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## Narrowing Chevron's Domain

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## **NARROWING *CHEVRON*'S DOMAIN**

KRISTIN E. HICKMAN & AARON L. NIELSON<sup>†</sup>

### ABSTRACT

*Chevron deference has become increasingly controversial. Some Justices on the Supreme Court have stated that they would overrule Chevron, and others have urged that it be curtailed. If Chevron were merely modified rather than overturned, it is unclear what that modified Chevron would look like. This Article argues that the time has come to narrow Chevron's domain by limiting Chevron deference to interpretations announced in rulemaking and not those announced in adjudication.*

*Under the classic formulation of Chevron, a court should defer to an agency's reasonable interpretation of ambiguous statutory language. This formulation is grounded in the notion that Congress, at least implicitly, signals a preference for agency rather than judicial decisionmaking when it delegates broad policymaking discretion as part of charging an agency with implementing and administering a statute. In *United States v. Mead Corp.*, the Supreme Court began defining what has come to be known as Chevron's domain—holding that Congress did not intend courts to defer to every agency resolution of statutory ambiguity, but rather only to those articulated in agency actions that carry legal force and thus reflect the exercise of delegated power. As a consequence of the *Mead* Court's analysis, courts typically*

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*defer under the Chevron standard to interpretations offered in notice-and-comment rulemakings and in formal adjudications, and apply the less deferential Skidmore standard in reviewing those advanced through less formal formats like interpretative rules and policy statements. Meanwhile, interpretations announced via informal adjudications represent a gray area for Mead's analysis.*

*With the benefit of hindsight, we believe that Mead did not go far enough in curtailing Chevron's reach. Applying Chevron to interpretations announced through adjudication has proven problematic in practice and has fueled a great deal of the anti-Chevron criticism. Meanwhile, Chevron's claim to stare decisis in the context of adjudications is surprisingly weak. Using a novel dataset of cases, this Article shows that the Supreme Court has applied Chevron only rarely in evaluating agency adjudications. We submit that this relative dearth of precedent is best explained by the fact that Chevron makes the most conceptual sense when applied to agency rulemakings. Accordingly, if the Court is looking for a way to address deference short of eliminating it, the soundest way to revisit Chevron is by narrowing its domain to exclude most if not all agency adjudications.*

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## INTRODUCTION

Administrative law today finds itself in a state of commotion.<sup>1</sup> With the additions of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to the Supreme Court, many expect the Court to rethink longstanding doctrines governing the administrative state. Indeed, the Court has already begun to do so. Since 2019, the Court has narrowed *Auer*<sup>2</sup> deference<sup>3</sup> and looked beyond the four corners of an agency decision for perhaps the first time in history.<sup>4</sup> Five Justices now have called for a reinvigoration of the nondelegation doctrine.<sup>5</sup> Based on what the Justices have already said, this trend seems likely to continue.<sup>6</sup>

As part of this rethinking, the Court seems to be taking a more jaundiced view of *Chevron*<sup>7</sup> deference.<sup>8</sup> Simultaneously, a new wave of

1. See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 166 (2019); Gillian E. Metzger, *The Supreme Court, 2016 Term, Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 49–50 (2017); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 853, 854–55 (2020).

2. *Auer v. Robbins*, 519 U.S. 452 (1997).

3. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019) (narrowing *Auer*, 519 U.S. 452).

4. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2578 (2019) (rejecting the agency's asserted rationale as pretextual).

5. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (calling for the aggressive use of nondelegation); *id.* at 2031 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring) (endorsing Gorsuch’s *Gundy* dissent); see also Nicholas Bagley, Opinion, ‘*Most of Government Is Unconstitutional*,’ N.Y. TIMES (June 21, 2019), <https://nyti.ms/2Y7UsXg> [<https://perma.cc/2HE8-EDB8>] (expressing alarm about the Justices’ enthusiasm for nondelegation).

6. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) (expressing skepticism about aspects of modern administrative law); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136–38 (2016) (same); Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94, 100–02 (2015) (same); David Feder, *The Administrative Law Originalism of Neil Gorsuch*, YALE J. REGUL.: NOTICE & COMMENT (Nov. 21, 2016), <http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch> [<https://perma.cc/A8PU-KTU5>] (same).

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

8. See, e.g., Dino Grandoni, *The Energy 202: Republicans Want To Know if Environmental Groups Are Really Foreign Agents*, WASH. POST (Sept. 6, 2018, 8:53 AM), <https://www.washingtonpost.com/news/powerpost/paloma/the-energy-202/2018/09/06/the-energy-202->

anti-*Chevron* scholarship has emerged,<sup>9</sup> and members of Congress are pursuing legislation purporting to overturn the *Chevron* standard.<sup>10</sup> Whether prompting or prompted by these voices, or perhaps both, the Court seems inclined to go along with the crowd. Chief Justice John Roberts has gone out of his way to invite further litigation over *Chevron*.<sup>11</sup> And Justice Gorsuch, writing for a majority of the Court, twice has suggested that *Chevron* may not be long for this world.<sup>12</sup> At a minimum, the Justices seem more willing to find clarity using traditional tools of statutory interpretation, thereby avoiding *Chevron* deference altogether.<sup>13</sup>

Going further, Justice Kavanaugh has argued that the *Chevron* framework itself is flawed and that exceptions to it should be understood broadly.<sup>14</sup> Justices Gorsuch and Clarence Thomas have

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republicans-want-to-know-if-environmental-groups-are-really-foreign-agents/5b9007281b326b3f31919f99 [https://perma.cc/U7N6-GRXX] (“Brett M. Kavanaugh hinted he may want to revisit if confirmed a doctrine important to environmental regulations called *Chevron* deference.”); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155–56 (10th Cir. 2016) (Gorsuch, J., concurring) (similar).

9. See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 997–1000 (2017). To be clear, *Chevron*’s critics vary in their objections. Some object to deference in general. See, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1227 (2016). Others argue merely that *Chevron* should be replaced with a less deferential standard. See, e.g., Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 843–50 (2010); Richard W. Murphy, *Abandon Chevron and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 49–56 (2017).

10. See, e.g., Kristin E. Hickman, *SOPRA? So What? Chevron Reform Misses the Target Entirely*, 14 U. ST. THOMAS L.J. 580, 587–88 (2018) (documenting different versions of the Separation of Powers Restoration Act passed by the House of Representatives in 2016 and 2017 that sought to overturn *Chevron* legislatively).

11. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part and in the judgment) (joining the Court’s decision to uphold *Auer* deference but specifically noting that his vote does not extend to *Chevron* deference).

12. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (“No party to these cases has asked us to reconsider *Chevron* deference.”); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“[W]hether *Chevron* should remain is a question we may leave for another day.”).

13. See, e.g., *Epic Sys.*, 138 S. Ct. at 1629; *SAS Inst.*, 138 S. Ct. at 1358; Jonathan Adler, *Shunting Aside Chevron Deference*, REGUL. REV. (Aug. 7, 2018), <https://www.theregreview.org/2018/08/07/adler-shunting-aside-chevron-deference> [https://perma.cc/55S3-ZN2K] (“*Chevron* deference was raised in defense of agency interpretations of statutory language in five cases this past term, and in all five cases a majority of the Court rejected the agency’s plea.”).

14. See, e.g., *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“The FCC’s net neutrality rule is a major rule, but Congress has not clearly authorized the FCC to issue the rule. For that reason alone, the rule is unlawful.”); Kavanaugh, *supra* note 6, at 2150 (“*Chevron* encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”).

questioned the very constitutionality of *Chevron* deference.<sup>15</sup> Justice Stephen Breyer, for his part, has never liked the *Chevron* standard.<sup>16</sup> And Chief Justice Roberts and Justice Samuel Alito also have sought openly to water down the doctrine.<sup>17</sup> Hence, today, the Court may have enough votes to step back from *Chevron*.<sup>18</sup> In one of his last opinions, Justice Anthony Kennedy maintained that the time has come to reexamine *Chevron*.<sup>19</sup> Reflecting this zeitgeist, seasoned lawyers now invoke *Chevron* with trepidation.<sup>20</sup> In short, although not (yet?) abandoned to the anticanon, the message is clear: *Chevron* is on thin ice.

This hostility has prompted alarm among *Chevron*'s defenders.<sup>21</sup> These defenders argue that when a statute administered by an agency is ambiguous—and thereby arguably confers a certain amount of policymaking discretion to the interpreter—politically accountable agency officials should have interpretative primacy.<sup>22</sup> Some defenders also express concern about judges assuming too great a policymaking

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15. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (highlighting “the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that *Chevron* conflicts with Article III’s duty to say what the law is).

16. See e.g., *SAS Inst.*, 138 S. Ct. at 1364 (Breyer, J., dissenting) (“I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.”); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364–65 (1986) (similar).

17. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 323–27 (2013) (Roberts, C.J., dissenting, joined, *inter alia*, by Alito, J.) (advancing a narrower theory of *Chevron*).

18. See, e.g., Asher Steinberg, *Does Anyone on the Supreme Court Believe in Chevron Anymore? A Squib on Chevron in SAS Inst.*, NARROWEST GROUNDS (Apr. 26, 2018), <https://narrowestgrounds.blogspot.com/2018/04/does-anyone-on-supreme-court-believe-in.html> [<https://perma.cc/TBZ5-3BLQ>] (counting votes).

19. See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (“[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”).

20. See, e.g., Daniel Hemel, *Argument Analysis: Hating on Chevron*, SCOTUSBLOG (Nov. 7, 2018, 1:43 PM), <http://www.scotusblog.com/2018/11/argument-analysis-hating-on-chevron> [<https://perma.cc/7EXR-TPNT>] (discussing an argument in *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019), where BNSF counsel stated “I hate to cite it, but I will end with *Chevron* . . .”).

21. See, e.g., Metzger, *supra* note 1, at 17 (noting “attacks”); cf. Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 20–21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3512154](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154) [<https://perma.cc/Y39M-KM4U>] (expressing concern that the Supreme Court will invalidate the intelligible principle standard and describing the same as “radical stuff”).

22. See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006).

role absent *Chevron*, given Congress's longstanding habit of delegating authority.<sup>23</sup> Others advance historical arguments for *Chevron* deference.<sup>24</sup> In response, however, skeptics increasingly question whether *Chevron* is lawful, as either a statutory or a constitutional matter,<sup>25</sup> and whether the doctrine creates bad incentives.<sup>26</sup> Suffice it to say, these are big fights that will no doubt continue to command much attention.

Whatever one's view of *Chevron* generally,<sup>27</sup> it is especially important now for the bench and bar to recall that not every agency interpretation is eligible for *Chevron* deference. In *United States v. Mead Corp.*,<sup>28</sup> the Court categorically limited "*Chevron's* domain"—the contexts in which such deference is available<sup>29</sup>—to agency actions carrying the force of law.<sup>30</sup> The Court also recognized that *Chevron* deference is particularly fitting for interpretations adopted using formal procedures.<sup>31</sup> Courts, therefore, generally use the *Chevron* standard in evaluating interpretations of ambiguous statutes offered by

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23. See, e.g., Nicholas Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1455–56 (2017).

24. See, e.g., Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 951–53 (2011); Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613, 1652–56 (2019).

25. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (questioning whether *Chevron* is statutorily authorized); Bamzai, *supra* note 9, at 912–19 (questioning whether *Chevron* is historically justified).

26. Compare generally, e.g., Philip Hamburger, *Chevron On Stilts: A Response to Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77 (2018) (challenging *Chevron*), and Charles J. Cooper, *The Flaws of Chevron Deference*, 21 TEX. REV. L. & POL. 307 (2017) (similar), with Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018) (defending *Chevron*).

27. For what it is worth, one of us believes that *Chevron* (or something much like it) is inevitable so long as Congress delegates policymaking discretion to agencies, see, e.g., Bednar & Hickman, *supra* note 23, at 1460, while the other is more skeptical but agrees that some efforts to limit *Chevron* create difficult line-drawing problems and that doctrinal coherence is valuable, see, e.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 54–55 (2010).

28. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

29. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001); see also Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 858–63 (2018) (expanding on the formulation of *Chevron's* domain); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 4 (2017) (noting that “scholars have focused on *Chevron's* domain—that is, when *Chevron* applies in judicial review”).

30. *Mead*, 533 U.S. at 226–27.

31. See *id.* at 229–30.

agencies in notice-and-comment rulemakings and in formal adjudications. By contrast, courts typically apply the less deferential *Skidmore v. Swift & Co.*<sup>32</sup> standard<sup>33</sup> to interpretations advanced through informal mediums, like interpretative rules and policy statements.<sup>34</sup> Meanwhile, agency interpretations announced through informal adjudication represent a gray area for *Chevron's* scope.<sup>35</sup>

The *Mead* Court's decision to narrow *Chevron's* domain offers the Justices a path forward. Despite the noise, the Supreme Court is unlikely to overrule *Chevron* outright. Last year, in *Kisor v. Wilkie*,<sup>36</sup> the Justices declined to overrule *Auer* deference, which applies to agency interpretations of their own regulations, despite its lack of theoretical justification.<sup>37</sup> Stare decisis played a substantial role in the Court's retention of *Auer* deference, which is unsurprising because the Court had not previously provided much of a theoretical basis for *Auer*.<sup>38</sup> By contrast, the Court has articulated and defended *Chevron's* theoretical underpinnings on the merits,<sup>39</sup> and the Chief Justice, although arguing for a less robust *Chevron*, has not called for it to be overruled altogether.<sup>40</sup> Yet as in *Kisor*, even if the Justices are unwilling

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32. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

33. *Id.* at 140.

34. *See, e.g., Mead*, 533 U.S. at 227–28.

35. *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.6 (6th ed. 2018) (detailing how *Mead* is applied).

36. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

37. *See, e.g., Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring) (“Our cases have not put forward a persuasive justification for *Auer* deference.”); Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 100 (2015) (documenting *Auer's* “unrestrained expansion . . . untethered from its origins without any meaningful explanation as to why”).

38. In *Kisor*, Justice Elena Kagan attempted to provide a theoretical basis for *Auer* deference and cited a number of cases that addressed aspects of the doctrine in support of that analysis. *Kisor*, 139 S. Ct. at 2410–11. Her effort, however, did not command a majority. *See id.* at 2425 (Roberts, C.J., concurring) (casting the deciding vote on stare decisis grounds without joining the theoretical discussion); *cf. Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring) (explaining why the theoretical justifications given for *Chevron* have wrongly been unthinkingly applied to *Auer*).

39. *See, e.g., Mead*, 533 U.S. at 229 (discussing the Court's understanding of congressional expectations upon delegating policymaking discretion); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (justifying *Chevron* deference on grounds of delegation, expertise, and political accountability); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514–19 (discussing justifications for *Chevron*).

40. *See Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring) (contending that the Court's decision in *Kisor* does not prevent the Court from reconsidering *Chevron*, but not taking a



to overrule *Chevron*, they still may want to curtail it.<sup>41</sup> If so, the Justices need a coherent way to cut back on *Chevron* without jettisoning it altogether.

Building on *Mead*, this Article argues that the best way to curtail *Chevron* going forward is to further narrow its domain. Specifically, the Court should eliminate, or at least reduce, deference to agency adjudications. Three justifications support this position.

First, narrowing *Chevron*'s domain is more consistent with the doctrine's theoretical underpinnings: delegation, expertise, and accountability. Again, the Court has held that *Chevron* first and foremost requires a delegation from Congress to an agency of the power to act with the force of law.<sup>42</sup> Whether Congress has delegated the authority to adopt legally binding rules and regulations is readily ascertainable from statutory text.<sup>43</sup> By contrast, which interpretations announced in adjudications carry the force of law has proven much harder to discern. In fact, counterintuitively, some lower courts now apply *Chevron* and defer to agencies' own assessments of whether Congress intended them to use formal adjudication procedures. This approach enables agencies essentially to bootstrap their own way into *Chevron* deference under the *Mead* standard.<sup>44</sup> Removing most adjudications from *Chevron*'s domain returns to Congress the decision of which agency interpretations are *Chevron*-eligible. Also, rulemaking is open to the public, meaning that agencies can benefit from the greater knowledge and wider perspectives that come from public comments and engagement with many groups, thus strengthening political legitimacy.<sup>45</sup> Adjudication, by contrast, typically involves a

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position regarding whether *Chevron* should be overturned); *City of Arlington v. FCC*, 569 U.S. 290, 314–17 (2013) (Roberts, C.J., dissenting) (critiquing the Court's application of *Chevron* doctrine but not arguing that the doctrine itself should go).

41. *Kisor*, 139 S. Ct. at 2408 (“*Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits.”).

42. *See Mead*, 533 U.S. at 226–27.

43. *See, e.g., City of Arlington*, 569 U.S. at 293 (identifying the FCC's statutory authority to adopt legally binding regulations).

44. *See, e.g., Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 18–19 (1st Cir. 2006); *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480–83 (D.C. Cir. 1989); *see also infra* Part II.B. (documenting this issue).

45. *See, e.g., Maggie McKinley, Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1603 (2018) (arguing that “the participation of individuals and minorities” in modern government occurs through “the notice and comment rulemaking process and the petitions required by the APA”).

narrow set of parties and, consequently, substantially less public input and data. If the purpose of *Chevron* deference is to allow more politically accountable agencies to bring their expertise to bear, it follows that agencies should be transparent and informed. Rulemaking, more than adjudication, advances that purpose.

Second, narrowing *Chevron*'s scope would go a long way toward answering some of the most weighty fairness objections levelled against *Chevron*, such as those advanced by Justice Gorsuch.<sup>46</sup> Unlike adjudication, which is retroactive in that it evaluates and assigns present legal consequences to past actions, rulemaking is prospective in character.<sup>47</sup> The Court's renewed focus on principles of foundational "fair warning"<sup>48</sup> thus also counsels in favor of a narrower domain for *Chevron*.

Third, narrowing *Chevron*'s reach will also result in a more predictable and consistent application of the doctrine by the courts. A narrower doctrine is a simpler one. As it is now, courts regularly struggle to determine whether an interpretation announced in adjudication should receive deference under *Mead*. *Mead* itself is hardly a model of clarity on this important point.<sup>49</sup> This confusion makes litigation much more expensive and complicated. When all of these justifications are considered together, the case against *Chevron* in the adjudicative context becomes quite strong.

Stare decisis is the obvious objection to this proposal. Yet, even if stare decisis preserves *Chevron* from outright repudiation, it should not prevent narrowing *Chevron*'s domain in the way this Article proposes.

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46. On the Tenth Circuit, then-Judge Gorsuch authored two important opinions about *Chevron*. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015). In 2005, a federal court concluded that the attorney general had discretion to adjust the status of certain immigrants. See *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1301 (10th Cir. 2005), *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2006). In the wake of that decision, Alfonso De Niz Robles and Hugo Rosario Gutierrez-Brizuela came forward to petition for relief. *Gutierrez-Brizuela*, 834 F.3d at 1144; *De Niz Robles*, 803 F.3d at 1168. Yet later, the Board of Immigration Appeals concluded that, in fact, such relief was unlawful, and then applied that interpretation retroactively to those who petitioned for relief. *De Niz Robles*, 803 F.3d at 1167 (citing *In re Briones*, 24 I. & N. Dec. 355 (B.I.A. 2007)). Gorsuch pointedly objected, with considerable normative force, to the unfairness of that retroactivity. See *Gutierrez-Brizuela*, 834 F.3d at 1145–48; *De Niz Robles*, 803 F.3d at 1175–80.

47. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1998).

48. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

49. See, e.g., *United States v. Mead*, 533 U.S. 218, 229–31 (2001) (offering different considerations to weigh in particular cases).

First, the stare decisis weight of *Chevron* for adjudications may be much less hefty than one might expect given the doctrine's prominence. *Chevron* itself involved rulemaking, as have a substantial majority of *Chevron* cases to reach the Justices, especially after *Mead*. A review of every Supreme Court case citing *Chevron* through the 2019 term demonstrates that the Court has actually extended *Chevron* deference only rarely outside of the rulemaking context. Most of those cases were decided before *Mead* with no or little analysis as to why *Chevron* was the right evaluative standard. Much of the Court's rhetoric regarding deference outside of the rulemaking context thus is, at best, dicta. Second, the Court has already held that the scope of a deferential standard of review can be narrowed without offending stare decisis; it did so twenty years ago in *Mead* and even more recently in *Kisor*.<sup>50</sup> Finally, for the pragmatists, narrowing *Chevron*'s domain poses fewer stare decisis concerns than overruling the doctrine outright, which is also on the table.

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The Article proceeds as follows. Part I examines *Chevron*, with particular focus on how *Chevron*'s domain fits with the Administrative Procedure Act's ("APA's") procedural framework for different types of agency action. Part II explains why *Chevron*'s domain should be narrowed to exclude some or all agency adjudications. Part III addresses the stare decisis implications of narrowing *Chevron*'s domain. As part of that analysis, the Article reviews every case decided by the Supreme Court through the 2019 term that cites *Chevron* to illustrate that the Court infrequently applies *Chevron* in the adjudication context. Based on that review, the Article concludes that principles of stare decisis allow the sort of revision proposed here.

### I. *CHEVRON*'S DOMAIN IN THEORY

The *Chevron* doctrine is one of the most familiar aspects of administrative law, but it is also complex and increasingly

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50. See, e.g., Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), <http://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine> [<https://perma.cc/WT2C-GAM7>] (detailing how *Auer* has been narrowed).

controversial. Most lawyers know the simple version of *Chevron*. When a statute is ambiguous, a reviewing court should defer to the administering agency's interpretation, so long as it is reasonable.<sup>51</sup> In truth, however, the question of when (to say nothing of how) *Chevron* applies is much more difficult. Although *Chevron* itself announces the simple version, the Supreme Court has stressed since then that not all agency interpretations should receive *Chevron* review.<sup>52</sup>

Understanding when *Chevron* does and does not apply is no easy task, especially because the Supreme Court has not clearly demarcated *Chevron*'s boundaries. To the contrary, the Court's cases often send conflicting signals.<sup>53</sup> Hence the emergence of what has come to be known as *Chevron*'s "step zero," which asks whether *Chevron* is even applicable.<sup>54</sup> Although where the lines are and how they apply can be fuzzy, the Court has clearly held that there *are* lines<sup>55</sup> and that *Chevron*'s two steps do not always apply. The categories of interpretations that courts must evaluate using the *Chevron* standard are widely referred to as "*Chevron*'s domain."<sup>56</sup>

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51. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

52. *See, e.g., Mead*, 533 U.S. at 226–27 (2001) (limiting *Chevron*'s scope to agency actions carrying the force of law); *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (listing formats that do not merit *Chevron* review).

