

TO REPUDIATE OR MERELY CURTAIL?  
JUSTICE GORSUCH AND *CHEVRON* DEFERENCE

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## TO REPUDIATE OR MERELY CURTAIL? JUSTICE GORSUCH AND *CHEVRON* DEFERENCE

*Kristin E. Hickman\**

The *Chevron* doctrine has dominated conversations about administrative law for thirty-five years. Most people reading this Essay probably know more or less by heart the basic doctrinal points of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> and its progeny. Decided in 1984, *Chevron* is best known for its two-part test for evaluating agency interpretations of statutes, asking first whether the meaning of the statute is clear or ambiguous, and if the latter, then asking second whether the agency's interpretation thereof is permissible.<sup>2</sup> Through this test, *Chevron* counsels that courts must defer to permissible agency interpretations of ambiguous statutes. *Chevron* also was notable for its recognition that some congressional delegations are implied through statutory ambiguity rather than explicit.<sup>3</sup> And since the Supreme Court decided *United States v. Mead Corp.*<sup>4</sup> in 2001, everyone knows that agency interpretations of statutes are eligible for *Chevron* deference only when Congress delegates to the agency the authority to act with the force and effect of law and when the agency interpretation in question reflects an exercise of that power.<sup>5</sup> Otherwise, the agency's interpretation should be evaluated—and perhaps given less deference—based upon the presence or absence of contextual factors of the alternative *Skidmore* standard.<sup>6</sup>

Beyond those basic pronouncements—and maybe even including them—doctrinal agreement about *Chevron* more or less ends. Disagreement and debate abound over just how to describe or ascertain statutory ambiguity, how to define and evaluate the presence or absence of congressional delegations,

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1. 467 U.S. 837 (1984).

2. *Id.* at 842–43.

3. *Id.* at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”).

4. 533 U.S. 218 (2001).

5. *See id.* at 226–27.

6. *See id.* at 227; *see also* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (calling upon courts to give “weight” to an agency's interpretation of a statute based upon factors such as thoroughness, validity, and consistency).

and which agency formats carry the legal force required for *Chevron* deference. As a result, *Chevron* means different things to different people, and substantial leeway exists for either narrowing or expanding the scope of *Chevron* deference.<sup>7</sup>

The late Justice Antonin Scalia was as responsible as anyone for *Chevron*'s rise to prominence. He promoted it staunchly first as a judge on the United States Court of Appeals for the D.C. Circuit and later as a Justice on the United States Supreme Court.<sup>8</sup> Later, Justice Scalia railed against his colleagues' efforts to shape the scope of *Chevron*'s applicability.<sup>9</sup> Paradoxically, in his last years on the Court, as some of his colleagues began to openly question *Chevron*'s premises, rather than offering a robust defense of the doctrine he previously had embraced so fully, Justice Scalia acknowledged that *Chevron* might be inconsistent with the text of the Administrative Procedure Act, even if it "at least was in conformity with the long history of judicial review of executive action."<sup>10</sup>

Justice Scalia's successor, Justice Neil Gorsuch, is regarded as one of *Chevron*'s most ardent foes.<sup>11</sup> As a judge on the United States Court of Appeals for the Tenth Circuit, in *Gutierrez-Brizuela v. Lynch*,<sup>12</sup> Justice Gorsuch challenged the *Chevron* doctrine's premises, contended that *Chevron* deference conflicts with separation of powers principles, and at least strongly hinted that the Supreme Court should repudiate *Chevron*.<sup>13</sup> Since joining the Court himself, Justice Gorsuch has continued to attack *Chevron*. Responding to the Court's denial of certiorari in *Scenic America, Inc. v. Department of Transportation*, Justice Gorsuch called upon the Court to resolve a circuit split regarding whether an agency's interpretation of ambiguous contractual terms should be *Chevron*-eligible.<sup>14</sup> More commentary ensued regarding Justice Gorsuch's dislike of *Chevron*.<sup>15</sup> From these and other writings and statements by Justice Gorsuch

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7. See Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1418–41 (2017) (illustrating this point).

8. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 838 (2001).

9. See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting); *Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting); *Christensen v. Harris Cty.*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment).

10. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment).

11. See, e.g., Niki Ford, *Tax Reform in a "World Without Chevron": Will Tax Regulations Withstand the Review of Justice Gorsuch?*, 71 TAX LAW. 975, 996–99 (2018); Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 39 & n.236 (2017); Janelle C. Sharpe, *Delegation and Its Discontents*, 64 WAYNE L. REV. 185, 191–203 (2018); Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 950–51 (2018).

12. 834 F.3d 1142 (10th Cir. 2016).

13. *Id.* at 1151–55 (Gorsuch, J., concurring).

14. *Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2, 2–3 (2017) (mem.) (Gorsuch, J., respecting the denial of certiorari).

15. See, e.g., Heather Elliott, *Justice Gorsuch's Would-Be War on Chevron*, 21 GREEN BAG 2D 315 (2018).

regarding *Chevron* deference, Court watchers and scholars generally consider him a solid vote on the Court for overturning the *Chevron* standard altogether. But what does that really mean?

Some *Chevron* critics are opposed merely to certain aspects of *Chevron* analysis, like the potential for judges simply to declare a complicated statute “ambiguous” and defer when meaning is not immediately apparent, rather than make a greater effort to resolve statutory meaning using traditional tools of statutory interpretation. Other *Chevron* critics acknowledge that judicial deference might be warranted for some subset of agency legal interpretations but prefer *Skidmore’s* contextual factors<sup>16</sup> or perhaps some other standard that would function differently<sup>17</sup> or might be less deferential.<sup>18</sup> In any of these scenarios, deference remains a possibility; only the circumstances and conditions of deference change.

Still other *Chevron* critics seek to do away with judicial deference altogether and have judges resolve all questions of statutory meaning using traditional tools of statutory construction. Nicholas Bednar and I have argued that efforts to do away with judicial deference altogether are doomed and that courts will continue to defer to agency legal interpretations (whether under the *Chevron* label or otherwise) so long as Congress continues to delegate broad policymaking discretion to agencies.<sup>19</sup> *Chevron* is merely a standard of review that provides judges with a common language and framework for explaining judicial decision-making.<sup>20</sup> This conclusion does not mean, however, that *Chevron* deference cannot be cabined, perhaps even more substantially than more recent jurisprudence has already.

Where in the spectrum of *Chevron* critics does Justice Gorsuch fall? Only he knows for sure. Justice Gorsuch will never be a *Chevron* enthusiast. He clearly favors a robust and independent judicial inquiry into statutory meaning and casts a skeptical eye toward applying the *Chevron* standard at all in many contexts. He does and undoubtedly will continue to whittle away at *Chevron* deference by applying traditional tools of statutory interpretation to find statutory clarity more readily than some of his colleagues and by pushing the Court to impose additional limitations on *Chevron’s* applicability. He may feel less

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16. For example, Justice Breyer is an advocate of a very *Skidmore*-like version of the *Chevron* standard. See Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 541–45 (2014) (describing Justice Breyer’s *Skidmore*-esque conception of *Chevron*).

17. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *HARV. L. REV.* 2118, 2121, 2144–45 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

18. The *Skidmore* standard is generally thought to be less deferential than the *Chevron* standard, both conceptually and empirically, but some courts and scholars have expressed doubts as to whether that is the case. See generally David Zaring, *Reasonable Agencies*, 96 *VA. L. REV.* 135 (2010) (surveying and synthesizing perspectives and empirical studies regarding the degree of deference afforded by different standards of judicial review in the administrative law context).

19. See Bednar & Hickman, *supra* note 7, at 1453–56 (making this argument).

20. See *id.* (making this point).

constrained by *stare decisis* than some of his colleagues, although his tenure on the Supreme Court is too brief at present to say so with any certainty.<sup>21</sup> He may well be part of an eventual Court majority that votes to overturn *Chevron*'s two-step standard. Nevertheless, evidence exists suggesting that Justice Gorsuch's harsh statements about *Chevron* were influenced by the particular mix of Tenth Circuit cases in which he participated. By comparison, the Supreme Court, at least historically, has applied the *Chevron* standard in a qualitatively different set of cases that, should the pattern hold, Justice Gorsuch may find less objectionable. Also, it is doubtful that Justice Gorsuch is so naive as to believe that judges can resolve all statutory questions on their own and need never defer to agency discretionary choices. For these reasons, even if one assumes (as one probably should) that Justice Gorsuch will continue pushing the Court to curtail and even repudiate the *Chevron* standard, it seems unlikely that Justice Gorsuch will succeed in doing away with judicial deference altogether, or even that he means to try.

### I. JUSTICE GORSUCH'S *CHEVRON*

When a Justice of the Supreme Court has thoroughly lambasted a doctrine, accusing it of “permit[ting] all too easy intrusions on the liberty of the people” and only grudgingly conceding that it is not *quite* “the very definition of tyranny,”<sup>22</sup> one would be foolhardy to argue that such a Justice is anything but an opponent of said doctrine. On the other hand, Justices of the Supreme Court—Justice Gorsuch included—tend to hold pretty nuanced views of legal doctrine. For the most part, Justice Gorsuch's reputation as a *Chevron* critic is attributable to his opinions in a handful of cases. Appreciating his pronouncements in those cases requires considering them in the context of his jurisprudence more broadly, principally at the Tenth Circuit, though also during his short time thus far at the Supreme Court.

#### A. *Negative Pronouncements*

Perhaps Justice Gorsuch's most significant statements regarding the *Chevron* doctrine come from a pair of immigration cases from his time as a Tenth Circuit judge: *De Niz Robles v. Lynch*<sup>23</sup> and *Gutierrez-Brizuela v. Lynch*<sup>24</sup>—particularly the latter, though understanding one requires considering the oth-

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21. Cf. Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 162–64, 163 n.18 (2018) (exploring the willingness of textualist Justices to ignore *stare decisis* in statutory cases but declining to characterize Justice Gorsuch given his limited tenure on the Court).

22. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151, 1155 (10th Cir. 2016) (Gorsuch, J., concurring).

23. 803 F.3d 1165, 1167 (10th Cir. 2015).

24. *Gutierrez-Brizuela*, 834 F.3d at 1143.

er. In these cases, the Tenth Circuit was called upon to consider a Board of Immigration Appeals (BIA) interpretation of the Immigration and Nationality Act. The Supreme Court has expressly called for using the *Chevron* standard to evaluate BIA interpretations of the immigration laws,<sup>25</sup> so it is hardly surprising that then-Judge Gorsuch recognized *Chevron's* applicability in *De Niz Robles* and *Gutierrez-Brizuela* as well.<sup>26</sup> In fact, although he did not acknowledge it in *De Niz Robles*, Judge Gorsuch recognized in *Gutierrez-Brizuela* that the Tenth Circuit had already deferred under *Chevron* step two to the BIA interpretation in question in a third case.<sup>27</sup> But the BIA interpretation at stake in all of these cases was contrary to an even earlier Tenth Circuit precedent, wherein laid the difficulty.

In *National Cable & Telecommunications Association v. Brand X Internet Services*,<sup>28</sup> the Supreme Court considered the interaction between the *Chevron* standard and *stare decisis* and, in an opinion authored by Justice Thomas, concluded that the former trumps the latter when statutory meaning is ambiguous.<sup>29</sup> In other words, if Congress has delegated, and an administering agency has exercised, the power to interpret a statute with the force of law and the statute is ambiguous, then a circuit court should defer to the agency's reasonable interpretation of the statute even when circuit precedent adopts a different interpretation. As Judge Gorsuch recognized in *De Niz Robles*, "[t]ogether, then, [*Chevron* and *Brand X*] mean that there are indeed some occasions when a federal bureaucracy can effectively overrule a judicial decision."<sup>30</sup> It was a conclusion that troubled Justice Scalia greatly in *Brand X*,<sup>31</sup> and it clearly troubles Justice Gorsuch as well.

As with *Chevron* itself, although *Brand X* involved a notice-and-comment regulation, the courts have carried its conclusions to the formal adjudication context as well, including BIA interpretations. But the circumstances of *Brand X* and the BIA cases are very different. The interpretation at issue in *Brand X* was communicated in a regulation adopted with public participation to regulate corporate activity on a prospective basis. By comparison, *De Niz Robles* and *Gutierrez-Brizuela* involved individual immigrants who entered the United States illegally and filed applications to have their immigration status adjusted based on a favorable Tenth Circuit interpretation of the Immigration and Nationality Act. In Mr. De Niz Robles's case, the BIA adopted a different, less-

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25. See, e.g., *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 448–49 (1987).

26. See *Gutierrez-Brizuela*, 834 F.3d at 1143; *De Niz Robles*, 803 F.3d at 1167.

27. See *Gutierrez-Brizuela*, 834 F.3d at 1144 (citing *Padilla-Caldera v. Holder*, 637 F.3d 1140, 1148–52 (10th Cir. 2011)).

28. 545 U.S. 967 (2005).

29. *Id.* at 981–83.

30. *De Niz Robles*, 803 F.3d at 1167.

31. See *Brand X*, 545 U.S. at 1014–20 (Scalia, J., dissenting).

favorable interpretation of the statute while his application was pending, applied that interpretation to him retroactively, and sought to deport him. Mr. Gutierrez-Brizuela filed his application after the BIA adopted its own interpretation of the statute but before the Tenth Circuit accepted the BIA's interpretation as controlling, but the end result was the same.

Like the Tenth Circuit in *De Niz Robles* and *Gutierrez-Brizuela*, other circuits have been troubled by and struggled with the interaction of *Chevron*, *Brand X*, and the retroactivity of adjudicative decisionmaking.<sup>32</sup> Writing for the court in *De Niz Robles*, again, Judge Gorsuch did not question *Chevron's* applicability. Instead, he focused his analysis on mitigating the retroactivity. “[I]f the separation of powers doesn’t forbid this form of decisionmaking”—and here he did not suggest otherwise—“might second-order constitutional protections sounding in due process and equal protection, as embodied in our longstanding traditions and precedents addressing retroactivity in the law, sometimes constrain the retroactive application of its results?”<sup>33</sup> Judge Gorsuch answered that question with a resounding “yes,”<sup>34</sup> rejecting the application of the BIA's interpretation to Mr. De Niz Robles, even while accepting prospective application of the same interpretation.

