CHEVRON'S CONSENSUS

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For nearly a quarter-century, federal courts have deferred to administrative agencies' statutory interpretations under the renowned Chevron *doctrine. Despite* Chevron*'s widespread appeal, its theoretical foundations remain contested. Judges and academics have debated whether* Chevron *rests on a theory of congressional delegation, administrative expertise, the executive branch's political responsiveness and accountability, agency deliberative rationality, concerns for national regulatory uniformity, or inherent executive power. This Article challenges the terms of this longstanding debate by demonstrating that* Chevron *does not rest exclusively upon any of these competing rationales. Instead,* Chevron *forges a pragmatic consensus between several leading theories, none of which can be properly considered redundant. By embracing pluralism and practical wisdom in statutory interpretation,* Chevron *furnishes an enduring response to the fragmentation of contemporary legal and political theory.*

In United States v. Mead Corp.*, the Supreme Court appeared to abandon* Chevron*'s consensus by endorsing congressional delegation as the touchstone for* Chevron *deference. By all accounts,* Mead *has sown confusion and discord in the circuit courts. What* Mead*'s critics have failed to appreciate, however, is that the Supreme Court actually employs the congressional delegation theory instrumentally to sustain* Chevron*'s consensus: where agency decision-making processes satisfy all of the leading rationales for deference, the Court applies* Chevron*. Conversely, where any of the leading rationales for deference remains unsatisfied, the Court evaluates agency statutory interpretations under the residual* Skidmore *test.*

The time has come to dismantle Mead*'s delegation fiction and expressly reconstruct* Chevron*'s pluralist consensus as the definitive test for* Chevron *deference. By candidly reaffirming* Chevron*'s consensus, the Supreme Court would clarify the scope of* Chevron*'s domain and enhance judicial transparency and accountability in statutory interpretation.*

INTRODUCTION

Nearly a quarter-century has passed since the Supreme Court decided *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, holding that federal courts must defer to administrative agencies' reasonable interpretations of ambiguous statutes.[1] Although *Chevron* has since become "the most cited case in modern public law,"[2] its theoretical underpinnings remain uncertain.

[1] Chevron U.S.A, Inc. v. Natural Res. Def. Council, Inc, 467 U.S. 837, 844 (1984).

[2] Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823 (2006); *see also* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND POLICY: PROBLEMS, TEXT, AND CASES 289 (5th ed. 2002) (observing that *Chevron* has been cited more times than *Brown v. Board of Education*, *Roe v. Wade*, and *Marbury v. Madison* combined).

Scholars have debated whether *Chevron* deference rests upon a theory of congressional delegation, administrative expertise, agency deliberative rationality, the executive branch's political responsiveness and accountability, concerns for national regulatory uniformity, or inherent executive power.[3] The contest between these competing foundational theories for *Chevron* deference reflects longstanding divisions over the proper relationship between agencies, courts, Congress, and the Chief Executive in the administrative state.

While scholars continue to ponder whether congressional delegation, agency expertise, or another comprehensive theory constitutes *Chevron*'s optimal foundation, this Article offers a different perspective. Returning to the text of Justice Stevens's unanimous opinion, I argue that *Chevron* does not rest exclusively on any single comprehensive theory of court-agency relations. Although the *Chevron* decision pays its respects to several of the grand theoretical movements of its era – legal realism, civic republicanism, neopluralism, public choice theory, and unitary executive theory – it makes no effort to arbitrate between these movements or their respective visions of statutory interpretation. Instead, *Chevron*'s methodology is pluralistic and conciliatory: courts should defer to the EPA's reasonable interpretations of the Clean Air Act precisely because *all* the leading theories of the administrative state support deference to agencies under the circumstances presented.

The genius of Justice Stevens's *Chevron* opinion is its insight that jurists who espouse fundamentally different views regarding the relationship between courts and administrative agencies in our federal system could still endorse judicial deference to the EPA under the circumstances presented in *Chevron*. A decade earlier, political philosopher John Rawls had proposed that pluralistic societies could achieve greater political stability and social cohesion by forging an "overlapping consensus" between competing comprehensive theories of "justice" based on citizens' shared conception of "justice as fairness."[4] Cass

[3] *See, e.g.*, Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2297-2301 (2006) (inherent executive power); Ronald J. Krotoszynski, Jr., *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 737 (2002) (administrative expertise); Thomas W. Merrill & Kristen E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (congressional delegation); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 87 (1994) (agency deliberative rationality); Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987) [hereinafter Strauss, *One Hundred Fifty Cases*] (concerns for national regulatory uniformity); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2587 (2006) [hereinafter Sunstein, *Beyond* Marbury] (the executive branch's political responsiveness and accountability).

[4] JOHN RAWLS, A THEORY OF JUSTICE 3, 340, 508-10 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; John Rawls, *The Domain of the Political and Overlapping*

Sunstein would later build upon Rawls's insight, arguing that judges should seek consensus on the outcome of particular cases even when they fundamentally disagree about the higher-level theory that justifies the shared result.[5] In a similar spirit, Justice Stevens's opinion for the unanimous Court in *Chevron* frames the EPA's decision-making process as a locus of theoretical consensus between the leading rationales for deference, endowing *Chevron* deference with an uncommon degree of political stability.[6] That *Chevron* has become the preeminent authority in American statutory interpretation is a testament to the durability of its consensus.[7]

Although *Chevron* enjoys widespread acceptance today, its pluralist consensus has been misunderstood and its early promise has not been fully realized. In 2001, the Supreme Court undermined *Chevron*'s consensus in *United States v. Mead Corp.* by expressly grounding *Chevron* in the congressional delegation theory.[8] Rather than confine *Chevron*'s application to contexts where all the leading rationales support deference to agency statutory interpretations, the Court held that *Chevron* applies whenever a court concludes Congress has authorized an agency to promulgate statutory interpretations "with the force of law."[9] Predictably, the Court's turn to *Mead*'s delegation fiction has proven to be highly controversial. Proponents of other rationales for *Chevron* deference have decried *Mead*'s delegation inquiry as an indeterminate legal fiction,[10] and circuit courts have struggled to apply

Consensus, 64 N.Y.U. L. REV. 233 (1989) [hereinafter Rawls, *Domain*]. This Article does not defend Rawls's vision of liberal political legitimacy per se, nor does it aspire to establish the political legitimacy of *Chevron*'s revolution from the perspective of Rawlsian political liberalism or any other comprehensive theory.

[5] *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-38 (1996) [hereinafter SUNSTEIN, LEGAL REASONING].

[6] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 839 (1984).

[7] *Chevron*'s consensus differs from Rawls's paradigmatic "overlapping consensus" inasmuch as *Chevron*'s domain is defined by agency decision-making *processes* rather than an abstract political conception of the public good. As will be shown in Part II, however, *Chevron* also transcends Sunstein's paradigmatic "incompletely theorized agreement" because the Supreme Court has implicitly embraced several discrete rationales within *Chevron*'s consensus as trans-procedural requirements for *Chevron* deference. Rather than attempt to define and defend a third modality of pragmatic consensus in contradistinction to Rawls and Sunstein, I will simply refer to *Chevron*'s overlapping rationales throughout this Article as "*Chevron*'s consensus."

[8] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[9] *Id.* at 229.

[10] *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005) [hereinafter Bressman, *How* Mead *Has Muddled*]; Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 792 (2002); Sunstein, *Beyond* Marbury, *supra* note 3, at 2603 ("In *Mead* and similar cases, why is the refusal to defer to the executive the most sensible fiction, that is, the most reasonable instruction to attribute to Congress?").

the Supreme Court's new test in a principled, consistent manner. It might be tempting to conclude, therefore, that *Chevron* has drifted far from the moorings of its original consensus.

Appearances can be deceiving, however. Even after *Mead*, the Supreme Court continues to apply *Chevron* deference only in contexts that fall within the scope of *Chevron*'s original consensus. Under the pretext of reconstructing Congress's intent, the Court has granted *Chevron* deference where agency decision-making processes satisfy five core factors: (1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity. Contrary to conventional wisdom, none of these overlapping rationales can be properly considered redundant; since the Court decided *Mead*, it has consistently withheld *Chevron* deference when any one of these core rationales is not satisfied.[11] Thus, the Supreme Court continues to honor *Chevron*'s consensus under the veil of *Mead*'s delegation fiction.