53. *See, e.g., Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he Court has declined to apply *Chevron* deference to arguably ambiguous civil statutes but it has only sometimes cited the *Mead* balancing test as the reason . . ."); 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, 1097–1120 (2008) (documenting confusion generated by the Court's application of seven different doctrines of deference and anti-deference over thirty years); Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419, 1423–24 (2018) (explaining that the Court's analysis from *King v. Burwell*, 135 S. Ct. 2480 (2015), about the scope of the major questions doctrine consists of only a "single, dense paragraph" with "a grab bag of reasons" (quoting Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2206 (2016))).

54. *See, e.g., Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1159 (11th Cir. 2018) ("Since *Chevron*, the Supreme Court has clarified what some refer to as 'step zero' of *Chevron*: the threshold requirement that an agency interpretation be of the sort that warrants *Chevron* analysis in the first instance."); *see also* Merrill & Hickman, *supra* note 29, at 836 (coining the term); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190 (2006) [hereinafter Sunstein, *Step Zero*] (adopting the term).

55. *See, e.g., Christensen*, 529 U.S. at 587 (holding that *Chevron* did not apply and that "interpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade'").

56. *See, e.g., Negusie v. Holder*, 555 U.S. 511, 531 (2009); Barnett & Walker, *supra* note 29, at 1442 ("Since its inception in 1984, *Chevron*'s domain has grown more complicated.").

### A. *The APA's Categories*

The Supreme Court has held that not all types of agency action are entitled to judicial review under the same standard of deference.<sup>57</sup> To understand *Chevron's* domain, therefore, it is necessary to start with the APA,<sup>58</sup> particularly the different types of agency action set out in the APA.

The APA generally divides *binding* agency action in two separate ways. (Nonbinding agency action is a separate category altogether.) First, and perhaps most familiar, the APA divides what agencies do between rulemaking and adjudication.<sup>59</sup> This particular line may be the APA's most important innovation.<sup>60</sup> But it is not the only distinction the APA draws. For both rulemaking and adjudication, the APA creates formal and informal varieties.<sup>61</sup> Each type of binding agency action carries its own statutory procedures. Thus, when evaluating a particular agency action, courts and litigants must know both whether the action is the product of rulemaking or adjudication, and whether the procedures the agency used to create the action were formal or informal. Accordingly, at least on paper, the APA's categories of agency action are as follows:

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57. See, e.g., *Mead*, 533 U.S. at 234–35.

58. See 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

59. See *id.* § 551(6)–(7) (defining “adjudication” as the “agency process for the formulation of an order,” and “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing”); *id.* § 551(4)–(5) (defining “rule making” as the “agency process for formulating, amending, or repealing a rule,” and “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency”).

60. See, e.g., George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1651 (1996).

61. See 5 U.S.C. § 553(c) (setting forth notice-and-comment rulemaking but stating that “[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [i.e., the sections that create the APA's formal procedures] apply instead of this subsection”); *id.* § 554(c) (setting forth requirements for adjudication, including giving “all interested parties” a “hearing and decision on notice and in accordance with sections 556 and 557 of this title”). The APA is not as explicit about informal adjudication, which applies to those adjudications that are not “required by statute to be determined on the record after opportunity for an agency hearing.” *Id.* § 554(a).

TABLE 1: THE APA'S FOUR CATEGORIES OF AGENCY ACTION

	<b>Formal</b>	<b>Informal</b>
<b>Rulemaking</b>	Rulemaking following a formal, oral evidentiary hearing	Rulemaking using notice and comment procedures
<b>Adjudication</b>	Formal requirements, including an oral evidentiary hearing	Almost no procedural requirements

Reality, however, is more complicated than the APA's text alone would suggest. For instance, the line between rulemaking and adjudication can be a slippery one, especially because the APA's definition of "rule" includes "an agency statement of [both] general or particular applicability."<sup>62</sup> Thus, although many believe that the difference between rulemaking and adjudication is that the former applies broadly and the latter narrowly, that is not the line at all. Instead, the key distinction is that—unless Congress specifies otherwise—rulemaking is of "future" effect, while adjudication is directed toward establishing the legal consequences of events that have already happened.<sup>63</sup>

To be sure, that test is not entirely satisfying. In a common law system, adjudication also has future effect in that "the principles announced in an adjudication cannot be departed from in future adjudications without reason."<sup>64</sup> Federal court adjudication, the principal purpose of which is to decide "cases and controversies,"

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62. *See id.* § 551(4); *see also, e.g.*, Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 942, 979–80 (2017) [hereinafter Nielson, *Seminole Rock*] (offering and discussing an example that was both an adjudication and rulemaking in discussing *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007)).

63. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1998) (Scalia, J., concurring):

The only plausible reading of ['and future effect' in the APA] is that rules have legal consequences only for the future. It could not possibly mean that merely *some* of their legal consequences must be for the future, though they may also have legal consequences for the past, since that description would not enable rules to be distinguished from 'orders,' see 5 U.S.C. § 551(6), and would thus destroy the entire dichotomy upon which the most significant portions of the APA are based.

*Id.*; *Neustar, Inc. v. FCC*, 857 F.3d 886, 896 (D.C. Cir. 2017) ("This prospective-retroactive distinction consistently focuses on the application of principles in the past or future.").

64. *Bowen*, 488 U.S. at 216–17.

creates precedent that is then applied in subsequent cases, backed by stare decisis.<sup>65</sup> Agency adjudication is similar. The future effect of agency adjudication is not precisely the same as that of judicial precedent, as agencies are not strictly bound by the same stare decisis principles that govern judicial adherence to precedent.<sup>66</sup> But agency decisions do have some precedential effect. When an agency makes a decision through adjudication with respect to one set of parties, the public recognizes that the agency likely will follow that decision in the future with respect to other, like parties. In other words, “the nature of adjudication is that similarly situated nonparties may be affected by the policy or precedent applied, or even merely announced in dicta, to those before the tribunal.”<sup>67</sup> In light of this precedential effect, agencies can—and do—consciously use adjudication as a policymaking tool for both the parties involved in the adjudication and the public at large. Still, the extra procedural steps required for rulemaking make changing a rule harder for an agency than overruling a precedent. Accordingly, policies announced in rules have greater “stickiness” than those announced in adjudications, meaning that the public can have more confidence that a policy announced via rulemaking rather than adjudication will have staying power.<sup>68</sup>

The distinction between formal and informal procedures is also important. Distinguishing between formal and informal rulemaking is straightforward. To the extent that formal rulemaking exists at all in modern administrative law,<sup>69</sup> the APA imposes trial-like procedures

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65. See, e.g., Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 803–04 (2018).

66. See, e.g., Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813, 1824 (2012) (explaining the test for when agencies can change course and, as an example, discussing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009)); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1042 (1995) (noting that, as compared to the strict stare decisis effect of judicial precedent, “an agency is free to depart from an interpretation or policy it adopts through adjudication provided that its explanation for its departure can survive judicial review for arbitrariness”).

67. *Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999) (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765–66 (1969)).

68. See, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 91 (2018) [hereinafter Nielson, *Sticky Regulations*].

69. The story of formal rulemaking’s (effective) demise has been recounted elsewhere and need not be repeated here. See, e.g., Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237, 239–40 (2014) [hereinafter Nielson, *In Defense of Formal Rulemaking*] (citing *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973)); see also Jack M. Beermann & Gary

complete with the presentation of evidence and cross-examination of witnesses.<sup>70</sup> The vast majority of contemporary rulemaking, however, is informal.<sup>71</sup> For informal rulemaking, the APA specifies procedures, known as notice and comment, that include a public notice of proposed rules and an opportunity for interested persons to submit written comments.<sup>72</sup> Congress by organic statute sometimes includes additional procedures or provides exemptions from APA rulemaking requirements.<sup>73</sup> In general, however, most binding rulemaking across the administrative state follows APA notice-and-comment procedures.

The APA also subjects formal and informal adjudication to different procedures. For formal adjudication, the APA requires procedures akin to a trial—indeed, the same procedural requirements as for formal rulemaking.<sup>74</sup> By comparison, the APA imposes virtually no procedural requirements for informal adjudication, at least de jure.<sup>75</sup> De facto, however, there are some minimal requirements, especially for decisions likely to result in litigation.<sup>76</sup> For adjudications, moreover, the APA's formal and informal boxes vastly oversimplify reality. The APA, after all, is just a default; Congress is free to add more procedures to it or eliminate procedures otherwise required by it. And, in fact, Congress often does add more procedures.<sup>77</sup> Organic

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Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 857 n.9 (2007) (“[S]ince *Florida East Coast Railway*, no organic rulemaking statute that does not contain the specific words ‘on the record’ has ever been held to require formal rulemaking.”); Kent H. Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1, 1 (2017) (questioning whether the Court was right to do so).

70. See 5 U.S.C. §§ 556–57 (2018).

71. HICKMAN & PIERCE, *supra* note 35, § 5.2 (“After *Florida East Coast Railway*, it is exceedingly difficult to convince a court to compel an agency to use formal rulemaking.”). One agency that uses formal rulemaking is the Copyright Royalty Board, but it is an outlier in this regard. See Andrew D. Stephenson, Note, *Webcaster II: A Case Study of Business to Business Rate Setting by Formal Rulemaking*, 7 HASTINGS BUS. L.J. 393, 405 (2011) (characterizing the procedures utilized by the Copyright Royalty Board as APA formal rulemaking).

72. See 5 U.S.C. § 553(b)–(d).

73. See Nielson, *In Defense of Formal Rulemaking*, *supra* note 69, at 256 (discussing hybrid rulemaking).

74. See *id.*

75. HICKMAN & PIERCE, *supra* note 35, § 6.2.1 (noting the limited requirements by APA § 555 for informal adjudications).

76. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 419 (1971) (interpreting APA § 706(2)(A) as requiring agencies engaging in informal adjudication to generate a decisionmaking record adequate to support judicial review).

77. See, e.g., *Azar v. Allina Health Serv.*, 139 S. Ct. 1804, 1810–14 (2019) (analyzing the significance of differences between the APA and the Medicare statute's procedural provisions);



statutes sometimes require procedures for agency adjudication that exceed those the APA imposes for informal adjudication yet fall short of those it imposes for formal adjudication. Conversely, agencies using informal adjudication often are free to incorporate formal procedures if they wish.<sup>78</sup> As a result, adjudication that the APA would categorize as informal sometimes partakes of formal procedures too.

In a 2016 report prepared for the Administrative Conference of the United States, Professor Michael Asimow recognized three rather than two types of agency adjudication.

“Type A adjudication” refers to adjudicatory systems governed by the adjudication sections of the [APA]. With a few exceptions, Type A hearings are presided over by administrative law judges (ALJs). The term “Type B adjudication” refers to adjudication by federal administrative agencies through evidentiary hearings required by statute, regulation, or other source of law, that are *not* governed by the adjudication provisions of the APA. The hearings in Type B adjudication are presided over by administrative judges (AJs), although these officials are known by many other titles (or by the agency heads without the assistance of AJs) . . . . The term “Type C adjudication” means adjudication by federal administrative agencies that does not occur through legally required evidentiary hearings.<sup>79</sup>

Asimow acknowledged that the borders between each of these adjudication types can be blurry in practice. He contended, however, that labeling Type B adjudication as informal, while perhaps technically correct as a matter of APA interpretation, “creates a false picture of Type B adjudication.”<sup>80</sup> According to Asimow, “In some cases, Type B adjudication is even *more* formal than the familiar trial-type adjudication procedure prescribed by the APA. In contrast, some Type A adjudication . . . is *less* formal than many Type B schemes.”<sup>81</sup>

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Kiewit Power Constructors Co. v. Sec’y of Lab., 959 F.3d 381, 400–01 (D.C. Cir. 2020) (observing that the Occupational Safety and Health Act “expressly exempted the Secretary from APA rulemaking” and considering the implications for *Chevron* deference).

78. See, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (“Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.”).

79. Michael Asimow, *Adjudication Outside the Administrative Procedure Act*, ADMIN. CONF. U.S., 2–3 (Sept. 16, 2016), <https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-updated-draft-report.pdf> [<https://perma.cc/3QE3-42AA>].

80. *Id.* at 2.

81. *Id.* at 3.

Incorporating Asimow's analysis and the effective end of formal rulemaking, the following chart more accurately reflects the categories of binding agency decisions:

TABLE 2: A REALISTIC VIEW OF THE CATEGORIES OF AGENCY ACTION

	Formal		Informal
Rulemaking	Rulemaking following a formal, oral evidentiary hearing		Rulemaking using notice and comment procedures
Adjudication	Type A	Type B	Type C
	Formal requirements, including an oral evidentiary hearing	An ad hoc combination of procedural requirements, including an oral evidentiary hearing	Almost no procedural requirements

### B. Policymaking Under the APA

Agencies can create policy through either rulemaking or adjudication. This surprising reality was blessed by the Supreme Court in 1947 in a foundational case known as *Chenery II*.<sup>82</sup> Following the agency's decision on remand from *Chenery I*<sup>83</sup> (which held that nothing in the common law, the only source the agency had cited, prohibited the corporate transactions at issue<sup>84</sup>), the Court allowed the Securities and Exchange Commission ("SEC") to delineate what was and was not lawful for corporate reorganizations case by case through adjudication, rather than through rulemaking. The Court, over Justice Robert Jackson's dissent,<sup>85</sup> explained that although rulemaking has important

82. SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194 (1947).

83. SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80 (1943).

84. See *id.* at 95 ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."); see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 960–73 (2007) (explaining the importance of *Chenery I*).

85. See, e.g., *Chenery II*, 332 U.S. at 210 (Jackson, J., dissenting) ("[This doctrine] reduces the judicial process in such cases to a mere feint.").

advantages and should be preferred,<sup>86</sup> an agency may announce policy in a common law fashion through adjudication. Thus, there is “a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”<sup>87</sup> The upshot is that “adjudication [thus can] operate[] as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation.”<sup>88</sup> And because adjudication is retroactive—indeed, that is a key dividing line between rulemaking and adjudication—it follows that agencies can make policy through adjudication and that policies so developed are then applied against individual parties based on past conduct.<sup>89</sup> The Court has often reiterated this principle.<sup>90</sup>

To be sure, there are limits on an agency’s ability to make policy retroactively through adjudication<sup>91</sup>—limits reflecting that retroactivity is disfavored precisely because it can be unfair to those before the agency and a potential threat to legal stability more generally. Thus, agencies have less ability to retroactively impose new

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86. *See id.* at 202 (majority opinion) (“The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”).

87. *See id.* at 203.

88. *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 154 (1991). As the Court noted in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974):

[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board’s discretion. Although there may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion.

*Id.* at 294.

89. *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (“The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.”); *see also Neustar, Inc. v. FCC*, 857 F.3d 886, 896 (D.C. Cir. 2017) (“[A]n adjudication *must* have retroactive effect, or else it would be considered a rulemaking.” (quoting *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921–22 (D.C. Cir. 2013))).

90. *See generally, e.g., Russell L. Weaver & Linda D. Jellum, Chenery II and the Development of Federal Administrative Law*, 58 ADMIN L. REV. 815 (2006) (explaining the doctrine).

91. *See Nielson, Seminole Rock, supra* note 62, at 963 (“[N]ot all retroactivity is permissible . . . This is especially true when the agency’s view departs in an extreme way from what an ordinary person would expect—for instance, because the policy reflects an unexpected change from what was understood to be the law—or when fines are at issue.”).

policies in adjudication when doing so will result in fines or other penal-type sanctions.<sup>92</sup> Likewise, agencies are less able to create new policy through adjudication where “the new rule represents an abrupt departure from well-established practice,” although, even then, the analysis involves a multifactor balancing test that also considers, among other things, the agency’s “statutory interest in applying a new rule despite the reliance of a party on the old standard.”<sup>93</sup>

In recent years, the Supreme Court has expressed discomfort—notably, even outside of the context of fines—with allowing agencies to make policy through interpretation when doing so does not provide regulated parties with “fair warning.”<sup>94</sup> As Justice Alito explained for the Court in *Christopher v. SmithKline Beecham Corp.*,<sup>95</sup> permitting an agency’s “interpretation of ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced” could “seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”<sup>96</sup> Justice Gorsuch has sounded similar themes. Apart from his concerns with retroactivity while on the Tenth Circuit,<sup>97</sup> he addressed *Chenery II* directly at oral argument in *Azar v. Allina Health Services*.<sup>98</sup> And in *Kisor*, the Court reaffirmed *Auer* deference, but in doing so imposed significant limits on that doctrine with particular concern about “unfair surprise.”<sup>99</sup>

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92. See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330–31 (D.C. Cir. 1995).

93. *Clark-Cowlitz*, 826 F.2d at 1081 (quoting *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)).

94. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (quoting *Gates & Fox Co. v. Occupational Safety and Health Rev. Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (opinion of Scalia, J.)).

95. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

96. *Id.* at 156.

97. See *supra* note 46 (citing cases and describing then-Judge Gorsuch’s arguments).

98. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019); see Transcript of Oral Argument at 62, *Azar*, 139 S. Ct. 1804 (No. 17-1484) (“In *Chenery II*, this Court did allow the government to engage in retroactive adjudications that affect substantive rights, but expected that it would be a rare thing that . . . would happen and that most of these kinds of actions would happen through rulemaking.”). Notwithstanding Justice Gorsuch’s statement at oral argument regarding *Chenery II*, his opinion for the Court in *Allina Health Services* did not make the same point.

99. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) (“And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates ‘unfair surprise’ to regulated parties.” (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007))).

Even so, *Chenery II* is still regarded as fundamental to the “structure of administrative law.”<sup>100</sup> Indeed, it is “axiomatic”; agencies can and do create policy through adjudication, which not only applies retroactively to the parties in the actual proceeding but also, via the decision’s “*ratio decidendi*,” thereafter shapes the actions of others who were not party to the decision but still are effectively bound by it.<sup>101</sup>

### C. *The Simple Version of Chevron*

*Chevron* and agency policymaking go hand in glove; the point of *Chevron*, after all, is that where a statute is ambiguous, an agency has some discretion to create the policy it thinks is best.<sup>102</sup> In recent years, *Chevron* deference has become an increasingly controversial aspect of administrative law.

The history of deference has been told before.<sup>103</sup> Suffice it to say here, well before *Chevron* was decided, courts would give at least *some* weight to at least *some* executive branch interpretations of the law. As Professor Aditya Bamzai explains, in the nineteenth century, courts “often ‘respected’ agency interpretations of ambiguous statutory provisions when those interpretations were long-standing or contemporaneous with the statute’s enactment.”<sup>104</sup> Similarly, Congress has long granted discretion to executive branch officials, for instance through the use of words like “reasonable” which arguably can be conceptualized as a delegation of interpretative authority.

In the twentieth century, the analysis became more muddled. Some cases seem like proto-*Chevron* cases. For example, in *AT&T Co. v. United States*,<sup>105</sup> decided in 1936, the Supreme Court considered a statute that simply instructed the Federal Communications

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100. See, e.g., Adrian Vermeule, *Symposium: Tampering with the Structure of Administrative Law*, SCOTUSBLOG (Jan. 29, 2019, 10:23 AM), <https://www.scotusblog.com/2019/01/symposium-tampering-with-the-structure-of-administrative-law> [<https://perma.cc/VN2J-PXHA>] (stressing the importance of *Chenery II*).

101. *Phila. Gas Works v. FERC*, 989 F.2d 1246, 1251 (D.C. Cir. 1993).

102. Indeed, the D.C. Circuit has recognized that Step Two of *Chevron* is similar to any other grant of discretion to an agency. See, e.g., Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760 (2017).

103. See, e.g., Bamzai, *supra* note 9, at 930–97; Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972–80 (1992).

104. See Barnett & Walker, *supra* note 29, at 10 (citing Bamzai, *supra* note 9, at 943).

105. *AT&T Co. v. United States*, 299 U.S. 232 (1936).

Commission “in its discretion” to “prescribe the forms of any and all accounts, records, and memoranda’ to be kept by” regulated parties within its jurisdiction.<sup>106</sup> In considering a challenge to accounting regulations under this provision, the Court described its function on judicial review in highly deferential terms, explaining that it “is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.”<sup>107</sup>

Similarly, in *NLRB v. Hearst Publications, Inc.*, decided in 1944,<sup>108</sup> the Supreme Court gave weight to a National Labor Relation Board (“NLRB”) interpretation—announced, notably, in an adjudication, as almost all of the NLRB’s interpretations are<sup>109</sup>—of the word “employee” for the reason that Congress empowered the agency “to administer the Act.”<sup>110</sup> The Court stressed that, although “[u]ndoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve,” judges should “giv[e] appropriate weight to the judgment of those whose special duty is to administer the questioned statute.”<sup>111</sup> “[W]here the question is one of specific application of a broad statutory term,” the Justices emphasized, “the reviewing court’s function is limited.”<sup>112</sup>

Yet other cases applied different standards. In *Skidmore*, for instance, the Court used “an indefinite, multifaceted inquiry” when assessing whether and how much to defer to the agency.<sup>113</sup> The Court again explained that an agency’s interpretation is not binding, but such an interpretation could help guide a court, with the weight to be afforded the agency’s view to depend “upon the thoroughness evident

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106. *Id.* at 235 (quoting Communications Act of 1934, 47 U.S.C. § 220(a) (1934)).

107. *Id.* at 236.

108. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944), *overruled in part* by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

109. *See, e.g.*, Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 508 (2016) (collecting citations).