Although the BIA tried to argue that the timing of Mr. Gutierrez-Brizuela's application distinguished his case from *De Niz Robles*,<sup>35</sup> Judge Gorsuch disagreed. Writing for the court, he said the key facts were that both status adjustment applications were submitted before the Tenth Circuit recognized the validity of the BIA's interpretation, and therefore, both Mr. De Niz Robles and Mr. Gutierrez-Brizuela reasonably relied on the Tenth Circuit's contrary precedent that favored their applications.<sup>36</sup> The same due process and equal protection concerns that animated the court's reasoning in *De Niz Robles* applied equally to Mr. Gutierrez-Brizuela, and the outcome with respect to retroactive application of the BIA's interpretation should be the same as well.<sup>37</sup>

Unlike in *De Niz Robles*, however, Judge Gorsuch wrote a separate concurring opinion in *Gutierrez-Brizuela*, in which he took aim squarely at the *Chevron* standard. At first, his concurring opinion merely questioned *Brand X* as a usurpation of the judicial function: “When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appro-

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32. See, e.g., *Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1277 (9th Cir. 2015); *Velásquez-García v. Holder*, 760 F.3d 571, 578–84 (7th Cir. 2014); *Garfias-Rodríguez v. Holder*, 702 F.3d 504, 516 (9th Cir. 2012) (en banc).

33. *De Niz Robles*, 803 F.3d at 1171–72.

34. *Id.* at 1172.

35. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144–45 (10th Cir. 2016).

36. *Id.* at 1145.

37. *Id.* at 1146.

appropriate remedial process. It's called legislation.”<sup>38</sup> As his concurring opinion went on, however, Judge Gorsuch challenged the validity of the *Chevron* standard outright, as inconsistent with the Administrative Procedure Act's command that the courts should “interpret . . . statutory provisions' and overturn agency action inconsistent with those interpretations.”<sup>39</sup> Ascertaining whether statutes are ambiguous and agency interpretations are reasonable leaves no room for courts to “interpret the law and say what it is,” Judge Gorsuch suggested.<sup>40</sup> He acknowledged that the *Chevron* opinion itself was “about permitting agencies to *make* the law” when Congress leaves a gap for the agency to fill, rather than “permitting agencies to assume the judicial function of *interpreting* the law.”<sup>41</sup> Yet based on *De Niz Robles* and *Gutierrez-Brizuela*, he insisted that “the problem remains that *courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them.”<sup>42</sup> Additionally, hitting several of the high points in the longstanding discussion about *Chevron*, Judge Gorsuch questioned whether legislators intend for courts to disregard their interpretive role in favor of agencies and whether Congress can delegate legislative power to agencies in the first place.<sup>43</sup> He wondered why the Supreme Court denies *Chevron* deference to interpretations of criminal statutes but not statutes with both civil and criminal applications.<sup>44</sup> He also suggested that *Chevron* does not work very well anyway, given the *Mead* decision's murkiness in narrowing *Chevron*'s scope and ongoing questions about “just how rigorous *Chevron* step one is supposed to be.”<sup>45</sup> And he maintained that “a world without *Chevron*,” and with *de novo* judicial review instead, would work just fine.<sup>46</sup>

Justice Gorsuch's hostility toward *Chevron* has manifested itself more subtly in other cases as well. Unlike some judges, he has not been shy about employing traditional tools of statutory interpretation to discern statutory meaning and clarity at *Chevron* step one, thereby avoiding deference.<sup>47</sup> In *Hydro Resources, Inc. v. EPA*,<sup>48</sup> writing for an en banc Tenth Circuit, then-Judge Gorsuch suggested that *Chevron* review might be inappropriate for an Environ-

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38. *Id.* at 1151 (Gorsuch, J., concurring).

39. *Id.* (quoting 5 U.S.C. § 706 (2012)).

40. *Id.* at 1152.

41. *Id.*

42. *Id.* at 1153.

43. *See id.*

44. *Id.* at 1155–57.

45. *Id.* at 1157.

46. *See id.* at 1158.

47. *See, e.g.,* *Wis. Cent., Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018); *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting); *Elwell v. Oklahoma*, 693 F.3d 1303, 1313 (10th Cir. 2012).

48. *Hydro Res., Inc. v. EPA*, 608 F.3d 1131 (10th Cir. 2010) (en banc).



mental Protection Agency (EPA) interpretation regarding the scope of its permitting authority under the Safe Drinking Water Act. He observed that the relevant provision was “not a statute specially involving environmental regulation, but one all and only about the geographic parameters of federal and tribal criminal prosecutorial authority,” and thus outside the range of EPA core expertise.<sup>49</sup> Judge Gorsuch avoided resolving the question, however, by contending that the agency’s failure to request deference allowed the court to review the agency’s interpretation *de novo*. He thus, either inadvertently or deliberately, seemed to favor the anti-*Chevron* position in an ongoing debate over whether and under what circumstances agencies can waive *Chevron* deference.<sup>50</sup> More recently, in *Scenic America, Inc. v. Department of Transportation*,<sup>51</sup> now-Justice Gorsuch suggested the Court take up whether an agency’s interpretation of an ambiguous contractual term should be *Chevron*-eligible and described that question in terms suggesting that he would think not.<sup>52</sup>

Finally, echoing his call in *Gutierrez-Brizuela* for *de novo* judicial review, Justice Gorsuch has not limited his attacks on deference doctrine to *Chevron*. In *E.I. Du Pont de Nemours & Co. v. Smiley*,<sup>53</sup> he filed a statement respecting a denial of certiorari asking the Court to resolve a circuit split over whether agency interpretations of statutes advanced for the first time in litigation are worthy of deference under *Skidmore*, and suggesting they should not be.<sup>54</sup>

### B. Contrary Signals

It is fair to suppose that a particular judge’s perspective on *Chevron* will be affected by the specific types of *Chevron* cases the judge sees. No one can possibly claim to have read, let alone really processed, every case applying *Chevron*, let alone every scholarly article or commentary discussing those cases. Scholars and judges possess many competing views regarding how *Chevron* operates and when it ought to apply. Meanwhile, many judges may handle only a small number of *Chevron* cases within a much larger docket. The types of *Chevron* cases a circuit court judge might see vary meaningfully from circuit to circuit.<sup>55</sup>

Justice Gorsuch participated in more than 2,700 cases while serving as a

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49. *Id.* at 1146.

50. *See, e.g.*, *Martin v. Soc. Security Admin.*, 903 F.3d 1154, 1161 & nn.47–49 (11th Cir. 2018) (per curiam) (documenting the circuit split); *Neustar, Inc. v. FCC*, 857 F.3d 886, 893–94 (D.C. Cir. 2017) (declaring *Chevron* waived by agency’s failure to advocate for it); James Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183 (2019) (discussing the issue).

51. 138 S. Ct. 2 (2017) (mem.).

52. *See id.* at 2–3 (Gorsuch, J., respecting the denial of certiorari).

53. *E.I. Du Pont de Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (2018) (mem.).

54. *See id.* at 2563–64 (Gorsuch, J., respecting the denial of certiorari).

55. *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 49–52 (2017).

judge on the Tenth Circuit.<sup>56</sup> Yet of those hundreds of cases, only eighteen appear to have yielded published opinions that even cite *Chevron* or, for thoroughness, *Skidmore* or *Mead*.<sup>57</sup> In many of those cases, the Tenth Circuit cited *Chevron* only in passing, sometimes in a broader discussion of judicial deference doctrine before applying some other standard of review,<sup>58</sup> and sometimes in cases with little or nothing to do with judicial deference at all.<sup>59</sup> The number of cases in which Justice Gorsuch participated while a Tenth Circuit judge that applied or meaningfully discussed the *Chevron* standard is quite small—only ten cases—and collectively is a rather unusual set.

