2014

# Chevron's Legacy, Justice Scalia's Two Enigmatic Dissents, and His Return to the Fold in City of Arlington, Tex. v. FCC

Stephen J. Leacock
*Barry University*

# *CHEVRON*'S LEGACY, JUSTICE SCALIA'S TWO ENIGMATIC DISSENTS, AND HIS RETURN TO THE FOLD IN *CITY OF ARLINGTON, TEX. V. FCC*

*Stephen J. Leacock*[+]



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[+] Professor of Law, Barry University School of Law. Barrister (Hons.) 1972, Middle Temple, London; LL.M. 1971, London University, King's College; M.A. (Bus. Law) CNAA 1971, City of London Polytechnic, London; Grad. Cert. Ed. (Distinction) 1971, Garnett College, London; B.A. (Bus. Law) (Hons.) CNAA 1970, City of London Polytechnic, London. The author gratefully acknowledges the assistance of Dean Leticia M. Diaz, Dean of Barry University, Dwayne O. Andreas School of Law and the assistance of Barry University, Dwayne O. Andreas School of Law in funding research assistance under a summer research grant to research and write this Article. The author also gratefully acknowledges the research assistance in the preparation of this Article provided by Teris A. Best of Barry University, School of Law and research funds provided by Barry University, School of Law that financed that research. The author also gratefully acknowledges the assistance of Assistant Professor of Law Library Louis Rosen, Reference Librarian, Barry University, School of Law, in gaining access to very useful materials. However, this Article presents the views and errors of the author alone and is not intended to represent the views of any other person or entity.

> "*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."[1]

Judicial friction[2] in the course of deciding administrative law controversies can generate sparks, igniting law-advancing ideas[3] that sometimes result in legal

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1. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) (referring to Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 551 (6th ed. 2013) [hereinafter LAWSON, FEDERAL ADMINISTRATIVE LAW] ("Despite its breadth, the broad reading of *Chevron* does not require judicial deference to *all* agency legal interpretations."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 571 (3d ed. 1986) [hereinafter POSNER, ECONOMIC ANALYSIS] ("The original rationale for the creation of . . . agencies was to relieve Congress of some of the burdens of legislating."); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 2 (2013) [hereinafter Lawson & Kam, Chevron*'s Origins*] ("For more than a quarter of a century, federal administrative law has been *dominated* by the so-called *Chevron* doctrine . . . .") (emphasis added). *See generally* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1325 (2008) ("*Chevron* . . . does not embrace any single rationale for deference to agency statutory interpretation.").

2. *See, e.g.*, *City of Arlington, Tex.*, 133 S. Ct. at 1873 n.4 (recognizing the confusion that agency in administrative law creates, stating that "[t]he Chief Justice's discomfort with the growth of agency power . . . is perhaps understandable"). *See also id.* at 1873 ("A few words in *response* to the dissent. The question on which we granted certiorari was whether 'a court should apply *Chevron* to review an agency's determination of its own jurisdiction.'" (emphasis added)).

3. This holds true, despite one view that "judges are passive interpreters" and that the "role [of judges] is semantic." Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, Aug. 24, 2012, http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism [hereinafter Posner, *Scalia's Incoherence*].

breakthroughs.[4] The starting premise for resolving any administrative law controversy is that agencies are only authorized to make legally valid decisions where Congress has granted the particular agency such authority.[5] Courts will reverse an agency's erroneous answer to a statutory interpretation question, even if the statute is one the agency administers.[6]

However, when a court determines that an agency is potentially empowered to issue a particular ruling, further judicial analysis and evaluation ensues, followed by the particular court's own determination and issuance of the court's judgment.[7] Thus, prior to the conception of *Chevron* deference,[8] when an

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4. *See, e.g.*, LAWSON, FEDERAL ADMINISTRATIVE LAW, *supra* note 1, at 459 ("When compared to pre-1984 law, *Chevron* appears to offer the virtue of simplicity: instead of an indeterminate, multi-factor test for deference, one merely asks whether the statute or regulation in question is clear and, if not, whether the agency's interpretation is reasonable.").

5. *See, e.g.*, *City of Arlington, Tex.*, 133 S. Ct. at 1869 ("Both [the] power [of agencies] to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*.") (emphasis added). *See also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 593–94 (2004) ("[There is] virtually unanimous accord in understanding the [agency] to forbid *only* discrimination preferring young to old. . . . The very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view.") (emphasis added) (citations omitted); *Chevron U.S.A. Inc.*, 467 U.S. at 836–37 (stating that both courts and agencies are prohibited from expanding a statute past the explicit boundaries of authority established by Congress); SEC v. Sloan, 436 U.S. 103, 122–23 (1978) (finding that, if "Congress intended the [Securities and Exchange] Commission to have the power" that the Commission purported to exercise, then Congress likely "could and would have authorized [the Commission] more clearly than [Congress] did," and "[t]he absence of any truly persuasive legislative history to support the Commission's view, and the entire statutory scheme suggesting that in fact the Commission is not so empowered, reinforce[d] [the Court's] conclusion that . . . no such power exists").

6. *See Gen. Dynamics Land Sys. Inc.*, 540 U.S. at 584–85, 600 (reversing the Sixth Circuit's decision that upheld the Equal Employment Opportunity Commission's finding that the Age Discrimination in Employment Act of 1967 prohibited employers from discriminating against younger workers in favor of older workers). *See also Sloan*, 436 U.S. at 106–08, 122–23 (affirming the Second Circuit's decision that a series of SEC orders suspending the trading of a certain stock was legally invalid, based on the SEC overstepping its statutory authority to suspend trading in certain situations).

7. *Chevron U.S.A. Inc.*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

8. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (describing deference as "not necessarily meaning anything more than considering [the Executive Branch's views concerning a statute's meaning] with attentiveness and profound respect[;] . . . say[ing] that those views, if at least reasonable, will ever be *binding* . . . is . . . seemingly a striking abdication of judicial responsibility"). *See also* Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 11 ("*[L]egal* deference [is] the extent to which courts are *obliged* to give a certain degree of deference to agency legal decisions simply because they are legal decisions of agencies.").

agency concluded that a particular statute was beset by ambiguities[9] or evinced gaps[10] pertaining to a particular issue, the agency proceeded to make its ruling.[11] If such rulings were challenged by an appeal to the courts, then the correctness and legal validity of such rulings were ultimately resolved at the discretion of the judiciary.[12]

A two-step process typically occurred to determine administrative law controversies that involved an agency interpreting and applying statutes. First, agencies dealing with such issues would fashion interpretations that resolved the detected ambiguities or filled the perceived gaps that Congress left.[13] Then, if the agency's interpretations and applications were disputed, the courts would decide their validity and whether they should be followed as U.S. law.[14]

However, the *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[15] decision created a significant shift in the U.S. Supreme Court's approach to administrative law deference jurisprudence with respect to agency decisions.[16] This Article will discuss that shift, its consequences, and its impact on the judiciary's intellectual digestion of the substantive administrative law implications. This Article also examines two widely discussed dissents by Justice Scalia in two *Chevron* deference cases.[17]

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9. *See* State v. Edwards, 87 A.3d 1144, 1147 (Conn. App. Ct. 2014) ("The test to determine ambiguity is whether [a] statute, when read in context, is susceptible to more than one reasonable interpretation . . . .").

10. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 142 (1921) (providing that "[w]hen [statutory] law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable [persons] . . . ought in such circumstances to do").

11. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 136, 138 (1944) (finding that an agency's determination was valid because the administrator was empowered "to reach conclusions [about] conduct without the law").

12. *See id.* at 140 (stating that "the rulings, interpretations and opinions" of an administrative agency are persuasive but "not controlling upon the courts"). *See also* CARDOZO, *supra* note 10, at 143 (theorizing that the basis for giving the judiciary the final ruling in statutory interpretation is the belief that "nine times out of ten, if not oftener, the conduct of right-minded [persons] would not have been different if the rule embodied in the decision had been announced by statute in advance").

13. *See Skidmore*, 323 U.S. at 139 (commenting that an agency's determination is "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case").

14. *Id.* at 140 (explaining that, while a court will consider an agency's interpretation in their deliberations, the court must weigh various factors to determine if the agency's interpretation and application of a statute are correct).

15. 467 U.S. 837 (1984).

16. *See* Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 2 ("*Chevron* virtually defines modern administrative law.").

17. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1005 (2005) (Scalia, J., dissenting); United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

Part I addresses the role *Chevron* plays in judicial review of agency decisions. Part II examines Justice Scalia's dissent in *United States v. Mead*,[18] followed by a discussion in Part III of his later dissent in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[19] Part IV evaluates the degree of harmony or conflict that materializes when Justice Scalia's two dissents are analyzed in light of the orthodox principles *Chevron* has sought to engender. Finally, Part V concludes that *Chevron* still has significance for administrative law determinations and that Justice Scalia may be returning to the fold.

## I. THE CHEVRON FRAMEWORK IN JUDICIAL REVIEW OF AGENCY DETERMINATIONS

### A. *Pre-*Chevron *Administrative Law Determinations Change from "What Power?" to "How Much Power?"*

Prior to the U.S. Supreme Court's *Chevron* decision, courts tended to treat an agency's conclusion about a statute's interpretation and application as persuasive authority.[20] Courts would apply factors that the Supreme Court set forth in *Skidmore v. Swift & Co.*[21] to decide whether to overturn the particular agency's determinations.[22] After enactment of the Administrative Procedure Act (APA),[23] a combination of *Skidmore* deference and APA analysis and application prevailed.[24] In making these decisions, the judiciary's fundamental obligations included assessing the degree of deference merited by an agency's decision on the whole.[25]

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18. 533 U.S. 218 (2001).

19. 545 U.S. 967 (2005).

20. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that agency determinations, "while not controlling upon the courts," do have the "power to persuade").

21. 323 U.S. 134 (1944).

22. *See id.* at 140.

23. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

24. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN L. REV. 673, 675 (2007) (pointing out that before the *Chevron* decision, the Supreme Court often favored its own standards of review of administrative decisions over the APA standards).

25. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446 (2005) ("While *Chevron* deference means that an agency, not a court, exercises interpretive control, *Skidmore* deference *means just the opposite*." (emphasis added)). *See also* United States v. Mead Corp., 533 U.S. 218, 241 (2001), (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite." (citation omitted)). *See generally* Doug Geyser, Note, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies after* Brand X, 106 COLUM. L. REV. 2129, 2130 (2006) ("[*Mead*] clarified that only agency actions taken with a certain degree of formality are entitled to *Chevron*-style deference . . . .").

### *B. The Most Recent Supreme Court Case Elucidates Key Issues in Administrative Law Agency Promulgations*

#### *1. Bias May Affect Decisions of Agency Administrators*

The U.S. Supreme Court *City of Arlington, Tex. v. FCC*[26] decision was the Court's most recent opportunity to rule on "whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)."[27] Such an agency determination may create an inherent conflict of interest, with the possibility of bias[28] impacting the legal purity of the agency's judgment, and thus, its own decision.

This Article readily concedes that an agency is not a court. Therefore, the rigidity and formality of the adversary principle, operative in legal proceedings before a court, do not apply in the context of an agency. Yet, "the [legal] maxim that no [person] is to be a judge in his own cause should be held sacred."[29] Arguably, somewhat similar substantive legal principles may also apply to an agency's determination.[30] However, while agencies may be perceived legally as artificial persons,[31] the APA expressly excludes them from the definition of "person."[32] Congress may have excluded agencies from this definition precisely to prevent biased agency actions.[33] Therefore, conceptions of bias may be relevant to an agency appointee's pecuniary interest in a matter before the agency for adjudication, rather than the agency's own "personal" interest in its own conceivable "self-aggrandizement."[34]

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26. 133 S. Ct. 1863 (2013).

27. *Id.* at 1868.

28. *See, e.g.*, King (De Vesci) v. Justices of Queen's Cnty., [1908] 2 I.R. 285, 294 (K.B.) ("[B]ias . . . [is] a real likelihood of an operative prejudice, whether conscious or unconscious." (internal quotation marks omitted)).

29. Dimes v. Grand Junction Canal, (1852) 10 Eng. Rep. 301 (H.L.) 315 (dictating that this maxim applies both in situations where a person has a personal interest and where he does not).

30. *See, e.g.*, Stephen J. Leacock, *Public Utility Regulation in a Developing Country*, 8 LAW. AMS. 338, 349–50 (1976) (applying the principles of bias to Barbadian persons who, similar to U.S. agency administrators, act quasi-judicially on a Board to administer a statute, and mandating that they be "disinterested" parties).

31. *See, e.g.*, J. Nick Badgerow, *Walking the Line: Government Lawyer Ethics*, 12 KAN. J.L. & PUB. POL'Y 437, 445 (2003) ("[A]n agency is an artificial person comprised of individual constituents . . . .").

32. 5 U.S.C. § 551(2) (West 2014) (defining "person" as "an individual, partnership, corporation, association . . . *other than an agency*" (emphasis added)).

33. *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1872 (2013).

34. *Id.* ("[W]e have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power *would have wrought a fundamental change in the regulatory scheme.*" (emphasis added)). In another context, agency preemption of state law, agency self-aggrandizement also demands consideration. *See* Gregory M. Dickinson, *Calibrating* Chevron *for Preemption*, 63 ADMIN. L. REV. 667, 698 (2011) ("[T]he danger of agency self-aggrandizement [in the context of federal

*2. Jurisdictional Concerns Are Irrelevant to Agency Determinations*

Whereas distinctions between jurisdiction and non-jurisdiction are highly relevant to courts of law, such distinctions do not have identical relevance in the context of determining the parameters of authority an agency possesses under administrative law. As Justice Scalia explained: "[t]he misconception that there are, for *Chevron* purposes, separate 'jurisdictional' questions on which no deference is due derives, perhaps, from a reflexive extension to *agencies* of the very real division between jurisdictional and nonjurisdictional that is applicable to *courts*."[35]

Thus, in *City of Arlington, Tex.*, the Supreme Court majority dismissed the assertion of any dichotomy of these principles as "a mirage" and concluded that the fundamental issue is more attenuated.[36] The majority enunciated that "[n]o matter how [the issue] is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."[37]

*3. Majority v. Dissent: Determining the Scope of the Agency's Power from Congress*

The *City of Arlington, Tex.* majority and dissent agreed that the fundamental question before the Supreme Court was whether the agency had acted within its authority.[38] However, Chief Justice Roberts expressed in his dissent that his overriding concern was the constitutional role of the judiciary—as one of the three coequal branches of government—in the U.S. separation of powers legal firmament to hold other branches of government accountable.[39] In his opinion, "[a] court should not defer to an agency until the court decides, *on its own*, that the agency is entitled to deference."[40]

The difference between the conclusions of the majority and the dissent lay in whether the detection of Congress's intention was, as the dissent stated, a

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preemption of state law through agency action] is sometimes cited as weighing against the application of *Chevron* deference.").

35. *City of Arlington, Tex.*, 133 S. Ct. at 1868 (emphasis added).

36. *Id.* at 1868, 1872.

37. *Id.* at 1868.

38. *Id.* at 1868. *See also id.* at 1883 (Roberts, C.J., dissenting) ("The appropriate question is whether the [congressional] delegation [of authority] covers the 'specific provision' and 'particular question' before the court." (citation omitted)). The majority and the dissent also agreed that the judiciary may properly defer to an agency's interpretation of an ambiguous provision in circumstances in which Congress clearly intended the courts to do so. *Id.* at 1872 ("The dissent is correct that . . . for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular matter adopted.").

39. *Id.* at 1886 ("[T]here is . . . firmly rooted in our constitutional structure . . . the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches [of government] do so as well.").

40. *Id.* at 1877 (emphasis added).

"question [that] is beyond the *Chevron* pale."[41] The dissent stated that a *court* must decide whether or not the *agency* was legally empowered to have made the decision at issue in the first place.[42] According to the dissent, courts should decide that question *before* the issue of according *Chevron* deference to the agency's decision is reached.[43] This distinction marks the line "in the sand" between the majority's and dissent's conclusions.[44] The majority reasoned that the ultimate determination was whether the agency had stayed within the boundaries of Congress' grant of authority, and found that *Chevron* deference applied automatically "because Congress ha[d] unambiguously vested the FCC with general authority to administer [the statute] . . . ."[45] While at least one Justice declared that the agency had remained within its boundaries,[46] the dissent concluded that the agency had overstepped the line.[47]

*4.* Skidmore *Foreshadowed the Agency Authority Issue, but Cases Continue to Arise*

The issue of an agency appropriating to itself more extensive parameters of authority than Congress intended had been analyzed and evaluated prior to *Chevron* and *City of Arlington, Tex.* Indeed, the question of staying "within the bounds of its statutory authority," addressed in *City of Arlington, Tex.*,[48] was precisely the issue before the U.S. Supreme Court almost seven decades earlier in *Skidmore*.[49] In *Skidmore*, the Supreme Court decided that, despite a lack of *express* legal authority to interpret a particular statute, an agency would likely have the experience and expertise to reach a more "informed judgment" on which courts could rely when deferring to their interpretation.[50] Therefore, the Supreme Court in *Skidmore* created deference criteria that constrained courts to consider the "thoroughness evident in [the agency's] consideration, the validity of [the agency's] reasoning, [the agency's] consistency with earlier and later

41. *Id.* at 1883 (internal quotation marks omitted).