To reap the full benefits of *Chevron*'s pluralist vision, the Supreme Court should pierce *Mead*'s delegation fiction and reaffirm *Chevron*'s consensus as the definitive test for determining the scope of *Chevron*'s domain. By reconstructing *Chevron*'s consensus, the Court would defuse much of the criticism that has been directed against *Mead*'s polarizing delegation fiction. More importantly, a consensus-based approach would illuminate the boundaries of *Chevron*'s domain, giving circuit courts a more coherent and intelligible framework for mapping *Chevron*'s domain. Under the consensus-based approach, federal courts would grant *Chevron* deference only in contexts where an agency's decision-making process satisfies the five leading rationales for deference. Conversely, where agency statutory interpretations do not satisfy one or more of these factors, federal courts would bypass *Chevron* and consider instead whether deference is warranted under *Skidmore v. Swift & Co.*,[12] a flexible multifactor test that has resurfaced in *Mead*'s wake.[13] *Chevron*'s consensus therefore has a vital role to play in clarifying the respective domains of courts and agencies in statutory interpretation.

I. CONSTRUCTING *CHEVRON*'S CONSENSUS

Chevron's basic facts and holding rank among the most oft-recited in American law.[14] The conventional narrative is familiar territory for students of administrative law and therefore can be summarized succinctly.

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[11] *See infra* Part II.C.

[12] 323 U.S. 134 (1944).

[13] *See id.* at 140 (evaluating whether an agency statutory interpretation merits deference based upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

[14] *See* BREYER ET AL., *supra* note 2, at 289.

In 1977, Congress amended the Clean Air Act to require any company creating a significant new "stationary source" of air pollutants to undergo an extensive regulatory review process. Four years later, the EPA interpreted the term "stationary source" to refer to an emitting plant as a whole rather than the plant's constituent parts. This holistic approach to emissions regulation – known popularly as the "bubble concept" – gave plant management the flexibility to modify equipment without triggering new source review so long as the modifications, taken as a whole, did not generate a substantial negative impact upon the plant's overall emissions.[15] When the Natural Resources Defense Council appealed the EPA's new interpretation, the D.C. Circuit struck down the agency's rule as an impermissible construction of the Act.[16] The Supreme Court disagreed. In a unanimous opinion authored by Justice Stevens, the Court stated that federal courts must apply a two-step test when reviewing statutes under agency administration: first, if "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear, that is the end of the matter"; and second, "[i]f . . . the court determines Congress has not directly addressed the precise question at issue" because "the statute is silent or ambiguous with respect to the specific issue," the court must determine whether the agency's construction of the statute is reasonable.[17] Applying this two-step test to the case at hand, the Court held that the D.C. Circuit erred in declining to defer to the EPA's reasonable interpretation of the Act.[18]

Justice Stevens offered several reasons why the D.C. Circuit should have deferred to the EPA's reasonable interpretation of the term "stationary source." First, he explained that the 1977 Amendments could be construed to reflect an implicit delegation of policymaking authority from Congress to the EPA:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[19]

Second, courts should defer to agencies' reasonable interpretations of ambiguous statutes, Justice Stevens argued, because agencies have experience and expertise that is valuable in accommodating "manifestly competing interests" – particularly in contexts where "the regulatory scheme is technical

[15] RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 7.4, at 384-85 (4th ed. 2004).

[16] Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 726-27 (D.C. Cir. 1982), *rev'd*, 467 U.S. 837 (1984).

[17] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[18] *Id.* at 844.

[19] *Id.* at 843-44.

and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."[20] Third, Justice Stevens suggested that administrative agencies might "properly" resolve the policy questions implicit in ambiguous statutes by "rely[ing] upon the incumbent administration's views of wise policy to inform its judgments. While 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 . . . ."[21] Each of these theories – congressional delegation, agency expertise, and executive accountability – as well as a variety of others counseled deference to the EPA's reasonable interpretation of the Clean Air Act.

A. *The* Chevron *Revolution: Separating Fact from Fiction*

The *Chevron* decision cast a long shadow over federal statutory interpretation. *Chevron* has been hailed "as a kind of revolution[,] . . . not only as a counter-*Marbury* for the modern era but also as a kind of *McCulloch v. Maryland*, granting the executive broad discretion to choose its own preferred means to promote statutory ends."[22] Some scholars have argued that *Chevron* fundamentally altered the division of labor between courts and agencies in statutory interpretation.[23] Others have viewed *Chevron* as the starting point for an even more ambitious project: renegotiating the relationship between courts and the executive branch across the vast expanse of public law, from criminal prosecution[24] to foreign affairs.[25] It may be worth stepping back for a moment,

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[20] *Id.* at 865 (citations omitted).

[21] *Id.*

[22] Sunstein, *Beyond* Marbury, *supra* note 3, at 2596 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 976 (1992) ("Justice Stevens's opinion contained several features that can only be described as 'revolutionary,' even if no revolution was intended at the time." (citation omitted)).

[23] *See, e.g.*, Kristen E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1548 (2006); John S. Kane, *Refining* Chevron *– Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 532 n.102 (2008).

[24] *See, e.g.*, Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 3 (1996) (arguing that *Chevron* deference should not be subject to proposed exceptions for the strict interpretation of criminal and deportation statutes); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996).

[25] *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 651 (2000); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1170 (2007) (arguing that the impact of *Chevron* on executive power has "many implications for legal issues raised by the war on terror, including those explored in the *Hamdi* and *Hamdan* cases"); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2663-64 (2005). *But see* Derek Jinks & Neal Kumar Katyal,

therefore, to distinguish the features of Justice Stevens's opinion that were truly revolutionary from those that merely synthesized, well-established principles.

1. The *Chevron* Two-Step

As important as *Chevron* has become to American statutory interpretation over the last two decades, in many significant respects its innovations were more "evolutionary" than "revolutionary."[26] For decades prior to *Chevron*, federal courts had preached deference to administrative agencies in statutory interpretation. The instruction that courts should honor Congress's "unambiguously" expressed intent at Step One followed a long line of decisions preaching that courts must apply clear statutory instructions.[27] By the same token, *Chevron*'s assertion that courts should defer to agencies' reasonable interpretations of ambiguous statutes at Step Two merely clarified the Court's prior jurisprudence. For fifty years, the Supreme Court had stressed that lower courts should defer to agencies where ambiguous statutory provisions could support multiple plausible constructions.[28]

This view of *Chevron*'s two-step formula as a mere synthesis and refinement of the Supreme Court's prior jurisprudence has become the "general consensus" among scholars, and for good reason.[29] The opinion itself does not proclaim any revolutionary purpose, nor does it purport to overrule, or

Disregarding Foreign Relations Law, 116 YALE L.J. 1230, 1230 (2007) (disputing *Chevron*'s applicability to foreign relations law generally); Evan Criddle, Comment, Chevron *Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1927-28 (2003) (disputing *Chevron*'s applicability to treaty interpretation).

[26] Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986) (characterizing *Chevron* as evolutionary since it only "remind[ed] lower federal courts of their obligation to defer to an agency's reasonable construction of any statutes administered by that agency"). *See* Russell L. Weaver, *Some Realism About* Chevron, 58 MO. L. REV. 129, 131 (1993) (arguing that "*Chevron's* importance has been exaggerated").

[27] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see, e.g.*, FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) (observing that courts "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate"); Office Employees Int'l Union v. NLRB, 353 U.S. 313, 318-19 (1957) (rejecting an agency statutory interpretation based on "the clear expression of the Congress to the contrary").

[28] *Chevron*, 467 U.S. at 843 n.11; *Democratic Senatorial Campaign Comm.*, 454 U.S. at 42-43 (inferring from "the absence of a prohibition on the agency arrangements at issue" and "the lack of a clearly enunciated legislative purpose to that effect" that the FEC's statutory interpretation was not "contrary to law"); Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 75 (1975); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130-31 (1944) (stating that the task of interpreting the term "employee" in the National Labor Relations Act "has been assigned primarily to the agency created by Congress to administer the Act" and must be affirmed "if it has 'warrant in the record' and a reasonable basis in law").

