2013) (applying *Chevron* to FDA decision letter); Village of Barrington v. Surface Transp. Bd., 636 F.3d 650, 659 (D.C. Cir. 2011) (applying *Chevron* to merger approval that involved substantial public participation); Menkes v. U.S. Dep't of Homeland Sec., 637 F.3d 319, 331–33 (D.C. Cir. 2011) (applying *Chevron* to agency's longstanding interpretation that resolved complex, interstitial question); Wyeth Holdings Corp. v. Sebelius, 603 F.3d 1291, 1296 (Fed. Cir. 2010) (applying *Chevron* to FDA decision letter); Teva Pharm. USA, Inc. v. Sebelius, 595 F.3d 1303, 1307–08, 1315 (D.C. Cir. 2010) (same); Teva Pharm. Indus. v. Crawford, 410 F.3d 51, 53 (D.C. Cir. 2005) (same); Mylan Labs. v. Thompson, 389 F.3d 1272, 1280 (D.C. Cir. 2004) (applying *Chevron* to FDA decision letter given the "complexity of the statutory regime under which the FDA operates, the FDA's expertise [and] the careful craft of the scheme it devised to reconcile the various statutory provisions"); Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 60 (2d Cir. 2004) (applying *Chevron* deference to HUD policy statement that "arose out of 'the careful consideration the Agency has given the question over a long period of time'") (quoting Barnhart v. Walton, 535 U.S. 212, 222 (2002)); Davis v. EPA, 348 F.3d 772, 779 n.5 (9th Cir. 2003) (applying *Barnhart* factors to justify *Chevron* deference for EPA ruling on California waiver request).

283. *See, e.g.*, Fox v. Clinton, 684 F.3d 67, 78 (D.C. Cir. 2012) (holding that slapdash agency letter was not entitled to *Chevron* deference).

284. *See, e.g.*, 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, 11–13 (2005)

noting, however, that this effect, to whatever degree it exists, should lessen if agencies accept that the difference of intensity of review between *Chevron* and *Skidmore* is not great.

### *C. The upshot*

In very quick shorthand, *Skidmore* requires courts to pick the statutory constructions they deem best whereas *Chevron* requires courts to affirm an agency statutory construction so long as it is reasonable. On the face of the matter, this difference in scrutiny sounds like it should be significant and often consequential, and courts certainly write their opinions as if it were. Also, empirical studies, most especially including the recent Barnett–Walker study, indicate that circuit courts affirm at notably higher rates when applying *Chevron* than *Skidmore*.[285]

Closer scrutiny suggests, however, that the doctrinal difference between *Chevron* and *Skidmore* levels of scrutiny does not have demonstrably significant functional effects. For one thing, there is good reason to think that statutory constructions subject to *Skidmore* should be, as a group, legally weaker than those subject to *Chevron*.[286] Holding other factors constant, this difference in strength suggests that affirmance rates should be lower for *Skidmore* than *Chevron* even if their doctrinal standards do not have any real effects on underlying judicial decision making. Moreover, courts commonly purport to apply a sliding scale that heightens deference as the *Skidmore* factors supporting an agency statutory construction strengthen.[287] Thus, where an agency offers a thorough analysis of an important, complex issue that implicates agency technical expertise, *Skidmore* deference should, in theory, approach *Chevron* levels. In general, we should expect agencies to invest greater resources in statutory constructions as their policy significance grows. Therefore, the difference between *Chevron* and *Skidmore* levels of deference should

(explaining, based on experience as General Counsel of the EPA, that "[a]t the margins, agency decisions after *Chevron* reflect more weight on policy choices and less on legalistic interpretations"); *cf.* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 723 (2014) (conducting survey of 128 agency officials with experience in rulemaking; finding that 43% "agreed" or "strongly agreed" that, where an agency "knows or strongly believes" *Chevron* will apply, the agency "will be more willing" to adopt an aggressive statutory construction at greater legal risk, but also finding that only 28% "agreed" or "strongly agreed" that the level of deference a court will apply to an agency statutory interpretation is "reasonably predictable").

285. *See supra* notes 272–283 and accompanying text (noting these findings).