110. *See Hearst*, 322 U.S. at 130 (“It is not necessary in this case to make a completely definitive limitation around the term ‘employee.’ That task has been assigned primarily to the agency created by Congress to administer the Act.”).

111. *Id.* at 130–31.

112. *Id.*; *see also id.* at 131 (“[T]he Board’s determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a *reasonable* basis in law.” (emphasis added)).

113. *Barnett & Walker*, *supra* note 29, at 10 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>114</sup> And, indeed, sometimes courts purporting to apply this standard “appeared to apply *de novo* judicial review, without deference to the agencies.”<sup>115</sup> In *Batterton v. Francis*,<sup>116</sup> decided just seven years prior to *Chevron*, the Court maintained that reviewing courts should defer to “legislative, or substantive, regulations” adopted pursuant to express delegations from Congress to prescribe standards, even if the court “would have interpreted the statute in a different manner,” but “interpretative regulation[s]” would be given “[v]arying degrees of deference” in accordance with *Skidmore*.<sup>117</sup>

In 1984, the Supreme Court decided *Chevron*—a case about rulemaking under the Clean Air Act and the meaning of the term “stationary source”—and appeared to announce a new and more rule-like test.<sup>118</sup> Indeed, law students everywhere learn the two steps of *Chevron*.<sup>119</sup> As the Supreme Court put it in the first (and, more or less,<sup>120</sup> canonical) articulation of the test:

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

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

115. Barnett & Walker, *supra* note 29, at 11; *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 552–67 (1985) (documenting differing approaches).

116. *Batterton v. Francis*, 432 U.S. 416 (1977).

117. *Id.* at 425 n.9.

118. *See, e.g.*, Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 810 (2002) (recognizing that *Chevron* is “more rule-like” than *Skidmore* but is nevertheless a standard rather than a rule); *cf.* Cass R. Sunstein, *Beyond Marbury: The Executive’s Power To Say What the Law Is*, 115 YALE L.J. 2580, 2590 (2006) (describing *Chevron* as “a simple rule, to the effect that delegations of rule-making power implicitly include the power to interpret ambiguities”).

119. *See, e.g.*, Hemel & Nielson, *supra* note 102, at 760 (“In the classic *Chevron* two-step, the court asks at Step One ‘whether Congress has directly spoken to the precise question at issue’; if [not], then the court proceeds to *Chevron* Step Two and asks ‘whether the agency’s answer is based on a permissible construction of the statute.’” (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984))).

120. Occasionally, the Court suggests *Chevron* may only have one step: Is the agency’s interpretation reasonable? *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009). Yet most of the time, the Court articulates the two-step version. *E.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016) (recognizing “two-step analysis set forth in *Chevron*”).

question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>121</sup>

The key move in *Chevron* was to “posit[] that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.”<sup>122</sup> Whether *Chevron* reflects a break from past practice is debated—though the fact that *Chevron* may be the most cited administrative law opinion of all time<sup>123</sup> and the fact that knowledgeable experts soon after *Chevron* was decided recognized it as an important change<sup>124</sup> together suggest that the Court did actually say *something* new.

Why did the Court do this? Justice John Paul Stevens, writing for the Court, offered at least three (overlapping) justifications.<sup>125</sup> First, Stevens invoked accountability, explaining that when a statute contains an ambiguity, “it is entirely appropriate for” the agency, as part of a “political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”<sup>126</sup> Second, Stevens relied on an agency's potential comparative advantage about how best to balance competing demands, explaining that judges “are not experts,” at least as to

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121. *Chevron*, 467 U.S. at 842–43.

122. Merrill & Hickman, *supra* note 29, at 833.

123. See Hemel & Nielson, *supra* note 102, at 772 (“*Chevron* . . . is by most measures the most frequently cited case in administrative law.”).

124. See, e.g., Scalia, *supra* note 39, at 512; Laurence H. Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

125. See, e.g., Hemel & Nielson, *supra* note 102, at 773.

126. *Chevron*, 467 U.S. at 865–66.



policy.<sup>127</sup> And third, perhaps most controversially, Stevens attempted to tie this deference to congressional will, arguing that Congress, at some point, had made an “implicit” delegation.<sup>128</sup>

Not everyone is persuaded by the Court’s analysis. In particular, many have questioned Justice Stevens’s third premise regarding implicit delegations. It is doubtful that Congress, when drafting legislation, contemplates the standard of review courts should use in evaluating agency interpretations thereof<sup>129</sup>—although Congress may act deliberately when it uses open-ended, discretion-suggesting words like “reasonable” and gives agencies power to exercise that discretion through legally binding rulemaking or adjudication.<sup>130</sup> Some likewise believe that the mandate of de novo review for questions of law contained in § 706 of the APA is irreconcilable with *Chevron* deference.<sup>131</sup> Suffice it to say, whether *Chevron* correctly understood the history of deference, the constitutional questions deference poses, and what Congress intended are all fertile grounds for spirited disagreement.

#### D. Articulating *Chevron*’s Domain

Even if *Chevron* should exist, it does not follow that the Supreme Court’s two-step analysis should apply to *all* ambiguous texts. When *Chevron* ought to apply, therefore, is another important question—

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127. *Id.* at 865. There is no obvious reason why agencies would have a comparative advantage when it comes to legal interpretation, which is a key argument against *Chevron*. In other words, why assume that Congress intended a policy choice at all?

128. *Id.* at 843–44.

129. *See, e.g.*, Mark Seidenfeld, *Revisiting Congressional Delegation of Interpretive Primacy as the Foundation for Chevron Deference*, 24 SUP. CT. ECON. REV. 3, 7 (2016). *But see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 994 (2013) (arguing that Congress acts against *Chevron*’s backdrop).

130. *See, e.g.*, Bednar & Hickman, *supra* note 23, at 1447.

131. *See, e.g.*, 5 U.S.C. § 706 (2018) (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”); *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (“Never mentioning § 706’s directive that the ‘reviewing court . . . interpret . . . statutory provisions,’ we have held that agencies may authoritatively resolve ambiguities in statutes.” (quoting § 706)); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 194–95 (1998) (explaining that “commentators in administrative law have ‘generally acknowledged’ that Section 706 seems to require de novo review on questions of law” (quoting Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 473 n.85 (1989))).

albeit one that, at least for a long time, did not receive as much attention as the existential question.<sup>132</sup> Notably, in *Christensen v. Harris County*<sup>133</sup> in 2000, a divided Court concluded that not all reasonable interpretations of ambiguous language merit *Chevron* deference.<sup>134</sup> Justice Thomas for the Court focused on the procedural format in which the interpretation was announced, particularly how the agency's interpretation was developed as well as the legal force it carried. As the Court explained:

[P]etitioners and the United States contend that we should defer to the Department of Labor's opinion letter, which takes the position that an employer may compel the use of compensatory time only if the employee has agreed in advance to such a practice. Specifically, they argue that the agency opinion letter is entitled to deference under our decision in *Chevron* . . . . Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.<sup>135</sup>

That limitation on *Chevron*'s domain drew a sharp rebuke from Justice Antonin Scalia, who would (generally) defer to any interpretation of an ambiguous statute administered by an agency, so long as “it represents the authoritative view of the [agency].”<sup>136</sup> Scalia believed that *Chevron*'s domain was vastly greater than that envisioned by Justice Thomas. But Scalia did not draw a precise line between which interpretations he would consider authoritative and which he would not, nor did he indicate whether he would find no persuasive value whatsoever in a nonauthoritative interpretation. Regardless, through Thomas's majority opinion and separate dissenting opinions by Justices Breyer and Stevens, the rest of the Court appeared to conclude that the proper deference for agency interpretations announced through less formal means is so-called “*Skidmore*”

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132. See Merrill & Hickman, *supra* note 29, at 835 (“Throughout most of the post-*Chevron* period, the Supreme Court and the courts of appeals have paid little attention to the problem of defining the scope of the *Chevron* doctrine.”).

133. *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

134. *Id.* at 587.

135. *Id.* at 586–87.

136. *Id.* at 591 (Scalia, J., concurring).

deference, which commands reviewing courts to defer to the extent that an agency's interpretation is persuasive.<sup>137</sup> Because of the splintered nature of the *Christensen* decision, however, it was unclear to Court watchers what the future would portend.

Justice Scalia saw what was coming, however, and tried to cut it off. Scalia was the Court's most fervent advocate of the simple version of *Chevron*. Over his objections, however, the very next year, in 2001, the Court concluded that Scalia's preferred simplified version of *Chevron* is an oversimplification. In *Mead*, the Court unequivocally added complexity to the basic *Chevron* two-step framework and at least partly defined *Chevron*'s domain by holding that only the subset of agency interpretations that carry the force and effect of law receive *Chevron* deference, while interpretations that lack such legal force, at most, receive the lesser *Skidmore* deference.<sup>138</sup> Likewise, and especially relevant to this Article, the *Mead* Court held that even agency decisions with legal effect do not uniformly receive *Chevron* deference.<sup>139</sup>

Although not as well-known as *Chevron*, the facts in *Mead* should still be familiar to lawyers. The question before the Court was whether "a tariff classification ruling by the United States Customs Service deserves judicial deference."<sup>140</sup> The Customs Service issues "tariff rulings before the entry of goods" by means of so-called "ruling letters."<sup>141</sup> Such ruling letters, while binding the direct recipient, do not bind anyone else.<sup>142</sup> They also, at least generally, are not the product of notice-and-comment rulemaking or formal adjudication and can be changed by the agency without any sort of public participation.<sup>143</sup> Moreover, there is no single entity responsible for issuing all such letters. Instead, each of the agency's dozens of "port-of-entry" offices

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137. See *id.* at 596 (Breyer, J., dissenting, joined by Ginsburg, J.) ("Justice Scalia may well be right that the position of the Department of Labor, set forth in both brief and letter, is an 'authoritative' agency view that warrants deference under [*Chevron*]. But I do not object to the majority's citing [*Skidmore*] instead." (citations omitted)); *id.* at 595 (Stevens, J., dissenting, joined by Ginsburg, J. and Breyer, J.) ("Because there is no reason to believe that the Department's opinion was anything but thoroughly considered and consistently observed, it unquestionably merits our respect.").

138. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

139. See *id.* at 234–35.

140. *Id.* at 221.

141. *Id.* at 222.

142. See *id.* at 223.

143. See *id.*

may do so, as can the agency's headquarters. Notably, "[m]ost ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff."<sup>144</sup> In other words, the facts in *Mead* differed greatly from those in *Chevron*. Whereas *Chevron* involved hierarchical, notice-and-comment rulemaking by the EPA, *Mead* confronted a scheme in which dozens of entities may interpret language through hearing-free adjudications.

The Supreme Court concluded that the *Chevron* two-step does not apply to tariff classification ruling letters.<sup>145</sup> But the Court was unwilling to say that interpretations announced in informal adjudications are per se ineligible for *Chevron* deference.<sup>146</sup> Instead, the Court offered a two-part standard: "In reviewing an 'administrative implementation of a particular statutory provision,'" a court should "defer to the agency's decision (1) 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law,' and (2) 'the agency interpretation claiming deference was promulgated in the exercise of that authority.'"<sup>147</sup> For the first prong, it is important that Congress authorized the agency to make binding decisions; for the second, courts focus on the "form and context" of the agency's interpretation.<sup>148</sup> Per *Mead*, if the agency's interpretation is the product of notice-and-comment rulemaking or formal adjudication, the case for *Chevron* is very strong; otherwise, an agency seeking deference has a much more difficult task.<sup>149</sup>

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144. *Id.* at 224.

145. *See id.* at 234 ("In sum, classification rulings . . . are beyond the *Chevron* pale.").

146. *See id.* at 230–31 ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." (citation omitted)).

147. *See* *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246 (9th Cir. 2013) (quoting *Mead*, 533 U.S. at 226–27).

148. *Id.* at 1246; *see also id.* at 1246–47 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." (quoting *Mead*, 533 U.S. at 227)).

149. Indeed, since deciding *Mead*, although opinions of the Supreme Court have suggested in dicta a broader scope for *Chevron*'s applicability, the Court has only actually extended *Chevron* deference to notice-and-comment regulations and adjudications that arguably could be classified as formal. *See* Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 547–49 (2014) [hereinafter Hickman, *Three Phases*] (surveying post-*Mead* applications of *Chevron* by the Supreme Court).

The upshot is that, although stating that *Chevron* applies to formal adjudications,<sup>150</sup> *Mead* was much more restrained about informal adjudications. Indeed, the Court was largely silent on this subject. The majority cited—with a “see, e.g.”—a single case concerning an informal adjudication.<sup>151</sup> The Court also suggested that a lack of procedure alone does not preclude *Chevron* deference.<sup>152</sup> Of course, the Court declined to review the informal adjudication at bar—the tariff ruling letter—using the *Chevron* standard. The Court had nothing to say about which informal adjudications might be *Chevron*-eligible.

Returning then to the APA’s “Four Boxes,” the *Mead* analysis—at least on the surface—is as follows:

TABLE 3: THE APA’S FOUR CATEGORIES WITH *MEAD*

	<b>Formal</b>	<b>Informal</b>
<b>Rulemaking</b>	<i>Chevron</i> Deference	<i>Chevron</i> Deference
<b>Adjudication</b>	<i>Chevron</i> Deference	<i>Mead</i> Two-Step Analysis

Similarly, using the categories that more accurately reflect the contemporary reality of agency decisionmaking, the analysis is as follows:

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150. See *Mead*, 533 U.S. at 230 (“[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

151. See *id.* at 231 (“[W]e have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.” (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995))). In *NationsBank*, the Court deferred to an interpretation announced in an informal adjudication by the Comptroller of the Currency. See *NationsBank*, 514 U.S. at 254 (“We are satisfied that the Comptroller’s construction of the Act is reasonable and therefore warrants judicial deference.”).

152. See *Mead*, 533 U.S. at 231.

TABLE 4: A REALISTIC VIEW WITH *MEAD*

	Formal	Informal	
Rulemaking	<i>Chevron</i> Deference (to the extent relevant)	<i>Chevron</i> Deference	
Adjudication	Type A	Type B	Type C
	<i>Chevron</i> Deference	<i>Mead</i> Two-Step Analysis	<i>Mead</i> Two-Step Analysis

This seemingly simple breakdown, however, ignores the complexity generated by post-*Mead* developments.

#### E. Post-Mead Guidance

Since the Supreme Court decided *Mead*, fights over its meaning and other questions regarding *Chevron*'s scope have continued unabated. *Mead*, of course, has been the focus of a great deal of scholarly attention.<sup>153</sup> Unfortunately, the Court's post-*Mead* jurisprudence regarding *Chevron*'s domain has been inconsistent.

In *Barnhart v. Walton*,<sup>154</sup> for instance, in an opinion for the Court by Justice Breyer, the Court deferred under *Chevron* to the Social Security Administration's interpretation announced in a notice-and-comment rulemaking partly because the interpretation was of a "long-standing" duration.<sup>155</sup> Echoing *Mead*, the *Barnhart* Court also stated that use of notice-and-comment rulemaking or formal adjudication was not always necessary for *Chevron* deference.<sup>156</sup> Breyer went on to suggest that *Chevron* deference would be due to less formal agency pronouncements based on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over

153. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1449–50 (2005); Hickman, *Three Phases*, *supra* note 149, at 527; Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 350–51 (2003).

154. *Barnhart v. Walton*, 535 U.S. 212 (2002) (quoting *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982)).

155. *Barnett & Walker*, *supra* note 29, at 13 (citing *Barnhart*, 535 U.S. at 219–20).

156. See *Barnhart*, 535 U.S. at 222.

a long period of time.”<sup>157</sup> Taking that dicta seriously, some courts have treated *Barnhart* as providing a multifactor approach to ascertaining an agency’s intention to exercise delegated authority to act with the force of law at *Mead*’s second step—arguably broadening *Chevron*’s domain.<sup>158</sup>

The Court also expanded *Chevron*’s scope with its decision in *National Cable & Telecommunications Association v. Brand X Internet Services*,<sup>159</sup> concluding that agencies using *Chevron*-eligible formats could overturn contrary circuit court interpretations of ambiguous statutes.<sup>160</sup> *Brand X* involved a notice-and-comment rulemaking wherein the Federal Communications Commission adopted an interpretation of the Communications Act that contradicted an earlier decision of the Ninth Circuit. Recognizing that such interpretations ordinarily are *Chevron*-eligible under *Mead*, the Court announced that *Chevron* deference trumps stare decisis when an agency-administered statute is ambiguous and contrary judicial precedent merely announces the court’s preferred, rather than required, construction. Because the Ninth Circuit precedent at issue met that description, the Court, in an opinion penned by Justice Thomas, held that *Chevron* was appropriate. “[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute . . . would allow a court’s interpretation to override an agency’s. *Chevron*’s premise is that it is for agencies, not courts, to fill statutory gaps.”<sup>161</sup>

On the other hand, in *King v. Burwell*,<sup>162</sup> the Court demonstrated that use of notice-and-comment rulemaking procedures alone is insufficient to establish eligibility for *Chevron* deference. Citing *FDA v. Brown & Williamson Tobacco Corp.*<sup>163</sup> and *Utility Air Regulatory*

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157. *Id.*

158. *See, e.g.*, *Atrium Med. Ctr. v. U.S. Dep’t of Health & Hum. Servs.*, 766 F.3d 560, 572–73 (6th Cir. 2014); *Fournier v. Sebelius*, 718 F.3d 1110, 1121 (9th Cir. 2013); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1247 (9th Cir. 2013).

159. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

160. *See id.* at 982–83.

161. *Id.* at 983. Justice Thomas more recently has expressed doubts about the validity of his reasoning in *Brand X*. *See Baldwin v. United States*, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari) (Mem.) (“*Brand X* appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation.”).

162. *King v. Burwell*, 135 S. Ct. 2480 (2015).

163. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

*Group v. EPA*,<sup>164</sup> two so-called “major questions” or “major rules” cases,<sup>165</sup> Chief Justice Roberts explained that although the Court will “often apply the two-step framework announced in *Chevron*,” in “extraordinary cases,” the Court may opt to sidestep the *Chevron* analysis.<sup>166</sup> There, the question was whether Congress’s decision in the Affordable Care Act to allow *states* to receive federal subsidies for health care exchanges also allowed the *federal government* to receive those same subsidies. The Court concluded that subsidies were available on federal exchanges too but did so without deferring to the Internal Revenue Service:

Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.<sup>167</sup>

Although the exact contours of the major questions doctrine are not pellucid, courts should expect to decide some subset of especially significant interpretative questions for themselves without deference. This is an obvious example of narrowing *Chevron*’s domain, limiting *Chevron*’s scope not only by reference to an agency’s choice of procedural category (as in *Mead*), but also by the nature and importance of the substantive question at stake. The Court’s post-*Mead* decisions have turned pre-*Mead* cases like *Brown & Williamson*, which rejected deference for especially important regulatory decisions, into its own doctrine.

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164. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

165. *See, e.g.*, *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 383 (D.C. Cir. 2017) (noting that some judges use “major questions” while others use “major rules”); *see also* Justice Kavanaugh describing the same:

In a series of important cases over the last 25 years, the Supreme Court has required *clear* congressional authorization for major agency rules of this kind. The Court, speaking through Justice Scalia, recently summarized the major rules doctrine in this way: “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”

*Id.* at 417 (Kavanaugh, J., dissenting) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

166. *King*, 135 S. Ct. at 2488–89.

167. *Id.* at 2489 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).



Another limit on *Chevron*'s domain comes from what one of us dubs *Chevron* Step-One-and-a-Half.<sup>168</sup> Under this doctrine, which the D.C. Circuit has elucidated at length<sup>169</sup> and which the Supreme Court appears to have adopted as well, albeit with less analysis,<sup>170</sup> an agency cannot receive *Chevron* deference unless it *acknowledges* the ambiguity. "In other words, the agency will lose if it mistakenly says that the issue can be resolved at *Chevron* Step One while the court determines that it should be resolved at *Chevron* Step Two."<sup>171</sup> Although Step-One-and-a-Half has its share of critics,<sup>172</sup> this limit on *Chevron*'s domain appears to be a meaningful limit on deference.

Finally, however, with Justice Scalia wielding the pen, the Court in *City of Arlington v. FCC*<sup>173</sup> refused to extend the *Mead* contextual approach to so-called jurisdictional questions—that is, statutory interpretations that would narrow or expand the scope of an agency's authority.<sup>174</sup> Justice Scalia's essential premise was that "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage," although he then seemed to contradict himself by identifying several instances in which the Court had deferred to agency jurisdictional interpretations.<sup>175</sup> Regardless, the Court's refusal to distinguish jurisdictional and nonjurisdictional questions was hardly unconventional.<sup>176</sup> Justice Breyer concurred in the judgment but wrote separately to reiterate his own context-specific approach to *Chevron*.<sup>177</sup>

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168. Hemel & Nielson, *supra* note 102, at 760–61.

169. *See id.* at 765 n.29 (collecting D.C. Circuit cases including, among others, *Peter Pan Bus Lines, Inc. v. Federal Motor Carrier Safety Administration*, 471 F.3d 1350, 1353–54 (D.C. Cir. 2006) and *PDK Laboratories Inc. v. DEA*, 362 F.3d 786, 797–98 (D.C. Cir. 2004)).

170. *See* *Negusie v. Holder*, 555 U.S. 511, 521 (2009).

171. Hemel & Nielson, *supra* note 102, at 760.

172. *See, e.g.*, Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 301 (2017).

173. *City of Arlington v. FCC*, 569 U.S. 290 (2013).

174. *Id.* at 296–97; *see also* Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1900–07 (2015) (describing competing definitions of what constitutes a jurisdictional question).

175. *City of Arlington*, 569 U.S. at 297.

176. *See, e.g.*, 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.5 (4th ed. 2002) (finding in case law more support than not for *Chevron* deference for jurisdictional questions); Sunstein, *Step Zero*, *supra* note 54, at 234–35 (arguing against excluding jurisdictional question).