[29] Hickman, *supra* note 23, at 1578.

even criticize, any earlier case.[30] Instead, it emphasizes continuity with prior decisions and bolsters each step with lengthy string citations to supporting precedents.[31] *Chevron*'s two-step formula apparently was not a source of contention among the Justices; no concurring or dissenting opinions accompanied the decision,[32] and the best available evidence suggests that it was not even discussed during the Court's internal deliberations.[33] Thus, there is little reason to believe the Supreme Court envisioned *Chevron*'s two-step formula as anything more than a modest restatement of the Court's deference doctrines.[34]

2. Flexible Agency Administration

In another respect, however, *Chevron* did spark a genuine revolution – by challenging the reigning principles of certainty and finality in statutory interpretation. Under certain circumstances, the Court declared, ambiguous regulatory statutes need not be ascribed a fixed and final meaning, whether by courts or agencies; rather, their meaning should be allowed to fluctuate over time to facilitate agency policy experimentation.[35] In *Chevron*'s brave new world, neither courts nor agencies would have to bind themselves to a particular interpretation of an ambiguous statutory provision. Instead, courts would construe statutory ambiguity as a discretionary space for what I will call "flexible agency administration" – continuous policy experimentation under the direction of agency administrators. Here was a revolution, indeed.

In the decades leading up to *Chevron*, the Supreme Court had deferred to agencies' reasonable interpretations of ambiguous statutes, but only where the agencies' interpretations did not conflict with judicial precedent. Once the Court affirmed an agency's interpretation of an ambiguous statute, that interpretation became binding on both the agency and the Court on stare

[30] *See* Starr, *supra* note 26, at 284.

[31] *See, e.g.*, *Chevron*, 467 U.S. at 843-45.

[32] *Id.* at 839.

[33] *See, e.g.*, Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, [1993] 23 Envtl. L. Rep. (Envtl. Law Inst.) 10,606, 10,613 (reviewing Justice Marshall's private papers and suggesting that the Justices did not focus on *Chevron*'s precedential impact upon statutory interpretation generally); *see also* Merrill & Hickman, *supra* note 3, at 838 (explaining that *Chevron* first achieved prominence in the lower courts).

[34] *See* Sullivan v. Everhart, 494 U.S. 83, 103 n.6 (1990) (Stevens, J., dissenting) ("It is, of course, of no importance that [an opinion] predates *Chevron* . . . . As we made clear in *Chevron*, the interpretive maxims summarized therein were 'well-settled principles.'" (quoting *Chevron*, 467 U.S. at 845)); Hickman, *supra* note 23, at 1578. It should probably come as no surprise, therefore, that for several subsequent terms the Supreme Court cited *Chevron* only irregularly and interchangeably with other precedents.

[35] *See Chevron*, 467 U.S. at 863-64 (stating that agencies must consider "varying interpretations and the wisdom of its policy on a continuing basis").

decisis grounds.[36] Although the Supreme Court deferred to reasonable agency interpretations of ambiguous statutes in the first instance, it steadfastly affirmed the principle of judicial supremacy in statutory interpretation by stressing that courts remain "the final authority on issues of statutory construction,"[37] and by declining to allow agencies to revise their own statutory interpretations after the interpretations had been etched into judicial precedents. If an agency wished to adopt a different policy after its prior statutory interpretation had been adopted by the Supreme Court, its sole recourse would be an appeal to Congress to revise the statute itself.

Chevron unsettled this status quo by attacking the assumptions on which it rested – specifically, the traditional understanding that certainty and repose should trump agency flexibility in administrative law. Writing for a unanimous Court, Justice Stevens observed that the EPA had "consistently" interpreted the term "source" in the 1977 Amendments "flexibly – not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena."[38] Justice Stevens reasoned that this flexible approach to statutory interpretation should prevail over the Court's traditional preference for consistency and finality:

> The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.[39]

Traditional concerns for consistency and finality in statutory interpretation have a weaker claim to authority in this context, the Court suggested, because the very "definition [of the term 'source'] itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute."[40] Thus, the EPA could reasonably give "the word 'source' . . . a plantwide definition for some purposes and a narrower definition for other purposes."[41] Alternatively, the EPA could preliminarily adopt the bubble concept for plant modifications as its official position but later reverse course based on a change of policy, perspective, or presidential administration.[42] No longer would the EPA have to bind itself to official positions on questions of

[36] *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) (stating that "considerations of *stare decisis* weigh heavily . . . in statutory construction," since Congress may simply modify the statute if they disagree with the Court).

[37] *Chevron*, 467 U.S. at 843 n.9.

[38] *Id.* at 863.

[39] *Id.* at 863-64.

[40] *Id.* at 864

[41] *Id.* at 856.

[42] *Id.* at 863-65.

statutory interpretation that it might later regret with the benefit of a "full understanding of the force of the statutory policy in the given situation."[43] Instead of carving the meaning of statutes in stone, *Chevron* directed courts to give agencies the discretion necessary for continuous experimentation, deliberation, and policy reassessment.

3. *Chevron* and Stare Decisis

Once the Supreme Court decided in *Chevron* that agencies should be permitted to "consider varying interpretations and the wisdom of its policy on a continuing basis"[44] rather than commit to a fixed statutory meaning, the question naturally arose whether courts must relax stare decisis to facilitate agencies' flexible statutory interpretation. After all, if flexible agency administration is preferable to judicial finality in certain contexts, as *Chevron* presupposes, why should courts use stare decisis to make agencies commit to particular interpretations of ambiguous statutes? This question was of central importance in the *Chevron* litigation because it had been raised in the proceedings below and, indeed, was the primary rationale for the D.C. Circuit's decision.[45]

A brief history of the *Chevron* litigation serves to place the stare decisis question in context. Throughout the 1970s, the EPA had adopted various official interpretations of the term "source" in the Clean Air Act Amendments.[46] Of immediate importance to the *Chevron* litigation was a rule proposed in 1979 "that would have permitted the use of the 'bubble concept' for new installations within a plant as well as for modifications of existing units."[47] The D.C. Circuit rejected this proposal on statutory interpretation grounds in two decisions, *ASARCO Inc. v. EPA*[48] and *Alabama Power Co. v. Costle*,[49] holding that the bubble concept could not be employed in a program designed to enhance air quality.[50] Initially, the EPA complied with the D.C. Circuit's decision by promulgating a revised rule that was consistent with the circuit court's holding. Soon after President Ronald Reagan took office, however, the EPA pressed the issue once again, adopting a formal rule in October 1981 that resurrected the bubble concept for modification of existing

[43] *Id.* at 844.

[44] *Id.* at 863-64.

[45] *See* Natural Res. Def. Council v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982) (holding the court is "impelled by the force of our precedent" in determining that the "regulatory change . . . is impermissible"), *rev'd*, 467 U.S. 837 (1984).

[46] *See Chevron*, 467 U.S. at 855-56.

[47] *Id.* at 855.

[48] 578 F.2d 319 (D.C. Cir. 1978).

[49] 636 F.2d 323 (D.C. Cir. 1980).

[50] *See Alabama Power*, 636 F.2d at 402; *ASARCO*, 578 F.2d at 329 (rejecting the bubble concept as applied to the 1977 Amendments).

units.[51] Once again, the D.C. Circuit struck down the EPA's regulation, this time relying principally on *ASARCO*, *Alabama Power*, and stare decisis.[52] As far as the circuit court was concerned, the legal meaning of the term "source" in the 1977 Amendments had been resolved conclusively by *ASARCO* and *Alabama Power* and could not be reopened by a new administration's unilateral directive.

Had the Supreme Court chosen to do so, it could have ignored the D.C. Circuit's stare decisis argument in *Chevron*. Clearly, the *ASARCO* and *Alabama Power* decisions could not bind the Supreme Court as a matter of stare decisis. The Court was therefore free to ignore the stare decisis issue that troubled the D.C. Circuit and examine the underlying question of statutory interpretation afresh. Given this context, it is noteworthy that the Court reached out to criticize not only the D.C. Circuit's failure to defer to the EPA in *ASARCO* and *Alabama Power*, but also the circuit court's continued reliance upon these circuit precedents as a matter of stare decisis: "The basic legal error of the Court of Appeals," Justice Stevens emphasized, "was to adopt a *static judicial definition* of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[53] Put simply, the D.C. Circuit should have resisted the impulse to enforce its own "static" statutory interpretation via stare decisis rather than honor the EPA's discretion to experiment with different reasonable interpretations over time. *Chevron* thus challenged the supremacy of stare decisis in statutory interpretation and offered a new vision of continuous, flexible, agency-directed statutory administration.

Recently, the Supreme Court clarified and reaffirmed the relationship between *Chevron* and stare decisis in *National Cable & Telecommunications Service v. Brand X Internet Services*.[54] "The whole point of *Chevron*," the Court explained, "is to leave the discretion provided by the ambiguities of a statute with the implementing agency. . . . *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."[55] For this reason, "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's

[51] Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981).