286. *See supra* notes 279–283 and accompanying text (discussing grounds for concluding that statutory constructions subject to *Skidmore* should be weaker, considered as a group, than those subject to *Chevron*).

287. *See supra* notes 237–241, 254–259 and accompanying text (discussing *Skidmore* deference as a sliding scale).

matter less for the types of agency statutory constructions that should elicit the most concern.

## IV. REPLACE *CHEVRON* WITH LESS STARE DECISIS

There is little proof that struggling over whether to apply the *Chevron* lens or the *Skidmore* lens to agency statutory constructions actually fine-tunes the level of scrutiny that courts apply in a way that demonstrably affects significant outcomes. *Chevron* nonetheless serves an important function. Where a court issues a step two opinion declaring a particular agency statutory construction to be reasonable, that opinion does not, by its terms, block the agency from choosing a different reasonable statutory construction at some future date. *Chevron* thus preserves ongoing agency interpretive discretion from the freezing force of judicial precedents by altering their scope. Use of this indirect means to protect agency interpretive discretion has, however, led to over thirty years of contention regarding whether and how to implement deferential review.[288] It would be far better and simpler to protect agency interpretive discretion directly by altering the *precedential force* of judicial opinions rather than their *scope*.

Courts could implement this idea by abandoning the *Chevron* framework and, at the same time, declining to give coercive horizontal stare decisis force to their own precedents when reviewing an agency's construction of a statute that it administers. Unpacking these ideas, a court's task when construing an agency's enabling act should always be to pick the best available interpretation. That said, as both *Skidmore* and fundamental demands of reasoned decision making require, to justify rejecting an agency's own construction of a statute that it administers, a reviewing court should have to explain why its preferred construction is better.[289] A court's construction of an agency's enabling act should enjoy normal precedential force until that court confronts a new construction developed by the agency. When reviewing this new construction, the court should not reject it simply for conflicting with the court's own precedent. Rather, the court should once again determine the best available construction without a coercive stare decisis thumb on the scale. If the court can explain why its precedent is better than the new agency construction, then the court should continue to follow that precedent. If the court cannot explain why its precedent is better than the agency's new construction, then the court should adopt the latter.

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288. *See generally supra* Part II.E (discussing *Chevron* implementation problems).

289. *See supra* notes 237–241 and accompanying text (discussing the duty of respect that courts owe agencies under *Skidmore*).

For another framing of this proposal, recall that, as the administrative state grew and became entrenched in the early twentieth century, courts protected agency interpretive discretion from the freezing force of *agency* precedents by the simple expedient of removing their stare decisis force.[290] Applying this same simple approach, courts should now protect agency interpretive discretion from the freezing force of *judicial* precedents by limiting their stare decisis force as well—rather than by relying on the monumentally confused and confusing *Chevron* framework.

### *A. The proposal's limited reach*

Assessment of the proposal's change to stare decisis principles requires an appreciation of important limits on its reach. As a threshold matter, the proposal does not question the axiomatic role of vertical stare decisis, which gives a higher court's precedents strictly binding force on lower courts subject to its jurisdiction.[291] A circuit court would not, therefore, be allowed to "overrule" the Supreme Court's construction of an agency statute.

Note also that a proposal to limit coercive horizontal stare decisis force can affect only those judicial opinions that happen to possess such force in the first place. As it happens, a large majority of federal court opinions lack such force, including all district court opinions,[292] as well as unpublished opinions by the circuit courts (about 80% of their total).[293] The proposal thus can affect only Supreme Court opinions and published circuit court opinions.

Supreme Court opinions, as it turns out, do not have all that much horizontal coercive force to lose given that the Court has never regarded its precedents as strictly binding on itself. Instead, it reserves the power to overrule a precedent where it finds a "special justification" that is "over

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290. *See, e.g.*, *supra* notes 116–119 and accompanying text (discussing Judge Learned Hand's rationale for allowing agency interpretive flip-flops in Niagara Falls Power Co. v. Federal Power Commission, 137 F.2d 787 (2d Cir. 1943)).

291. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court 'superior' to it.").

292. *See, e.g.*, Thomas R. Lee & Lance S. Lenhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 168–70 (2001) ("[F]ederal district courts . . . have long exercised their judicial power without creating precedent in the same way that courts of appeals create precedent.").