42. *Id.*

43. *Id.* ("[W]hether Congress wants us to [defer to an agency's interpretation] is a question that courts, not agencies, must decide.").

44. *Id.* at 1874 ("Where we differ from the dissent is in . . . the dissent['s proposal] that even when general rulemaking authority is clear, *every* agency rule must be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion.").

45. *Id.*

46. *Id.* at 1875–77 (Breyer, J., concurring in part and concurring in the judgment).

47. *Id.* at 1884–86 (Roberts, C.J., dissenting).

48. *Id.* at 1868.

49. Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944) (finding that the agency had not exceeded its authority in interpreting the Fair Labor Standards Act to grant compensation to certain employees).

50. *Id.* at 140.

pronouncements, and all those factors which give it power to persuade, if lacking power to control."[51]

### 5. *The* Chevron *Doctrine Provides a Modern Framework for Analyzing Agency Interpretations*

Unfortunately, the *Skidmore* decision did not ultimately prove to be a panacea with regard to agency deference jurisprudence.[52] Thus, forty years after the *Skidmore* decision, the Supreme Court enunciated a modern benchmark substantive approach to determining the degree of deference to which agency decisions are entitled.[53] However, views differ with respect to *Chevron*'s substantive meaning[54] and its legal impact on administrative law principles.[55]

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51. *Id. See also* Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 849 (2010) ("In one sense, *Skidmore* is much more straightforward than *Chevron* because *Skidmore* does not include multiple steps and multiple versions.").

52. *See* Beermann, *supra* note 51, at 849 (noting that "[t]o some . . . a more constrained, certain doctrine is preferable to *Skidmore*" (footnote omitted)).

53. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839 (1984). *See also* Scalia, *supra* note 8, at 512 ("It should *not* be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is *entirely new law*." (emphases added)).

54. *See, e.g.*, Dickinson, *supra* note 34, at 705 ("*Chevron*'s presumption of delegation through ambiguity to agency expertise is quite reasonable."); Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 834 (2007) ("[B]oth *Skidmore* and *Chevron* partially reinforce each other[;] . . . ultimate interpretive authority is based upon institutional competence."); Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 55 ("By mid- to late-1985, near *Chevron*'s first anniversary, many decisions across many circuits could be cited for the proposition that the two-step *Chevron* framework . . . was simply settled law."); Randolph J. May, *Defining Deference Down, Again: Independent Agencies,* Chevron *Deference, and* Fox, 62 ADMIN. L. REV. 433, 448 (2010) ("*Chevron* deference is primarily all about [the] constitutional commitment to political accountability."); Rajiv Mohan, Chevron *and the President's Role in the Legislative Process*, 64 ADMIN. L. REV. 793, 794 (2012) ("In *Chevron* . . ., the Supreme Court held that courts should defer to an agency's reasonable interpretation of an ambiguous statute." (citation and footnote omitted)). *But see* Beermann, *supra* note 51, at 784 ("*Chevron*'s multiple meanings make analysis of *Chevron* very difficult."); Foote, *supra* note 24, at 697 ("*Chevron* and its progeny misstate the core function of public administration and misconstrue the legal authority for the administrative implementation of statutory programs."); William S. Jordan, III, Chevron *and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 254 (2009) ("*Chevron* does not support deference to agency *procedural* decisions . . . ." (emphasis added)); John S. Kane, *Refining* Chevron*-Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 590 (2008) ("[T]he *Chevron* framework is a policy decision by a Court that said it was unqualified to make policy decisions. . . [T]he deference Chevron dictates is a rebuttable presumption.").

55. *See, e.g.*, Criddle, *supra* note 1, at 1272 ("Although *Chevron* has since become the most cited case in modern public law, its theoretical underpinnings remain uncertain." (footnote omitted) (internal quotation marks omitted)); Foote, *supra* note 24, at 677 ("[T]he judge-made *Chevron* doctrines have had pernicious effects."); Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 2 ("Even after almost thirty years and thousands of recitations, unanswered questions about this *Chevron* framework abound."). *See also* Linda Jellum, Chevron*'s Demise: A Survey of* Chevron

In any event, the *Chevron* mandate first requires a clear intent of Congress to allocate authority to the agency to administer the particular statute being interpreted.[56] Second, the court must determine whether the statute was either "silent or ambiguous with respect to the specific issue" or issues in controversy.[57] Third, the court must be persuaded that, in light of the first and second prongs, the agency was entitled to significant deference in interpreting the statute as it did.[58]

Of course, if it were proven that Congress *expressly* and unambiguously allocated specific authority for an agency to take certain action, judicial deference to the agency's decisions would be assured.[59] However, clarity with regard to congressional intent is not guaranteed.[60] Therefore, judicial detection of the quantum of authority that an agency has been expressly or impliedly allocated by Congress can be enigmatic.[61] When the courts determine that Congress has not expressly stated the specific authority assigned to an agency, the courts must determine whether or not to give the agency's interpretation *Chevron* deference.[62]

*Chevron* is a thirty-year-old decision, and in the context of *City of Arlington, Tex.*, "the first question presented [was] [w]hether . . . a court should apply *Chevron* [deference] to . . . an agency's determination of its *own* jurisdiction."[63] The particular significance of this determination stemmed from the inescapable conflict of interest inherent in the agency's determination of the parameters of its own jurisdiction.[64]

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*from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 726 (2007) ("*Chevron* has proved to be less clear, predictable, and simple than originally envisioned.").

56. *Chevron U.S.A. Inc.*, 467 U.S. at 842–43.

57. *Id.* at 843.

58. *Id.* ("[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute."). *See also* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013) (explaining that when a statute is ambiguous, Congress must have "'understood that the ambiguity would be resolved . . . by the agency, and desired [that] the agency (rather than the courts) . . . possess whatever degree of discretion the ambiguity allows'" (citation omitted)).

59. *Chevron U.S.A. Inc.*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter . . . .").

60. United States v. Mead Corp., 533 U.S. 218, 227, 229 (2001) (Scalia, J., dissenting) (differentiating between express and implied congressional intent to grant an agency particular authority); *Chevron U.S.A. Inc.*, 467 U.S. at 843–44 (noting that sometimes Congress purposefully leaves ambiguous provisions or gaps in statutes for agencies to interpret).

61. *See* Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 73.

62. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) ("*Chevron*[] deference to [an agency's] statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *Chevron U.S.A. Inc.*, 467 U.S. at 843; Jordan, *supra* note 54, at 284 n.197 (providing further examples for the boundaries of permissible agency action under an ambiguous statute).

63. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1867–68 (2013) (emphasis added) (internal quotation marks omitted).

64. *See supra* Part I.B.1.

However, although the *Chevron* decision has articulated the appropriate modern test of deference, arguably, the court did not explicitly enunciate how to unerringly detect "clear" congressional intent for an agency to have a particular authority.[65] In *Chevron*, the judiciary failed to specifically articulate the parameters of identifying congressional intent in the context of apparently incomplete congressional expressions of such intent.[66] A growing number of courts have grappled with this conundrum since the time of the *Chevron* decision.[67]

Unfortunately, without express congressional statements within the statute, the extent to which the agency has the authority to interpret a particular matter remains unclear.[68] Therefore, the judiciary must do the best that it can to elucidate this confusion.[69] To avoid this potential conflict, it is important to understand the substantive principles of *Chevron* deference that courts must apply.[70]

### *C. Distinguishing* Chevron *from* Skidmore

There are substantial differences between the facts and circumstances of the *Chevron* controversy and those in *Skidmore*.[71] *Chevron* addressed the Environmental Protection Agency (EPA)'s interpretation of an ambiguity in the Clean Air Act[72] and assessed whether or not Congress had assigned the EPA authority to interpret the statute in the particular manner selected by that agency.[73] In contrast, the Supreme Court in *Skidmore* exhaustively analyzed the interpretations made by an administrator, who had ruled that waiting time did

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65. *See* Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 73.