[52] *See* Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 728 (D.C. Cir. 1982) ("This court's prior adjudications in *Alabama Power* and *ASARCO* preclude us from sanctioning EPA's employment of the bubble concept in the Clean Air Act's nonattainment program."), *rev'd*, 467 U.S. 837 (1984).

[53] *Chevron*, 467 U.S. at 842 (emphasis added).

[54] 545 U.S. 967, 981 (2005) (holding that *Chevron* deference applies to the FCC's interpretation of the Communications Act).

[55] *Id.* at 981-82 (quoting Smiley v. Citibank, 517 U.S. 735, 742 (1996)); *see also* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.").

interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."[56]

By clarifying what was at stake in *Chevron*'s vision of flexible agency administration, *Brand X* also demonstrated why *Chevron* was revolutionary and potentially controversial. For traditionalists, *Chevron*'s requirement that courts defer to administrative agencies' shifting interpretations of ambiguous statutes on a continuing basis – even in the face of conflicting judicial interpretations – seemed to sweep aside the core rule-of-law values at the heart of judicial statutory interpretation.[57] Rather than seeking to standardize statutory meaning, as courts had traditionally done, the Supreme Court in *Chevron* and *Brand X* shunned stare decisis and celebrated interpretive pluralism, policy flexibility, and a new spirit of regulatory experimentation and innovation. Where *Chevron* applied, statutory ambiguities were now "within the control of the Executive Branch for the future."[58] Even the most enthusiastic advocates of flexible agency administration recognized the need for a robust theory to buttress *Chevron*'s political stability in the midst of persistent theoretical pluralism.

B. *After the Revolution: Debating* Chevron*'s Foundation*

What that stabilizing theory should look like was less clear. Although *Chevron*'s basic canon of deference to agency interpretations of ambiguous statutes quickly gained widespread acceptance across the political spectrum, scholars disagreed profoundly about precisely *why* the Supreme Court was justified in deferring to the EPA's dynamic interpretation of the 1977 Clean Air Act Amendments. Seeking to stabilize *Chevron*'s theoretical underpinnings, commentators proposed grounding *Chevron* deference in various comprehensive theories of the administrative state, from constitutional formalism to deliberative democracy to the unitary executive thesis.[59] These comprehensive theories of the administrative state, in turn, generated competing rationales for *Chevron* deference, including implicit congressional delegation, administrative expertise, the executive branch's political accountability for agency policy, agencies' capacity for rational, transparent deliberation, and the need for uniformity in statutory administration. Some of these rationales predated *Chevron*. Most claimed authority in *Chevron*'s text.

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[56] *Brand X*, 545 U.S. at 982-83.

[57] *See Mead*, 533 U.S. at 248-49 (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency – or have allowed a lower court to render an interpretation of a statute subject to correction by an agency."); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941-56 (1992) (arguing that *Chevron* undermines the ideal of stability in statutory interpretation); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1430 (2005).

[58] *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).

[59] *See supra* note 3 and accompanying text.

Several surfaced in *Chevron*'s wake. Each gained adherents in some circles but was rejected in others. Disagreement persists to this day concerning *Chevron*'s optimal theoretical foundation.[60]

1. Congressional Delegation

Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration. Although this "congressional delegation" rationale is often cited as *Chevron*'s signature contribution to statutory interpretation,[61] the notion that *Chevron* introduced this rationale is not entirely accurate. Long before *Chevron*, the Supreme Court reasoned that the task of interpreting ambiguous statutory provisions was "committed"[62] or "assigned primarily to the agency created by Congress to administer the Act."[63] In 1974, for example, the Supreme Court explained in *Morton v. Ruiz*[64] that an agency's administrative responsibility "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[65] *Chevron* provided greater depth to the congressional delegation thesis, however, by distinguishing "express" from "implied" delegations and approving both types of delegation as grounds for deference:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory

[60] *See supra* note 3 and accompanying text.

[61] *See, e.g.*, Hickman, *supra* note 23, at 1548 ("The more revolutionary . . . aspect of *Chevron* is its call for strong, mandatory deference . . . where Congress implicitly delegates rulemaking authority through the combination of statutory ambiguity and administrative responsibility, as exemplified by the Clean Air Act and the EPA.").

[62] NLRB v. Highland Park Mfg. Co., 341 U.S. 322, 327 (1951) (Frankfurter, J., dissenting).

[63] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944).

[64] 415 U.S. 199 (1974).

[65] *Id.* at 231; *see also* INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981) ("[T]he Act commits [statutory interpretation] in the first instance to the Attorney General and his delegates, and their construction . . . should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute."); Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 87 (1975); United States v. Shimer, 367 U.S. 374, 381-82 (1961) (citing Bates & Guild Co. v. Payne, 194 U.S. 106, 108-09 (1904)).

> provision for a reasonable interpretation made by the administrator of an agency.[66]

Put simply, whether or not Congress has expressly authorized an agency to decide questions of statutory interpretation, courts must construe gaps and ambiguities in regulatory statutes as implicit delegations of policymaking authority to administrative agencies.

If the congressional delegation theory was "well-established" and relatively uncontested before *Chevron*,[67] it has proven to be deeply controversial in *Chevron*'s wake. Judge Harry Edwards of the D.C. Circuit has argued the assumption "that silence or ambiguity confers that kind of interpretative authority on the agency is unacceptable, for it assumes the very point in issue and thus 'fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other.'"[68] The contextual case for a presumption of congressional delegation is equally tenuous. Congress has never enacted legislation containing a general delegation of interpretive authority to an administrative agency, and, as Thomas Merrill has argued, Congress's general "practice of enacting specific delegations of interpretative authority suggests that Congress understands that no such general authority exists."[69] Critics of the congressional delegation theory have argued persuasively that Congress expressly disclaimed any such intent to delegate interpretive authority in the Administrative Procedure Act ("APA") by directing reviewing courts to "decide all relevant questions of

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[66] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (citation omitted).

[67] *Id.* at 845; *see also* Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) ("It is thus evident that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain.").

[68] CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (quoting Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 261 (1988)). The congressional delegation theory begs the question, moreover, whether "congressional intent" is itself a coherent concept. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 ("Although Congress has broad power to decide what kind of judicial review should apply to what kind of administrative decision, Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.").

[69] Merrill, *supra* note 22, at 995; *see also* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 447 (2003) ("[C]ongressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text . . . .").

law."[70] When all is said and done, therefore, the best argument for the congressional delegation theory may rest on legislative *inaction*; namely, that Congress has not intervened to suppress *Chevron*'s revolution.[71] But this post hoc rationale offers, at best, a tenuous justification for flexible agency administration. Unless Congress speaks more plainly to the issue in the future, critics' discontent with the congressional delegation theory is unlikely to subside.

2. Agency Expertise

Administrative agencies' superior experience and expertise in particular regulatory fields offers a second popular justification for *Chevron* deference. Prior to *Chevron*, courts frequently deferred to agencies based on agencies' greater familiarity with statutes' legislative history and congressional intent, better access to information about the regulated industries or activities, and practical day-to-day experience administering regulatory statutes.[72] Justice Stephen Breyer has observed that agencies may "have had a hand in drafting" regulatory statutes, and their staff maintain "close contact with the relevant legislators and staffs," giving them insight into "*current* congressional views, which, in turn, may, through institutional history, reflect prior understandings."[73] Statutes under agency administration often address technical subjects using industry-specific terminology, which agencies are better equipped to comprehend, contextualize, and apply.[74] Because such

[70] 5 U.S.C. § 706 (2000); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 194-95 (1998) (observing that "commentators in administrative law have 'generally acknowledged' that [the APA] seems to require de novo review on questions of law"); Merrill & Hickman, *supra* note 3, at 865; Panel Discussion, *Judicial Review of Administrative Action in a Conservative Era*, 39 ADMIN. L. REV. 353, 368 (1987) (comments of Cass Sunstein) ("If there's any evidence of congressional views in the meantime, those views are very much in accord with the original spirit of the Administrative Procedure Act, that is, that administrative agency interpretations of law should not be deferred to.").

[71] *See* AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999) (stating that Congress is aware that its statutory ambiguities "will be resolved by the implementing agency").

[72] *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130 (1944); Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).

[73] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368 (1986).