293. *See* Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 761 (1995) (discussing courts' rapid adoption of rules governing publication, citation, and precedential force of their opinions; collecting these rules); Judicial Facts and Figures 2015 tbl.2.5, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/Table2.05.pdf (last updated Sept. 30, 2015) (reporting that approximately 80% of circuit court decisions on the merits go unpublished).

and above the belief that the precedent was wrongly decided."[294] Decisions to overrule consider factors such as a precedent's workability, antiquity, reliance interests, and the quality of its reasoning.[295] Although the conceptual underpinnings of the common law's declaratory theory and the Court's "special justification" approach differ, they both have the effect of creating a rebuttable presumption that precedents should be followed. It is fair, however, to question the meaningfulness of this presumption given that most cases contentious enough to make it to the Supreme Court likely present sufficient raw materials for a willing justice to craft a "special justification."[296]

The precedential force of published circuit court opinions presents a complex picture. By long tradition, the coercive horizontal effects of a circuit court opinion apply only within that circuit—circuits do not "bind" each other.[297] En banc opinions, like Supreme Court opinions, enjoy presumptive horizontal force.[298] Published opinions by three-judge panels, however, do carry strictly binding horizontal force, and later panels of the same court are supposed to follow them.[299] The proposal's most significant effect would be to eliminate this horizontal binding force of circuit court panel opinions when courts review new agency statutory constructions.

Even for this category, however, the proposal's incremental effects would be largely limited to eliminating the horizontal stare decisis force of *Chevron* step one opinions purporting to determine unambiguous statutory meaning because step two opinions do not have that much effective horizontal stare decisis force to lose. Again, a step two opinion affirming a given statutory construction as reasonable does not block an agency from adopting a different construction later. Moreover, even a step two opinion rejecting a particular agency construction as unreasonable does not necessarily block the agency from readopting that construction. Veering back to *Chevron* metaphysics, if an agency statutory construction gets past step one, then it should follow that a reasonable explanation *could* be offered for it.[300] A step two rejection may therefore signify merely that the

294. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) (quotation marks omitted) (quoting Haliburton Co. v. Erica P. Johnson Fund, Inc., 134 S. Ct. 2398, 2407 (2014)).

295. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362–63 (2010).

296. It borders on cliché to note that, when the majority of the Court overrules a precedent, a dissenting justice will complain that the majority did not give enough weight to the precedent's stare decisis force. *See, e.g.*, Alleyne v. United States, 133 S. Ct. 2151, 2172 (2013) (Alito, J., dissenting) (condemning the majority for overruling "a well-entrenched precedent with barely a mention of *stare decisis*").

297. *See* Estreicher & Revesz, *supra* note 22, at 740 (referencing rejection of "intercircuit stare decisis").

298. *See* Riddle v. Kemna, 523 F.3d 850, 855 (8th Cir. 2008) (en banc) (overruling previous en banc decision, Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999)).

299. Hart v. Massanari, 266 F.3d 1155, 1171–72 (9th Cir. 2001).

300. *See supra* note 200 and accompanying text (noting that step one tests for rationality).

agency's *explanation* for choosing its construction was unreasonable—leaving open the possibility that the agency could later offer a better and sufficient explanation.[301] Of course, the upshot here is that, because *Chevron*'s rationality review already limits the freezing force of step two opinions by limiting their scope, stripping them of coercive horizontal stare decisis force would have very little additional effect.

Lastly, recall that the *Brand X* doctrine already limits the precedential force of judicial opinions in which courts exercised independent judgment regarding statutory meaning rather than applying *Chevron*.[302] Under *Brand X*, an agency can use its *Chevron* authority to trump the stare decisis force of a judicial precedent so long as the precedent did not hold "that its construction follow[ed] from the unambiguous terms of the statute."[303] In other words, agencies can trump judicial precedents that would have reached step two had *Chevron* applied. As with actual step two opinions, these hypothetical step two opinions under *Brand X* have little coercive horizontal stare decisis effect to lose.