177. *See City of Arlington*, 569 U.S. at 308 (Breyer, J., concurring) ("I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant.").

The Chief Justice dissented and urged the Court to adopt a highly contextualized understanding of *Chevron*.<sup>178</sup> Scalia responded harshly to these arguments, accusing his dissenting colleagues of seeking to eliminate *Chevron* altogether.<sup>179</sup> Yet the Court's refusal to narrow *Chevron*'s domain in *City of Arlington* does not mean that the Court is content to let the issue alone. Arguably, the Court's majority opinion in *King* merely repackaged the debate over jurisdictional interpretations in major questions terms.<sup>180</sup> Meanwhile, turnover in the Supreme Court's personnel since *City of Arlington* suggests that there may be five or more votes now to revisit that decision.<sup>181</sup>

Indeed, subsequent to *City of Arlington*, several Justices have signaled their interest in considering other questions regarding *Chevron*'s domain, irrespective of the format used. For instance, Justice Gorsuch, writing for the Court, has indicated that *Chevron* deference should not apply when the Department of Justice, which is closely connected to the president, disagrees with an independent agency about how to read a statute.<sup>182</sup> Similarly, as a circuit court judge, Gorsuch argued that *Chevron* deference should not apply when an agency has attempted to apply its interpretation retroactively through adjudication, at least when the affected individual has a strong reliance interest because of an earlier judicial decision.<sup>183</sup>

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178. See *id.* at 323 (Roberts, C.J., dissenting) (“[E]ven when Congress provides interpretive authority to a single agency, a court must decide if the ambiguity the agency has purported to interpret with the force of law is one to which the congressional delegation extends.”).

179. See *id.* at 304–06 (majority opinion) (“Make no mistake—the ultimate target here is *Chevron* itself. . . . [W]hat the dissent proposes is a massive revision of our *Chevron* jurisprudence.”).

180. See Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 58 (suggesting that “*King* reflects a careful effort by Chief Justice Roberts to accomplish, through alternative framing, a broader curtailment of *Chevron*'s scope that he advocated unsuccessfully two terms earlier in *City of Arlington v. FCC*”).

181. See, e.g., Aaron L. Nielson, *Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1, 2 n.9 (2017) (counting votes).

182. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (“[W]hatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.”).

183. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1148 (10th Cir. 2016).

## II. REMOVING ADJUDICATION FROM *CHEVRON*'S DOMAIN

Today's Supreme Court is thinking hard about deference, with particular focus on *Chevron*. But what is the Court going to do with it? No one knows—presumably not even the Justices. It is unclear whether there are five votes to overrule *Chevron*, especially given that a majority was unwilling to overrule *Auer* and the Chief Justice, who reserved the question in *Kisor*, has criticized *Chevron*'s effect but has not called for the case to be overruled.<sup>184</sup> But the Court may have at least five votes to curtail *Chevron*'s scope. Unfortunately, no one has articulated a sensible way to do that. Revisiting precedent without a well-considered alternative is a recipe for doctrinal incoherence and unintended consequences. We submit that the most principled and administrable way to reform *Chevron* deference is by narrowing its domain.

Specifically, the Court should revisit the notion of deferring to statutory interpretations announced by agencies in adjudications. For reasons discussed below, our preference would be for courts never to defer to agency interpretations announced in adjudications. Recognizing, however, that the Court may not be willing to go so far, then at a minimum, the Court should categorically eliminate *Chevron* deference for interpretations announced in adjudications that lack congressionally imposed formal adjudication procedures—which means many if not most Type A and Type B adjudications and all informal Type C adjudications. If the Court ever allows *Chevron* deference in the adjudication context, it ought to employ a more robust retroactivity analysis.

### A. *Adjudication's Pitfalls*

*Chevron* deference for agency adjudications generally raises three concerns. First, deferring to agency interpretations announced in adjudications does not align with the rationales often relied upon in defending *Chevron* deference—namely, delegation, expertise, and accountability. Second, such deference poses due process concerns. Finally, applications of *Mead*'s test in the adjudication context are, quite simply, a mess. Each of these rationales is discussed below.

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184. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part); *City of Arlington*, 569 U.S. at 314–16 (Roberts, C.J., dissenting).

1. *Tension with Chevron's Theory.* The first reason the Supreme Court should narrow *Chevron's* domain is that a narrower version is more consistent with the reasons why *Chevron* exists. It is generally understood that, when an agency pursues policymaking, public participation in the agency's decisionmaking process yields better outcomes, as a matter of both quality and legitimacy. Thus, when an agency is making policy choices rather than engaging in mere traditional statutory interpretation, rulemaking is superior to adjudication. If narrowing *Chevron's* domain encourages agencies to pursue rulemaking rather than adjudication as their preferred policymaking format, the result will be outcomes that are more consistent with *Chevron's* delegation, expertise, and accountability rationales, as well as *Chevron's* implicit recognition of a divide between interpretation and policy choice.

Rulemaking and adjudication are different, with perhaps the most important distinction being public notice and opportunity for comment. Under notice-and-comment rulemaking, an agency must provide the public with a "notice of proposed rule making" discussing "the terms or substance of the proposed rule or a description of the subjects and issues involved" and "give interested persons an opportunity to participate . . . through submission of written data, views, or arguments . . ." <sup>185</sup> Likewise, agencies must provide the public with the data supporting its proposal <sup>186</sup> and respond to all material comments—namely, "comments that, if true, would cast real doubt on the agency's decision." <sup>187</sup> And the agency's final rule must be a "logical outgrowth" of its proposed rule, meaning that the agency cannot depart too much from the proposal. <sup>188</sup>

The idea behind these requirements is twofold. One involves quality. Agencies possess more expertise in their respective subject matter areas than do courts, but they are not omniscient. Because

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185. 5 U.S.C. § 553(b)–(c) (2018).

186. See, e.g., *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *superseded by statute*, Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246 (codified as amended at 15 U.S.C. § 793(c)(1)), *as recognized in* *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); see also HICKMAN & PIERCE, *supra* note 35, § 6.2.

187. Nielson, *Sticky Regulations*, *supra* note 68, at 97 (citing *City of Portland v. EPA*, 507 F.3d 706, 714–15 (D.C. Cir. 2007)); see also HICKMAN & PIERCE, *supra* note 35, § 6.5.

188. See, e.g., Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 214 (1996); see also HICKMAN & PIERCE, *supra* note 35, § 5.3.1 (documenting cases applying the logical outgrowth test).

agency officials do not have a monopoly on knowledge,<sup>189</sup> they develop their expertise and improve their decisionmaking by reaching out to the public seeking information.<sup>190</sup> An idea that sounds good in an agency's conference room may not make sense in the real world, for some reason that the agency had not considered. Or an agency's data may be flawed, for some reason that the agency does not know. When agencies act with less knowledge—including “unknown unknowns,” that is, things that the agency does not know it does not know<sup>191</sup>—they may go astray. Rulemaking's procedural requirements, which enable the public to provide agencies with information, help counteract that threat. That is not to say, of course, that notice and comment are always necessary to achieve quality agency decisionmaking.<sup>192</sup> But all else being equal, a process that solicits comments and forces agencies to engage with the views of the public should generally lead to better policy outcomes.<sup>193</sup> To the extent that *Chevron* is justified by agency expertise, much of that expertise comes from the procedures that agencies are required to use when they engage in rulemaking.<sup>194</sup>

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189. See, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 1 N.Y.U. J.L. & LIBERTY 5, 12–13 (2005). This article was originally published by *The American Economic Review* in 1945.

190. See, e.g., *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (recognizing that one purpose of notice-and-comment rulemaking procedures is “to ‘assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions’” (quoting *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978))); Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and Proposed Framework*, 83 CORNELL L. REV. 921, 958–60 (1998) (asserting the importance of notice-and-comment rulemaking for improving agency decisionmaking by developing agency expertise).

191. See, e.g., *Citizens for Resp. & Ethics v. Dep't of Educ.*, 538 F. Supp. 2d 24, 30 n.4 (D.D.C. 2008) (“More poetically stated: ‘As we know, there are known knowns. There are things we know we know. We also know there are known unknowns. That is to say we know there are some things we do not know. But there are also unknown unknowns, the ones we don't know we don't know.’” (quoting Sec'y of Def. Donald H. Rumsfeld, Dep't of Def. News Briefing (Feb. 12, 2002, 11:30 AM), <https://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636> [<https://perma.cc/USY7-UJGC>])).

192. See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 514–15 (2002).

193. See, e.g., Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209, 1217 (2018) [hereinafter Nielson, *Optimal Ossification*] (explaining that procedures “help ensure higher quality regulations”).

194. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that agencies have greater “expertise”).

Second, and related, such a process may also be deemed more legitimate.<sup>195</sup> Although legitimacy can be a fuzzy concept, scholars recognize that when certain procedural formalities are met, the resulting outcome is more likely to command public support, or at least acceptance.<sup>196</sup> A process that requires an agency to interact with broad segments of society and explain why it has acted in view of concerns raised by the general public, all else being equal, typically should yield more legitimate outcomes. To be sure, this can go too far; too many procedures make it difficult for agencies to accomplish anything.<sup>197</sup> But as a conceptual matter, procedures that force public interaction should, at least generally, result in greater legitimacy.<sup>198</sup> To the extent that *Chevron* is justified by notions of legitimacy, which the Court suggested by its emphasis on the greater relative political accountability, part of that legitimacy presumably also comes from the procedures that agencies must use, in addition to the fact that elections have consequences.<sup>199</sup>

These points matter because rulemaking (often<sup>200</sup>) is superior to adjudication on both of these important measures. Although agencies sometimes may gain enough information to make optimal policy through the adjudicatory process—especially if the adjudication is widely publicized and the agency allows nonparties to submit relevant information—there is reason to fear that sometimes they do not. Adjudications typically involve only a narrow group of parties. Likewise, although adjudication has certain claims to legitimacy of its

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195. See, e.g., Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 718–22 (2016) (reviewing DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014)).

196. See, e.g., Nielson, *Optimal Ossification*, *supra* note 193, at 1212 n.14 (citing Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005)).

197. See *id.* at 1231 (explaining this limit on the principle).

198. See, e.g., McKinley, *supra* note 45, at 1538.

199. See, e.g., *Chevron*, 467 U.S. at 865 (1984) (explaining that “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices”).

200. “Often” does not mean “always.” For certain types of decisions, formal adjudication (or formal rulemaking, for that matter) may be superior, especially for technical issues. As one of us has explained elsewhere in a related context, cross-examination—which exists in formal rulemaking and formal adjudication but not in informal rulemaking or informal adjudication—has important benefits, both in terms of quality and legitimacy. See Nielson, *In Defense of Formal Rulemaking*, *supra* note 69, at 279–80.

own (trials are important for a reason),<sup>201</sup> when compared at least with informal adjudication (which requires almost no procedures), the rulemaking process results in more legitimate outcomes, at least in the sense of legitimacy based on public accountability.

When all of this is put together, the argument for narrowing *Chevron*'s domain is straightforward. To the extent that the Court has justified *Chevron* on pragmatic grounds, the pragmatic argument for it is stronger in the rulemaking context, where, at least as compared to informal adjudication, we should expect higher-quality outcomes that command greater legitimacy. Thus, the case for *Chevron* carries the most weight in the rulemaking context, which, again, describes *Chevron* itself.

At the same time, there is another important theoretical reason why *Chevron* should not apply in the adjudication context. The Court's current posture of extending *Chevron* deference to some adjudications, but not others, based on the procedures used allows agencies to bootstrap their way into *Chevron* deference. Nothing in the theoretical justifications for *Chevron*, however, supports the bizarre idea that agencies, not Congress, can choose whether deference is available.

Again, *Mead* predicates eligibility for *Chevron* deference on congressional delegation of authority to act with the force and effect of law. As *Mead* makes clear, the mere presence of statutory ambiguity alone is inadequate to demonstrate that Congress has made such a delegation. Something more is required, and in the ordinary course, the Court has relied upon the agency's procedures. As noted above, in the rulemaking context, Congress tends to be quite clear in granting agencies the authority to adopt legally binding regulations. Agencies seeking to adopt legally binding regulations are bound by the APA to follow notice-and-comment rulemaking procedures, unless Congress has imposed alternative procedures. Thus, both the delegation of authority to act with legal force and the procedures used for doing so are found in statutory text.

Adjudication is different. Congress rarely expressly requires the formal adjudication procedures imposed by the APA. Congress often merely calls for a "hearing" without specifying the procedures it means

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201. See *id.* at 279 ("[W]hile trials clearly are intended to serve instrumental values as devices for determining the 'truth' . . . they also serve other, interrelated values, including participatory, dignitary, educational, and legitimating values." (quoting Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 504 (2003))).

the agency to follow. In such circumstances, courts in the post-*Chevron* era are more inclined to let the agency decide what procedures it will follow.<sup>202</sup> The purported basis for this approach comes from the Supreme Court's *Florida East Coast Railway*<sup>203</sup> doctrine, which holds that unless an agency's organic statute calls for rulemaking "on the record," informal rulemaking procedures are sufficient.<sup>204</sup> In addressing adjudication, the APA uses nearly identical "on the record" phrasing as the language interpreted by the Court in *Florida East Coast Railway* with respect to rulemaking.<sup>205</sup> Yet, the Justices have never addressed when the APA's formal adjudication procedures are required.

In response to this gap in Supreme Court precedent, for many years, the circuit courts struggled to decide whether to follow the same approach in evaluating if an agency should use formal adjudication procedures under the APA.<sup>206</sup> Although the APA prescribes alternative procedures for informal rulemaking (in other words, notice and comment), the APA imposes very few procedural requirements for informal adjudication. This concerns some courts. Thus, despite *Florida East Coast Railway*, in decisions predating *Chevron* by several years, the First and Ninth Circuits adopted a presumption in favor of the APA's formal adjudication procedures.<sup>207</sup> The Second and Seventh Circuits followed the reasoning of *Florida East Coast Railway* in adopting the opposite presumption, however, effectively leaving the choice of procedures to the agencies themselves.<sup>208</sup>

Since the Supreme Court decided *Chevron*, including in the years after *Mead*, that landscape has moved even further in favor of agency choice. Several years after the Supreme Court decided *Chevron*, the D.C. Circuit held that a statutory reference to a "public hearing"

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202. See HICKMAN & PIERCE, *supra* note 35, § 6.2 (explaining the history).

203. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

204. See *id.* at 240–41 (quoting 5 U.S.C. § 553(c) (2018)); see also Nielson, *In Defense of Formal Rulemaking*, *supra* note 69, at 251–53 (describing the case).

205. See 5 U.S.C. § 554(a) (calling for the APA to apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing").

206. See HICKMAN & PIERCE, *supra* note 35, § 6.1.

207. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 878 (1st Cir. 1978), *superseded by rule*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), *as recognized in* *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977).

208. See *City of West Chi. v. U.S. Nuclear Regul. Comm'n*, 701 F.2d 632, 641 (7th Cir. 1983); *AT&T Co. v. FCC*, 572 F.2d 17, 21–22 (2d Cir. 1978).



without additional guidance regarding the procedures to be used represents an ambiguity that the agency may resolve by adopting its own procedures.<sup>209</sup> An agency's conclusion that a statutory hearing reference does not require APA formal adjudication procedures, and the adjudication procedures the agency adopts instead to resolve that ambiguity, are eligible for *Chevron* deference.<sup>210</sup> Since the Court decided *Mead*, the First Circuit explicitly adopted this same conclusion.<sup>211</sup> Notably, the First Circuit cited *Brand X* as the impetus for replacing its previous presumption with *Chevron* deference for the agency's procedural choices.<sup>212</sup>

This jurisprudential shift also should make a significant difference in how courts think about *Mead* and *Chevron* deference for agency adjudications more generally. As a growing number of circuits give agencies considerably more control over the procedures used for adjudication, they simultaneously allow agencies to choose whether the interpretations they advance through those adjudications will receive *Chevron* deference. If the agency chooses formal adjudication procedures under the APA, then courts will extend *Chevron* deference. The same may be true if the agency chooses procedures that strongly resemble but are not quite the same as APA formal adjudication.<sup>213</sup> If the agency chooses substantially less formal adjudication procedures, *Chevron* deference is less likely. Regardless, it is the agency rather than Congress that is making the procedural choice, and thus it is the agency that is choosing the deference standard

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209. See *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1481 (D.C. Cir. 1989) (quoting 42 U.S.C. § 6928(b) (1982)).

210. See *id.*

211. See *Dominion Energy*, 443 F.3d at 18–19; see also *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004) (concluding that the statute and implementing regulations clearly require APA formal adjudication with oral hearings but deferring under the *Auer* standard to the agency's interpretation of its own regulations to allow for summary adjudications without oral hearings in some circumstances as making good policy sense).

212. *Dominion Energy*, 443 F.3d at 17.

213. Notably, the Supreme Court has not clearly articulated what it means by formal adjudication as it used the term in *Mead*. Did the Court mean to refer only to the formal adjudication procedures prescribed by the APA—that is, Professor Asimow's Type A adjudication? Or did the Court mean to be more inclusive of Professor Asimow's Type B adjudications, whether or not the procedures used align precisely with those of the APA's formal adjudication category? This question matters because, if the applicability of the APA's formal adjudication procedures does not drive the analysis, but rather only an agency's use of certain procedures, agencies may be able to game their way further through the *Mead* two-step analysis by adding some but not all of the formal adjudication procedures required by the APA.

that flows from those procedures. This ability for an agency to choose its own deference standard creates opportunities for strategic behavior that the Court did not contemplate in *Mead*, much less in *Chevron* itself. Such bootstrapping potential is in substantial tension with the delegation premise for *Chevron* deference advanced by the *Mead* Court.

2. “*Due Process*” Concerns. A second reason to narrow *Chevron*'s domain to exclude agency adjudications sounds in overlapping concepts such as due process, fairness, and the rule of law. Simply put, agency adjudications impose present legal consequences for past actions, making deference in such instances retroactive in its orientation and undermining reliance interests.<sup>214</sup> By comparison, agency rulemaking typically is prospective. Deference with retroactive application is much harder to defend than deference applied only prospectively.

Consider, for example, the circumstances of Alfonso De Niz Robles and Hugo Rosario Gutierrez-Brizuela. In 2005, the Tenth Circuit concluded that the U.S. attorney general had discretion to adjust the status of certain immigrants.<sup>215</sup> Relying on that decision, De Niz Robles and Gutierrez-Brizuela petitioned the federal government for such relief.<sup>216</sup> Yet later, the Board of Immigration Appeals (“BIA”) concluded that, in fact, such relief was unlawful, and then applied that rule to declare De Niz Robles, Gutierrez-Brizuela, and others like them as “categorically ineligible for an adjustment of status and subject to removal” from the United States.<sup>217</sup> Given the statutory ambiguity and a reasonable BIA interpretation, as the Tenth Circuit conceded in this instance, *Chevron* and *Brand X* compel judicial deference to the agency. Recognizing the due process implications as “obvious,” the Tenth Circuit declined to apply the BIA's interpretation retroactively to De Niz Robles and Gutierrez-Brizuela because “the retroactive

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214. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1998) (Scalia, J., concurring); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539–40 (D.C. Cir. 2007) (noting the “presumption of retroactivity for adjudications”).

215. See *Padilla-Caldera v. Gonzales*, 426 F.3d 1294, 1299–1301 (10th Cir. 2005), *amended and superseded on reh'g*, 453 F.3d 1237 (10th Cir. 2006).

216. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1144–45 (10th Cir. 2016); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015).

217. See *De Niz Robles*, 803 F.3d at 1167–68 (documenting history, including *In re Briones*, 24 I. & N. Dec. 355 (B.I.A. 2007)).

application of new penalties to past conduct that affected persons cannot now change denies them fair notice of the law and risks endowing a decisionmaker expressly influenced by majoritarian politics with the power to single out disfavored individuals for mistreatment.”<sup>218</sup> Not all similarly situated litigants have been so fortunate.<sup>219</sup>

Of course, part of the theory driving *Chevron* deference is the notion that agencies are better positioned than courts to resolve statutory questions that are more a matter of policy choice than resolvable using traditional tools of statutory interpretation. In a line of cases dating back to *Chenery II*, the Supreme Court recognized that agencies sometimes can make policy through adjudication as well as through rulemaking and that the choice between those procedures is for agencies rather than courts to make.<sup>220</sup> It does not follow, however, that an agency’s choice of adjudication rather than rulemaking as the vehicle for pronouncing its interpretation of a statute should automatically entitle the agency to *Chevron* deference. Indeed, policymaking in adjudication should be different in kind from policymaking through rulemaking. Although retroactive policymaking need not always be troubling,<sup>221</sup> it certainly can be, especially given bedrock principles such as fair notice.<sup>222</sup> Justice Robert Jackson, hardly a reactionary, once condemned such retroactivity as administrative “lawlessness,”<sup>223</sup> and the Court has repeatedly stressed that retroactivity can raise concerns about fair notice.<sup>224</sup>

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218. *Gutierrez-Brizuela*, 834 F.3d at 1146 (citing *De Niz Robles*, 803 F.3d at 1169–70).

219. *See, e.g.*, *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520–23 (9th Cir. 2012) (en banc).

220. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 203 (1947); *see also, e.g.*, *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) (restating the black-letter rule from *Chenery II* that “a mere lack of clarity in the law does not make it manifestly unjust to apply a subsequent clarification of that law to past conduct”).

221. *See NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008) (allowing the agency to announce policy retroactively via adjudication because the agency’s reading of the relevant law was objectively the most reasonable).

222. *See* Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of “Fair Notice,”* 86 S. CAL. L. REV. 193, 204 (2013) (explaining that the principle of “fair notice . . . is deeply rooted in our legal system”); Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 543 (2009) (explaining that “fair notice has been recognized as an essential element of the rule of law” for centuries).

223. *Chenery II*, 332 U.S. at 217 (Jackson, J., dissenting).

224. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012) (“[W]here, as here, an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.”); *Martin v. Occupational Safety*

The Supreme Court's treatment of *Auer* or *Seminole Rock*<sup>225</sup> deference is consistent with this position.<sup>226</sup> In recent years, the Court has been concerned about agencies receiving deference when interpreting their own regulations. Often, the context in which such interpretation occurs involves agency adjudication, as in *Kisor*. The concern is that agencies will unfairly spring new obligations on unsuspecting parties via retroactive adjudication.<sup>227</sup> Although *Kisor* upheld *Auer* against an all-out challenge that it should be overruled, Justice Elena Kagan pointedly acknowledged that “unfair surprise” is a reason to deny deference.<sup>228</sup> It is unfair to make someone suffer for not predicting a new policy.<sup>229</sup>

Yet that concern, at bottom, is not limited to agency interpretations of regulations. After all, there often is not much conceptual difference between *amending* a regulation and *reinterpreting* a regulation. The real concern arises when such amendment or reinterpretation occurs retroactively. But that rule-of-law apprehension, sounding in basic fairness, is not limited to retroactive interpretations of *regulations*; it also applies to retroactive interpretations of *statutes*.<sup>230</sup> The same principle of unfairness that drove the Court's move in *Kisor* to limit *Auer* and “*Seminole Rock*'s domain”<sup>231</sup> also should lead the Court to limit *Chevron*'s domain. In either context, the Court should worry about (relatively) aggressive policymaking in adjudication, which deference inherently enables.

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& Health Rev. Comm'n, 499 U.S. 144, 158, (1991) (highlighting “adequacy of notice to regulated parties”).

225. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

226. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (restating the deference rule from *Seminole Rock*, 325 U.S. at 414).

227. *See, e.g., Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (arguing that when “the power to prescribe is augmented by the power to interpret” an “incentive” emerges “to speak vaguely and broadly, so as to retain a ‘flexibility’ that will enable ‘clarification’ with retroactive effect”).

228. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019).

229. *See, e.g., Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 535 (2003) (explaining that “*Chenery II* is troubling” and “provides far more opportunities for abuse [in today's world] than it did in 1947”).

230. Nielson, *Seminole Rock*, *supra* note 62, at 996 (“[O]nce we realize that the separation-of-powers concern, at its core, is retroactivity, there is no reason why the same sort of . . . argument . . . would not also apply to *Chevron* in adjudications.”).

231. Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1451 (2011).

Importantly, even if these retroactivity concerns do not rise to the level of outright unconstitutionality, they nonetheless affect perceptions regarding the fairness and political legitimacy of agency actions. Thus, due process concerns, even when they do not amount to a constitutional violation, have long been understood to limit what agencies can do.<sup>232</sup> There is, and should be, something off-putting about creating new duties and then applying those duties to past conduct, a practice that can be “*literally Orwellian*.”<sup>233</sup> And there are certainly examples where the unfairness is palpable, as Justice Gorsuch explained.<sup>234</sup> Hence, rulemaking *should be* the favored policymaking tool.<sup>235</sup>

Indeed, retroactively announcing policy via adjudication presents two types of overlapping concerns—what we call “Due Process” and “due process,” with the former being actual constitutional violations and the latter being the sort of government action that, while perhaps constitutional, nonetheless requires a clear statement from Congress because of its tension with traditional understandings of fairness and the rule of law. Both Due Process and due process matter. For instance, there often is no constitutional prohibition on retroactive rulemaking; Congress *can* authorize it.<sup>236</sup> Yet courts understandably are reluctant to conclude that Congress has done so.<sup>237</sup> Part of that concern stems

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232. See *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“This [due process] requirement has now been thoroughly ‘incorporated into administrative law.’” (quoting *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987))); *Rollins Env’t Servs. (NJ), Inc. v. EPA*, 937 F.2d 649, 655 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part) (“It is a simple principle of administrative law that, in adopting administrative regulations, an agency ‘has the responsibility to state with ascertainable certainty what is meant by the standards . . . promulgated.’” (quoting *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976))).

233. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 & n.5 (D.C. Cir. 2008) (citing *GEORGE ORWELL, ANIMAL FARM* 102–03 (1946)).

234. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (“Perhaps the most basic of due process’s customary protections is the demand of fair notice.”).

235. See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 202 (1947) (“The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”).

236. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

237. See, e.g., *Nat’l Mining Ass’n v. Dep’t of Lab.*, 292 F.3d 849, 859 (D.C. Cir. 2002) (“An agency may not promulgate retroactive rules absent express congressional authority.”);

from the ordinary meaning of the word “rule” itself, which suggests prospectivity. But part of it also stems from the background fact that the law recognizes the unfairness and disruptive effects of retroactivity.<sup>238</sup>

Somewhere between Due Process and due process, moreover, is constitutional avoidance, in which the Court assumes that Congress did not intend to push the constitutional line absent some clear statement from Congress.<sup>239</sup> Because retroactivity poses such concerns, and because Congress has not expressly authorized *Chevron* in any context,<sup>240</sup> it follows that the Court could conclude that this absence of a clear statement means that *Chevron* should not apply to agency adjudications.<sup>241</sup> The Court should be wary before concluding that Congress has authorized agencies to push the limits of due process.<sup>242</sup>

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HICKMAN & PIERCE, *supra* note 35, § 3.6 (tracing the relevant case law on congressional delegation of authority to an agency).

238. See *Bowen*, 488 U.S. at 208. As the *Bowen* Court explained:

Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

*Id.*

239. See, e.g., *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (explaining that constitutional avoidance “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”).

240. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (“Heedless of the original design of the [Administrative Procedure Act], [the Court has] developed an elaborate law of deference to agencies’ interpretations of statutes and regulations.”).

241. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“In traditionally sensitive areas . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989))).

242. See, e.g., *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340–41 (D.C. Cir. 2002) (“[T]he constitutional avoidance canon of statutory interpretation trumps *Chevron* deference.”); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (“We . . . read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore reject the request for administrative deference.”). Adrian Vermeule argues that even the protections necessary to uphold due process often are, and should be, within an agency’s discretion. For more on this topic, see ADRIAN VERMEULE, *LAW’S ABNEGATION* 87–88 (2016). Yet courts often express alarm about threats to due process when agencies are involved, and recent moves to reinforce the fair notice doctrine suggest a reinvigoration of such concerns. See, e.g., *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (declining to defer to an agency interpretation of an ambiguous regulation that

And make no mistake; the Supreme Court has recognized that retroactivity poses such concerns. As the Court explained in *Christopher*, the law recognizes “the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”<sup>243</sup> The cited authority for that principle was a decision from the D.C. Circuit authored by then-Judge Scalia.<sup>244</sup> There, Scalia observed that “[w]here the imposition of penal sanctions is at issue . . . the due process clause prevents [judicial] deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”<sup>245</sup> Although Scalia’s opinion is not perfectly clear, it appears that he invoked Due Process—that allowing an agency to make important decisions through retroactive adjudication fails “for lack of ‘fair’ or ‘constitutionally adequate’ warning.”<sup>246</sup> The Court in *Christopher* then enforced that principle beyond a narrow penal context.<sup>247</sup> The Court has also held, under the void-for-vagueness doctrine, that to be constitutional, criminal statutes must provide “fair notice.”<sup>248</sup> Justice Gorsuch, in turn, explained at length why that same standard should apply to civil statutes.<sup>249</sup> This suggests a Due Process limit on an agency’s ability to create policy retroactively, including through use of deference.

Whether it is Due Process or due process, a clear statement requirement should apply when agencies make policy retroactively via deference.<sup>250</sup> Yet whereas *Chevron* assumes that silence or ambiguity

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would have imposed liability on a company for conduct that occurred before the agency’s interpretation).

243. *Christopher*, 567 U.S. at 156 (quoting *Gates & Fox Co. v. Occupational Safety & Health Rev. Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

244. *Id.*

245. *Gates & Fox Co.*, 790 F.2d at 156.

246. *Id.*; see also *id.* (“If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.” (quoting *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976))).

247. *Christopher*, 567 U.S. at 155–56 (applying the doctrine in context of a civil dispute between private parties).

248. *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015).

249. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring) (“I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law’s demands . . . is ‘the first essential of due process.’” (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))).

250. Cf. *INS v. St. Cyr*, 533 U.S. 289, 320–21 n.45 (2001) (refusing to defer to the agency’s view about “a statute that is ambiguous with respect to retroactive application”).

equals congressional authorization, a clear statement requirement is premised on the opposite theory—that silence equals no congressional authorization. And if circumstances exist where both theories would seem to apply simultaneously, then one theory must prevail. This dynamic, we submit, changes how one should think about *Chevron*. There is less reason in the rulemaking context for a clear statement requirement regarding retroactive intent because the policies created through rulemaking are almost always prospective.<sup>251</sup> By contrast, in the context of adjudications, a clear statement rule should apply. To be sure, even without deference, announcing new interpretations in adjudication creates some retroactivity concerns, as most interpretations contain something akin to law creation.<sup>252</sup> Yet, of course, the retroactivity concerns are heightened with deference.

3. *Administrability Concerns.* A third argument in favor of narrowing *Chevron*'s domain relates to administrability. At least in the adjudication context, *Mead* is a mess. In explaining *Mead*'s force-of-law standard, the Court specifically identified an agency's use of formal adjudication procedures, along with notice-and-comment rulemaking, as "a very good indicator" of congressional intent that the agency's interpretation would carry the force of law and be eligible for *Chevron* deference.<sup>253</sup> The Court went on to emphasize that a lack of such procedures is not dispositive, however, and cited a pre-*Mead* case involving *Chevron* deference to a less formal agency adjudication by the Comptroller of the Currency.<sup>254</sup> *Mead* itself involved an informal adjudication in the form of a customs ruling letter.<sup>255</sup> Yet beyond those two very different and isolated examples, the *Mead* Court did not elaborate how to discern which adjudications carry legal force and which do not.

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251. *Cf., e.g.,* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (concluding that federalism's clear statement rule defeats ambiguity). Of course, other clear statement rules may apply, especially if *Chevron* poses constitutional concerns. Such questions are beyond the scope of this Article.

252. *See, e.g.,* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 475 (2001) ("[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action." (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted))).

253. *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

254. *Id.* at 230–31.

255. *Id.* at 230.



It is easy to discern whether an agency possesses the authority to adopt binding regulations. Statutes often say so by authorizing agency officials to adopt “rules and regulations,” both generally as needed and to accomplish specific, congressionally identified goals.<sup>256</sup> By comparison, agency organic statutes contemplating adjudication often provide little or no procedural guidance—for example, merely calling for a “hearing” with no further indication of the procedures to be used, thereby allowing agencies tremendous latitude to determine for themselves the procedures they will follow. Consequently, despite *Mead*’s seeming simplicity, it is not at all clear how to determine when to apply the *Chevron* framework to particular adjudications. As then-Judge Gorsuch explained,

[T]oday courts will only *sometimes* apply *Chevron* deference to ambiguous civil statutes. Neither, respectfully, does looking to the Supreme Court’s case law supply a great deal of guidance on how to apply *Mead*’s balancing test. In recent years, the Court has declined to apply *Chevron* deference to arguably ambiguous civil statutes but it has only sometimes cited the *Mead* balancing test as the reason, leaving more than a few litigants and lower courts to wonder how they are supposed to proceed.<sup>257</sup>

This criticism is fair, if perhaps overstated. On the one hand, judicial opinions are not treatises, and if the Court believes the meaning of a statute is clear, then the Court may see little need to recite and analyze all of the steps of *Mead* and *Chevron*. On the other hand, as explained above, the Court has not provided bright lines for ascertaining when *Chevron* applies. The Court has said that *Chevron* applies in rulemaking and formal adjudication contexts. The Court’s guidance for informal adjudication has been utterly context dependent. Meanwhile, the category of “informal adjudication” is extraordinarily broad. Very few agency formats are identical, or even that similar, to

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256. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 293 (2013) (observing that the Communications Act of 1934 “empowers the Federal Communications Commission . . . to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions’” (quoting Communications Act of 1934, 47 U.S.C. § 201(b) (2012))); *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57 (2011) (finding provision authorizing the Treasury Department “to ‘prescribe all needful rules and regulations for the enforcement’” of that statute “to be ‘a very good indicator of delegation meriting *Chevron* treatment” (first quoting the Internal Revenue Code, 26 U.S.C. § 7805(a) (2006); then quoting *Mead*, 533 U.S. at 229)).

257. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

the tariff ruling letter at issue in *Mead*. Courts are left applying a common-law-style analysis, reasoning by analogy. Unfortunately, it is difficult to perform that sort of analysis when the Supreme Court has applied *Mead* expressly in only a small number of opinions that do not involve rulemaking.<sup>258</sup> Thus, lower courts struggle with *Mead*.<sup>259</sup>

Although courts muddle through, the fact that *Mead* is not easily applied in the adjudication context suggests the need for a more bright-line rule.<sup>260</sup> In other contexts, where the Court has recognized that a balancing test is hard to apply, it has replaced that test with brighter lines. For instance, in the area of jurisdiction, the Court recognized that a multifactor test for a corporation's "principal place of business" would be too "complex"; it thus adopted the nerve-center standard.<sup>261</sup> To be sure, the Court should not create a bright-line rule where the law itself is not bright. The Court does not have a license to create clarity

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258. Beyond the *Mead* decision itself, searching the Supreme Court database in Westlaw for "533 U.S. 218" and keyciting the *Mead* decision identified fifty additional cases that cite *Mead*, most of which are also included in the study documented in Part III.A.(i) and the Appendix below. Most of those cases either involve notice-and-comment rulemaking (eligible for *Chevron* deference under *Mead*), see, e.g., *City of Arlington*, 569 U.S. at 293–94, 307; *Mayo Found.*, 562 U.S. at 50, 55–56; *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002), or informal guidance documents that obviously fall in the rulemaking category (and warrant at most *Skidmore* deference according to *Mead*), see, e.g., *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 385–86 (2003) (applying *Mead* and *Skidmore* in evaluating the Social Security Administration's Program Operating Manuals System); *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (applying *Mead* and *Skidmore* to a Food and Drug Administration regulatory preamble). In several others, the Court either found the statute clear, so did not need to apply *Mead* to discern the appropriate deference standard, see, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 390–91 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326–27 (2008), or cited *Mead* for other purposes, see, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–16 (2019) (citing *Mead* in drawing analogies between *Auer* and *Chevron*); *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (citing *Mead* in recognizing that sometimes "statutory circumstances" indicate that Congress meant to grant "an agency gap-filling powers). Still others included citations to *Mead* only in concurring or dissenting opinions, raising questions as to whether the majority applied *Mead* as part of its analysis. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 161 (2002) (Breyer, J., dissenting). Consequently, the number of cases in which the Court has applied *Mead* to decide whether *Chevron* or *Skidmore* provides the appropriate evaluative standard for an agency adjudication, whether formal or not, is very small.

259. See, e.g., *HICKMAN & PIERCE*, *supra* note 35, § 3.6 (explaining the confusion *Mead* has caused); *Bressman*, *supra* note 153, at 1449–50 (reflecting upon the consequences of different readings of *Mead*).

260. See generally, e.g., Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994) (explaining the value of coherent doctrine); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (explaining the value of bright-line rules).

261. *Hertz Corp. v. Friend*, 559 U.S. 77, 92, 94 (2010); see *id.* at 94 ("Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits. Judicial resources too are at stake.").

where the law does not allow it.<sup>262</sup> But to the extent that *Chevron* is, for the most part, judicially developed, the Court has greater latitude to define its contours.<sup>263</sup>

For administrability purposes, therefore, the Court has good reason to fashion a brighter line in the context of *Chevron*'s domain. Because *Mead* is challenging to apply in the adjudication context,<sup>264</sup> the Court should look for an easier test. Limiting *Chevron* to formal adjudications, while excluding informal adjudications from *Chevron*'s domain, would be an improvement. Yet, as Asimow's comparison of Type A and Type B adjudications suggests, determining whether a particular hearing process is an APA formal adjudication as opposed to a highly formalized informal adjudication could easily slip into asking which highly formalized informal adjudications are formal enough, and then we are right back where we started with *Mead*. For this reason, the superior bright-line rule would ask simply whether the agency decision is the product of rulemaking or adjudication.

#### B. A Narrower Narrowing?

It is also, of course, possible to have a narrower narrowing of *Chevron*'s domain. The Supreme Court, for instance, could keep the two essentially per se categories from *Mead*—namely, that *Chevron* applies to interpretations announced in rulemaking and formal adjudication—while turning *Mead*'s gray area over informal adjudication into another categorical rule of no deference. This approach would address many of the concerns with *Chevron*'s scope but would leave more of *Mead* intact.

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262. See, e.g., Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WM. & MARY L. REV. 2027, 2048–78 (2015) (criticizing efforts to create clarity without regard to congressional direction). See generally Gary Lawson & Steven G. Calabresi, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014) (providing similar criticisms).

263. Cf. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (“[C]onsiderations [by the Court of a statute’s structure and purpose] . . . are pertinent not only to the scope of the implied right, but also to the scope of the available remedies.”); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring) (“In my view, when rights of action are judicially ‘implied,’ categorical limitations upon their remedial scope may be judicially implied as well.”).

264. See, e.g., HICKMAN & PIERCE, *supra* note 35, § 3.6.8 (explaining the difficult question of whether *Chevron* deference should apply to “a non-precedential interpretation announced by a single member of [Board of Immigration Appeals]” and the approaches taken by circuit courts).

Other potential limitations are worth considering as well. For instance, what about formal adjudications where the agency lacks rulemaking power, thus taking the case outside of the *Chenery II* framework? The Board of Immigration Appeals is an example. The Supreme Court recognized that *Chevron* deference may apply to the Immigration and Naturalization Service (“INS”) as early as 1987 in *INS v. Cardoza-Fonseca*.<sup>265</sup> As documented below, the Court has carried that deference over to the BIA.<sup>266</sup> But does deference in this context make sense? If Congress has determined that an agency cannot engage in rulemaking, is that not a signal that Congress does not want the agency to receive deference? In other words, applying *Chevron*'s fiction, what theory would justify deference *only* for adjudications, even though, for all of the reasons explained above, the case for *Chevron* is much weaker in the adjudicatory context? Where Congress has concluded that the agency has no authority to promulgate rules, the argument that Congress has nonetheless implicitly authorized that agency to make policy, with deference, via adjudication is hard to see. In an effort to narrow *Chevron*'s domain, the Supreme Court could thus hold that no deference applies for these agencies.

Similarly, because the forms of adjudication, in practice, are more complex than the simple APA model, there is an argument that not all formal adjudications should receive per se treatment. For instance, single-member BIA decisions are nonprecedential; in other words, they do not bind other BIA decisionmakers.<sup>267</sup> In that sense, they are reminiscent of the customs letters at issue in *Mead*.<sup>268</sup> The difference is that the BIA engages in formal adjudication for those decisions, which is quite unlike what happened in *Mead*. Although a maximalist reading of *Mead* may suggest that even nonprecedential formal adjudication is enough for *Chevron* to apply, most circuits only extend *Skidmore*

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265. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (“There is obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication . . . [and] courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.”).

266. See, e.g., *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion) (“Principles of *Chevron* deference apply when the BIA interprets the immigration laws.”); see also *id.* at 76 (Roberts, C.J., concurring in judgment) (affording *Chevron* deference but advocating for a more limited scope of the doctrine).

267. See *HICKMAN & PIERCE*, *supra* note 35, § 5.2.

268. See *United States v. Mead Corp.*, 533 U.S. 218, 222–23 (2001) (stating that ruling letters are nonbinding on third parties to the transaction).

review to those adjudications.<sup>269</sup> At a minimum, the Supreme Court should endorse that line of cases.

Finally, to the extent the Court is reluctant to reject *Chevron* for agencies to which it has granted *Chevron* deference in the past in the context of adjudication, the Court could at least mitigate some of the above-stated concerns by adopting a more robust approach to retroactivity analysis. Justice Kagan's recognition in *Kisor* of the danger of "unfair surprise" is a good step in that direction, one that the Court could take for *Chevron* too.<sup>270</sup>

We believe that each of these options is better than the status quo. Yet we also believe that for the reasons set forth above, it would make even more sense to eliminate *Chevron* from the adjudication context altogether. These narrower narrowings, in other words, are better than nothing, but do not address all of the concerns with *Chevron* and adjudication.

### III. STARE DECISIS AND *CHEVRON*'S DOMAIN

So, what about stare decisis? When the Supreme Court has decided a question of law, it should not lightly cast that decision aside.<sup>271</sup> Here, the Court has already applied *Chevron* to interpretations announced in adjudications. Indeed, in *Mead*, the Court announced a presumption that legal interpretations announced through formal adjudications receive *Chevron* deference.<sup>272</sup> And even for informal adjudications, the Court suggested that *Chevron*

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269. See HICKMAN & PIERCE, *supra* note 35, § 3.6.

270. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) (“[A] court may not defer to a new interpretation . . . that creates ‘unfair surprise’ to regulated parties.” (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007))).

271. See, e.g., *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015) (explaining that “[o]verruling precedent is never a small matter” and “*stare decisis* means sticking to some wrong decisions”); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 326 n.49 (2005) (explaining that all of the Justices have demonstrated respect for stare decisis, at least in some contexts).

272. See *Mead*, 533 U.S. at 229 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of . . . adjudication that produces . . . rulings for which deference is claimed.”); see also *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 123 (2002) (O’Connor, J., concurring) (quoting *Mead* for the proposition of *Chevron* deference for notice-and-comment rulemaking and formal adjudication).

sometimes applies.<sup>273</sup> Given all of this, how could the Court retreat from *Chevron* deference for agency adjudications now?

We have three responses. First, adjudication's claim to *Chevron* deference on stare decisis is actually surprisingly weak. Its rhetoric notwithstanding, the Supreme Court has applied *Chevron* in evaluating adjudications only rarely, particularly post-*Mead*. Other doctrinal developments further undermine *Chevron*'s claim to stare decisis in the adjudication context. Second, the Court already has concluded not only in *Mead* but also in *Kisor* that it does not violate stare decisis to narrow a deference doctrine, which is all we advocate here. Finally, if the Court cannot identify a principled way to reduce the incidence of *Chevron* deference in circumstances that raise some of the above-acknowledged concerns, a majority of the Justices could decide to overrule *Chevron* altogether.