[74] Starr, *supra* note 26, at 309-10; *see also* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 774-75 (1991) ("Once the issue is shifted to one of means, expertise is reflected primarily in the assessment of the likely outcomes of policy alternatives. Such assessments should be entitled to deference . . . ."); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574 (1985) (arguing that "interpretive expertise might be based on any one of three possible grounds: (1) access to greater knowledge or evidence of statutory meaning; (2) an interpretive process better suited to yielding correct solutions; or

statutes are often highly complex, courts rely on agencies' expertise to anticipate the effects of the courts' interpretations on the regulatory scheme as a whole. Giving deference to agency expertise, courts may then select the interpretation that will best promote the program's purpose. For all these reasons, courts before *Chevron* deferred to agencies' expert judgments regarding the "best" reading of ambiguous statutes.

In *Chevron*, the Supreme Court marshaled these expertise-based arguments in support of flexible agency administration. The Court stressed that the Clean Air Act required the EPA to administer Congress's "policy decisions in a technical and complex arena."[75] Although Congress did not decide the policy issues presented in *Chevron* "on the level of specificity presented by these cases," Congress might have thought "that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."[76] Whether members of Congress actually shared such intent to delegate this important policy decision to the EPA "matters not," the Court reasoned.[77] "Judges are not experts in the field" and therefore should allow agency administrators to administer statutes flexibly based on their relevant expertise.[78]

Some scholars have argued vigorously that this expertise theory offers the best rationale for *Chevron* deference,[79] but the expertise theory has also attracted criticism. For decades, opponents have argued that "expertise" cannot be exercised objectively and instead simply masks value-laden policy decisions.[80] Agency expertise may lack traction or take second-billing to political considerations in contexts where agency policy impacts the distribution of resources between competing economic interests. Furthermore, even assuming expertise might be valuable in statutory interpretation generally, it is not clear that it necessitates *Chevron* deference. Agency expertise may be compromised by faulty assumptions or institutional biases. Sensitive questions of agency statutory interpretation often are committed to

(3) motivation by a set of preferences more conducive to accurate identification of statutory meaning").

[75] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863, 865 (1984).

[76] *Id.* at 865.

[77] *Id.*

[78] *Id.*

[79] *See, e.g.*, Krotoszynski, *supra* note 3, at 754.

[80] *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1683-87 (1975); *see also* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2135 (2002) ("[T]he legal realists' hope that legal ambiguities could be resolved by objective policy expertise has long ago grown quaint. . . . In practice, it is rare to find a field of social policy where there are not experts on opposing sides of an issue, . . . undermining any claim to an objective expert resolution.").

political appointees or legal counsel rather than agency specialists.[81] In recent years, the simmering tension between politics and expertise in agency decision-making has boiled over into the public sphere. Officials at the EPA, NASA, and the Office of the Surgeon General have criticized the Bush Administration for discounting, ignoring, or redacting agencies' expert findings and recommendations in pursuit of ideological objectives.[82] The Supreme Court itself seems to be growing increasingly concerned about this systematic neglect and politicization of agency expertise, as Jody Freeman and Adrian Vermeule have observed.[83] To presume that agency statutory interpretations are based upon expert judgment is to endorse an impressive legal fiction.

3. Political Accountability

Another rationale for *Chevron* deference focuses upon agencies' relationship with the White House. If questions of statutory interpretation require sensitive moral judgments or choices between competing interests or visions of the public good, perhaps these issues should be determined by "the incumbent administration[]" rather than by the judiciary:

> While 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 – 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.[84]

Since the interpretation of ambiguous statutes under agency administration "really centers on the wisdom of the agency's policy, . . . federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do."[85] Unlike the federal judiciary, administrative agencies make policy under the President's electoral mandate. The President oversees the implementation of agency policy and is politically accountable for the success or failure of agency administration.[86] Thus, questions in statutory

[81] *See* HAROLD SEIDMAN, POLITICS, POSITION, AND POWER 58-66 (5th ed. 1998).

[82] *See, e.g.*, Editorial, *Censorship on Global Warming*, N.Y. TIMES, June 20, 2003, at A1 (describing the EPA's censorship of a scientific report); Andrew C. Revkin, *Climate Expert Says NASA Tried to Silence Him*, N.Y. TIMES, Jan. 29, 2006, at A1; Jeremy Symons, *How Bush and Co. Obscure the Science*, WASH. POST, July 13, 2003, at B04; Julie Rovner, *Ex-Surgeon General Says Administration Interfered*, NAT'L PUB. RADIO, July 10, 2007, http://www.npr.org/templates/story/story.php?storyId=11854247.

[83] *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 92.

[84] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984).

[85] *Id.* at 866.

[86] *See* William N. Eskridge, Jr. & Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2626-27 (2006).

interpretation that necessitate "assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones"; rather, they are committed to "the political branches."[87] This rationale for *Chevron* deference bears close affinities to unitary executive theories of the administrative state that seek to anchor all agency policymaking in the President's constitutional and popular mandate.[88]

Several arguments have been leveled against attempts to link *Chevron* deference to the executive branch's political accountability. As Justice Stevens recognized in *Chevron*, "agencies are not directly accountable to the people."[89] Nor are individual agency employees – political appointees and career staff – directly accountable to the people. The legitimacy of an agency's interpretive lawmaking under *Chevron* arguably depends, therefore, upon a theory that all regulatory policy takes shape under the direction and approval of the Chief Executive.[90] Yet this unitary executive vision of executive lawmaking does not comport with reality. Although the President exercises general oversight authority over the federal bureaucracy, Congress has insulated many types of agency policymaking from direct presidential control by committing these decisions to independent agencies or administrative law judges,[91] and agencies have been known to repel White House interference in regulatory policymaking.[92] Moreover, as a practical matter, the President cannot personally review every regulation that might one day lead to litigation.[93] Direct presidential policymaking in agency statutory administration is

[87] *Chevron*, 467 U.S. at 866.

[88] *See, e.g.*, Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 604 (2005).

[89] *Chevron*, 467 U.S. at 865.

[90] *Id.* at 865. *But see* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 50-51 (2006) (arguing, contrary to conventional wisdom, that agency policymaking may be more conducive to transparency and political accountability than White House policymaking).

[91] *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 891 (1991) (granting authority to the U.S. Tax Court to construe statutes and rules); Mistretta v. United States, 488 U.S. 361, 412 (1989) (authorizing the creation of the U.S. Sentencing Commission as an independent body that promulgates binding guidelines); Morrison v. Olson, 487 U.S. 654, 696 (1988) (authorizing the creation of independent counsel to investigate and prosecute "free from executive supervision"); *see also* Caust-Ellenbogen, *supra* note 74, at 813 (observing that the President's "supervisory power over agencies . . . is largely limited to executive departmental agencies").

[92] *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 736 (2007) [hereinafter Strauss, *Overseer*].

[93] *See* Bressman & Vandenbergh, *supra* note 90, at 50; Merrill, *supra* note 22, at 996 ("[I]t is simply unrealistic, given the vastness of the federal bureaucracy, to expect that the President or his principal lieutenants can effectively monitor the policymaking activities of all federal agencies."); Strauss, *Overseer*, *supra* note 92, at 754.

exceptional; the vast majority of regulatory decisions that aspire to *Chevron* deference cannot be traced neatly to any discrete White House policy directive. Thus, if *Chevron* deference is truly based upon a theory that all regulatory policy emanates from the popularly elected President, Justice Stevens's opinion would not be "this generation's *Erie*," as Cass Sunstein has asserted,[94] but rather the elevation of a new "brooding omnipresence in the sky"[95] for our generation – the omniscient, omnipotent Chief Executive.

Even assuming that the President could exercise effective control over agency statutory interpretation, some scholars have argued that presidential administration alone would not legitimate *Chevron* deference. For example, an agency's responsiveness to political pressures may be a disadvantage if it forces agencies to disregard their own views as informed by experience and expertise.[96] Lisa Schultz Bressman has argued persuasively that mere political accountability cannot justify *Chevron* deference if an agency's statutory interpretation is manifestly irrational[97] or adopted only informally.[98] Moreover, although the President clearly bears responsibility for his or her administration's general performance, the degree to which any single agency statutory interpretation impacts the President's approval rating may be negligible. For all these reasons and many more,[99] attempts to justify *Chevron* based on presidential administration remain controversial.

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[94] Sunstein, *Beyond* Marbury, *supra* note 3, at 2598.

[95] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (stating that the common law is "not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified").

[96] Caust-Ellenbogen, *supra* note 74, at 814 (demonstrating the tension between majoritarianism and expertise in agency policymaking); *see also* Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 249 (1993).