*Chevron* is often most closely associated with judicial review of agency regulations that contain interpretations guided by agency expertise, often with respect to scientific or other technical subject matter, which were adopted using notice-and-comment rulemaking procedures that emphasize public participation. *Chevron* itself was such a case—evaluating a notice-and-comment regulation that elaborated the meaning of the statutory term “stationary source” for permitting purposes under the Clean Air Act.<sup>60</sup> Many if not most Supreme Court applications of the *Chevron* standard similarly have involved direct chal-

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56. See *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 66 (2017) [hereinafter *Confirmation Hearing*] (statement of Hon. Neil Gorsuch).

57. Cases were identified in two ways. First, a deliberately overbroad Westlaw search was run, with the false positives (e.g., cases containing the word “Chevron” but not referring to the standard) excluded by reading the search results. See WESTLAW, <https://1.next.westlaw.com> (follow “Cases” hyperlink; then follow “U.S. Courts of Appeal” hyperlink; then follow “10th Circuit Court of Appeals” hyperlink; then enter and apply search term *adv: (Chevron Skidmore “Mead Corp.”) & Gorsuch & DA(bef 04/08/2017) & DA(aft 08/08/2006)*) (yielding 33 cases). Second, also in Westlaw, a Keycite search was performed for each of the *Chevron*, *Skidmore*, and *Mead* decisions, with the results then narrowed to Tenth Circuit cases that included the word “Gorsuch” and that were decided during Justice Gorsuch’s service on that court, between August 8, 2006, and April 8, 2017, again excluding false positives by reading cases not previously identified. *Cf. id.*

58. See *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d 1141 (10th Cir. 2016) (invalidating a regulation on other grounds, with then-Judge Gorsuch writing and a dissenting judge arguing for *Chevron* deference given his views regarding those other grounds); *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1165 (10th Cir. 2016) (mentioning the *Chevron* and *Auer* standards in rejecting a nonspecific claim to deference for a subregulatory manual, and authored by then-Judge Gorsuch); *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1142 (10th Cir. 2011) (citing *Chevron* in discussing standards of review generally before evaluating an agency’s application of its regulations in an adjudication, joined by then-Judge Gorsuch); *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1162–63 (10th Cir. 2011) (evaluating an informal agency interpretation of a statute using the *Skidmore* standard, joined by then-Judge Gorsuch); *S. Utah Wilderness v. Office of Surface Mining Reclamation & Enft*, 620 F.3d 1227, 1235–36 (10th Cir. 2010) (citing *Chevron* as part of a larger discussion of judicial deference standards but not applying *Chevron* in reviewing the administrative order in question because it lacked the force of law, joined by then-Judge Gorsuch); see also *United States v. Magnesium Corp. of Amer.*, 616 F.3d 1129, 1142 n.11 (10th Cir. 2010) (not citing *Chevron* but mentioning the *Skidmore* standard in upholding an interpretative rule against procedural and process challenges, with then-Judge Gorsuch writing).

59. See *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1141 (10th Cir. 2016) (resolving the case under law of the case doctrine so mentioning but ignoring appellant’s *Chevron* argument); *United States v. Nicholson*, 721 F.3d 1236, 1249 (10th Cir. 2013) (Gorsuch, J., dissenting) (addressing a Fourth Amendment issue and citing *Chevron* among several cases for the general proposition “that we live in a world where some laws are ambiguous and don’t admit an easy or even a single right answer”).

60. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 839–40 (1984).

lenges to the validity of agency regulations adopted through notice-and-comment rulemaking.<sup>61</sup> One informal study of the Supreme Court's *Chevron* jurisprudence from 2001 through 2014 documented eleven cases of deference to agency regulations, as compared to three of deference to adjudications,<sup>62</sup> although recent terms arguably have seen an uptick in adjudication cases, particularly concerning interpretation of the immigration laws.<sup>63</sup>

By comparison, Justice Gorsuch's Tenth Circuit *Chevron* docket reflects a heavier concentration of agency adjudications—five of the ten, often with agencies seemingly taking aggressive positions. The *De Niz Robles, Gutierrez-Brizuela*, and *Hydro Resources* cases described above fall into this category. Another is *Caring Hearts Personal Home Services, Inc. v. Burwell*,<sup>64</sup> in which the Center for Medicare and Medicaid Services persisted in pursuing reimbursement of \$800,000 in Medicare payments from a health care provider even after it became clear that the agency had applied the wrong regulations in ordering the repayment.<sup>65</sup> Writing for the court in that case, then-Judge Gorsuch said essentially that it was a good thing that the agency did not claim *Chevron* deference given that the agency was “struggling to keep up with the furious pace of its own rulemaking.”<sup>66</sup> The last is *TransAm Trucking, Inc. v. Administrative Review Board*, which saw then-Judge Gorsuch dissenting to argue both that the statute was clear and that the agency had failed to claim *Chevron* deference,<sup>67</sup> while the panel majority deferred under *Chevron*.<sup>68</sup>

By comparison, the five *Chevron* cases involving notice-and-comment regulations in which then-Judge Gorsuch participated at the Tenth Circuit are much less remarkable. In *Forest Guardians v. United States Fish and Wildlife Service*<sup>69</sup> and *Berneike v. CitiMortgage, Inc.*,<sup>70</sup> Judge Gorsuch joined opinions written by others deferring to agency interpretations at *Chevron* step two, although he concurred separately in the former to address “two minor” (and unrelated)

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61. See, e.g., *Wis. Cent. Ltd. v. United States*, 183 S. Ct. 2067 (2018); *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *EPA v. EME Homer City Generation, LP*, 572 U.S. 489 (2014); *Astrue v. Capato*, 566 U.S. 541 (2012); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011); *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *Global Crossing Telecomms., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45 (2007); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81 (2007); *Household Credit Servs. v. Pfennig*, 541 U.S. 232 (2004); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36 (2002).

62. See Hickman, *supra* note 16, at 548 & nn.168–70.

63. See *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

64. 824 F.3d 968 (10th Cir. 2016).

65. *Id.* at 970.

66. *Id.* at 969–70, 973.

67. 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting).

68. *Id.* at 1211–12.

69. 611 F.3d 692 (10th Cir. 2010).