#### A. A Weak Stare Decisis Claim

Stare decisis is an important part of the law.<sup>274</sup> But employing traditional stare decisis analysis in the context of adjudication, *Chevron* is not entitled to much precedential weight. First, dicta notwithstanding, the Supreme Court only rarely has used *Chevron* in evaluating agency adjudications, particularly post-*Mead*. Additionally, other doctrinal developments, already noted above, undermine *Chevron*'s claim to precedential force with respect to agency adjudications.

1. *Infrequent Application.* *Chevron* is a doctrine oriented, first and foremost, toward agency rulemaking. The quintessential *Chevron* case is notice-and-comment rulemaking, as *Chevron* itself concerned such an interpretation.<sup>275</sup> The rulemaking context also best matches the theoretical justifications for *Chevron* on its own terms. Although

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273. See *Mead*, 533 U.S. at 230–31 (citing as an example *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 256–57 (1995), concerning a Comptroller of the Currency informal adjudication).

274. See, e.g., Kristin E. Hickman, *Contemplating a Weaker Auer Standard*, YALE J. REGUL.: NOTICE & COMMENT (Sept. 23, 2016), <https://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman> [<https://perma.cc/63VH-Q3VW>] (noting the importance of stare decisis); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856–59 (2018) (noting similar).

275. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 858–59 (1984) (“These conclusions were expressed in a proposed rulemaking in August 1981 that was formally promulgated in October.”).

agency adjudications far outnumber agency rulemakings,<sup>276</sup> contemporary agencies more often use rulemaking when making significant interpretive pronouncements.<sup>277</sup> A substantial majority of cases in which the Justices have afforded deference involve rulemaking.

By comparison, the Court squeezed agency adjudications into the *Chevron* framework almost as an afterthought. As a theoretical matter, the Court's extension of *Chevron*'s domain to formal adjudications almost certainly derives from its conclusion in *Chenery II* that an agency with both rulemaking and adjudication powers may choose between the two formats when exercising policymaking discretion. The Court has never said so explicitly, although *Chevron* itself did cite *Chenery II* as favoring some amount of deference to agency interpretations reflecting policy choices.<sup>278</sup> Regardless, although the Court rhetorically embraced *Chevron* for some subset of agency adjudications, its actual decisions do not reflect that rhetoric.

From the *Chevron* decision itself through the end of the October 2019 term, the Supreme Court cited *Chevron* in 238 cases.<sup>279</sup> Many of those cases, however, do not reflect actual applications of *Chevron*. For example, the Court cited *Chevron* frequently for the proposition that it “reviews judgments, not opinions,”<sup>280</sup> or when drawing analogies to agency cases.<sup>281</sup> The Court also cited *Chevron* on numerous occasions where it expressly declined to apply the standard. In many of those cases, the Court opted to apply a different standard, such as

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276. See HICKMAN & PIERCE, *supra* note 35, § 6.1 (observing that “[f]ederal agencies conduct millions of adjudications each year” and “dwarf courts in terms of the proportion of adjudications resolved by the two types of institutions”).

277. See *id.* § 4.8 (explaining the preference).

278. *Chevron*, 467 U.S. at 844–45.

279. Cases were identified by searching the Supreme Court database in Westlaw for “467 U.S. 837” and by keyciting the *Chevron* decision, also in Westlaw. See Appendix (offering additional details regarding methodology and listing cases).

280. See, e.g., *Jennings v. Stephens*, 574 U.S. 271, 274 (2015) (citing *Chevron* in asserting that “[t]his Court, like all other federal appellate courts, does not review lower courts’ opinions, but their judgments”); *Camreta v. Greene*, 563 U.S. 692, 716 (2011) (Kennedy, J., dissenting) (quoting *Chevron* in stating that the Court only reviews judgments, not opinions); *Ohio v. Robinette*, 519 U.S. 33, 51 n.9 (1996) (Stevens, J., dissenting) (same); *Michigan v. Lucas*, 500 U.S. 145, 155 (1991) (Stevens, J., dissenting) (same).

281. See, e.g., *Teva Pharm. U.S.A. Inc. v. Sandoz, Inc.*, 574 U.S. 318, 351 (2015) (Thomas, J., dissenting) (analogizing determining patent indefiniteness to the first step in *Chevron* analysis); *Williams v. Taylor*, 529 U.S. 362, 387 n.13 (2000) (asserting that Congress has not delegated power to state courts in the same manner that it has delegated power to agencies).

*Skidmore*.<sup>282</sup> In others, the Court expressly declined to decide whether *Chevron* applied.<sup>283</sup> In yet another subset of cases, the majority opinion was silent altogether regarding deference doctrine while a concurring or dissenting opinion raised the possibility of *Chevron* deference.<sup>284</sup> Finally, a small subset of *Chevron* citations came in dissents or other statements accompanying memorandum orders denying certiorari.<sup>285</sup>

Particularly challenging to categorize were cases in which a majority opinion noted that the agency claimed *Chevron* deference or a lower court applied *Chevron*, and a concurring or dissenting opinion also suggested that *Chevron* deference was warranted, but the majority opinion was less clear regarding its own view of *Chevron*'s applicability, typically because the majority found the statute clear. In some of these cases, the Court strongly implied that it used the *Chevron* framework, even if the Court did not say so expressly or defer to the agency.<sup>286</sup> In others, the Court's rhetoric was much more equivocal.<sup>287</sup>

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282. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (applying *Skidmore* rather than *Chevron* to Department of Justice interpretative rule); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002) (applying *Skidmore* rather than *Chevron* to EEOC guidelines); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (applying *Skidmore* instead of *Chevron* to interpretations of the Rehabilitation Act by several agencies).

283. See, e.g., *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 631 (2012) (ruling that determination of *Chevron*'s applicability to present case was unnecessary); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (same); *Calif. Dental Ass'n v. FTC*, 526 U.S. 756, 765–66 (1999) (same); *Dunn v. CFTC*, 519 U.S. 465, 479 n.14 (1997) (same); *Est. of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (same).

284. See, e.g., *Lawson v. FMR LLC*, 571 U.S. 429, 476–78 (2014) (Sotomayor, J., dissenting) (arguing that *Chevron* deference should have been granted to Department of Labor rulings); *Dada v. Mukasey*, 554 U.S. 1, 29 n.1 (2008) (Scalia, J., dissenting) (citing *Chevron*'s holding that an agency need only adopt a reasonable interpretation of a statute to warrant deference); *Melendez v. United States*, 518 U.S. 120, 136 (1996) (Breyer, J., concurring) (same); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring) (same).

285. See, e.g., *VF Jeanswear LP v. EEOC*, 140 S. Ct. 1202, 1204 (2020) (Thomas, J., dissenting from the denial of certiorari) (Mem.) (arguing that *Chevron* deference should not apply to EEOC regulation not promulgated under agency's statutory interpretation authority); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 789–90 (2020) (statement of Gorsuch, J.) (Mem.) (finding *Chevron* deference inappropriate for a regulation from Bureau of Alcohol, Tobacco, Firearms, and Explosives); *Baldwin v. United States*, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from denial of certiorari) (Mem.) (criticizing *Chevron*'s role in modern jurisprudence).

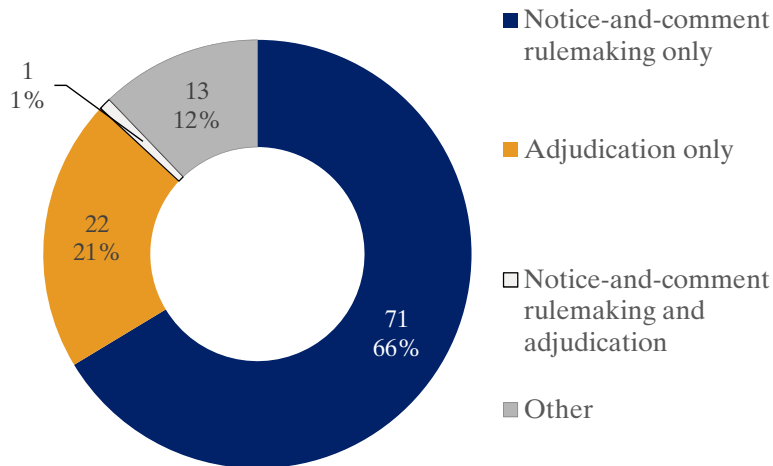
286. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (citing *Chevron* in describing authoritativeness of agency's statutory interpretation without applying full *Chevron* framework); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130 (1990) (rejecting the Interstate Commerce Commission's claim that its interpretation required deference under *Chevron*).

287. See, e.g., *United States v. LaBonte*, 520 U.S. 751, 762 n.6 (1997) (deciding that the Court need not reach the question of *Chevron* deference); *Dole v. United Steelworkers of Am.*, 494 U.S.



Ultimately, of the 238 cases that cited *Chevron* in some manner, the Court arguably applied the *Chevron* standard to evaluate an agency legal interpretation in 107 cases.<sup>288</sup> Only 23 of those cases concerned agency adjudications.<sup>289</sup>

FIGURE 1: *CHEVRON* IN THE SUPREME COURT: ADJUDICATION VS. RULEMAKING, ALL APPLICATIONS



Of course, when contemplating the stare decisis effect of the cases in which the Court claimed to apply the *Chevron* standard in evaluating agency adjudications, a few additional points are worth noting. First, at what point can an agency claim that stare decisis applies to entitle it to *Chevron* deference: when the Court says it is applying the *Chevron* standard to evaluate the agency's adjudication, or when the Court actually defers? The agency won only 72 of the 107 cases identified as applying *Chevron*. And in the entire history of *Chevron*, the Court has deferred to agency interpretations advanced in adjudications a mere 14 times—just 6 percent of the 238 cases in which the Court cited *Chevron*,

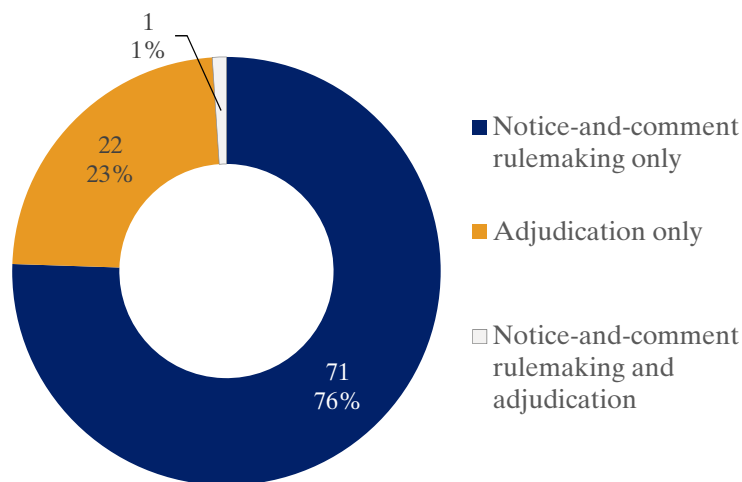
26, 42–43 (1990) (declining to extend *Chevron* deference); *Pub. Emps. Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989) (same).

288. See Appendix (listing applicable cases).

289. To be precise, 22 cases concerned agency interpretations adopted in adjudications only, 71 cases concerned agency interpretations adopted through notice-and-comment rulemaking, and 1 case—*Arkansas v. Oklahoma*, 503 U.S. 91 (1992)—concerned both, while 13 cases concerned agency interpretations adopted using other formats. See Appendix (listing cases).

13 percent of the 107 cases in which the Court actually applied *Chevron*, and 19 percent of the 72 cases in which the Court applied *Chevron* and the agency won.<sup>290</sup>

FIGURE 2: *CHEVRON* IN THE SUPREME COURT: RULEMAKING VS. ADJUDICATION, AGENCY WINS BECAUSE OF DEFERENCE



Second, and perhaps more importantly, a judicial declaration that one agency's adjudications are *Chevron*-eligible arguably should not carry over to those of another agency, especially given the tremendous variability in adjudication procedures from agency to agency and *Mead*'s context-specific analysis that affords deference to some adjudication procedures but not to others. The cases involving agency adjudications in which the Court either claimed to apply or expressly deferred under the *Chevron* standard involved a very small number of agencies, with just two agencies representing more than half of the adjudications in question.

290. *Id.* Although distinguishing *Chevron* Step Two cases from *Chevron* Step One cases is often difficult, in one of the fourteen cases in which the Court applied *Chevron* to evaluate an agency interpretation advanced in adjudication and the agency won, the Court found the meaning of the statute clear—arguably reducing the instances of *Chevron* deference to agency adjudications further to thirteen cases. See *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (concerning an Interstate Commerce Commission interpretation).

TABLE 5: *CHEVRON* IN THE SUPREME COURT: ADJUDICATIONS BY AGENCY

Agency	Applied	Deferred
Board of Immigration Appeals/ Immigration & Naturalization Service	8	4
National Labor Relations Board	6	3
Comptroller of the Currency	2	2
Federal Labor Relations Authority	2	2
Interstate Commerce Commission	2	1
Pension Benefit Guaranty Corp.	1	1
Commerce Department	1	1
Environmental Protection Agency	1	0

The numbers are even more stark when one considers only the cases since the Court narrowed *Chevron's* scope in the *Mead* decision. From the time the Court decided *Mead* through the end of the October 2019 term, the Court cited *Chevron* in 106 cases.<sup>291</sup> Of those 106 cases, only 23 concerned agency adjudications at all. Of those 23 cases, the Court clearly and unequivocally applied the *Chevron* standard to evaluate agency interpretations in only 7, and the Court actually deferred in only 3.<sup>292</sup> By comparison, the Court clearly and unequivocally applied the *Chevron* standard to evaluate agency interpretations adopted through notice-and-comment rulemaking in 32 post-*Mead* cases and actually deferred to the agency in 24 of those cases.<sup>293</sup>

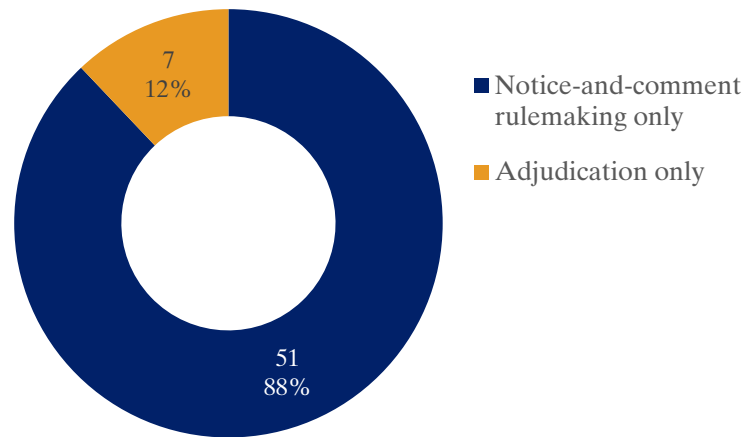
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291. This number does not include the *Mead* decision itself.

292. See *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 56–57, 76 (2014) (plurality opinion) (applying and deferring under *Chevron*); *Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012) (same); *United States v. Eurodif S.A.*, 555 U.S. 305, 316–22 (2009) (same); see also Appendix (listing cases in each category).

293. See Appendix.

FIGURE 3: *CHEVRON* IN THE SUPREME COURT: ADJUDICATION VS. RULEMAKING SINCE *MEAD*



Irrespective of whether the agency won or lost, of the 7 adjudications to which the Court purported to apply the *Chevron* standard, 6 involved a single agency—the Board of Immigration Appeals—again, with the agency winning some and losing others.<sup>294</sup> The only post-*Mead*, non-BIA case in which the Court clearly applied and deferred under *Chevron* to an agency adjudication, *United States v. Eurodif S.A.*,<sup>295</sup> also exemplifies why lower courts continue to struggle with which adjudications might be *Chevron*-eligible. *Eurodif* involved a Commerce Department antidumping determination under the Tariff Act of 1930.<sup>296</sup> The statute authorized the imposition of antidumping duties on sales of “foreign merchandise” but not on sales of services, and the case concerned the Commerce Department’s conclusion that a particular set of transactions fell into the former

294. See *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018); *Mellouli v. Lynch*, 575 U.S. 798, 798 (2015) (deciding that BIA interpretation did not receive *Chevron* deference because it was unreasonable); *Scialabba*, 573 U.S. at 56–69 (plurality opinion) (holding that BIA interpretation warranted *Chevron* deference); *Martinez Gutierrez*, 566 U.S. at 591 (same); *Negusie v. Holder*, 555 U.S. 511, 516–21 (2009) (holding the BIA’s interpretation would be accorded deference on remand); see also *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567–72 (2017) (finding the meaning of the statute clear, so declining to decide whether the rule of lenity would apply rather than *Chevron* to resolve statutory ambiguity in similar circumstances).

295. *United States v. Eurodif S.A.*, 555 U.S. 305 (2009).

296. *Id.* at 308.

rather than the latter category.<sup>297</sup> The Court applied *Chevron* and deferred to the agency's interpretation of the statute, citing *Mead*.<sup>298</sup> Briefing in the case based the government's claim to *Chevron* on two criteria: (1) the Federal Circuit's prior characterization of the agency's procedures as "relatively formal" and its decisions as "self-executing," and (2) the Tariff Act's call for judicial review of the agency's factual findings using the substantial evidence standard.<sup>299</sup> Another brief characterized the adjudication at issue as "on-the-record."<sup>300</sup> But no claim was made that the agency used actual Type A, APA formal adjudication, and the Court failed to explain whether all, some, or none of the noted characteristics prompted its decision to extend *Chevron* deference to this agency's adjudications but not others. At the very least, this case stands out for the parties' efforts to justify *Chevron* deference to what appears to have been a Type B, if relatively formal, adjudication.

Regardless, whether viewed through a pre-*Mead* or post-*Mead* lens, when one considers Type A, Type B, and Type C adjudications, the Court's consideration of the circumstances in which agency adjudications are *Chevron*-eligible has been astonishingly limited. Essentially all of the major *Chevron* cases, especially after *Mead*, arise in the rulemaking context. This is not surprising, however, because the theoretical justifications for *Chevron* deference fit best with rulemaking.

2. *Traditional Stare Decisis Analysis.* The fact that the Supreme Court most often applies *Chevron* in the rulemaking context has important implications for stare decisis. Although the Court takes stare decisis seriously, it also describes stare decisis as a "principle of

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297. *Id.*

298. *Id.* at 316.

299. Brief for the United States at 24, *Eurodif S.A.*, 555 U.S. 305 (Nos. 07-1059, 07-1078), 2008 WL 2794014, at \*24 (quoting *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1381-82 (Fed. Cir. 2001)).

300. Brief for Petitioners USEC Inc. & U.S. Enrichment Corp. at 27, *Eurodif S.A.*, 555 U.S. 305 (Nos. 07-1059, 07-1078), 2008 WL 2794015, at \*27.

policy”<sup>301</sup> rather than “an inexorable command.”<sup>302</sup> Consequently, the Court has identified several factors that it considers relevant in deciding whether to honor *stare decisis*, including the quality of the Court’s reasoning in support of that precedent, the impact that overruling the precedent would have on legitimate reliance interests, and the workability of the rule or standard that precedent establishes.<sup>303</sup> A full explication of *stare decisis* and *Chevron* is beyond the scope of this Article. Nevertheless, given these general parameters, a few points are worth noting.

First, a threshold question should be acknowledged. Although the Court applies the same factors across a variety of legal contexts, it does not evaluate them in the same way in all circumstances. The Court has described the force of *stare decisis* as “enhanced” when the precedent interprets a statute, and Congress can reverse the Court;<sup>304</sup> “reduced” when it involves procedural or other rules that do not guide primary behavior, where reliance interests are much lower;<sup>305</sup> and “at its weakest” in constitutional cases, because constitutional amendment is so difficult.<sup>306</sup> By this understanding, the entire *Chevron* framework may be entitled only to relatively weak *stare decisis* support under any circumstances, not just for adjudications.

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301. *Hohn v. United States*, 524 U.S. 236, 251 (1998) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

302. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); cf. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (making the same point but opting to shape rather than overturn *Auer* deference).

303. See, e.g., *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019) (“We have identified several factors to consider in deciding whether to overrule a past decision, including ‘the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.’” (quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018))).

304. See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (“Indeed, we apply statutory *stare decisis* even when a decision has announced a ‘judicially created doctrine’ designed to implement a federal statute.” (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014))); *Watson v. United States*, 552 U.S. 74, 82–83 (2007) (describing “long congressional acquiescence” as enhancing statutory *stare decisis*). But see *Gamble v. United States*, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring) (questioning this policy).

305. *Knick*, 139 S. Ct. at 2179 (noting in reference to potential reliance interests that “the force of *stare decisis* is ‘reduced’ when rules that do not ‘serve as a guide to lawful behavior’ are at issue” (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995))).

306. See *Janus*, 138 S. Ct. at 2478 (“The doctrine [of *stare decisis*] ‘is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.’” (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997))).

Tremendous disagreement exists over exactly what type of legal doctrine *Chevron* represents. Judicial opinions and academic literature variously describe *Chevron* as a standard of review, a canon or method of statutory interpretation, and a rule of decision.<sup>307</sup> How one characterizes *Chevron* may affect its entitlement to stare decisis.<sup>308</sup> For example, stare decisis arguably has little, if any, force for canons or methods of statutory interpretation, which generally are considered nonprecedential.<sup>309</sup> Although the Court traditionally has treated *Chevron*, much like *Auer*,<sup>310</sup> as a doctrine that the courts must apply when certain conditions are satisfied,<sup>311</sup> some scholars argue that *Chevron* is better understood as a canon or method of statutory interpretation, and thus that stare decisis should not apply to it at all.<sup>312</sup> At any rate, the Court's own precedent on precedent—most notably, *Mead* and *Kisor*—confirms that in the specific context of deference, some modification is allowed without offending stare decisis.