### *B. Limiting the horizontal stare decisis force of* Chevron *step one-style opinions*

Given the limits just described, the proposal's real effect would be to limit the coercive horizontal stare decisis force of judicial opinions that, in the language of *Brand X*, follow "from the unambiguous terms of the statute."[304] *Chevron* step one opinions obviously would fall into this category. In addition, under *Brand X*, judicial opinions that would have resolved statutory meaning at step one if they had applied *Chevron* would also qualify. Collectively, for ease of reference, consider both of these types to be in the "*Chevron* step one-style."

As a general point in support of this proposal, it bears noting that stare decisis doctrines, to borrow a phrase from *Chevron*, are not "carved in stone."[305] These doctrines represent judicial policy determinations regarding how to balance the benefits of adhering to the past against those of allowing change.[306] These policy determinations regarding change have themselves changed greatly over time. Starting from the common law's

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301. *See supra* notes 203–207 and accompanying text (noting that step two has been characterized as testing agency explanations for arbitrariness).

302. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

303. *Id.*

304. *Id.*

305. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).

306. *See, e.g.*, Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1170–71 (2008) (discussing policy roots of stare decisis).

declaratory model, courts have built a highly complex system of horizontal and vertical principles applying various levels of force to various types of judicial opinions.[307] On a more specific note, the most spectacular change in recent decades has been the adoption by circuit courts of publication rules that, as implemented, have made the vast majority of their opinions non-precedential.[308] Viewed against this backdrop, the proposal's alteration of the precedential force of judicial constructions of agency statutes qualifies as modest and incremental.

Another general point bearing emphasis is that courts have long purported to modulate the force of judicial precedents according to the type of issue that they determine.[309] This practice represents a judgment that the policy concerns underlying stare decisis play out differently in different contexts.[310] On the one hand, a strong commitment to stare decisis helps ensure equal treatment of litigants, reduces the risk of arbitrary decision making, and enhances reliance interests, among other benefits.[311] On the other, such commitment may block correction of error or prevent the courts from accommodating new and valuable learning.[312] Bearing such concerns in mind, the Supreme Court has declared that constitutional precedents warrant less force because the absence of legislative means to correct them raises the potential damage of judicial error.[313] The other side of this coin is that statutory precedents enjoy special force precisely because Congress, if it wishes, can correct them.[314] Precedents that implicate strong reliance interests, such as those bearing on property, also warrant special strength.[315]

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307. *See, e.g.*, Hart v. Massanari, 266 F.3d 1155, 1163–68 (9th Cir. 2001) (briefly surveying evolution of stare decisis from the declaratory theory's evidentiary approach to the modern concept of binding precedent in hierarchical federal system).

308. *See* Dragich, *supra* note 293, at 761 (discussing rapid adoption of such rules during the 1960s).

309. *See, e.g.*, William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (noting that the Supreme Court has purported to give differing levels of force to common law, constitutional, and statutory precedents).

310. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 924–25 (2007) (Breyer, J., dissenting) (explaining that stare decisis applies with less force to constitutional than statutory cases; explaining that stare decisis should apply with particular force where property or contract rights are implicated due to reliance interests).

311. *See* Payne v. Tennessee, 501 U.S. 808, 827–28 (1991) (enumerating benefits of stare decisis).

312. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794 (2012) ("[T]he negative consequences of stare decisis can be stated more objectively as the cost of judges not being able to judge. Or, put differently, a decision that is ripe for discarding remains law. As a result, stare decisis can tend to calcify the law, causing age-old precedent to linger despite developments in other areas of law and in society.").

313. *See Payne*, 501 U.S. at 828 (indicating that stare decisis has less force in "constitutional cases, because in such cases correction through legislative action is practically impossible" (quotation marks omitted) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting), *overruled in part by* Helvering v. Mountain Producers Corp., 303 U.S. 376 (1983)))

314. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014) ("The principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to