70. 708 F.3d 1141 (10th Cir. 2013).

points.<sup>71</sup> In a third, *WWC Holding Co. v. Sopkin*, he dissented from a decision in which the majority extended *Chevron* deference to FCC regulations, but for reasons wholly unrelated to that aspect of the majority's decision. A fourth, *Contreras-Bocanegra v. Holder*, saw him joining his colleagues and three other circuits in rejecting an agency regulation at *Chevron* step one, but without questioning that *Chevron* was the appropriate standard.<sup>72</sup> And in the last, *Elwell v. Oklahoma*, he authored the opinion for a unanimous panel again declining *Chevron* deference because statutory meaning was clear, without questioning the applicability of the standard.<sup>73</sup>

This dichotomy between adjudications and rulemakings arose, at least in a sense, in his Senate confirmation hearing. In an exchange with Senator Di-  
anne Feinstein regarding the EPA's Corporate Average Fuel Economy (CAFE) standards, then-Judge Gorsuch claimed he had "never suggested" that he found *Chevron* deference problematic in the rulemaking context, as contrasted with adjudications, like those in *De Niz Robles* and *Gutierrez-Brizuela*.<sup>74</sup> When Senator Feinstein questioned whether he had said that "Congress could not legislate by leaving some of the rules up to the scientists or other professionals in departments," Gorsuch described that characterization of his views as a "misunderstanding."<sup>75</sup> He then contrasted Senator Feinstein's example, based on "fact-finding by scientists, biologists, and chemists" who "get great deference from the courts,"<sup>76</sup> with the circumstances of *Gutierrez-Brizuela*, where an agency had upended "the judicial precedent that this man had relied upon" and "overturn[ed] a judicial precedent without an act of Congress[,] . . . raising serious due process concerns, fair notice and separation of powers concerns."<sup>77</sup> "[C]an a man like Mr. Gutierrez, the least amongst us, be able to rely on judicial precedent on the books, or can he have the ball picked up as he is going in for the kick?"<sup>78</sup>

## II. THE PERSISTENCE OF STATUTORY AMBIGUITY

As Justice Gorsuch no doubt appreciates, doing away altogether with judicial deference to agency interpretations of statutes is unlikely, for the simple reason that the judiciary is ill-equipped to resolve at least some if not many ambiguities in statutory text. "Ambiguity" in the context of *Chevron* jurisprudence is a judicial term of art. A statute is not ambiguous under *Chevron* step

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71. *Forest Guardians*, 611 F.3d at 719 (Gorsuch, J., concurring).

72. 678 F.3d 811, 816–18 (10th Cir. 2012) (en banc).

73. 693 F.3d 1303, 1313 (10th Cir. 2012).

74. See *Confirmation Hearing*, *supra* note 56, at 86.

75. *Id.*

76. *Id.* at 87.

77. *Id.* at 86–87.

78. *Id.* at 87.

one merely because clever lawyers can articulate at least two colorable alternative interpretations of statutory text. Otherwise, every statutory interpretation question before a federal circuit court would go straight to *Chevron* step two. On the other hand, as Justice Scalia once observed, ambiguity in the *Chevron* sense does not require “absolute equipoise” between two competing alternative interpretations.<sup>79</sup> “If nature knows of such equipoise in legal arguments, the courts at least do not.”<sup>80</sup>

Ambiguity for *Chevron* purposes is as much a matter of kind as of degree, and not all kinds of statutory ambiguity push judicial review into *Chevron* step two. As Justice Scalia explained further:

An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. When the former is the case, what we have is genuinely a question of law, properly to be resolved by the courts. When the latter is the case, what we have is the conferral of discretion upon the agency, and the only question of law presented to the courts is whether the agency has acted within the scope of its discretion—i.e., whether its resolution of the ambiguity is reasonable.<sup>81</sup>

In other words, the question under *Chevron* step one is not simply whether a statute’s meaning is unclear or difficult to determine. In such cases, judges can apply traditional tools of statutory interpretation to ascertain statutory meaning as they have done in non-agency cases for decades. Rather, the proper inquiry at *Chevron*’s first step really is, as the Court has often said, whether Congress left a gap that it intended the administering agency to fill.<sup>82</sup>

In some instances, *Chevron*-style statutory ambiguity is obvious because Congress explicitly calls it out. Many regulatory statutes contain provisions that expressly authorize an administering agency to adopt regulations elaborating statutory requirements based on a short description of what Congress wishes to accomplish.<sup>83</sup> Congress also sometimes uses statutory terms that are so mushy and open-ended—for example, phrases like “appropriate and necessary,”<sup>84</sup> “reasonable, practicable, and appropriate,”<sup>85</sup> or “in the public inter-

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79. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520.

80. *Id.*

81. *Id.* at 516.

82. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

83. See, e.g., 26 U.S.C. § 1502 (2012) (containing a single sentence authorizing regulations for determining the tax liabilities of affiliated corporate groups); 29 U.S.C. § 655(a) (2012) (extending broad authority to adopt occupational safety or health standards).

84. See 42 U.S.C. § 7412(n)(1)(A)(b) (2012); see also *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (recognizing “the capaciousness of this phrase”).

85. See 49 U.S.C. § 30111(b)(3) (2012).

est”<sup>86</sup>—that they obviously convey policymaking discretion. Even broad statutory terms are not limitless and may still cabin agency discretion. But traditional tools of statutory interpretation are not especially helpful in narrowing statutory meaning to the point of practical application.

Consider, for example, the interpretive question at issue in *AT&T v. Iowa Utilities Board*,<sup>87</sup> which demonstrates both of these qualities. The case concerned Federal Communications Commission (FCC) regulations implementing the Telecommunications Act of 1996.<sup>88</sup> The statute in that case required incumbent providers of telephone services to give potential competing carriers sufficient access to their local exchange networks (including but not limited to facilities and equipment) as to facilitate market competition.<sup>89</sup> After providing a broad general definition of the kinds of “network element[s]” covered by the requirement,<sup>90</sup> the statute specifically instructed the FCC to adopt regulations “determining what network elements should be made available”<sup>91</sup> to competing carriers by considering “at a minimum, whether—(A) access to such network elements as are proprietary in nature is *necessary*; and (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”<sup>92</sup>

Words like “necessary” and “impair” are intrinsically ambiguous. Necessary can mean “indispensable,”<sup>93</sup> but it can also mean something more like “appropriate and helpful,” depending on the context.<sup>94</sup> Is access to a network element to facilitate market competition necessary only if absolutely required for functionality, or is it enough for such access to significantly improve functionality? Correspondingly, impair means to “diminish in function, ability, or quality”<sup>95</sup> or to “make worse.”<sup>96</sup> But how much diminishment is enough to justify requiring access? Such determinations are infused with policymaking discretion, and the statute clearly anticipates that the FCC should be the decider. But the exercise of such policymaking discretion is not purely fact-based, either. Traditional tools are useless beyond a certain degree of generality, but they still may be useful in establishing the outer boundaries of statutory

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86. See, e.g., 16 U.S.C. § 1536(h)(1)(A)(ii) (2012).

87. 525 U.S. 366 (1999).

88. *Id.* at 371–78.

89. *Id.* at 371–73.

90. See 47 U.S.C. § 153(35) (2012).

91. *Id.* § 251(d)(2).

92. *Id.* § 251(d)(2)(A)–(B) (emphasis added).

93. *Necessary*, DICTIONARY.COM, <https://www.dictionary.com/browse/necessary> (last visited Feb. 6, 2019).

94. See *Welch v. Helvering*, 290 U.S. 111, 113 (1933).

95. *Impair*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/impair> (last visited Feb. 6, 2019).