Second, turning to the traditional factors, because *Chevron* was conceived in the context of judicial review of agency rulemaking and has been applied mostly in rulemaking cases, the Court's analysis of why *Chevron* ought to apply to agency adjudications as well is comparatively limited. Presumably because of *Chenery II*, the Court almost reflexively mentions formal adjudications alongside notice-and-comment regulations as agency actions that carry the force of law and thus are entitled to *Chevron* deference under the analysis of *Mead*. Yet, as Asimow's work and this Article demonstrate, real-world adjudications do not fall neatly into categories of formal and informal adjudications. And the Court has offered next to no analysis or

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307. See generally Kristin E. Hickman & David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611 (2020) (describing the different ways in which courts and scholars have categorized *Chevron* and arguing, where it matters, for thinking of *Chevron* as a standard of review).

308. *Id.* at 650–55.

309. *Id.* at 653–54.

310. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (describing the agency's interpretation as “controlling,” and further observing that the agency's interpretation “is in no sense a ‘post hoc rationalizatio[n]’ advanced by an agency seeking to defend past agency action against attack” and “[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question”).

311. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) (explaining *Chevron* deference as a mandatory doctrine).

312. See, e.g., Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1152–61 (2019); Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1807–11 (2010).

guidance as to which procedures make an adjudication formal enough or how courts should discern when Congress has authorized an agency to act with the force of law through adjudication. The result is a lack of theoretical support, beyond *Chenery II* in the background, for applying *Chevron* to adjudication as well as rulemaking.

Third, *Chevron* generally does not present especially strong reliance interests in the context of agency adjudications.<sup>313</sup> Rulemaking is already favored in the law.<sup>314</sup> Regulations often stay on the books for quite some time. An opportunity for widespread public participation is an expectation of the procedural requirements for rulemaking.<sup>315</sup> Agencies as well as private parties are bound by them. By contrast, adjudications occur more frequently and are more limited in their participation and scope. Also, the interpretations they advance commonly have a shorter shelf life. Agencies may treat their adjudications as having quasi-precedential effect<sup>316</sup> and may not deviate from past adjudications without some explanation.<sup>317</sup> But the Court has recognized that adjudications offer agencies flexibility that regulations lack. Indeed, this point was one of the reasons for the Court's general endorsement in *Chenery II* of adjudication as a policymaking format.<sup>318</sup>

Moreover, if the Court were to change the deference scheme as this Article suggests, past cases evaluating agency interpretations of statutes would not have to be revisited, as the primary precedential effect of those cases concerns statutory interpretations that the Court either upheld or rejected, not whether the Court relied on *Chevron* deference in reaching those conclusions.<sup>319</sup> The only change would be

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313. Justice Gorsuch has argued that *Chevron* itself has not created reliance interests. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157–58 (10th Cir. 2016) (Gorsuch, J., concurring). Our argument does not depend on this broader point.

314. See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 202 (1947).

315. See 5 U.S.C. § 553(b)–(c) (2018).

316. See, e.g., *Stephenson & Pogoriler*, *supra* note 231, at 1494 (explaining that an agency adjudicative order “may state a broad interpretive principle that would clearly affect many other cases”).

317. *HICKMAN & PIERCE*, *supra* note 35, § 11.6 (documenting the courts' reluctance to accept unexplained departures from agency precedent).

318. See, e.g., *Chenery II*, 332 U.S. at 202–03 (offering as a justification for “case-by-case evolution of statutory standards” via adjudication that “the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule”).

319. *Cf. CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (“Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same.”).



how courts and agencies approach their analysis of agency interpretations of statutes advanced in *future* adjudications.

Finally, as described in Part II above, applying *Chevron* to agency adjudications raises questions and concerns that either do not exist or at least do not present similarly in the rulemaking context. Put simply, *Chevron* and agency adjudications are an awkward fit, like putting a square peg in a round hole. Whatever concerns *Chevron*'s critics have with respect to its workability for judicial review of agency rulemaking, those issues are magnified substantially in the adjudication context. To date, the Court has seen fit mostly to ignore those issues, contributing to the "undertheorization" of *Chevron* and adjudication. In fact, the Court's general failure to address the problems raised by applying *Chevron* in the adjudication context more robustly should give the Court at least a somewhat freer hand to revise its own handiwork.

3. *Changed Circumstances.* Meanwhile, other doctrinal developments have emerged that further cast doubt on *Chevron*'s applicability to adjudications, additionally undermining the force of stare decisis.<sup>320</sup> In particular, since the Supreme Court decided *Mead*, at least three important doctrinal developments, taken together, have altered the legal landscape—giving rise to significant fairness and bootstrapping concerns that did not exist when the Court decided *Mead* and raising questions about the wisdom of continuing to apply *Chevron* to agency adjudications. Under the law of precedent, these changes matter.

One important development is the Supreme Court's decision in *Brand X*, in which the Court concluded that agencies using *Chevron*-eligible formats could overturn contrary circuit court interpretations of ambiguous statutes.<sup>321</sup> Like so many of the Court's key *Chevron* decisions, *Brand X* involved notice-and-comment rulemaking as the FCC adopted an interpretation contrary to that of the Ninth Circuit. As Justice Gorsuch has recognized, *Brand X* potentially creates bizarre effects in the context of adjudication, especially when a party has relied

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320. See, e.g., *Herrera v. Wyoming*, 139 S. Ct. 1686, 1695 (2019) (declining to follow an earlier case because an intervening case had "undercut both pillars of [the earlier case's] reasoning"); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2460 (2018) (overcoming stare decisis, in part, because the precedent at issue had "been undermined by more recent decisions").

321. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 982–83 (2005); HICKMAN & PIERCE, *supra* note 35, § 3.6.4 (explaining doctrine).

on a previous statement of law from a court.<sup>322</sup> It is one thing to let an agency change the law going forward; it is something else to let an agency change the law that applies to what has already happened, especially when private parties have relied on judicial decisions.<sup>323</sup> It is doubtful that the *Mead* Court had this in mind when it advocated the eligibility of formal adjudications for *Chevron* review. Nor was it contemplated in *Chevron*, which, again, concerned prospective rulemaking and not retroactive adjudication. So long as *Brand X* is law and *Chevron* applies in the adjudication context, cases like *Gutierrez-Brizuela v. Lynch*<sup>324</sup> will arise, where private parties will not be able to plan their lives around judicial holdings.<sup>325</sup> The Tenth Circuit, with then-Judge Gorsuch writing, attempted to get around this problem by finding a limit on the scope of *Brand X*. A better solution would be to avoid the problem altogether by narrowing *Chevron*'s domain.

The second development is the continued trend among the circuit courts of treating the choice-of-adjudication procedures as a matter of agency discretion that itself is eligible for *Chevron* deference. As noted above, since the Court decided *Mead*, the First Circuit explicitly adopted this approach as well—and cited *Brand X* as the impetus for replacing its previous presumption with *Chevron* deference to the agency's procedural choices.<sup>326</sup> This jurisprudential shift—and the bootstrapping it enables—should matter in how one thinks about *Mead* and *Chevron* deference for agency adjudications. Congress rarely expressly requires APA formal adjudication procedures. As a growing number of circuits give agencies more control over the procedures they use, those courts simultaneously allow agencies to choose whether they will receive *Chevron* deference for the interpretations advanced through those adjudications.<sup>327</sup>

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322. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1150–52 (10th Cir. 2016) (Gorsuch, J., concurring); see also *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512–14, 530–33, 545–46 (9th Cir. 2012) (en banc) (featuring several opinions struggling with the issue).

323. See *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring) (“Quite literally then, after this court declared the statutes’ meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals.”).

324. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016).

325. See *supra* text accompanying notes 215–21920 (describing the circumstances of *Gutierrez-Brizuela* and *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015)).

326. See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16–18 (1st Cir. 2006).

327. The Supreme Court, of course, could also hold that these circuit court cases are mistaken. But to the extent that the Court accepts this growing line of precedent, it undermines the case for *Chevron* in the adjudication context.

The third jurisprudential development after *Mead* is the Supreme Court's decisions strengthening the fair notice doctrine. As noted above, in recent years, the Court has breathed life into this doctrine, which limits an agency's ability to retroactively make policy through adjudication.<sup>328</sup> Whereas circuit court cases in the pre-*Mead* era had recognized the "due process" implications of retroactively making policy,<sup>329</sup> the Court itself had addressed the topic on only a few occasions, with its main case on the subject probably being *Chenery II*. That presumably is why the Court in *Christopher* cited D.C. Circuit precedent, rather than its own cases, for "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"<sup>330</sup> As explained above, this development cuts against *Chevron* deference in the adjudication context.

These post-*Mead* developments, combined with administrative law's traditional preference for rulemaking as the better vehicle for agency policy choice,<sup>331</sup> suggest that the Court could limit *Chevron*'s applicability to the rulemaking context without seriously offending stare decisis. The fact that the Court has occasionally deferred to interpretations announced in adjudication is important. But that fact also must be understood in context; in reality, the overwhelming majority of the Court's applications of *Chevron* are rulemaking cases, not adjudication cases. And the Court has not yet considered how the intervening developments in the broader law discussed here may affect the proper scope of *Chevron*'s domain.

### B. *Narrowing, Not Overruling*

The foregoing analysis, moreover, is reinforced by the Supreme Court's prior narrowing of its deference standards irrespective of stare decisis. As already documented, the Court has already narrowed *Chevron*'s scope, in *Mead* and *King*, without raising stare decisis concerns. More recently, in *Kisor*, the Supreme Court narrowed *Auer* deference without suggesting that doing so violated stare decisis. Here, we do not argue that the Supreme Court should throw out *Chevron*

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328. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–59 (2012).

329. See, e.g., *Gates & Fox Co. v. Occupational Safety & Health Rev. Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (opinion of Scalia, J.).

330. *Christopher*, 567 U.S. at 156 (alteration in original) (quoting *Gates & Fox Co.*, 790 F.2d at 156).

331. See *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 202 (1947) (explaining that although an agency can choose its policymaking tool, rulemaking is generally more appropriate).

altogether. We just urge that *Chevron*'s domain be narrowed. *Kisor* provides the roadmap for what we have in mind.

In *Kisor*, the lone question before the Court was whether to overrule *Auer*. Invoking stare decisis, Justice Kagan, joined by a plurality of the Court and Chief Justice Roberts in part and for the judgment, explained why *Auer* should be retained. Yet the Court did not simply reaffirm *Auer*; the Justices narrowed it. Kagan emphasized that “even as we uphold [*Auer*], we reinforce its limits” and “further develop [them] today.”<sup>332</sup> The Court then took “the opportunity to restate, and somewhat expand on” what the Court had said before, in an effort to “clear up some mixed messages.”<sup>333</sup> That “expan[sion]” was really a narrowing of *Auer*'s scope. The Court stressed, for instance, that real ambiguity must be present and courts have the threshold ability to resolve “hard interpretive conundrums, even relating to complex rules.”<sup>334</sup> The Court also expressly repudiated language suggesting that *Auer* was more deferential than *Chevron*.<sup>335</sup> Likewise, the Court held that interpretation must be “the agency’s ‘authoritative’ or ‘official position,’ rather than any more ad hoc statement not reflecting the agency’s views,” and “must in some way implicate its substantive expertise.”<sup>336</sup> “When the agency has no comparative expertise in resolving a regulatory ambiguity,” deference is inappropriate.<sup>337</sup> Importantly, although not per se forbidding the practice, the Court also strongly hinted that courts should not defer to agency interpretations advanced in briefs, at least not ordinarily.<sup>338</sup>

*Auer* deference is no longer the same creature that it was. Previously, most courts did not understand *Auer* to be as narrow as *Kisor* now holds, and Justice Kagan’s majority opinion in *Kisor* pointedly casts doubt on older cases from the Supreme Court itself that did not apply *Kisor*'s newly announced limitations.<sup>339</sup> What we propose

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332. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (upholding, but modifying, *Auer v. Robbins*, 519 U.S. 452 (1997)).

333. See *Kisor*, 139 S. Ct. at 2414 (emphasis added).

334. See *id.* at 2414–15 (citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)).

335. See *id.* at 2416.

336. *Id.* at 2416–17.

337. *Id.* at 2417.

338. See *id.* at 2417 n.6.

339. See *id.* at 2414–15 (criticizing—with an “e.g.”—*United States v. Larionoff*, 431 U.S. 864 (1977), for applying “deference without significant analysis of the underlying regulation” and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), for applying “deference without

here is similar. Just as the *Kisor* Court narrowed *Auer* without offending stare decisis—in fact, the Court’s judgment depends on stare decisis<sup>340</sup>—the Court could also narrow *Chevron*’s domain without doing serious damage to precedent.

*Mead* itself fit this pattern. Prior to *Mead*, the Court’s language did not limit *Chevron* according to the legal force of agency action or the procedures used by the agency. *Mead* changed how *Chevron* was understood to work for entire categories of cases. That change is one reason why Justice Scalia’s dissent in *Mead* was so bellicose; he viewed the Court’s decision as a departure from *Chevron*.<sup>341</sup> Yet the Court’s majority disagreed and concluded that it was free to narrow *Chevron*’s domain. The Court could and should do so again.

### C. Consider the Alternative

Our final argument is directed to pragmatists. It is almost a foregone conclusion that the Supreme Court will do *something* with *Chevron*; the Justices are too invested in the issue to stand down entirely. The Supreme Court has already begun nibbling around the edges.<sup>342</sup> And the Chief Justice—who, in *Kisor*, cast the deciding vote to save *Auer*—has gone out of his way to invite further litigation about *Chevron*.<sup>343</sup> The Court is looking for a path. Unless it has a plan in mind, the Court, acting on its dissatisfaction with *Chevron*, may make a hash of judicial deference doctrine and create unintended consequences through ad hoc revisions based on the facts of individual cases. Indeed, if there are not five votes to scrap the entire *Chevron*

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careful attention to the nature and context of the interpretation”). Notably, Justice Gorsuch observed that “[t]he majority leaves *Auer* so riddled with holes that, when all is said and done, courts may find that it does not constrain their independent judgment any more than *Skidmore*.” *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring in the judgment).

340. See *Kisor*, 139 S. Ct. at 2422–23.

341. See *United States v. Mead Corp.*, 533 U.S. 218, 256–57 (2001) (Scalia, J., dissenting) (“To decide the present case, I would adhere to the original formulation of *Chevron* . . . . *Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates . . .”).

342. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (rejecting *Chevron* deference where the government’s position is inconsistent between agencies).

343. See, e.g., Debra Cassens Weiss, *Roberts Mostly Joins Liberal Justices as SCOTUS Refuses To Overturn Auer Decision on Agency Power*, AM. BAR ASS’N J. (June 26, 2019, 9:50 AM), <http://www.abajournal.com/news/article/supreme-court-rules-on-federal-regulator-power-in-case-on-auer-deference> [https://perma.cc/A3QJ-G3LK] (“Roberts and four other conservative justices, in separate opinions, made clear that they did not think the majority ruling upholding *Auer* foreclosed a review of *Chevron* deference.”).

framework, a series of ad hoc, case-driven limits seems likely unless the Court can land on a unified theory. Regardless of one's views of *Chevron* generally, the prospect of ad hoc limits rather than principled narrowing should not be attractive.

At bottom, there is no bright-line rule governing when the Court should overrule a case.<sup>344</sup> And there is reason to think that the Court has its eyes on *Chevron*. In light of that reality, the question for those who think stare decisis should apply here is what restrictions on *Chevron* make the most sense. Curtailing it for adjudications fits that description.

#### CONCLUSION

*Chevron* is under attack—and sometimes it deserves it. Why, for instance, does Justice Gorsuch dislike *Chevron* so much? It is because of cases like *Gutierrez-Brizuela*, where an agency not only told a court to read a statute in a liberty-depriving way but also instructed that same court to apply the agency's "new rule to completed conduct that transpired at a time when the contrary judicial precedent appeared to control."<sup>345</sup> Retroactivity is disfavored for a reason. Cases like *Gutierrez-Brizuela* give *Chevron*'s critics ammunition.

If *Kisor* is a guide, the Supreme Court is looking for a path to curtail *Chevron* that is grounded in doctrine, administrable in practice, potent enough to prevent abuse, and limited enough to preserve the doctrine's core. This Article offers that path. *Mead*'s insight that not all types of agency action merit deference is valid, but that insight should be taken further. Dropping deference for agency adjudications is a workable middle ground, preserving *Chevron* for notice-and-comment regulations where it is most defensible while eliminating it in those contexts for which *Chevron* is less defensible in theory and more dangerous in practice. Whatever one's views of *Chevron* generally, the reality is that deferring in the adjudication context is in tension with *Chevron*'s theoretical justifications, can produce real unfairness, and has created a mess in the lower courts to boot. All of this can be addressed by narrowing *Chevron*'s domain. So, really, why not do it?

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344. See, e.g., Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1853 (2013) (noting that Justices characterize stare decisis "as a matter of discretion rather than compulsion").

345. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143 (10th Cir. 2016).

## APPENDIX

Westlaw indicates that the Supreme Court has cited the *Chevron* decision on 238 separate occasions, including the *Chevron* decision itself.<sup>346</sup> In creating the charts in Part III above, we reviewed and categorized all 238 cases to determine whether (1) the Court cited *Chevron* for some proposition other than deference; (2) *Chevron* was cited in a concurring or dissenting opinion rather than by the majority; (3) the majority opinion indicated it was actually utilizing the *Chevron* standard or merely cited it in passing; (4) the majority deferred to the agency; and (5) the interpretation at issue was advanced through notice-and-comment rulemaking, adjudication, or some other format. The following summarizes our categorization of the cases.

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346. Cases were identified by searching the Supreme Court database in Westlaw for “467 U.S. 837” and by keyciting the *Chevron* decision, also in Westlaw. These searches yielded 242 results, including the *Chevron* decision itself. Three of those were memorandum orders denying rehearing in which the Westlaw synopsis, rather than the Court’s order, contained the citation. We excluded those three memorandum orders in our study. See *Am. Iron & Steel Inst. v. Nat. Res. Def. Council, Inc.*, 468 U.S. 1227 (1984) (Mem.) (denying petition for rehearing); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 468 U.S. 1227 (1984) (Mem.) (same); *Ruckelshaus v. Nat. Res. Def. Council, Inc.*, 468 U.S. 1227 (1984) (Mem.) (same). We also excluded from the study *Stutson v. United States*, 516 U.S. 193 (1996) (per curiam). *Stutson* was a criminal case in which the Court addressed its criteria for GVR’ing cases. The Court issued its per curiam opinion in *Stutson* simultaneously with its opinion in *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), which concerned social security benefits and was also GVR’d. Justice Scalia dissented from both *Stutson* and *Lawrence* in a single opinion, and mentioned *Chevron* in that dissent. See *Stutson*, 516 U.S. at 198 (cross-referencing Scalia’s dissent in *Lawrence*); *Lawrence*, 516 U.S. at 177 (Scalia, J., dissenting). Although Scalia’s dissent only invoked *Chevron* in relation to *Lawrence*, and the U.S. Reporter appended the dissent to *Lawrence*, Westlaw chose to include Scalia’s dissent under the citation to *Stutson*. See *Lawrence*, 516 U.S. at 186–88 (Scalia, J., dissenting). Accordingly, excluding *Stutson* seemed appropriate. We retained, however, several statements regarding denials of certiorari in which individual Justices expressed substantive views regarding *Chevron*. See, e.g., *Whitman v. United States*, 574 U.S. 1003 (2014) (Mem.) (Scalia, J., respecting the denial of certiorari) (discussing *Chevron* deference in interpreting criminal statutes); *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Mem.) (Ginsburg, J., respecting the denial of the petition for a writ of certiorari). Finally, in the course of our research, we discovered one case that arguably extends *Chevron* deference without actually citing *Chevron*. See *SEC v. Zandford*, 535 U.S. 813 (2002). In that case, the Court gave unlabeled “deference” to the SEC’s “reasonable” interpretation of an “ambiguous” statute expressed by the SEC through formal adjudication, citing *Mead* as support. *Id.* at 819–20. Because we cannot say conclusively that the Court was applying *Chevron* rather than *Skidmore* in that case, and because we otherwise limited our study to cases in which the Court cited *Chevron*, we did not include the *Zandford* decision in our analysis.

**Majority Opinions Applying Chevron Two-Step Framework**

(Agency win because of deference marked by asterisk)

Sturgeon v. Frost, 139 S. Ct. 1066 (2019)  
Pereira v. Sessions, 138 S. Ct. 2105 (2018)  
Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018)  
Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018)  
Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017)  
Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190 (2017)  
\*Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016)  
\*FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016)  
Michigan v. EPA, 135 S. Ct. 2699 (2015)  
Mellouli v. Lynch, 135 S. Ct. 1980 (2015)  
Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014)  
\*Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014)<sup>347</sup>  
\*EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014)  
\*City of Arlington v. FCC, 569 U.S. 290 (2013)  
\*Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013)  
\*Holder v. Martinez Gutierrez, 566 U.S. 583 (2012)  
\*Astrue v. Capato, 566 U.S. 541 (2012)  
United States v. Home Concrete & Supply, LLC, 566 U.S. 478  
(2012)<sup>348</sup>  
\*Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44  
(2011)  
Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519 (2009)  
\*Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009)  
Negusie v. Holder, 555 U.S. 511 (2009)<sup>349</sup>

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347. In *Scialabba*, Justice Kagan's opinion for the Court represented only a plurality of three Justices. Both Kagan's plurality opinion and Chief Justice Roberts's concurring opinion agreed, however, that the statute was ambiguous and the agency's interpretation was reasonable and entitled to deference under *Chevron*. They just used different reasoning in reaching that conclusion.

348. A key section of Justice Breyer's opinion for the Court in the *Home Concrete* case represented only a plurality of four Justices, but both Breyer for the Court and Justice Scalia in concurrence agreed that *Chevron* provided the standard of review and that Supreme Court precedent rendered the statute clear, and clearly contrary to the agency's interpretation.