For the present purpose, the most pertinent examples of courts shaping stare decisis to fit a legal context come from their treatment of both administrative and judicial constructions of agency statutes. Recall that, functionally speaking, courts used to give declaratory-theory-style force to agency precedents.[316] Accordingly, one can find many opinions from the nineteenth century in which courts stated that longstanding, consistent, contemporaneous agency statutory constructions should be abandoned only for strong reasons.[317] As the administrative state became pervasive, courts increasingly confronted situations in which the benefits of allowing an agency to change interpretive course seemed great enough to justify the drawbacks.[318] The courts' doctrinal solution to this problem was simplicity itself: They just stopped giving coercive stare decisis force to agency precedents and instead extolled the benefits of allowing agencies to change interpretive course based on new learning.[319] For many decades, rather than apply this same simple approach to reduce the freezing force of judicial precedents, courts relied on the indirect method of deploying rationality review to reduce the scope of their precedents rather than their force.[320] In *Brand X*, however, the Supreme Court finally supplemented this approach by limiting the stare decisis force of judicial precedents that did not apply *Chevron* but that would have reached step two if they had.[321]

The proposal carries this process one step further by depriving *Chevron* step one-style opinions of their coercive horizontal stare decisis force in the context of judicial review of new agency statutory constructions. The great policy advantage of this proposal is that it would serve *Chevron*'s function of preserving agency interpretive flexibility from the freezing force of judicial precedents while at the same time avoiding all of the confusion that the *Chevron* doctrine has created.[322] The obvious disadvantage to consider on the other side of the ledger is that extending agency interpretive

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alter what we have done." (quotation marks omitted) (quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008))).

315. *Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . .").

316. *See generally supra* Part II.A.2 (discussing nineteenth-century judicial practice of favoring entrenched agency precedents).

317. *See supra* notes 46–51 (collecting cases).

318. *See, e.g.*, *supra* Part II.C.1 (discussing the Court's willingness to allow flexibility in agency interpretation on tax issues in the emerging administrative state).

319. *See, e.g.*, *supra* note 131 and accompanying text (quoting the Supreme Court's insistence that agency statutory interpretations should evolve with agency learning in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265–66 (1975)).

320. *See generally supra* Parts II.C.D (discussing courts' use of rationality review to protect agency interpretive discretion from judicial precedents).

321. Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

322. On the confusion *Chevron* has created, see generally *supra* Part II.E.

flexibility to include step one-style precedents might destabilize the law unacceptably.

But a moment's reflection suggests that depriving step one-style precedents of coercive horizontal stare decisis force would do little to destabilize the law—and that any such effect might in any event be justified. Like pretty much every other aspect of *Chevron*, the precise meaning and requirements of step one are contested.[323] Still, the Supreme Court's original description of step one indicates that it should apply where Congress's unambiguous intent is clear.[324] Certainly, courts can and do disagree in some cases on identification of clear, unambiguous congressional intent. It is, however, precisely those cases in which congressional intent can be clearly identified that should least need coercive horizontal stare decisis force for interpretive stability. After all, a later court should be just as capable as an earlier court to determine "clear" meaning for itself without the crutch of a precedent's coercive force. Put another way, an agency can try all it wants to persuade a court to depart from its precedent adopting a particular statutory construction, but if that precedent genuinely relied on clear, unambiguous congressional intent, then the agency's effort should fail.

Suppose, however, that, at an agency's behest, a court does reject its precedent that purported to identify clear, unambiguous congressional intent. This outcome certainly would destabilize the law to some extent, but it would also provide strong evidence that the statutory provision at issue was, in fact, ambiguous. The entire *Chevron* edifice is built on the idea that agencies, thanks to their greater expertise and accountability, should resolve such ambiguities.[325] Thus, even if adoption of the proposal would destabilize the law to this limited degree, this effect would be broadly consistent with the policy balance that the *Chevron* doctrine has already claimed to strike between interpretive stability and flexibility.

Another quite practical point to consider is that courts are, by and large, conservative institutions that prefer stability and are sensitive to reliance interests[326]—indeed, that sensitivity does much to explain the existence of

323. On the topic of *Chevron* step one confusion in particular, see generally *supra* Part II.E.2.

324. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

325. *See id.* at 865–66 (referencing agency expertise and political accountability as grounds for deference).

326. Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

stare decisis doctrine.[327] As such, it would not be a trivial matter, generally speaking, for an agency to persuade a court to change a precedent that purported to rely on clear congressional meaning even if that precedent technically lacked coercive force. In particular, basic requirements of reasoned decision making would require an agency to explain why its new construction was sufficiently superior to the judicial precedent to overcome any reliance interests that the latter might have engendered.[328] In other words, to persuade a court to abandon its precedent, an agency would need to demonstrate that the advantages of change outweigh the stare decisis-type advantages of stability in that very case.