66. *See id.*

67. *Id.* at 73–74 (positing that the answer for this difficulty in interpretation might lie outside the *Chevron* doctrine).

68. *See* United States v. Mead Corp., 533 U.S. 218, 240 (2001) (Scalia, J., dissenting) (noting that the Court refuses to establish a bright-line rule for distinguishing express intent from implied intent, and that even upon determining the category of intent, "the uncertainty is not at an end").

69. *See, e.g.*, City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1868 (2013) (establishing the test that courts can use because the agency's "scope" of authority is in question); Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 171 (1803) (positing that some legal questions are "properly determinable in the *courts*" (emphasis added)).

70. *See* Beermann, *supra* note 51, at 807–08 (highlighting the continuing difficulties of applying the *Chevron* framework and clarifications that the Supreme Court can make).

71. *Compare* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984), *with* Skidmore v. Swift & Co., 323 U.S. 134, 134–37 (1944).

72. Clean Air Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401–7614 (2012)).

73. *Chevron U.S.A. Inc.*, 467 U.S. at 840 (stating that the issue revolved around whether or not the EPA had authority to "allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble'").

not qualify as working time under the Fair Labor Standards Act.[74] The Court determined the administrator was acting without an express congressional authority to take the action.[75] The Court reasoned that the administrator's determinations "d[id] not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do."[76] Rather, the pertinent interpretations adopted by the administrator were ruled by the Supreme Court to be persuasive, but not legally binding on the Court in the context of that particular case.[77]

However, the *Chevron* court noted that the EPA was *expressly* authorized by Congress in the Clean Air Act "to promulgate National Ambient Air Quality Standards (NAAQ's)[,] . . . publish a list of categories of sources of pollution[,] and . . . establish new source performance standards (NSPS) for each."[78] The EPA's initial actions failed to attain the mandated goals set by Congress to have a certain level of NAAQ's by 1975,[79] and Congressional efforts to remedy the unresolved problems by follow-up legislation were similarly unsuccessful.[80] In fact, it was the political fallout from the clash of national antithetical economic constituencies in the U.S. that prevented Congress from statutorily resolving the nationwide problems relating to air quality issues.[81] Thereupon, the EPA rose to the occasion and issued rulings[82] specifically calibrated to fill the gaps left by this congressional failure until such time as Congress succeeded in enacting further legislation.[83]

In adjudicating the challenges to the EPA's actions, the Supreme Court reasoned that the challenge purported to impugn the EPA's actions by "center[ing] on the *wisdom* of the [EPA]'s policy, rather than whether [the policy] is a reasonable choice within a gap left open by Congress . . . ."[84] The challenge legally failed because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of

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74. *See Skidmore*, 323 U.S. at 134, 139 ("The conclusion of the Administrator . . . is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the workweek . . . .").

75. *Id.* at 139 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions.").

76. *Id.*

77. *Id.* at 140.

78. *Chevron U.S.A. Inc.*, 467 U.S. at 846 (naming section 109 of the 1970 Amendments as the source for the express authority).

79. *Id.* at 847.

80. *Id.*

81. *Id.* at 847, 851–53.

82. *Id.*

83. *Id.* at 847–48, 857–59 (noting the EPA's ultimate adoption of a "plantwide definition" of "sources," as opposed to a definition that distinguished between "nonattainment areas and PSD areas").

84. *Id.* at 866 (emphasis added).

the public interest are not judicial ones . . . ."[85] Moreover, the challenge failed because the EPA was assigned authority by Congress to act under the provisions of the Clean Air Act.[86] The Court concluded that the EPA's interpretation was legally valid because it was "a permissible construction of the [Clean Air Act]."[87] In essence, the *Chevron* Court held that when reviewing an administrative agency's interpretation of a statutory question, a court must first determine whether Congress' intent is clearly expressed in the statute or legislative history pertinent to the question in controversy.[88]

The Court also reasoned that if the judiciary clearly and unambiguously determines Congress' intent, then a court must exercise its own self-restraint and accord full deference to the interpretation enunciated by the agency.[89] However, when a court deduces that the statute is either silent or ambiguous with respect to the question in controversy, then a court must determine whether or not Congress' intent was to either expressly or impliedly assign discretionary authority to the agency.[90] Such delegated congressional authority would empower the agency with discretion to resolve any ambiguities by filling the gaps left by Congress in the statutory mandate.[91] If a court concluded that Congress had undeniably assigned express or implied discretionary authority to the agency responsible for administering the statute, then the court "should not disturb" the agency's choice.[92] This judicial obligation of "non-disturbance" was thus predicated on a court's conclusions that the agency's interpretation was convincingly reasonable and not antithetical to the legislative history or discernible congressional intent.[93]

Finally, a court should not disrupt the agency's interpretation unless it concludes that the agency's interpretation was "arbitrary, capricious," or otherwise "manifestly contrary to the [enabling] statute" that the agency was expressly assigned the power to administer.[94] Therefore, the Supreme Court reasoned that *Chevron* deference means that an administering agency "to which Congress has delegated policymaking responsibilities"[95] should be accorded judicial deference in legally appropriate circumstances.[96] Thus, if the administrative agency has provided a reasonable answer to the question posed

85. *Id.*
86. *Id.* at 843–44, 866.
87. *Id.* at 866.
88. *Id.* at 842–43.
89. *Id.*
90. *Id.* at 843.
91. *Id.* at 843–44.
92. *Id.* at 845.
93. *Id.*
94. *Id.* at 844.
95. *Id.* at 865.
96. *Id.* at 865–66 ("When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy, . . . the challenge must fail.").

by the pertinent statute by selecting a reasonably permissible construction of that statute, the court should not overturn the agency's interpretation simply because the court may disagree with it.[97]

## II. JUSTICE SCALIA'S DISSENT IN MEAD

### *A. Mead's Majority Questions the Chevron Deference Test*

In *Mead*, the Supreme Court majority concluded that a court must examine if Congress assigned the agency the authority "to make rules carrying the force of law, and that the agency interpretation . . . was promulgated in the exercise of that authority"[98] in order to determine whether or not an agency should be accorded *Chevron* deference.[99] The *Mead* Court also provided examples of "rulemaking or adjudication" that could confirm that the agency had been assigned the appropriate congressional authority.[100] The Court concluded, however, that affording *Chevron* deference to an agency's actions is sometimes appropriate even if the agency has not invoked the formal "rulemaking or adjudication" processes.[101]

Thus, the ultimate test of an agency's entitlement to *Chevron* deference required a determination of congressional intent.[102] In *Mead*, the Supreme Court concluded that the United States Customs Service (Customs) had not been assigned congressional authority to make rules endowed with the "force of law,"[103] and therefore, the action taken by the agency did not legally merit *Chevron* deference.[104]

Essentially, the *Mead* Court did not interpret the controversy as simply a matter of process-selection for Customs.[105] Rather, it seems that the Supreme Court perceived fundamental concerns of fairness to the impacted businesses as decisive.[106] The majority's perceptions appeared to focus on substantive equitable doctrines, such as freedom from unfair surprise.[107] Other important

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97. *Id.* at 865 ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.").

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

99. *Id.* *See also* Bressman, *supra* note 25, at 1475–88 (discussing the ramifications of the *Mead* holding on future administrative law decisions); Dickinson, *supra* note 34, at 676 (stating that, in *Mead*, "the [Supreme] Court transformed *Chevron*'s hard-and-fast rule of deference to agency interpretations to a more context-specific inquiry into congressional intent to delegate"); Geyser, *supra* note 25, at 2164 (discussing the expansion of the *Chevron* doctrine in *Mead*).

100. *Mead*, 533 U.S. at 229–30.

101. *Id.* at 231.

102. *Id.* at 229–31.

103. *Id.* at 231–32.

104. *Id.* at 231–34.

105. *See id.* at 232.

106. *Id.* at 233–34.