96. *Id.*

authority. But policymaking in these instances is not purely fact-based, either. Indeed, the regulations at issue in *AT&T* required that all network elements be made available to competitors,<sup>97</sup> and the Supreme Court rejected that interpretation at *Chevron* step two for failing to give effect to *necessary* and *impaired* as anticipating limitations on access.<sup>98</sup> But the Court, in an opinion written by Justice Scalia, had no difficulty recognizing nevertheless that the statute could accommodate more than one approach—i.e., was ambiguous—and that the choice among competing permissible alternatives was for the FCC to make.<sup>99</sup>

Even provisions using terms that are less obviously mushy and open-ended may be obviously ambiguous in this same way. One example comes from the Internal Revenue Code.<sup>100</sup> That statute imposes on individuals and entities the obligation to pay taxes, and it dedicates hundreds of pages of statutory text to instructing taxpayers regarding how to calculate their tax liabilities and prepare and file their tax returns. Congress has determined that an affiliated group of corporations that share common ownership should file a single income tax return and determine the corresponding income tax liability as a single economic unit. To that end,

[t]he Secretary [of the Treasury] shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability . . . . In carrying out the preceding sentence, the Secretary may prescribe rules that are different from the provisions . . . that would apply if such corporations filed separate returns.<sup>101</sup>

Those two sentences represent the totality of a provision that encompasses a very large field, as the Federal Circuit recognized in *Rite Aid Corp. v. United States*.<sup>102</sup> The individual words and phrases within that provision have meaning corresponding to the context of the larger statute, however, such that the agency's discretion is not limitless. Thus, despite the apparent breadth of discretion conferred upon the Treasury Department by that provision, taxpayers can argue, and courts may conclude, that a particular regulation exceeds statutory authority based on that context. Indeed, the *Rite Aid* court invalidated a Treasury Department regulation under *Chevron* step two by reading the first sentence above as preventing the agency from adopting "a method that im-

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97. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371–73 (1999).

98. *Id.* at 388–92.

99. *See id.* at 388.

100. *See generally* 26 U.S.C. §§ 1–7874 (2012).

101. *Id.* § 1502.

102. *See Rite Aid Corp. v. United States*, 255 F.3d 1357, 1359 (Fed. Cir. 2001) (recognizing "special, myriad problems resulting from the filing of consolidated income tax returns").

poses a tax on income that would not otherwise be taxed” under the statutory scheme of which the provision is a part.<sup>103</sup>

Deferring to agencies when Congress commands them to act is not unique to *Chevron*. In 1936, in *AT&T Corp. v. United States*,<sup>104</sup> the Supreme Court used almost *Chevron*-like reasoning in evaluating the validity of regulations adopted by the FCC under the Communications Act of 1934. That statute tasked the FCC with setting the rates that telephone companies could charge their customers. The FCC could not perform that task without collecting sufficient financial information from the telephone companies regarding the costs that they incurred in serving their customers. Thus, the statute authorized the FCC to, “in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to [the Communications Act], including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.”<sup>105</sup> AT&T challenged an FCC regulation that required telephone companies to follow a particular methodology in accounting for property acquisitions on the grounds that it went beyond “prescrib[ing] the forms” for keeping a record of accounts. In upholding the regulation, the Supreme Court acknowledged that traditional tools of statutory interpretation were simply inadequate to illuminate the content of the statute.<sup>106</sup> An agency might adopt regulations providing such content that a court concludes are an unreasonable interpretation of the statute. One example is because the regulations contain too many exceptions and therefore are insufficiently uniform. But the ambiguity of the statute, again, is obvious.

Congressional delegation of policymaking discretion and statutory ambiguity in the *Chevron* sense are not limited to provisions in which Congress expressly identifies a gap for an agency to fill. *Chevron*'s insight was that when traditional tools of statutory interpretation do not lead to a clear answer as to statutory meaning, this sort of ambiguity may represent another circumstance in which Congress intended the agency to exercise policymaking discretion. This conception of congressional delegation and statutory ambiguity is consistent with the longstanding judicial interpretation of general grants of rule-making authority in statutes as giving agencies the power to adopt regulations with the same legal force as regulations adopted pursuant to specific grants of rulemaking power.<sup>107</sup>

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103. *Id.*

104. *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232 (1936).

105. 47 U.S.C. § 220(a)(1) (2012).

106. *See Am. Tel. & Tel. Co.*, 299 U.S. at 235–37, 247.

107. *See, e.g., Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011) (recognizing that whether a regulation carries the force of law for *Chevron* purposes “does not turn on whether Congress’s delegation of authority was general or specific” and that general authority regulations carry the force of law).



For several decades, regulatory statutes additionally have given agencies broad, general authority to adopt rules and regulations as they deem “necessary”<sup>108</sup> or “needful”<sup>109</sup> or “efficient” to effectuate the statutes that they administer.<sup>110</sup> Since the 1960s, agencies have pursued policy objectives by adopting regulations pursuant to such general authority.<sup>111</sup> Many statutes contain undefined or underdefined terms, or have provisions that interact in unanticipated ways. In such cases, agencies are not filling congressionally identified gaps. Rather, agencies and regulated parties have discovered ambiguities through practical application and have sought to resolve those ambiguities by regulation. And through general authority rulemaking grants, Congress has acknowledged by statute that there may be some instances in which it has, as Justice Scalia suggested, “no particular intent” regarding some interpretive questions and intends for the agency to fix such problems.<sup>112</sup> The *Chevron* decision itself was such an instance, with the EPA relying on general authority to adopt regulations for the purpose of elucidating an underdefined statutory term in the Clean Air Act, “stationary source.”<sup>113</sup> Applying semantic canons of construction<sup>114</sup> and reviewing legislative history, the *Chevron* Court unanimously concluded that the usual methods of statutory interpretation failed to yield a clear answer<sup>115</sup>—hence the rationale for moving on to *Chevron* step two and deferring to the agency’s interpretation.

Acknowledging the notion of implied delegations through statutory ambiguity does not require treating a statute as ambiguous merely because statutory language at first blush seems susceptible of more than one reasonable interpretation. A reviewing court should engage in at least some amount of digging into the statutory context and history before declaring a statute ambiguous. Hence, the *Chevron* opinion itself, in discussing *Chevron*’s first step of ascertaining statutory clarity, declares that “[t]he judiciary is the final authority on issues of statutory construction” and calls upon reviewing courts to utilize “traditional tools of statutory construction” in evaluating congressional intent.”<sup>116</sup> In many cases, with such effort, it becomes obvious that one of the proffered alternatives is simply *right* and the other obviously *wrong*, in that the former comports with the statutory scheme while the latter twists it out of coherence.

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108. *E.g.*, 21 U.S.C. § 371(a) (2012).

109. *E.g.*, 26 U.S.C. § 7805(a) (2012).

110. *E.g.*, 29 U.S.C. § 156 (2012).

111. *See, e.g.*, Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 546–49 (2002) (documenting this history).

112. *See supra* note 81 and accompanying text.

113. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 839–41 (1984).

114. *See id.* at 859–62 (rejecting the claim that “there is no statutory language even relevant to ascertaining the meaning of stationary source” but concluding that “parsing of general terms in the text of the statute will [not] reveal an actual intent of Congress”).

115. *See id.* at 862 (finding the legislative history “unilluminating”).

116. *Id.* at 843 n.9.

The many cases in which courts have decided unanimously that the meaning of the statute was clear at *Chevron* step one provide examples.