[97] *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463-64, 503-15 (2003) (arguing that a focus on accountability to legitimize agency interpretation "overlooks the ever-present risk of arbitrariness").

[98] *See* Bressman, *How* Mead *Has Muddled*, *supra* note 10, at 1449 ("Procedural formality, whether imposed under constitutional law or administrative law, always has been a necessary feature of governmental legitimacy.").

[99] *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 284 (2006) (arguing that the White House cannot compel agencies to adopt a particular statutory interpretation in contexts where Congress has committed the decision to an agency administrator by express statutory command); Strauss, *Overseer*, *supra* note 92, at 704-05 ("[W]here Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President's role . . . is that of overseer and not decider.").

4. National Uniformity, Responsiveness, Inherent Authority, and Deliberative Rationality

A variety of other rationales have surfaced post-*Chevron* to support flexible agency administration. Peter Strauss has proposed that *Chevron* be understood as a device to ensure uniformity in federal administrative law: by committing ambiguous statutory provisions to executive interpretation, courts reduce the likelihood that circuit splits will cast a pall of uncertainty over unitary regulatory programs.[100] Cass Sunstein has emphasized the executive's ability to react quickly and decisively to "update" statutes in response to changing circumstances.[101] Justice Antonin Scalia, Jack Goldsmith, and John Manning have gone so far as to suggest the President might have an independent constitutional power to fill gaps in statutes.[102] Other commentators have stressed the need for deliberative rationality in regulatory policymaking, arguing that agencies are better at collecting and synthesizing information through rulemaking processes than are courts through litigation.[103] In sum, a host of theories have sprung up over the past quarter-century to justify *Chevron*'s revolution.

C. *Justice Stevens's Pragmatic Solution*

Given these diverse rationales for judicial deference to agency statutory interpretations, *Chevron* raised a delicate question: should the Supreme Court ground flexible agency administration in a theory of congressional delegation, agency expertise, political responsiveness and accountability, or some other principle? Had Justice Stevens attempted to ground *Chevron*'s innovative deference doctrine in a single foundational theory for flexible agency administration, his opinion likely would have incited bitter dissents and concurrences and undermined the decision's now-iconic status in statutory interpretation.

The subtle genius of Justice Stevens's *Chevron* opinion – and the reason why it endures as a landmark case in American statutory interpretation today – is that it unites disparate comprehensive theories into a consensus-based coalition favoring flexible agency administration. Justice Stevens recognized that under any of the leading comprehensive rationales for deference to administrative agencies, the EPA's decision-making process was sufficiently

[100] Strauss, *One Hundred Fifty Cases*, *supra* note 3, at 1112; *see also* E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 VILL. ENVTL. L.J. 1, 4 (2005).

[101] *See* Sunstein, *Beyond* Marbury, *supra* note 3, at 2587-88, 2595.

[102] United States v. Mead Corp., 533 U.S. 218, 256-57 (2001) (Scalia, J., dissenting) (arguing that "a background rule of law against which Congress legislates" is that "[a]mbiguity means Congress intended agency discretion"); Goldsmith & Manning, *supra* note 3, at 2297-2301.

[103] *See, e.g.*, Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 484-86 (1986).

rigorous and the statute under review was sufficiently ambiguous to compel the conclusion that the questions of statutory interpretation before the Court were "not judicial ones."[104] By pursuing political harmony and practical wisdom rather than ideological purity, *Chevron* cleared a space of relative stability in a field of law otherwise beset by intractable theoretical conflict. In this respect, *Chevron* followed a path marked by political philosopher John Rawls: the pragmatic "overlapping consensus."

1. Rawls's Overlapping Consensus

A decade before the Supreme Court decided *Chevron*, Rawls foreshadowed the decision's antifoundationalist approach in *A Theory of Justice* by introducing the concept of an "overlapping consensus."[105] Rawls's primary concern in *A Theory of Justice* was to defend his vision of "justice as fairness."[106] In a seminal passage, Rawls argued the diverse members of a liberal democracy could all embrace "the same *principles* of justice" despite "considerable differences in citizens' *conceptions* of justice" – whether they be Kantian, utilitarian, or any other high-level theory – insofar as "these conceptions lead to similar political judgments."[107] Where "different premises can yield the same conclusion," Rawls reasoned, "there exists what we may refer to as overlapping rather than strict consensus."[108] For Rawls, the conception of "justice as fairness" was one such overlapping consensus – a mutually acceptable political conception that could bind together fundamentally different comprehensive theories of "justice" through reciprocity. Although reasonable citizens might hold diverse and seemingly irreconcilable conceptions of the public good, they could also accept "justice as fairness" as a focal point of overlapping consensus, recognizing that "their views support the same judgment in the situation at hand, and would do so even should their respective positions be interchanged."[109]

In subsequent writings, Rawls clarified the mechanics and utility of the overlapping consensus. The primary virtue of an overlapping consensus, according to Rawls, is that it addresses moral pluralism's challenge to public justification in political philosophy.[110] Rawls argues that under what he terms the "liberal principle of legitimacy," any attempt to prescribe foundational moral principles for constitutional democracies must accommodate citizens' heterogeneous religious, philosophical, and moral commitments on their own terms.[111] To elevate a single, comprehensive conception of "justice" to the

[104] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

[105] RAWLS, A THEORY OF JUSTICE, *supra* note 4, at 388.

[106] *Id.* at 3.

[107] *Id.* at 387 (emphasis added).

[108] *Id.* at 387-88.

[109] *Id.* at 388.

[110] *See* RAWLS, POLITICAL LIBERALISM, *supra* note 4, at 15.

[111] *Id*. at 10, 137; *see also* Rawls, *Domain*, *supra* note 4, at 239.

detriment of other reasonable conceptions would transform the state into an intolerably oppressive partisan force in the contest between religious, philosophical and moral traditions. Instead, constitutional democracy must be grounded in a shared political conception of justice acceptable to all: the golden overlapping consensus.[112]

Rawls's pragmatic, consensus-based approach to public justification eschews metaphysics and epistemology in favor of practical reason. Rather than focus on first principles, Rawls argues that "citizens' reasoning in the public forum about constitutional essentials and basic questions of justice . . . is now best guided by a political conception" of justice, which embodies "principles and values of which all citizens can endorse."[113] When a true overlapping consensus is achieved, citizens who advocate competing comprehensive theories will be able to "endorse the political conception, each from its own point of view."[114] Each can view the political conception "as derived from, or congruent with, or at least not in conflict with, their other values."[115]

Rawls argues that an overlapping consensus facilitates social harmony and mutual respect – essential ingredients for political stability in a pluralist constitutional democracy. To explain how this is so, Rawls contrasts the overlapping consensus with a *modus vivendi* or "treaty between two states whose national aims and interests put them at odds."[116] According to Rawls, states design treaties to promote their respective national interests. In most instances, however, "both states are ready to pursue their goals at the expense of the other, and should conditions change they may do so."[117] Thus, a treaty built on independent interests is "inevitably fragile," because it is "founded solely on self- or group-interest."[118] In contrast, an overlapping consensus is not merely the "equilibrium point" where competing interests converge, but a moral conception that unites disparate philosophical and religious traditions.[119] Because citizens can view the political conception of "justice as fairness" as a reflection of their own comprehensive moral doctrines, they "will not withdraw their support of it should the relative strength of their view in society increase and eventually become dominant."[120] For Rawls, the generally acceptable

[112] *See* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 6 (1987) [hereinafter Rawls, *Overlapping Consensus*] ("Given the fact of pluralism, and given that justification begins from some consensus, no general and comprehensive doctrine can assume the role of a publicly acceptable basis of political justice.").

[113] RAWLS, POLITICAL LIBERALISM, *supra* note 4, at 10.

[114] *Id.* at 134; Rawls, *Domain*, *supra* note 4, at 239.

[115] RAWLS, POLITICAL LIBERALISM, *supra* note 4, at 11.

[116] *Id.* at 147.

[117] *Id.*

[118] Rawls, *Overlapping Consensus*, *supra* note 112, at 2.

[119] *See id.*

[120] RAWLS, POLITICAL LIBERALISM, *supra* note 4, at 148.

political abstraction of "fairness" provided a recipe for building consensus, fostering cooperation and mutual respect, and minimizing antagonism in a pluralist society divided by diverse moral codes.