107. *See id.* at 233.

factors that the Court considered, such as opportunities for interested parties to express their views, also seemed critical to its conclusion.[108]

### *B. Justice Scalia's Dissent: Replacing* Chevron

In Justice Scalia's *Mead* dissent, he disagreed with the majority opinion for at least four main reasons.[109] First, he reasoned that the Court inappropriately added an additional step to the *Chevron* deference test.[110] He proposed that this addition impermissibly required that the agency be allowed to act with the "force of law."[111]

Second, Justice Scalia was exceptionally concerned that the court might be discarding the *Chevron* test of deference and resurrecting a partially modified *Skidmore* test.[112] Third, Justice Scalia disagreed with the majority's conclusion that the agency's interpretation must be restricted to the context of exercising the agency's "rulemaking or adjudication" authority.[113]

Finally, Justice Scalia argued that if an agency had the congressional authority to act with the "force of law" only in the rulemaking or adjudicatory context, then certain consequences would be inevitable.[114] For example, instead of "formal adjudication," the agency might be coerced into exclusively making use of one of the "safe harbor" methods of "notice-and-comment" rulemaking when interpreting a statute.[115] This course of agency action could later force the judiciary to overturn its *own* prior opinions.[116] Justice Scalia reasoned that the majority would foreclose some agencies from access to *Chevron* deference whenever such agencies were not assigned congressional authority to "make rules carrying the force of law."[117]

At first glance, the *Mead* majority may conceivably appear to add an additional step to the *Chevron* test.[118] However, on closer examination and analysis, the majority's decision may be reconciled with the language articulated by the Supreme Court in *Chevron*.

### *C. Reconciling* Chevron *and* Mead

A careful analysis of the *Mead* majority decision clearly indicates that no reconciliation of competing policy choices by the agency was at issue in

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108. *See id.*
109. *See id.* at 239–61 (Scalia, J., dissenting).
110. *Id.* at 239, 245–46.
111. *Id.* at 239.
112. *See id.* at 250.
113. *Id.* at 252–53.
114. *Id.* at 245.
115. *Id.* at 245–46.
116. *Id.* at 246–49 (remarking that in "no case, in the entire history of the federal courts, . . . ha[s the Supreme Court] allowed a judicial interpretation of a statute to be set aside by an agency").
117. *See id.* at 239.
118. *See id.*

*Mead*.[119] However, this reconciliation was *precisely* the issue in controversy in *Chevron*.[120] Essentially, the *Mead* Court was not modifying the test for determining entitlement to *Chevron* deference.[121] Rather, the Court simply sought to restate congressional intent as the quintessential component of *Chevron* deference.[122]

On the other hand, *Chevron* enunciated that an agency should be accorded judicial deference when its interpretation of a statute is "reasonable" and Congress has unambiguously "committed to the agency's care [the responsibility of interpreting] the statute" in question.[123] So, although the *Chevron* Court did not specifically use the phrase "force of law," it can be inferred that the judiciary would accord this high level of deference only to agencies explicitly assigned congressional authority to administer the statute under scrutiny in carefully calibrated circumstances.[124] The majority in *Mead* appeared to conclude that, whereas the resolution of evident policy choices would make the agency's intellectual struggle patent,[125] a more attenuated analysis of underlying consequences would be best attained by conducting a *Skidmore* analysis and evaluation.[126]

### *D. Scalia's Other Concerns: The Inevitable Confusion Created by Multiple Deference Standards*

#### *1.* Mead*'s Changes to the* Chevron *Test May Lead to Agency Troubles*

In *Mead*, Justice Scalia questioned whether the Supreme Court was seeking to restore the prior "*Skidmore* deference" test in administrative law.[127] He reasoned that if the Supreme Court chose to resurrect the previously abrogated *Skidmore* deference test, then agencies and litigants would be at a disadvantage.[128] Restoring *Skidmore* deference would unfairly deprive agencies and litigants of knowing what type of deference ruled supreme in American

119. *See id.* at 221 (describing the single policy concern).

120. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("[T]he decision involves reconciling conflicting policies.").

121. *See Mead*, 533 U.S. at 237–38 (noting that different situations and statutes can call for tests of deference other than that enunciated by *Chevron*).

122. *Id.* at 227.

123. *Chevron U.S.A. Inc.*, 467 U.S. at 845.

124. *See id.* at 866; *supra* notes 98–99 and accompanying text (providing the holding of *Chevron*).

125. *See Mead*, 533 U.S. at 226–27.

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

127. *Id.* at 241 (Scalia, J., dissenting).

128. *Id.* at 240–41.

administrative law to any degree of reasonable certainty.[129] In the view of one commentator:

> [W]ere the [*Mead*] doctrine actually to devolve into a case-by-case search for congressional intent, *Chevron* would lose all utility as a bright-line rule, and all *Chevron* cases would be thrown into . . . unpredictable chaos . . . . In short, all of Justice Scalia's worst fears would be realized.[130]

In reality, an unavoidable hiatus would arise until the Supreme Court decided each case involving agency statutory interpretation.[131] This would also unfairly deprive the entire legal community of anticipated guidance from the Supreme Court.[132]

*2.* Mead *Highlights the Debate on the Effect that* Chevron *had on* Skidmore *Deference*

The issue of abrogation or continued survival of *Skidmore* deference was particularly important to Justice Scalia in *Mead*.[133] In Scalia's opinion, the Supreme Court did not intend to abrogate *Skidmore* deference through its pre-*Chevron* decisions.[134] However, Scalia's dissenting opinion decisively concluded that the Supreme Court unequivocally abrogated *Skidmore* deference by virtue of its *Chevron* decision and post-*Chevron* jurisprudence.[135]

Justice Scalia is not necessarily correct in proposing that the Supreme Court eliminated *Skidmore* deference principles through its *Chevron* decision. In reality, the Supreme Court cited *Skidmore* without declaring that the decision was being overruled.[136] Therefore, opposing points of view may exist. For example, the Supreme Court may have simply declined to follow or even apply the *Skidmore* deference analysis because the specific issue in *Chevron* did not require application or consideration of that test.[137]

However, in a different context, the Supreme Court explained the legal effect of such conduct by the Court.[138] Declining to follow *Skidmore—sub silentio—*

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129. *See id.* at 241, 245.

130. *See* Dickinson, *supra* note 34, at 688.

131. *See Mead*, 533 U.S. at 238 (explaining that courts must decide which level of deference a case requires).

132. *Id.* at 240–41, 251 (Scalia, J., dissenting).

133. *See id.* at 256.

134. *See id.* at 241.

135. *See id.* at 241, 253–55 (exploring and, ultimately discounting, an "exception" case that provides support for the majority's theory post-*Chevron*).

136. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 865 n.40 (1984).

137. *See Mead*, 533 U.S. at 237 (stating that "[t]he Court . . . said nothing in *Chevron* to eliminate *Skidmore*'s recognition of various justifications for deference depending on the statutory circumstances and agency action").

138. *See, e.g.*, Fed. Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481, 499 n.16 (1958) ("Certainly it must be assumed that the Court would refrain from settling *sub silentio* an issue of such obvious importance and difficulty plainly requiring a clearly expressed disposition.").

does not unequivocally justify a conclusion that the Supreme Court completely or even partially overruled *Skidmore* as a controlling precedent with respect to according judicial deference to agency decisions. Arguably, and as the *Mead* Supreme Court decision acknowledged by its judgment, surviving *Mead* precedential validity is also tenable.[139]

Additionally, Justice Scalia disagreed with the *Mead* majority because the method of dissemination of the agency's viewpoint[140] was not addressed in *Chevron*.[141] According to Justice Scalia, if the majority limited an agency to promulgating an interpretation through formal proceedings *only*, it would be adding an additional step to the *Chevron* test.[142] Justice Scalia did not perceive the *Chevron* decision to mandate such a formal interpretation process.[143]

One may propose that prevention of unfair surprise is an important requirement in administrative agency behavior and that making use of formal proceedings to promulgate agency policy changes would effectively eliminate unfair surprise.[144] However, prevention of unfair surprise is not a relevant consideration in *every* action that an agency takes.[145] The use of formal proceedings[146] is intended to prevent unfair surprise when other means of resolving a matter before the agency might be unfair.[147] However, in *Mead*, the corporation acting as an importer was the party impacted by the agency action.[148]

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139. *See Mead*, 533 U.S. at 238–39 ("Since the *Skidmore* assessment *called for here* ought to be made in the first instance by the Court of Appeals for the Federal Circuit or the CIT, [the Court] . . . vacate[s] the judgment and remand[s] the case for further proceedings consistent with this opinion." (emphasis added)).

140. *See id.* at 243 (Scalia, J., dissenting) ("There is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law.").

141. *Id.* at 252 ("*Chevron* . . . made no mention of the 'relatively formal administrative procedure[s],' . . . that the Court today finds the best indication of an affirmative intent by Congress to have ambiguities resolved by the administering agency." (citation omitted)).