Also, it is undoubtedly true that Justices or judges sometimes are a little too quick to find ambiguity, whether because they mistake the scope of the *Chevron* step one inquiry or simply do not try hard enough to evaluate statutory meaning for themselves. For example, in *Scialabba v. Cuellar de Osorio*,<sup>117</sup> Justice Kagan, writing for a plurality of three Justices, said that because the statutory provision that gave rise to the interpretive issue before the Court seemed internally inconsistent on its face, the statute was ambiguous, and deference was appropriate.<sup>118</sup> Six Justices across three opinions castigated Justice Kagan for not trying hard enough to find statutory clarity. Chief Justice Roberts, joined by Justice Scalia, wrote to “take a different view of what makes th[e] provision [in question] ‘ambiguous.’”<sup>119</sup> “Direct conflict is not ambiguity,” he said, along with, “*Chevron* is not a license for an agency to repair a statute that does not make sense.”<sup>120</sup> Instead, he read the statutory provision in context to find its meaning, although he then found within that meaning a separate gap for the agency to fill.<sup>121</sup> Justice Sotomayor, on behalf of three dissenting Justices, accused Justice Kagan of “rushing to find a conflict within the statute” rather than employing “traditional tools of statutory construction” to resolve the seeming inconsistency.<sup>122</sup> “We do not lightly presume that Congress has legislated in self-contradicting terms.”<sup>123</sup> Justice Alito also dissented, but noted his agreement with Chief Justice Roberts’s criticism of Justice Kagan’s approach to ambiguity.<sup>124</sup>

Nevertheless, as the above examples illustrate, suggesting that all questions of statutory meaning can be resolved using de novo review risks asking judges to go far beyond traditional tools of statutory interpretation and intrude deeply into the policy sphere. For *Chevron*’s first step, then, the true difficulty lies at the margins, in ascertaining at what point statutory interpretation ends and policymaking begins. If judges should put forth at least a little effort to find statutory clarity in some instances, then how much effort is enough, and how much is too much? Whether the tiebreaker is *Chevron* or some other

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117. 573 U.S. 41 (2014).

118. *Id.* at 57 (describing the statutory provision at issue as “Janus-faced”).

119. *Id.* at 76 (Roberts, C.J., concurring).

120. *Id.*; *cf.* *Rite Aid Corp. v. United States*, 255 F.3d 1357, 1359–60 (Fed. Cir. 2001) (“[I]n the absence of a problem created from the filing of consolidated returns, the Secretary is without authority to change the application of other tax code provisions to a group of affiliated corporations filing a consolidated return.”).

121. *Scialabba*, 573 U.S. at 76–79 (Roberts, C.J., concurring).

122. *Id.* at 87–88 (Sotomayor, J., dissenting).

123. *Id.* at 87.

124. *Id.* at 79 (Alito, J., dissenting).

doctrine, reasonable judges can and will disagree over when a statute is ambiguous.<sup>125</sup>

### III. CURTAILING *CHEVRON'S* SCOPE

As illustrated above, some amount of statutory ambiguity and judicial deference to agencies is unavoidable, at least in a world in which Congress deliberately extends policymaking discretion to agencies. Nevertheless, some Justices and judges—including Justice Gorsuch—will more aggressively apply traditional tools of interpretation to resolve statutory meaning at *Chevron* step one, and thereby will curtail the extent of judicial deference that agencies receive. Beyond the ambiguity issue, however, Justice Gorsuch is not alone in seeing other ways to reduce *Chevron's* scope. It is well settled that not every agency action that fills a statutory gap warrants judicial review under the *Chevron* standard, let alone *Chevron* deference. Moreover, Justice Gorsuch is absolutely correct that agency actions often raise unanswered questions regarding whether they ought even to be eligible for *Chevron* deference.<sup>126</sup>

In *United States v. Mead Corp.* and subsequent cases, the Supreme Court acknowledged that *Chevron* does not provide the appropriate evaluative standard for all agency interpretations of statutes.<sup>127</sup> Eligibility for *Chevron* review—and thus for *Chevron* deference—is predicated on an assumption that Congress intended the agency, rather than the courts, to be primarily responsible for resolving statutory ambiguity. In *Mead*, therefore, the Court said that the *Chevron* standard applies only when both Congress has delegated to the agency the power to act with the force of law and the agency has acted with that power in administering the statute.<sup>128</sup> The *Mead* Court was a little fuzzy, however, on precisely how one should determine whether agency action carries such legal force.

The Court in *Mead* identified an agency's use of notice-and-comment rulemaking or formal adjudication procedures as a strong indicator that a particular interpretation carries the force of law.<sup>129</sup> These two examples are the most obvious candidates for *Chevron* deference, but for different reasons.

Agency interpretations adopted through notice-and-comment rulemaking are the paradigmatic example of an agency exercising delegated power with the force of law to resolve statutory ambiguity. Again, the *Chevron* decision it-

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125. *Cf. Muscarello v. United States*, 524 U.S. 125 (1998) (featuring a divided Court disagreeing over whether a statute was sufficiently ambiguous to support applying the rule of lenity).

126. *See, e.g., Merrill & Hickman, supra* note 8, at 848–52 (identifying fourteen separate unresolved questions regarding *Chevron's* scope, many of which remain unresolved nearly twenty years later).

127. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *see also King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

128. *Mead*, 533 U.S. at 226–27.

129. *Id.*

self concerned notice-and-comment regulations adopted by the EPA elaborating the meaning of an underdefined statutory term, “stationary source.”<sup>130</sup> As outlined in Part II above, statutes frequently contain both specific and general grants of rulemaking authority for the purpose of allowing agencies to resolve statutory details in implementing and administering government programs. Perhaps unsurprisingly, most of the cases in which the Supreme Court has deferred under *Chevron* to agency interpretations of ambiguous statutes have involved notice-and-comment rulemaking.<sup>131</sup>

As a normative matter, if both statutory ambiguity and agency reasonableness are present, then defending *Chevron* deference for notice-and-comment regulations as a format for communicating agency legal interpretations is easy. Notice-and-comment procedures are intended and designed to facilitate public participation in the development and extensive vetting of regulatory text.<sup>132</sup> Regulations are typically prospective in their application, so parties subject to their mandates have advance notice.<sup>133</sup> The agency regulatory process may be democratically suboptimal relative to the legislative process. But unless and until the courts stop Congress from delegating policymaking responsibility to agencies, notice-and-comment rulemaking is the next best alternative for ensuring democratic legitimacy in the development of legal rules.

Formal adjudications are trickier. The Supreme Court has long included formal adjudications within *Chevron*'s domain, having extended *Chevron* review on a number of occasions to interpretations adopted by the National Labor Relations Board,<sup>134</sup> the Board of Immigration Appeals,<sup>135</sup> and other agencies using those procedures.<sup>136</sup> Also, long before *Chevron*, in *SEC v. Chenery Corp.*

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130. See *supra* notes 113–15 and accompanying text.

131. See Hickman, *supra* note 16, at 548 & nn.168–70 (making this point).

132. See 5 U.S.C. § 553(b)–(c) (2012) (requiring agencies to publish a written notice of proposed rulemaking, offer interested parties the opportunity to submit comments in response, and then in conjunction with final rules, publish a “statement of basis and purpose” or preamble addressing significant comments received).

133. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988) (rejecting retroactivity, and thus demanding prospectivity, for most agency regulations).