In sum, limiting the coercive horizontal stare decisis force of judicial precedents provides a far clearer, simpler, and direct means to protect agency interpretive flexibility from the freezing force of judicial precedents than the scheme of rationality review associated with *Chevron*. An obvious objection to this proposal is that it would create too much instability by enabling agencies to abandon *Chevron* step one-style judicial precedents that rely on unambiguous congressional intent. This objection, however, largely dissolves when one recognizes that precedents that rely on unambiguous congressional intent ought not, in general, need the help of coercive stare decisis for their preservation. Moreover, were an agency to persuade a court to abandon its precedent for a new agency construction, this result would tend to show that the court's precedent did not properly rely on clear, unambiguous congressional intent in the first place—i.e., in terms of current doctrine, the precedent should have been a *Chevron* step two opinion with very limited precedential scope. Adoption of the proposal would thus leave the balance that the current *Chevron* framework strikes between interpretive stability and flexibility largely in place, while at the same time simplifying the law tremendously.

## CONCLUSION

Critics such as Justice Thomas, Justice Gorsuch, and the House of Representatives have all in recent years condemned the *Chevron* doctrine for undermining separation of powers and the rule of law.[329] This over-the-top criticism is fundamentally misplaced, but it does make the possibility that administrative law might abandon the *Chevron* doctrine and its confusing encrustations less academic than it once was. As such, it is an

327. *Id.* at 828 ("Considerations in favor of *stare decisis* are at their acme . . . where reliance interests are involved . . . .").

328. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (explaining that an agency must consider "serious reliance interests" when changing policy).

329. *See supra* notes 13–16 and accompanying text (noting these authorities' attacks on the *Chevron* doctrine).

especially propitious time to consider how administrative law might function in a post-*Chevron* world.

Under current doctrine, courts must choose between applying *Chevron*'s rationality review and *Skidmore*'s purportedly more aggressive form of review when assessing an agency's construction of a statute it administers.[330] Perhaps the greatest of all *Chevron* ironies is that it is far from clear that the difference in deference levels that these two standards prescribe determines many outcomes in the types of cases that most matter—i.e., cases in which an agency has supported a statutory construction with serious analytical support to further its policy ends.[331]

It does not follow, however, that the entire *Chevron* edifice serves no useful purpose. By applying rationality review, courts issuing *Chevron* step two opinions avoid making *Marbury*-style statements of "what the law is."[332] A judicial opinion that merely states that a given agency statutory construction is reasonable does not preclude an agency from later adopting a different reasonable construction. Using a deference doctrine to protect agency interpretive discretion from the freezing force of judicial precedents, however, causes needless confusion. It would be far simpler and better for courts to accomplish this end not by adjusting the scope of their opinions but instead by adjusting their precedential force.

To this end, courts should abandon the *Chevron* doctrine. When reviewing an agency's construction of a statute it administers, a court should instead, a la *Skidmore*, choose the best available statutory construction. Judicial review should start, however, from a presumption that the agency's statutory construction is correct, and a court should reject it only if the court can explain why its own construction is better. Critically, this approach should apply even where an agency's statutory construction contradicts a court's own precedent—i.e., courts should review agency statutory constructions without the distortion of coercive horizontal stare decisis. This shift would reconceptualize judicial deference for agency statutory constructions, transforming it from a duty to extend rationality review of dubious effectiveness to a poorly defined set of statutory constructions into a judicial duty to keep an open mind when reviewing agencies' efforts to change their statutory constructions based on new learning or changing values. Abandoning *Chevron* and updating stare decisis in this way would not change many outcomes where courts review agency statutory constructions. It would, however, tremendously simplify an absurdly complex corner of administrative law.

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330. *See* United States v. Mead Corp., 533 U.S. 218, 234–35 (2001) (observing that *Skidmore* deference would apply to agency interpretation that was not eligible for *Chevron*).

331. *See generally* Part III (discussing grounds for concluding that *Chevron* and *Skidmore* levels of deference are functionally similar, especially in significant cases).

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