142. *See id.* at 239–40 (Scalia, J., dissenting).

143. *Id.*

144. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (noting that "as long as interpretive changes create no unfair surprise-and the [agency's] recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation . . . makes any such surprise unlikely here-the change in interpretation alone presents no separate ground for disregarding the [agency's] present interpretation" (citations omitted)).

145. *See, e.g.*, Okla. Dep't of Envtl. Quality v. EPA, 740 F.3d 185, 192 (D.C. Cir. 2014) (finding that unfair surprise was not an issue when determining the validity of an EPA ruling on national air quality standards).

146. *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 486 (Foundation Press 10th ed., 2003) ("[F]ormal rulemakings have become quite rare."). *See also* LAWSON, FEDERAL ADMINISTRATIVE LAW, *supra* note 1, at 207–08 (noting the origins of formal rulemaking in administrative law).

147. *See* STRAUSS ET AL., *supra* note 146, at 669–72 (discussing the issues biased agency actions create and how formal rulemaking may prevent them).

148. *Mead*, 533 U.S. at 224–25 (noting that the Mead Corporation imports day planners that were tariffed as a result of the EPA's promulgation).

This party could effectively protect itself by shifting the costs of increased import duties forward "downstream" to the ultimate consumer. The importers' profit levels would not be reduced or impaired by the validity of the action actually taken or by the method of dissemination selected by the Customs officials in *Mead*.

Therefore, Justice Scalia viewed the *Mead* majority's addition of a step to the implementation of the agency's determination as a modification to the *Chevron* test to include only agencies that act through one of the "safe harbor" methods.[149] This additional step would negatively impact agency discretion with regard to the promulgation method that the agency could otherwise freely select.[150] This interpretation would potentially snatch *Chevron* deference from agency decisions in circumstances where such agencies had been assigned congressional authority to interpret a silent or ambiguous statute.[151]

For Justice Scalia, the result of such a ruling would be that agencies would not know whether their interpretation would be accorded *Chevron* deference until the case reached a court.[152] The court would then be limited to a determination as to whether or not the agency had acted with some potentially mysterious "force of law."[153] It would be legally inappropriate and certainly disconcerting to litigants to reach this determination at this stage in the legal process.[154] A potentially favorable agency interpretation could be nullified based upon conclusions that the agency failed to promulgate in its interpretation through some form of formal rulemaking procedure.[155]

However, some support exists for the assertion that the majority sought to preserve some degree of future flexibility.[156] The *Mead* majority seemed to acknowledge that there are some unarticulated instances when, despite the lack of a formal procedure, an agency's action would not necessarily mean that it should be denied *Chevron* deference.[157]

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149. *Id.* at 246 (Scalia, J., dissenting) ("[I]nformal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm that the Court has unleashed . . . .").

150. *Id.* (holding that "informal rulemaking-which the Court was once careful to make voluntary unless required by statute . . . will now become a virtual necessity" (citations omitted)).

151. *See id.*

152. *Id.* at 240 (Scalia, J., dissenting) (explaining that "[l]itigants cannot then assume that the statutory question is one for the courts").

153. *Id.* ("Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such application can be set aside unless it appears that Congress delegated authority . . . to make rules carrying the force of law." (internal quotation marks omitted)).

154. *Id.* at 240–41.

155. *Id.*

156. *See, e.g.*, *id.* at 230, 237–38 (arguing for flexibility between the *Chevron* and *Skidmore* tests).

157. *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 . . . .").

*3. Scalia Advocates Against Inefficiency in Administrative Law Due to Lack of Formal Rulemaking Procedures*

Finally, Justice Scalia expressed concern that if a court rejected an agency's interpretation because the agency failed to promulgate the interpretation through a formal proceeding, and the court made a conflicting judicial interpretation, then the agency could merely promulgate its desired interpretation through a formal proceeding.[158] The court could then be forced to reverse its earlier opinion upon subsequent challenge to the formal agency action.[159] Such possibilities raise the issue of an agency possibly being allowed to easily overturn a court's *stare decisis*, thereby demoting the power constitutionally assigned to the judiciary to nothing more than advisory-opinion status.[160]

There may be flaws that inherently exist in such a point of view. Although the *Mead* Court may not have fully addressed this point, it specifically addressed the same point about four years in *Brand X*.[161] Justice Scalia perceived this later articulation by the Supreme Court majority in *Brand X* as simply a "belated remediation of *Mead* . . . ."[162]

The Supreme Court in *Brand X* pointed out that simply because an agency has acted within one of the mentioned "safe harbor" methods[163] does not necessarily mean that Congress intended to assign any absolute authority to the agency.[164] This assertion means that the agency would be precluded from taking subsequent formal action to coerce the court into ruling against its own *stare decisis* if the judiciary had initially ruled against an agency interpretation and substituted a judicial interpretation.[165]

## III. JUSTICE SCALIA'S BRAND X DISSENT

### *A. The* Brand X *Majority Opinion*

In *Brand X*, the Supreme Court held that Congress had indeed assigned to the Federal Communications Commission (FCC) authority to fill any gaps and

158. *Id.* at 247–48 (Scalia, J., dissenting).

159. *Id.* at 248.

160. *Id.* at 247–48 ("Approving this procedure would be a landmark abdication of judicial power.").

161. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong.").

162. *See id.* at 1018 (Scalia, J., dissenting).

163. *See supra* text accompanying note 115.

164. *Brand X*, 545 U.S. at 1004 (Breyer, J., concurring).

165. *See id.* at 1015–17 (Scalia, J., dissenting) (extrapolating the effects of the majority's allowance for "judicial decisions subject to reversal by executive officers").

interpret any ambiguities within the Communications Act[166] as permitted under *Chevron* deference.[167] The Court ruled that the Communications Act was ambiguous with respect to the type of internet service providers that fell within the "telecommunications servic[e]" regulations.[168] The FCC had interpreted the statute to mean that broadband cable internet service providers were not among those regulated.[169]

The Supreme Court, as with respect to the *Chevron* decision twenty years prior, determined that it was Congress' intent to empower an administering agency to fill any gaps or interpret any ambiguities left in a statute by Congress.[170] The Court concluded that judicial interpretation should only play a role in initially determining whether a statute was unambiguous or not.[171] Therefore, by virtue of this approach, the agency was precluded from making any conflicting interpretations.[172] The Court ruled that the FCC had the requisite congressional authority to receive *Chevron* deference,[173] and therefore, judicial intervention was not justified.[174]

### *B. Scalia's Dissent: Invalidation of Legal Precedent*

Justice Scalia disagreed with the Court's majority opinion for two reasons.[175] First, Justice Scalia believed that this ruling allowed an agency to actively and legally invalidate a prior judicial interpretation of a statute.[176] Second, Scalia contemplated that the majority's decision might be interpreted to legally empower an agency to disregard established judicial legal precedent.[177]

#### *1. Scalia's First Concern: Empowering Agencies to Overturn Statutory Rulings*

In Justice Scalia's first argument, he articulated that the majority opinion potentially allowed an agency to overturn a Supreme Court ruling by the agency's own enunciation of the "best" interpretation of an ambiguous statutory

166. Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (codified at 47 U.S.C. § 151 (West 2014)).

167. *Brand X*, 545 U.S. at 980–81 ("Congress ha[d] delegated to the [FCC] the authority to 'execute and enforce' the Communications Act . . . and to 'prescribe such rules and regulations as may be necessary . . . to carry out the provisions' of the Act.").

168. *Id.* at 980–81.

169. *Id.* at 978–79.

170. *Id.* at 980–82.

171. *Id.* at 982–83.

172. *Id.*

173. *Id.*

174. *Id.* at 981–82.

175. *Id.* at 1016–18 (Scalia, J., dissenting).

176. *Id.* ("A court's interpretation is conclusive, the Court says, only if it holds that interpretation to be 'the *only permissible* reading of the statute,' and not if it merely holds it to be 'the *best* reading.'").