2. Sunstein's Incompletely Theorized Agreement

While Rawls would build political consensus around an abstract conception of justice, Cass Sunstein has argued that legal reasoning is often best served by "incompletely theorized agreements on particular outcomes, accompanied by agreements on the narrow or low-level principles that account for them."[121] Put simply, judges may agree about which party should prevail on a legal claim even if they are unable to arrive at a mutually acceptable high-level theory to justify that result. For example, three judges on a federal circuit panel could agree that images alleged to be child pornography are subject to state regulation without sharing a common definition of pornography or a comprehensive theory of the First Amendment. Sunstein suggests that in these circumstances courts might find it useful to avoid grand theory and instead develop low-level rules that formalize and institutionalize judges' overlapping intuitions regarding the appropriate outcome for particular cases.

Sunstein expressly contrasts incompletely theorized agreements with Rawls's overlapping consensus. Rawls's overlapping consensus eschews comprehensive theories of the public good in favor of abstractions such as "fairness" that reduce friction and enhance social cohesion. In Rawls's view, "the deeper the conflict, the higher the level of abstraction to which we must ascend to get a clear and uncluttered view of its roots."[122] Sunstein takes the opposite approach. He writes:

> The distinctly legal solution to the problem of pluralism is to produce agreement on particulars, with the thought that often people who are puzzled by general principles, or who disagree on them, can agree on individual cases. When we disagree on the relatively abstract, we can often find agreement by moving to lower levels of generality.[123]

Whereas Rawls advocates "conceptual ascent" to a higher level of abstraction as a strategy for defusing political conflict, Sunstein proposes conceptual descent as a strategy for achieving consensus that he thinks is better suited to judicial decision-making in a common law system.

Whether based on a high-level abstraction such as "fairness" or the low-level particular facts of a given case, the two pragmatic approaches advanced by Rawls and Sunstein share the same basic aspirations. Both approaches

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[121] SUNSTEIN, LEGAL REASONING, *supra* note 5, at 37; *see* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1736 (1995) [hereinafter Sunstein, *Agreements*] (explaining that when judges "disagree on an abstraction, they move to a level of greater particularity" to reach a particular outcome).

[122] SUNSTEIN, LEGAL REASONING, *supra* note 5, at 47 (quoting RAWLS, POLITICAL LIBERALISM, *supra* note 4, at 46).

[123] *Id.*

harness the overlapping consensus between disparate moral, political, and jurisprudential traditions. In so doing, both approaches offer a path to political stability and social cohesion even in the midst of persistent theoretical conflict.

3. A Consensus for Flexible Agency Administration

Chevron's defense of flexible agency administration in statutory construction bears important similarities to both Rawls's overlapping consensus and Sunstein's incompletely theorized agreement. The primary challenge confronting the Court in *Chevron* was to construct a public justification for flexible agency statutory administration that would command the allegiance of reasonable jurists across the political and jurisprudential spectrum. Given the vast diversity of viewpoints concerning the proper relationship between courts and agencies in statutory administration, the Court could not provide a stable public justification for *Chevron* deference without addressing the leading comprehensive theories of the administrative process. If the Court tethered flexible agency administration exclusively to a single comprehensive theory of the administrative process, it would undermine *Chevron*'s political durability and compromise its long-term viability.

Enter Justice Stevens, author of the Supreme Court's unanimous *Chevron* opinion. In recent years, Justice Stevens has gained a reputation as the Roberts Court's most vociferous "dissenter,"[124] but in an earlier era he was better known as the Court's preeminent pragmatist.[125] Justice Stevens's pragmatic judicial philosophy is illustrated in *Burnham v. Superior Court of California*,[126] where the Supreme Court considered whether "tag jurisdiction" would satisfy the constitutional requirements of due process.[127] In separate opinions, Justices Scalia and Brennan debated whether a defendant's actual physical presence in a forum was sufficient as a matter of law to establish personal jurisdiction or whether the controlling legal standard was instead "minimum contacts."[128] Justice White, who shared Justice Stevens's penchant for pragmatism, argued that the trial court's assertion of jurisdiction under such circumstances had not been shown to be "so arbitrary and lacking in common

[124] *See, e.g.*, Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 7, 2007, at 50, 50, *available at* http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html.

[125] *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 240 (1999) (listing Stevens alongside other judicial pragmatists such as Justices Holmes, Brandeis, Cardozo, Frankfurter, Jackson, Douglas, Brennan, Powell, White, and Breyer); Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, *in* REHNQUIST JUSTICE 157, 177-79 (Earl M. Maltz ed., 2003); Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 FORDHAM L. REV. 2201, 2201 (2006).

[126] 495 U.S. 604 (1990).

[127] *Id.* at 607 (Scalia, J., plurality opinion).

[128] *Compare id.* at 607-28 (finding physical presence sufficient to establish personal jurisdiction), *with id.* at 628-40 (Brennan, J., concurring in the judgment) (proposing "minimum contacts" as the appropriate standard).

sense" as to necessitate reversal.[129] Justice Stevens, for his part, declined to take sides in the debate among these three approaches. Instead, he filed a short concurring opinion stating that "it is sufficient to note that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combine to demonstrate that this is, indeed, a very easy case."[130] If all nine Justices could agree that the Fourteenth Amendment permitted tag jurisdiction according to their own jurisprudential theories, the Court need not decide whether Justice Scalia's originalist theory, Justice Brennan's teleological/evolutionary theory, or some other comprehensive theory best defined the demands of constitutional due process.

In the Supreme Court's unanimous *Chevron* opinion, Justice Stevens employed a similar consensus-based justification for flexible agency administration. Foreshadowing *Burnham*, Justice Stevens refrained from taking sides in the debate between unitary executive theory, public choice theory, civic republicanism, and other comprehensive theories of the administrative process. Instead, Justice Stevens spoke approvingly of each of these theories, arguing there were multiple overlapping justifications for *Chevron* deference, including implicit congressional delegation,[131] agency expertise,[132] presidential accountability,[133] and inherent executive authority.[134] In this manner, *Chevron* laid the foundation for a pragmatic consensus in statutory interpretation: when an administrative agency engages in flexible statutory interpretation through notice-and-comment rulemaking procedures, citizens of diverse religious, philosophical, and moral perspectives could agree that courts ought to defer to the agency's reasonable interpretations of ambiguous statutory provisions.

Justice Stevens's effort to integrate multiple overlapping rationales for flexible agency administration was critical to establishing *Chevron*'s political stability. As discussed previously, *Chevron* sparked a quiet revolution in statutory interpretation by holding that regulatory statutes need not be set in stone, thereby allowing agencies to define ambiguous statutory provisions flexibly, subject only to the spare constraints of reasonableness. This

[129] *Id.* at 628 (White, J., concurring in part and concurring in the judgment).

[130] *Id.* at 640 (Stevens, J., concurring in the judgment).

[131] *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (stating that "express delegation" exists when Congress "explicitly le[aves] a gap for the agency to fill").

[132] *See id.* at 844, 865 (remarking that Congress gave deference to agencies because "those with great expertise and charged with responsibility for administering the provision" would be better able to do so than Congress).

[133] *See id.* at 865 (indicating that the President's direct accountability to the people makes it appropriate for the executive branch – including administrative agencies – to make policy decisions).

[134] *See id.* at 845 (arguing that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer").

unprecedented endorsement of flexible agency interpretation necessitated a robust political justification, one that would foster stability and mutual respect in a pluralist legal community.

Lacking a unifying "political conception" of flexible agency administration akin to Rawls's vision of "justice as fairness," Justice Stevens instead grounded *Chevron*'s consensus in attributes of the EPA's decision-making process. The agency activities under review in *Chevron* sat serendipitously at the crossroads of the leading comprehensive theories of administrative governance: the Clean Air Act's "regulatory scheme [was] technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies."[135] How best to vindicate industry emission standards without unduly retarding industry productivity was a sensitive policy question that rested squarely within the agency's expertise. The EPA had adopted the bubble concept through notice-and-comment rulemaking, which allowed for public participation and reasoned deliberation. In addition, the EPA's return to the bubble concept in 1981 followed a change in presidential administrations, suggesting that the EPA had, in fact, "rel[ied] upon the incumbent administration's views of wise policy to inform its judgments."[136] Finally, to the extent the Court explored Congress's intent, Stevens's opinion hypothesized a variety of plausible explanations for why Congress might have chosen to delegate authority to the EPA under the circumstances.[137] Embracing all these rationales for deference as equally valid, the Supreme Court endorsed the EPA's decision-making process in *Chevron* as the focal point for a consensus favoring flexible agency administration.