349. In *Negusie*, the agency neither won nor lost precisely. The agency felt bound in its decisionmaking by judicial precedent that the Court later said the agency misinterpreted. Although the Court made clear that the statute was ambiguous and the agency was eligible for *Chevron* deference, it did not defer to the agency but rather remanded the case to the agency to



- \*United States v. Eurodif S.A., 555 U.S. 305 (2009)
- \*Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644 (2007)
- \*Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007)
- \*Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007)
- \*Glob. Crossing, Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45 (2007)
- Rapanos v. United States, 547 U.S. 715 (2006)
- \*Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)
- \*Household Credit Servs. v. Pfennig, 541 U.S. 232 (2004)
- \*Barnhart v. Thomas, 540 U.S. 20 (2003)
- \*Yellow Transp., Inc. v. Michigan, 537 U.S. 36 (2002)
- \*Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002)
- \*Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002)
- \*Barnhart v. Walton, 535 U.S. 212 (2002)
- \*HUD v. Rucker, 535 U.S. 125 (2002)
- Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002)
- \*New York v. FERC, 535 U.S. 1 (2002)
- Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327 (2002)
- NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001)
- Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)
- \*Lopez v. Davis, 531 U.S. 230 (2001)
- Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)
- FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)
- \*Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000)
- \*INS v. Aguirre-Aguirre, 526 U.S. 415 (1999)
- \*Your Home Visiting Nurse Servs. v. Shalala, 525 U.S. 449 (1999)
- AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)
- \*Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1998)
- NCUA v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998)
- \*Regions Hosp. v. Shalala, 522 U.S. 448 (1998)
- \*United States v. O'Hagan, 521 U.S. 642 (1997)

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give it the opportunity to exercise its discretion. We have categorized the case here as the Court applying *Chevron* but not deferring. *But see* Hemel & Nielson, *supra* note 102, at 760 (placing this case in its own category).

- United States v. LaBonte, 520 U.S. 751 (1997)
- \*Auer v. Robbins, 519 U.S. 452 (1997)
  - \*Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)
  - \*Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996)
  - \*Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996)
  - \*NLRB v. Town & Country Elec., 516 U.S. 85 (1995)
  - \*Babbitt v. Sweet Home Chapter of Comm. for a Great Or., 515 U.S. 687 (1995)
  - \*Reno v. Koray, 515 U.S. 50 (1995)
  - \*NationsBank of N.C., N.A. v. Variable Annuity Life Ins., 513 U.S. 251 (1995)
- Brown v. Gardner, 513 U.S. 115 (1994)
- MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994)
- \*PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994)
  - \*ABF Freight Sys. v. NLRB, 510 U.S. 317 (1994)
  - \*Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993)
  - \*Reiter v. Cooper, 507 U.S. 258 (1993)
  - \*United States v. Alaska, 503 U.S. 569 (1992)
  - \*Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407 (1992)
  - \*Arkansas v. Oklahoma, 503 U.S. 91 (1992)
- Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)
- Presley v. Etowah Cnty. Comm'n, 502 U.S. 491 (1992)
- \*Pauley v. BethEnergy Mines, 501 U.S. 680 (1991)
  - \*Rust v. Sullivan, 500 U.S. 173 (1991)
  - \*Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991)
  - \*Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117 (1991)
  - \*Mobil Oil Ex. & Prod. Se., Inc. v. United Dist. Cos., 498 U.S. 211 (1991)
  - \*Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990)
  - \*Fort Stewart Schs. v. FLRA, 495 U.S. 641 (1990)
  - Dep't of Treasury, IRS v. FLRA, 494 U.S. 922 (1990)
  - \*Sullivan v. Everhart, 494 U.S. 83 (1990)
  - Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)
  - Sullivan v. Zebley, 493 U.S. 521 (1990)
  - Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158 (1989)
  - \*Mead Corp. v. Tilley, 490 U.S. 714 (1989)

- \*Massachusetts v. Morash, 490 U.S. 107 (1989)
- Pittson Coal Grp. v. Sebben, 488 U.S. 105 (1988)
- \*K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)
- Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988)
- Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988)
- \*NLRB v. United Food & Comm. Workers Union, Local 23, 484 U.S. 112 (1987)
- INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)
- \*Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987)
- \*CFTC v. Schor, 478 U.S. 833 (1986)
- \*Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986)
- \*Atkins v. Rivera, 477 U.S. 154 (1986)
- \*Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986)
- \*Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426 (1986)
- \*United States v. Fulton, 475 U.S. 657 (1986)
- Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986)
- \*United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)
- \*Cornelius v. Nutt, 472 U.S. 648 (1985)
- \*Hillsborough Cnty. v. Automated Med. Labs, Inc., 471 U.S. 707 (1985)
- \*Conn. Dep't of Income Maint. v. Heckler, 471 U.S. 524 (1985)
- \*Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116 (1985)
- \*United States v. Boyle, 469 U.S. 241 (1985)
- \*Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)

***Majority Opinions Applying Chevron Two-Step Framework:***

***Notice-and-Comment Rulemaking*** (Agency win because of deference marked by asterisk)

- Sturgeon v. Frost, 139 S. Ct. 1066 (2019)
- Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018)
- Dig. Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018)
- Coventry Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190 (2017)
- \*Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016)
- \*FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760 (2016)

Michigan v. EPA, 135 S. Ct. 2699 (2015)  
Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014)  
\*EPA v. EME Homer City Generation, L.P., 572 U.S. 489 (2014)  
\*City of Arlington v. FCC, 569 U.S. 290 (2013)  
\*Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145 (2013)  
\*Astrue v. Capato, 566 U.S. 541 (2012)  
United States v. Home Concrete & Supply, LLC, 566 U.S. 478  
(2012)  
\*Mayo Found. for Med. Educ. & Res. v. United States, 562 U.S. 44  
(2011)  
Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519 (2009)  
\*Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009)  
\*Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644  
(2007)  
\*Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007)  
\*Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007)  
\*Glob. Crossing Tel., Inc. v. Metrophones Tel., Inc., 550 U.S. 45  
(2007)  
Rapanos v. United States, 547 U.S. 715 (2006)  
\*Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs., 545 U.S. 967  
(2005)  
\*Household Credit Servs. v. Pfennig, 541 U.S. 232 (2004)  
\*Barnhart v. Thomas, 540 U.S. 20 (2003)  
\*Yellow Transp., Inc. v. Michigan, 537 U.S. 36 (2002)  
\*Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002)  
\*Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002)  
\*Barnhart v. Walton, 535 U.S. 212 (2002)  
\*HUD v. Rucker, 535 U.S. 125 (2002)  
Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002)  
\*New York v. FERC, 535 U.S. 1 (2002)  
Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co., 534 U.S. 327  
(2002)  
Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)  
Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159  
(2001)  
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)  
\*Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1 (2000)  
AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)  
\*Atl. Mut. Ins. Co. v. Comm'r, 523 U.S. 382 (1998)

- \*Regions Hosp. v. Shalala, 522 U.S. 448 (1998)
- \*United States v. O'Hagan, 521 U.S. 642 (1997)
- United States v. LaBonte, 520 U.S. 751 (1997)
- \*Auer v. Robbins, 519 U.S. 452 (1997)
- \*Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)
- \*Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996)
- \*Babbitt v. Sweet Home Chapter of Comm. for a Great Or., 515 U.S. 687 (1995)
- Brown v. Gardner, 513 U.S. 115 (1994)
- MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994)
- \*PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994)
- \*Good Samaritan Hosp. v. Shalala, 508 U.S. 402 (1993)
- \*Reiter v. Cooper, 507 U.S. 258 (1993)
- \*United States v. Alaska, 503 U.S. 569 (1992)
- \*Rust v. Sullivan, 500 U.S. 173 (1991)
- \*Am. Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991)
- \*Mobil Oil Ex. & Prod. Se., Inc. v. United Dist. Cos., 498 U.S. 211 (1991)
- \*Sullivan v. Everhart, 494 U.S. 83 (1990)
- Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)
- Sullivan v. Zebley, 493 U.S. 521 (1990)
- Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158 (1989)
- \*Massachusetts v. Morash, 490 U.S. 107 (1989)
- \*K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988)
- Bethesda Hosp. Ass'n v. Bowen, 485 U.S. 399 (1988)
- \*CFTC v. Schor, 478 U.S. 833 (1986)
- \*Atkins v. Rivera, 477 U.S. 154 (1986)
- Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986)
- \*United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)
- \*Cornelius v. Nutt, 472 U.S. 648 (1985)
- \*Conn. Dep't of Income Maint. v. Heckler, 471 U.S. 524 (1985)
- \*Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116 (1985)
- \*United States v. Boyle, 469 U.S. 241 (1985)
- \*Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)

**Majority Opinions Applying Chevron Two-Step Framework:  
Adjudication** (*Agency win because of deference marked by asterisk*)

- 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)  
\*Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014)  
\*Holder v. Martinez Gutierrez, 566 U.S. 583 (2012)  
Negusie v. Holder, 555 U.S. 511 (2009)<sup>350</sup>  
\*United States v. Eurodif S.A., 555 U.S. 305 (2009)  
NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706 (2001)  
\*INS v. Aguirre-Aguirre, 526 U.S. 415 (1999)  
\*Holly Farms Corp. v. NLRB, 517 U.S. 392 (1996)  
\*NLRB v. Town & Country Elec., 516 U.S. 85 (1995)  
\*NationsBank, N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251 (1995)  
\*ABF Freight Sys. v. NLRB, 510 U.S. 317 (1994)  
\*Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407 (1992)  
Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)  
\*Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117 (1991)  
\*Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990)  
\*Fort Stewart Schs. v. FLRA, 495 U.S. 641 (1990)  
Dep't of Treasury, IRS v. FLRA, 494 U.S. 922 (1990)  
Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).  
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)  
\*Clarke v. Sec. Indus. Ass'n, 479 U.S. 388 (1987)

**Majority Opinions Applying Chevron Two-Step Framework:  
Notice-and-Comment Rulemaking and Adjudication Without  
Specifying Deference to Either** (*Agency win because of deference marked by asterisk*)

- \*Arkansas v. Oklahoma, 503 U.S. 91 (1992)

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350. See *supra* note 349 (explaining the hard-to-categorize outcome in this case).

**Majority Opinions Applying Chevron Two-Step Framework:**

**Miscellaneous Agency Action** (Agency win because of deference marked by asterisk)

- \*Lopez v. Davis, 531 U.S. 230 (2001) (interim rule requesting comments)
- NCUA v. First Nat'l Bank & Trust Co., 522 U.S. 479 (1998) (interpretative ruling and policy statement)
- \*Reno v. Koray, 515 U.S. 50 (1995) (Program Statement characterized as internal agency guideline and interpretative rule)
- Presley v. Etowah Cnty. Comm'n, 502 U.S. 491 (1992) (Department of Justice amicus brief)
- \*Pauley v. BethEnergy Mines, 501 U.S. 680 (1991) (interim regulations)
- \*Mead Corp. v. Tilley, 490 U.S. 714 (1989) (opinion letters and informal guidelines)
- Pittston Coal Grp. v. Sebben, 488 U.S. 105 (1988) (interim regulations)
- \*NLRB v. United Food & Com. Workers Union, Local 23, 484 U.S. 112 (1987) (procedural rules)
- \*Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) (letter from Secretary of Commerce to Japanese Charge d'Affaires ad interim, agency inaction)
- \*Young v. Cmty. Nutrition Inst., 476 U.S. 974 (1986) (policy statement, agency inaction)
- \*Fed. Deposit Ins. Corp. v. Phila. Gear Corp., 476 U.S. 426 (1986) (longstanding, informal agency policy and practice)
- \*United States v. Fulton, 475 U.S. 657 (1986) (Secretary of Energy orders delegating decisionmaking authority to subordinates)
- \*Hillsborough Cnty. v. Automated Med. Labs, Inc., 471 U.S. 707 (1985) (preamble to regulations)

**Majority Opinions Applying Chevron Two-Step Framework:**

**Notice-and-Comment Rulemaking and Miscellaneous Agency Action Without Specifying Deference to Either** (Agency win because of deference marked by asterisk)

- \*Your Home Visiting Nurse Servs. v. Shalala, 525 U.S. 449 (1999) (Medicare Provider Reimbursement Manual)

***Majority Opinions Mentioning Chevron Two-Step Framework But Not Applying It***

Cnty. of Maui v. Haw. Wildlife Fund, 140 S. Ct. 1462 (2020)  
Shular v. United States, 140 S. Ct. 779 (2020)  
Kisor v. Wilkie, 139 S. Ct. 2400 (2019)  
PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051 (2019)  
Smith v. Berryhill, 139 S. Ct. 1765 (2019)  
Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)  
SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348 (2018)  
Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018)  
Scenic Am., Inc. v. DOT, 138 S. Ct. 2 (2017) (Mem.)  
Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)  
Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969 (2016)  
Tex. Dep't of Hous. v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015)  
King v. Burwell, 135 S. Ct. 2480 (2015)  
Decker v. Nw. Env't Def. Ctr., 568 U.S. 597 (2013)  
Wos v. E.M.A., 568 U.S. 627 (2013)  
Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012)  
Freeman v. Quicken Loans, Inc., 566 U.S. 624 (2012)  
Roberts v. Sea-Land Servs., 566 U.S. 93 (2012)  
Douglas v. Indep. Living Ctr. of S. Cal., Inc., 565 U.S. 606 (2012)  
Judulang v. Holder, 565 U.S. 42 (2011)  
Barber v. Thomas, 560 U.S. 474 (2010)  
Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261 (2009)  
Carcieri v. Salazar, 555 U.S. 379 (2009)  
Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527 (2008)  
Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008)  
Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)  
Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007)  
Env't Def. v. Duke Energy Corp., 549 U.S. 561 (2007)  
Massachusetts v. EPA, 549 U.S. 497 (2007)  
Gonzales v. Oregon, 546 U.S. 243 (2006)  
Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581 (2004)  
Alaska Dep't of Env't Conservation v. EPA, 540 U.S. 461 (2004)



Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003)  
Nat'l Park Hosp. Ass'n v. DOI, 538 U.S. 803 (2003)  
Wash. Dep't of Soc. & Health Servs. v. Guardianship, 537 U.S. 371  
(2003)  
Meyer v. Holley, 537 U.S. 280 (2003)  
Utah v. Evans, 536 U.S. 452 (2002)  
Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)  
Edelman v. Lynchburg Coll., 535 U.S. 106 (2002)  
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002)  
INS v. St. Cyr, 533 U.S. 289 (2001)  
United States v. Mead Corp., 533 U.S. 218 (2001)  
Alexander v. Sandoval, 532 U.S. 275 (2001)  
Christensen v. Harris Cnty., 529 U.S. 576 (2000)  
Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999)  
Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999)  
United States v. Haggard Apparel Co., 526 U.S. 380 (1999)  
Nat'l Fed'n of Fed. Emps., Local 1309 v. DOI, 526 U.S. 86 (1999)  
DOC v. U.S. House of Representatives, 525 U.S. 316 (1999)  
Bragdon v. Abbott, 524 U.S. 624 (1998)  
Phillips v. Wash. Legal Found., 524 U.S. 156 (1998)  
Metro. Stevedore Co. v. Rambo, 521 U.S. 121 (1997)  
Dunn v. CFTC, 519 U.S. 465 (1997)  
Neal v. United States, 516 U.S. 284 (1996)  
Lawrence v. Chater, 516 U.S. 163 (1996)  
Dir., Off. of Workers' Comp. Programs, DOL v. Newport News  
Shipbuilding & Dry Dock Co., 514 U.S. 122 (1995)  
ICC v. Transcon Lines, 513 U.S. 138 (1995)  
City of Chicago v. EDF, 511 U.S. 328 (1994)  
Nw. Airlines v. Cnty. of Kent, 510 U.S. 355 (1994)  
John Hancock Mut. Life Ins. v. Harris Tr. & Sav. Bank, 510 U.S.  
86 (1993)  
Stinson v. United States, 508 U.S. 36 (1993)  
Est. of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992)  
Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992)  
Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)  
Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990)  
Dole v. United Steelworkers of Am., 494 U.S. 26 (1990)  
Pub. Emps. Ret. Sys. v. Betts, 492 U.S. 158 (1989)

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)  
Pittston Coal Grp. v. Sebben, 488 U.S. 105 (1988)  
Huffman v. W. Nuclear, Inc., 486 U.S. 663 (1988)  
Edward J. DeBartolo Corp. v. Fla. Gulf Coast, 485 U.S. 568 (1988)  
ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988)  
Lukhard v. Reed, 481 U.S. 368 (1987)  
Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531 (1987)  
Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418  
(1987)  
DOT v. Paralyzed Veterans of Am., 477 U.S. 597 (1986)  
Bowen v. Am. Hosp. Ass'n, 476 U.S. 610 (1986)  
Hillsborough Cnty. v. Automated Med. Labs, Inc., 471 U.S. 707  
(1985)  
Bennett v. Ky. Dep't of Educ., 470 U.S. 656 (1985)

***Cases with Only Concurring or Dissenting Opinions Citing Chevron  
Two-Step Framework***

Little Sisters of the Poor Saints Peter & Paul Home v.  
Pennsylvania, 140 S. Ct. 2367 (2020)  
VF Jeanswear LP v. EEOC, 140 S. Ct. 1202 (2020) (Mem.)  
Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,  
140 S. Ct. 789 (2020) (Mem.)  
Baldwin v. United States, 140 S. Ct. 690 (2020) (Mem.)  
BNSF Ry. Co. v. Loos, 139 S. Ct. 893 (2019)  
Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015)  
Whitman v. United States, 135 S. Ct. 352 (2014) (Mem.)  
Lawson v. FMR LLC, 571 U.S. 429 (2014)  
Mut. Pharm. Co. v. Bartlett, 570 U.S. 472 (2013)  
Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50 (2011)  
Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1  
(2011)  
Dada v. Mukasey, 554 U.S. 1 (2008)  
Smith v. City of Jackson, 544 U.S. 228 (2005)<sup>351</sup>

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351. Justice Stevens's plurality opinion for the Court in *City of Jackson* concluded that the meaning of the statute was clear without citing *Chevron*. Justice Scalia's concurring vote was necessary to comprise a majority of the Court in favor of the agency, however, and his opinion makes clear his reliance on *Chevron* in evaluating the case. Accordingly, notwithstanding

Clark v. Martinez, 543 U.S. 371 (2005)  
Intel Corp. V. Advanced Micro Devices, Inc., 542 U.S. 241 (2005)  
Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541  
U.S. 1 (2004)  
Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)<sup>352</sup>  
Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002)  
Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66 (1999)  
Melendez v. United States, 518 U.S. 120 (1996)  
Stone v. INS, 514 U.S. 386 (1995)  
Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)  
Newark Morning Ledger Co. v. United States, 507 U.S. 546 (1993)  
United States v. Burke, 504 U.S. 229 (1992)  
Gregory v. Ashcroft, 501 U.S. 452 (1991)  
EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991)  
Sullivan v. Stroop, 496 U.S. 478 (1990)  
Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988)  
Miss. Power & Light Co. v. Mississippi, 487 U.S. 354 (1988)  
EEOC v. Com. Off. Prod. Co., 486 U.S. 107 (1988)  
Regents of Univ. of Cal. v. Pub, Emp. Rels. Bd., 485 US. 589 (1988)  
Jean v. Nelson, 472 U.S. 846 (1985)  
Sec. Indus. Ass'n. v. Bd. of Governors of Fed. Rsrv. Sys., 468 U.S.  
137 (1984)

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Stevens's silence regarding *Chevron*, we categorized this case as an application of *Chevron* by the majority.

352. The Court splintered over whether the standard for an injunction against a prescription drug program adopted by the state of Maine was satisfied based on federal preemption and dormant Commerce Clause challenges. The Department of Health and Human Services submitted an amicus brief in favor of the injunction, but the Court largely ignored it. Writing for a four-Justice plurality, Justice Stevens said that HHS could act more definitively to claim federal preemption and reject Maine's program, but he did not mention *Chevron* in making that suggestion. Justice Breyer, who joined the plurality opinion, authored a concurring opinion in which he suggested that any deliberate action by HHS would be entitled to weight, but he cited both *Chevron* and *Skidmore* without specifying which would apply. Justices Scalia and Thomas each separately concurred in the judgment, and one or the other was necessary to form a majority. Justice Scalia's concurring opinion was silent as to *Chevron*. Justice Thomas's opinion mentioned *Chevron*, but he argued that the statute clearly preempted Maine's program so that any definitive HHS action claiming preemption would simply be correct, as opposed to being entitled to deference. Given that *Chevron* was not mentioned in either Justice Stevens's plurality opinion or Justice Scalia's concurring opinion, and neither of Justice Breyer's nor Justice Thomas's concurring opinions were essential to the outcome of the case, we categorized this case as not involving an application of *Chevron* by the majority.

***Majority Opinions and Orders Citing Chevron Outside of Context of Agency Statutory Interpretation and the Two-Step Framework***

Shular v. United States, 140 S. Ct. 779 (2020)  
Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015)  
Teva Pharm. U.S.A. Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015)  
Jennings v. Stephens, 135 S. Ct. 793 (2015)  
Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011)  
Camreta v. Greene, 563 U.S. 692 (2011)  
Parents Involved v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)  
Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007)  
Schaffer v. Weast, 546 U.S. 49 (2005)  
Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)  
Bush v. Gore, 531 U.S. 98 (2000)  
Williams v. Taylor, 529 U.S. 362 (2000)  
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)  
Ohio v. Robinette, 519 U.S. 33 (1996)  
Texas v. Hopwood, 518 U.S. 1033 (1996) (Mem.)  
First Options v. Kaplan, 514 U.S. 938 (1995)  
United States v. R.L.C., 503 U.S. 291 (1992)  
McCormick v. United States, 500 U.S. 257 (1991)  
Michigan v. Lucas, 500 U.S. 145 (1991)  
FMC Corp. v. Holliday, 498 U.S. 52 (1990)  
Crandon v. United States, 494 U.S. 152 (1990)  
California v. Rooney, 483 U.S. 307 (1987)  
Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804 (1986)  
EEOC v. Fed. Lab. Rels. Auth., 476 U.S. 19 (1986)  
United States v. Lane, 474 U.S. 438 (1986)  
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)