177. *Id.* at 1018–19.

provision.[178] Such empowerment would permit Supreme Court decisions on issues of law to be later overruled or reversed by an agency's decision.[179] Justice Scalia had addressed this precise concern almost five years earlier when *Mead* was decided.[180] Furthermore, if Scalia's interpretation of the majority opinion is correct, the majority's position goes against the fundamental legal principles of U.S. law that state that once the U.S. Supreme Court has made an interpretation, each such interpretation is the supreme law of the land throughout the United States and its territories.[181]

Justice Scalia reasoned that if the Supreme Court decided that an agency decision was not entitled to *Chevron* deference, this decision by the Court would amount to a judicial interpretation.[182] Thus, if the agency subsequently used a formal process of promulgation to announce its decision, then the court's earlier decision—that the agency's action was null and void because of the *means* that it used to promulgate its interpretation—could potentially be reversed because the agency would have re-promulgated its earlier decision using a viable "force of law" source of authority.[183]

However, Justice Scalia's reasoning is not entirely convincing. The majority arguably concluded that if the judiciary was put in a situation in which it was required to interpret a statute prior to an agency's opportunity to do so, then the administering agency should not be precluded from making a different interpretation.[184] This conclusion would be valid where Congress had assigned express or implied authority to the agency to make a pertinent interpretation.[185] After all, Congress is a branch of government coequal to the judiciary.[186]

The *Brand X* Court pointed out that "whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur."[187] On the contrary, congressional delegation of authority to an agency to interpret a statute under *Chevron* "established a presumption that Congress, when it left ambiguity in a

178. *Id.* at 1016–17.

179. *Id.*

180. *See supra* notes 158–160 and accompanying text.

181. *See, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333–35 (1816) (establishing that the Supreme Court exercises appellate jurisdiction over state courts as well as federal courts, and that its decisions are final and binding).

182. *Brand X*, 545 U.S. at 1016 (Scalia, J., dissenting).

183. *Id.* at 1016–17. *See also* United States v. Mead, 533 U.S. 218, 229–31 (2001) (exploring an agency's ability "to speak with the force of law when it addresses ambiguity in [a] statute").

184. *Brand X*, 545 U.S. at 983–84. *See also* Geyser, *supra* note 25, at 2156–67 ("Justice Scalia's concerns are unfounded and . . . *Brand X* has not created a constitutional problem.")

185. *Brand X*, 545 U.S. at 982–83.

186. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 205 (2009) ("The Congress is a coequal branch of government whose Members take the same oath [that Members of the judiciary take] to uphold the Constitution of the United States." (internal quotation marks omitted)).

187. *Brand X*, 545 U.S. at 983.

statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."[188]

Therefore, the Supreme Court majority acknowledged that a court could be placed in a situation where there is a case in controversy concerning an ambiguous or silent statute that the administering agency has not yet interpreted.[189] Should this occurrence materialize, the court has a duty to make a judicial determination as to the best interpretation.[190] However, the Court conceded that when Congress has assigned the "first and foremost"[191] authority to exercise its discretion in interpreting a statute to an agency, it is because "agencies are better equipped to make" "difficult policy choices."[192]

Furthermore, courts should defer to the administering agency once that agency has formulated a different interpretation.[193] Essentially, courts must find a way to attain non-interference with the fundamental doctrine of judicial precedent,[194] while simultaneously acknowledging that "[t]here should be greater readiness to abandon an untenable position when the rule to be discarded may[,] . . . in its origin[,] . . . [be] the product of institutions or conditions which have [changed] . . . with the progress of [time]."[195]

This reasoning does not necessarily mean that the judicial interpretation is not legally binding.[196] Rather, unless a court has determined that the statute is unambiguous, it is the intent of Congress that the agency's interpretation should be preeminent.[197] This simply means that Congress intended to grant the administering agency discretion to interpret the statute differently than the court, provided that such an interpretation is reasonable.[198]

The settled law—undisturbed by issues related to the parameters of *Chevron* deference—was enunciated in *Mead* and explained by Justice Breyer in his concurring opinion in *Brand X*.[199] In *Mead*, as aforementioned, the Supreme

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188. *Id.* at 982.

189. *See id.* ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

190. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

191. *Brand X*, 545 U.S. at 982.

192. *See id.* at 980.

193. *Id.*

194. *See* Geyser, *supra* note 25, at 2156–67 (internal quotation marks omitted) (arguing that courts still "say what the law is" by establishing boundaries within which agencies may operate).

195. CARDOZO, *supra* note 10, at 151.

196. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 171 (1803) ("[A] *legal* question [is] properly determinable in the *courts* . . . ." (emphasis added)).

197. *See* text accompanying *supra* note 187.

198. *Brand X*, 545 U.S. at 980.

199. *See id.* at 1004 (Breyer, J., concurring).

Court concluded that if a court determined that an agency did not have congressional authority to make a particular statutory interpretation, then a court's decision is not at risk of having its ruling overturned.[200] This conclusion is correct because the use of a formal process by an agency in such circumstances would be to no avail.[201] As Justice Breyer explained: "Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation . . . ."[202]

Should an agency misconstrue the court's decision and purport to override the judicial interpretation through the activation of a formal process, the court is obligated to initiate its judicial inquiry based on the *Chevron* criteria to determine congressional intent in the particular circumstances.[203] If the court determines that no congressional intent to assign the agency such authority exists, then no degree of formality of process taken by an agency is legally capable of overturning the judicial interpretation under scrutiny.[204]

*2. Scalia's Second Concern: Affording Agencies* Chevron *Deference*

Justice Scalia's second argument addresses the discernment of the Court's meaning in light of the language that the Supreme Court used in addressing whether or not an agency should be afforded *Chevron* deference.[205] Essentially, he questions whether the Court's majority opinion could empower an agency—acting without the congressional authority—to interpret statutory ambiguities so as to invalidate a judicial decision.[206] He seems to suggest that the term "best" interpretation, rather than "only" interpretation, could place the judicial holding in a precarious position that could fundamentally impact future statutory interpretation.[207]

However, Justice Scalia may have overlooked a potentially credible alternative. Inherent judicial power allows a court to stay the legal proceedings and formally seek the agency's "best" interpretation by presenting the agency with a court request for a determination of the pertinent statute.[208] A branch of government (the judiciary) seeking a determination from another coequal branch of government (the executive), in circumstances where a third coequal branch of government (the legislature) had expressly or impliedly empowered an

200. *See* United States v. Mead, 533 U.S. 218, 236–38 (2001).

201. *See Brand X*, 545 U.S. at 1004 (Breyer, J., concurring).

202. *Id.* (Breyer, J., concurring) (citation omitted).

203. *See Mead*, 533 U.S. at 229–30.

204. *Brand X*, 545 U.S. at 982–83.

205. *See id.* at 1018 (Scalia, J., dissenting).

206. *Id.* at 1016–17.

207. *Id.* at 1018–19.

208. *See supra* note 190 and accompanying text (discussing the judiciary's inherent power to make law). *See also* 5 U.S.C. § 706 (West 2014) (describing the scope of the judiciary's power when reviewing agency action).

agency by statute to resolve such an issue is entirely rational conduct. The previously-stayed court action would resume upon the agency providing an official determination of its "best interpretation" to the court. *Chevron* deference jurisprudence would also apply to such agency determinations. Of course, if the court was determining whether or not an agency determination should be accorded *Chevron* deference, and the court ruled that neither gaps nor ambiguities existed in the statute, the court should conclude that only the courts' interpretation could conceivably be legally tenable.

## IV. THE DEGREE OF HARMONY OR CONFLICT BETWEEN JUSTICE SCALIA'S TWO DISSENTING OPINIONS AND THE "ORTHODOX" PRINCIPLES RELATING TO THE "CHEVRON FRAMEWORK" IN JUDICIAL REVIEW OF AGENCY LEGAL CONCLUSIONS

A comparison between Justice Scalia's dissents in *Mead*[209] and in *Brand X*[210] raises the specter of inconsistency in his reasoning. In *Mead*, the Supreme Court did not accord *Chevron* deference in interpreting the agency's action,[211] whereas in *Brand X* the Court afforded the agency's decision *Chevron* deference.[212] Justice Scalia's central argument in both his *Mead* and *Brand X* dissents centers on each case's majority narrowing the original *Chevron* analysis.[213]

Justice Scalia's opinion in his *Brand X* dissent arguably extends his substantive viewpoint expressed in his *Mead* dissent.[214] In his *Mead* dissent, however, Justice Scalia reasoned that the majority was modifying and reconfiguring *Chevron* deference doctrine in such a way that it did not apply to the agency's decision.[215] Rather, according to Scalia, the *Mead* majority concluded that Customs should not be accorded the deference to which that administrative agency's determination was entitled under *Chevron* deference parameters.[216]

However, Customs was not assigned express power by Congress "to make rules carrying the force of law" with regard to the use of Ruling Letters.[217] Notwithstanding this absence of express conferral of power by Congress, Justice Scalia was apparently influenced by the Solicitor General's conclusions.[218]

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209. *See supra* Part II.B.