134. See, e.g., *ABF Freight Sys., Inc. v. Nat. Labor Relations Bd.*, 510 U.S. 317, 324 (1994); *Lechmere, Inc. v. Nat. Labor Relations Bd.*, 502 U.S. 527, 536 (1992); cf. *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 768 n.6 (1988) (Blackmun, J., concurring in part and dissenting in part) (noting the Court's policy of deferring to National Labor Relations Board (NLRB) interpretations of the National Labor Relations Act); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988) (stating that “statutory interpretation by the [NLRB] would normally be entitled to deference” under *Chevron* but applying the canon of constitutional avoidance in rejecting the agency's interpretation to resolve the case at *Chevron* step one).

135. See, e.g., *Negusie v. Holder*, 555 U.S. 511, 516–17 (2009); *Immigration & Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445–48 (1987).

136. See, e.g., *Glob. Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45, 52, 57–58 (2007) (applying *Chevron* in context of an FCC order); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680,

(*Chenery II*),<sup>137</sup> the Supreme Court held that when Congress gives both rule-making and adjudicatory powers to an agency it tasks with implementing and administering a statute, the agency can choose whether to use rulemaking or adjudication procedures when acting with legal force.<sup>138</sup> The natural interaction between *Chevron's* delegation premise and *Chenery II* leads logically to the conclusion that agency interpretations advanced through formal adjudication should be *Chevron*-eligible. In many cases, therefore, stare decisis demands that courts regard agency interpretations adopted through such procedures as *Chevron*-eligible.

All of that said, the nature of adjudications is such that the interpretations that an agency adopts through such procedures tend to be narrower in their scope and may be susceptible more often to resolution through traditional tools of statutory construction. Consider, by way of comparison, that the courts have elaborated the requirements of the Sherman Act using common law methods.<sup>139</sup> Consequently, one might anticipate that a court applying the *Chevron* standard in such contexts would more readily find the meaning of the statute clear.

Moreover, serious normative objections attach to agencies utilizing adjudication rather than rulemaking to exercise policymaking discretion. Courts and scholars have recognized that rulemaking is superior to case-by-case adjudication as a means of illuminating the meaning of open-ended statutory terminology. For example, in *National Petroleum Refiners v. Federal Trade Commission*,<sup>140</sup> the D.C. Circuit lauded rulemaking as allowing an agency to provide advance notice of legal requirements to affected parties, in addition to permitting the agency to contemplate more thoroughly the implications of its interpretive choices.<sup>141</sup> By contrast, as discussed in Part I, then-Judge Gorsuch recognized in cases like *De Niz Robles v. Lynch*<sup>142</sup> and *Gutierrez-Brizuela v. Lynch*<sup>143</sup> that the retroactive nature of agency decisionmaking through adjudication denies affected parties notice of the legal consequences of their actions, particularly where agencies are acting contrary to existing judicial precedent. And, notably, when Congress has divided statutory rulemaking and adjudication powers between two agencies, the Supreme Court has at least implicitly recognized rulemaking's greater claim to *Chevron* deference by treating inter-

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689–91, 696–97 (1991) (applying *Chevron* in the context of claims adjudications under the Department of Labor's black lung benefits program).

137. 332 U.S. 194 (1947).

138. *Id.* at 202–03.

139. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 96 (2012) (describing the courts' common law approach to interpreting the term "restraint of trade" as used in the Sherman Act).

140. 482 F.2d 672 (D.C. Cir. 1973).

141. *Id.* at 681–84.

142. 803 F.3d 1165, 1167 (10th Cir. 2015).

143. 834 F.3d 1142, 1143 (10th Cir. 2016).

pretations of the agency with rulemaking power as *Chevron*-eligible, rather than the agency with adjudication power, especially where the two agencies disagree.<sup>144</sup> Hence, where *stare decisis* does not require the application of *Chevron* in the adjudication context—for example, because the adjudication in question is not formal and the agency in question has not previously received *Chevron* deference for its adjudications—one might anticipate Justice Gorsuch to argue against deferring.

The Supreme Court in *Mead* also said that lack of notice-and-comment rulemaking or formal adjudication procedures is not dispositive of an interpretation's eligibility for *Chevron* deference.<sup>145</sup> Since deciding *Mead*, the Supreme Court has not applied the *Chevron* standard to defer to an interpretation advanced in any other way.<sup>146</sup> On a few occasions prior to deciding *Mead*, however, the Court did extend *Chevron* deference to interpretations advanced through less formal formats.<sup>147</sup> Such cases are the exception rather than the rule. Nevertheless, they raise uncertainty in the lower courts regarding *Chevron*'s scope in the post-*Mead* era, and again, one might anticipate that Justice Gorsuch would seek to resolve such questions so as to curtail *Chevron*'s scope.

#### CONCLUSION

No one should consider Justice Gorsuch to be a friend of the *Chevron* doctrine. Certainly, Justice Gorsuch will continue to find cases in which he questions an agency's claim to *Chevron* deference for one reason or another. He will push for more frequent judicial resolution of statutory meaning rather than deference to agency interpretations of law. To the extent that *Chevron* deference remains an option, he will argue for clarifying and curtailing the scope of its applicability. In both regards, he will be continuing the efforts of some of his fellow Justices, past and present. He may even succeed in convincing his colleagues to repudiate the *Chevron* standard, at least by name.

Nevertheless, given the ubiquity of congressional authorizations of agency rulemaking power and expansive congressional reliance on agencies to make difficult policy choices, any conception that Justice Gorsuch will be able to altogether eliminate judicial deference to agency interpretations of law in favor of *de novo* review is fanciful. Whether under the label of *Chevron* or otherwise,

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144. Cf. *Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 123, 134 (1995) (noting the division of rulemaking power to the Office of Workers' Compensation Programs and adjudication power to the Benefits Review Board); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476–77 (1992) (favoring interpretations of the Longshore and Harbor Workers' Compensation Act advanced by the Office of Workers' Compensation Programs over those adopted by the Benefits Review Board).

145. See *United States v. Mead Corp.*, 533 U.S. 218, 231–32 (2001).

146. See Hickman, *supra* note 16, at 548 & nn.168–70 (making this point).

147. See, e.g., *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995).

many judges simply will not want to intrude too deeply into the policy sphere that contemporary interpretation sometimes invades.

And it is not at all clear that Justice Gorsuch really means to try to eliminate judicial deference from our jurisprudence. At the Tenth Circuit, his *Chevron* cases involved more than the usual number of agency adjudications with aggressive agency positions and retroactive effect, where deferring was uncomfortable and justifications for *Chevron's* applicability were arguably weaker. It was in those cases that his rhetoric against *Chevron* was most vociferous. By comparison, assuming that the Supreme Court's past cases predict its future docket in this regard, Justice Gorsuch now will be called upon to resolve more cases resembling *Chevron's* paradigmatic scenario: notice-and-comment regulations adopted by agencies to fill statutory gaps left deliberately to agency expertise. He may not soften his anti-*Chevron* rhetoric, but he also may not always object to every instance in which the Court defers.

Nevertheless, Justice Gorsuch will have plenty of opportunities to curtail the scope of *Chevron's* applicability. He undoubtedly will push his colleagues to utilize traditional tools of statutory interpretation to resolve statutory meaning at *Chevron* step one and thereby avoid deference on a case-by-case basis. Also, he presumably will push his colleagues to resolve open questions regarding eligibility for *Chevron* review to restrict deference more categorically as well. Perhaps merely curtailing *Chevron* will be enough.