210. *See supra* Part III.B.

211. *See supra* notes 103–104 and accompanying text.

212. *See supra* notes 173–174 and accompanying text.

213. *See supra* notes 149–151, 205–07 and accompanying text.

214. *Compare* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1005–20 (2005) (Scalia, J., dissenting), *with* United States v. Mead, 533 U.S. 218, 239–61 (2001) (Scalia, J., dissenting).

215. *Mead*, 533 U.S. at 256–59 (Scalia, J., dissenting).

216. *Id.*

217. *Id.* at 226–27.

218. *Id.* at 258 (Scalia, J., dissenting) ("There is no doubt that . . . Customs . . .'s interpretation represents the authoritative view of the agency. . . . [T]he . . . United States has filed a brief . . . that

Scalia preferred to apply the maxim of facilitating the "triumph of substance over form" rather than the majority's somewhat talismanic "force of law" focus.[219]

A "force of law" discussion did not predominate in the *Chevron* opinion, although the EPA had express Congressional authority to administer the statute that the EPA was interpreting, justifying the *Chevron* deference.[220] However, Scalia's dissent is supported by the mandatory empowerment of the Customs Service, pursuant to Ruling Letters issued by the Secretary of the Treasury, to "fix the final classification and rate of duty applicable to [imported] merchandise under the [Harmonized Tariff Schedule of the United States]."[221] The majority's absolute focus on the specific *agent* empowered to issue Ruling Letters could be perceived as elevating form over substance.[222]

Finally, the Customs department in *Mead* was not assigned by Congress the unconditional degree of power necessary to administer the pertinent statute comparable to the degree assigned to the EPA in *Chevron*.[223] The *Mead* majority concluded that this disparate assignment of power by Congress when comparing *Chevron* with *Mead* justified and supported the difference in the two decisions.[224]

Turning to Justice Scalia's dissent in *Brand X*, his primary concern was the risk of an agency being accorded the legal power to nullify a prior judicial interpretation of a statute by the Supreme Court.[225] Justice Scalia perceived the FCC's determination as behavior in an adjudicative capacity.[226] He reasoned that the FCC's determination should not, based on the *Mead* decision, be accorded the *Chevron* level of administrative deference because Congress had not expressly assigned the necessary level of legal authority to the FCC.[227] However, the *Mead* majority provided two examples of how congressional authority *could* be seen, such as the agency acting with "notice-and-comment

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represents the position set forth in the ruling letter to be the *official position of the Customs Service*." (emphasis added) (citation omitted)). *See also* Beermann, *supra* note 51, at 826 ("Justice Scalia's opinion suggests an alternate path: *Chevron* deference should apply whenever an interpretation reflects the official position of an agency on a matter that would otherwise qualify for *Chevron* deference . . . .").

219. *Mead*, 533 U.S. at 243 (Scalia, J., dissenting).

220. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984).

221. *Mead*, 533 U.S. at 221–22 (internal quotation marks omitted).

222. *See id.* at 221.

223. *Compare supra* note 78 and accompanying text (providing that the *Chevron* court found express authority for the EPA's actions), *with supra* notes 103–104 and accompanying text (concluding that the *Mead* court found Congress did not grant *Customs* authority).

224. *See Mead*, 533 U.S. at 232–33.

225. *See supra* note 177 and accompanying text.

226. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1016–17 (2005) (Scalia, J., dissenting).

227. *Id.* at 1015–17.

rulemaking or formal adjudication," or if the agency failed to act with "administrative formality," it would not be awarded *Chevron* deference.[228]

There is both harmony and conflict inherent in Justice Scalia's two dissents.[229] Justice Scalia asserts that the majority is not following its own *stare decisis*.[230] Although in one dissent Justice Scalia concluded that the administering agency should have been accorded *Chevron* deference,[231] and in the other opinion he finds differently,[232] this difference does not necessarily discredit his reasoning. Although it may appear on the surface that Justice Scalia is contradicting his own dissent in *Mead* by his reasoning in his *Brand X* dissent, a more careful and reflective analysis, reveals that Justice Scalia may essentially be striving for the ascendancy of substance over form.[233]

## V. CONCLUSION

The founders may have concluded that certain structural agencies of the executive branch[234] should evolve rather than be rigidly set in the U.S. Constitution immediately. Or, the founders may have concluded that it was best to err on the side of restraint. One member of the judiciary has expressed the view that "the administrative process may well be efficient in achieving its goals . . . ."[235] Regardless, the evolution of agencies has been simultaneously both perpetual and permanent in the hands of the legislature[236] assisted by the watchful vigilance of the judiciary.[237] However, a cautionary admonition from two commentators may prove to be prescient.[238]

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228. *Mead*, 533 U.S. at 230–31. *See also* Dickinson, *supra* note 34, at 705, at 687 ("*Mead*'s focus is on *formality*." (emphasis added)).

229. *See supra* notes 209–14 and accompanying text.

230. *See Mead*, 533 U.S. at 239, 249 (Scalia, J., dissenting).

231. *Id.* at 239.

232. *Brand X*, 545 U.S. at 1019 (Scalia, J., dissenting).

233. *See, e.g.*, Foote, *supra* note 24, at 690 (noting that the Supreme Court decisions in *Mead* and *Brand X* are a "remarkable transformation of the paradigm of agency work from the pre-*Chevron* years . . . to the distorted reality of *Chevron*").

234. *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting) ("[M]odern administrative agencies fit most comfortably within the Executive Branch . . . .").

235. POSNER, ECONOMIC ANALYSIS, *supra* note 1, at 575 (articulating the rationale for the creation of agencies).

236. *See City of Arlington, Tex.*, 133 S. Ct. at 1868 ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.").

237. *Id.* at 1876 (Breyer, J., concurring in part and concurring in the judgment) ("Although seemingly complex in abstract description, in practice this framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency.").

238. *See* Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 61 ("The more *Chevron* mandates deference, the more power flows from the judiciary to the executive. For those who place faith in the courts as the *primary* engine of justice, that is *unwelcome*." (emphasis added)).

Nevertheless, the Supreme Court decision in *Chevron* has successfully contributed to the continuing evolution and development of agencies and their role as an integral part of one of the three coequal branches of government in the United States. The *Chevron* decision and the subsequent *Chevron* deference jurisprudence that the decision has fostered have effectively calmed this area of administrative law.[239] As Judge Easterbrook has observed: "[W]e're all trying to apply the law laid down by the Supreme Court."[240] Indeed, it seems that some peripheries of the doctrine have mellowed since the *Chevron* decision.[241] Other contentions that continue to rage unabated essentially relate to issues tangential to *Chevron* deference.[242] However, in light of the 2013 Supreme Court decision in *City of Arlington, Tex. v. FCC*, penned by Justice Scalia,[243] in spite of his dissents[244] in *Mead* and *Brand X*, it may even be safe to conclude that Justice Scalia has returned to the fold.

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239. *See, e.g.*, *id.* at 73 ("The great debate over *Chevron*'s soul [has] ended with nary a whimper, much less a bang.").

240. *See Interview with United States Court of Appeals Judges: Frank H. Easterbrook*, 15 SCRIBES J. LEGAL WRITING 1, 15 (2013).

241. *See, e.g.*, Lawson & Kam, Chevron*'s Origins*, *supra* note 1, at 73 ("The debate is effectively settled whether deference is generally due to agency legal interpretations *even regarding pure or abstract legal questions* . . . ." (emphasis added)).

242. *Id.* ("*Chevron* continues to be a contentious subject across a wide range of *other issues* for which resolutions are much less likely, clear, or both." (emphasis added)).

243. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1874–75 (2013). *See also* Posner, *Scalia's Incoherence*, *supra* note 3, at 5 ("Justice Scalia has called himself . . . a 'faint-hearted originalist.'").

244. *See*, *e.g.*, Bressman, *supra* note 25, at 1444 ("Notwithstanding Justice Scalia's doomsday forecast, the majority believed that *Mead* was justified in principle. The Court stated that *Mead* 'tailors deference to [the] variety' of administrative procedures that Congress envisions and agencies employ."). *See also* Geyser, *supra* note 25, at 2131 (arguing that "Justice Scalia's concerns are unfounded and . . . *Brand X* does not permit agencies to 'overrule' courts").