As applied to traditional agency rulemakings like the EPA's bubble rule, *Chevron*'s consensus-based justification for flexible agency administration has proven to be remarkably durable for nearly a quarter-century. Judges, litigators, and academics of diverse political and jurisprudential commitments have embraced *Chevron*, each defending the decision as an expression of their otherwise discordant visions of the administrative state.[138] Legislative supremacists defend *Chevron*'s implied congressional delegation thesis as a principled reconstruction of Congress's intent.[139] Legal realists, for their part, generally reject the congressional delegation thesis but emphasize functional

[135] *Id.* at 865.

[136] *Id.*

[137] *Id.*

[138] *See, e.g.*, Breyer, *supra* note 73, at 368; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517; Panel Discussion, *supra* note 70.

[139] *See, e.g.*, Smiley v. Citibank, 517 U.S. 735, 740-41 (1996) ("Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

concerns such as the comparative advantages of agency expertise, uniformity, and dispatch.[140] For advocates of a unitary executive model of the administrative state, *Chevron* seems to reinforce presidential primacy in regulatory policy.[141] *Chevron*'s account of agencies relying on the current administration's political priorities when "reconciling conflicting policies" likewise resonates for public choice theorists.[142] Neopluralists and civic republicans emphasize the comparative advantages of agency deliberative procedures such as notice-and-comment rulemaking as a forum for public engagement and consensus-building in agency norm-entrepreneurship.[143] Justice Stevens's polyphonic *Chevron* opinion thus speaks to readers in the language of their own comprehensive theories. Jurists with diverse perspectives have hailed the decision as an affirmation of their own disparate visions of the administrative state.

Chevron's revolution has encountered resistance along the way, of course. In the years immediately following the decision, some scholars argued that flexible agency administration shifted the balance of power in statutory interpretation too far in the direction of executive discretion, inappropriately diminishing the judiciary's traditional role.[144] Such criticism was relatively thin during *Chevron*'s infancy, however, and it has only diminished with the passage of time. To be sure, critics might yet argue that none of *Chevron*'s interwoven rationales for deference – including the consensus construct itself – suffices to legitimate *Chevron* as a matter of legal or political theory. As a practical matter, however, the *Chevron* revolution is a fait accompli. If *Chevron* has not achieved *perfect* consensus outside of the Supreme Court, the breadth of its appeal and the strength of its precedential authority among judges, academics, and practitioners of diverse views is nothing short of remarkable.

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[140] *See, e.g.*, Brian Galle, *The Justice of Administration: Judicial Responses to Executive Claims of Independent Authority To Interpret the Constitution*, 33 FLA. ST. U. L. REV. 157, 158-59 (2005) (describing "the legal realist view that assigning legal meaning is a choice of policy" as the "dominant paradigm" since *Chevron*); Sunstein, *Beyond* Marbury, *supra* note 3, at 2583 (characterizing *Chevron* as "a natural and proper outgrowth of . . . the legal realist attack on the autonomy of legal reasoning").

[141] *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 256-57 (2001) (Scalia, J., dissenting) (arguing that *Chevron* rests, at least in part, on the executive's inherent lawmaking authority); Goldsmith & Manning, *supra* note 3, at 2297-2301.

[142] *Chevron*, 467 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

[143] *See, e.g.*, Seidenfeld, *supra* note 3, at 138 (advocating a deliberative democracy conception of *Chevron* that requires an agency to "persuasively explain its interpretation" to the public).

[144] *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (expressing separation-of-powers concerns); Shapiro, *supra* note 57, at 941-56; Tyler, *supra* note 57, at 1430.

II. DECONSTRUCTING DELEGATION

Justice Stevens's singular achievement in *Chevron* was to construct a consensus in favor of flexible agency administration in contexts where agencies use notice-and-comment rulemaking procedures to interpret ambiguous statutory provisions. This pragmatic consensus earned *Chevron* widespread renown, but it also left a host of important questions unanswered. For example, did the Court in *Chevron* necessarily adopt *all* of the competing comprehensive rationales for deference? If so, what should courts do when these rationales point in different directions? Would *Chevron* command deference if agency administrators follow presidential directives but refuse to employ deliberative decision-making processes or disregard the expert opinions of career staff? Would *Chevron* apply equally to legislative rules, interpretive rules, opinion letters, internal agency guidelines, informal policy statements, and agency litigation positions? If not, where should courts draw the line between agency actions that fall within *Chevron*'s domain and those that do not?

These questions illustrate a problem of central importance to *Chevron*'s legacy, characterized in recent commentary as "Step Zero,"[145] namely: to what forms of agency action does *Chevron* apply? Since 2001, the Supreme Court has attempted to address this problem by endorsing congressional delegation as the definitive test for *Chevron* deference.[146] This approach has appeased some critics, irritated others, and perplexed the circuit courts. Beneath the Supreme Court's delegation rhetoric, however, the Court has continued to honor *Chevron*'s pragmatic spirit by granting *Chevron* deference only when agency decision-making processes satisfy five core rationales: congressional delegation, agency expertise, political responsiveness and accountability, deliberative rationality, and national uniformity.

A. *The Unbearable Lightness of Congressional Delegation*

For roughly a decade and a half after *Chevron*, the prevailing assumption among circuit courts and scholars was that the decision represented an "incompletely theorized agreement"[147] that would require further clarification and refinement. Many expected that the Supreme Court eventually would have to choose between the competing comprehensive rationales for *Chevron* deference.[148] Law reviews overflowed with commentary on *Chevron* as

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[145] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 224-26 (2006).

[146] *Mead*, 533 U.S. at 231-32 (denying *Chevron* deference where there is no congressional delegation of authority to the agency).

[147] *See generally* Sunstein, *Agreements*, *supra* note 121 (discussing the mechanics of incompletely theorized agreements in other settings).

[148] *See* Hickman, *supra* note 23, at 1550 ("Scholars posited a variety of legal foundations for *Chevron* including not only congressional delegation but others ranging from constitutional requirement to mere judicial policy. Changing *Chevron*'s underlying premise alters the scope of the doctrine's applicability."); Kathryn A. Watts, *Adapting to*

scholars advocated first one and then another foundational theory. Neglecting the strength and stability of *Chevron*'s original consensus, proponents of various legal and political theories encouraged the Supreme Court to cut through the Gordian knot of *Chevron*'s interwoven rationales and anoint their particular theory as *Chevron*'s authoritative foundation.[149]

The Supreme Court took the bait in *United States v. Mead Corp.*[150] In an opinion authored by Justice David Souter, the Court denied *Chevron* deference to the U.S. Customs Service's tariff classification rulings because there was "no indication that Congress intended such a ruling to carry the force of law."[151] The Court explained that flexible agency administration under *Chevron* did not extend to all agency interpretive choices: "[A]gencies charged with applying a statute necessarily make all sorts of interpretive choices, and . . . not all of those choices bind judges to follow them . . . ."[152] Instead, *Chevron* deference applied to a limited "category of interpretive choices distinguished by an additional reason for judicial deference."[153] That additional reason, the Court explained, was congressional delegation:

> This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result.[154]

By characterizing congressional delegation as the definitive test for *Chevron* deference, *Mead* limited *Chevron*'s scope to fields of administrative activity in

Administrative Law's Erie *Doctrine*, 101 NW. U. L. REV. 997, 1005 (2007) (commenting that the "different explanations for deference" in *Chevron* prompted scholars "to debate *Chevron*'s legal underpinnings").

[149] *See supra* Part I.B.

[150] 533 U.S. 218 (2001).

[151] *Id.* at 221.

[152] *Id.* at 227.

[153] *Id.* at 229. Justice Breyer paved the way for this "additional reason" theory a year earlier when he argued in an influential dissent that *Chevron* "simply focused upon an additional, separate legal reason for deferring to certain agency determinations, namely, that Congress had delegated to the agency the legal authority to make those determinations." Christensen v. Harris County, 529 U.S. 576, 596 (2000) (Breyer, J., dissenting); *see also* Merrill & Hickman, *supra* note 3, at 872, *noted in Mead*, 533 U.S. at 230 n.11.

[154] *Mead*, 533 U.S. at 229 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984)).

which courts could reasonably infer that Congress would have intended to give agencies the authority to act with "the force of law."[155] Outside this limited domain, an agency might still receive deference under the Supreme Court's pre-*Chevron* interpretive principles, as outlined in the 1944 decision *Skidmore v. Swift & Co.*,[156] based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[157] However, outside *Chevron*'s domain, agencies would lack the same freedom to change course and experiment with different interpretations of ambiguous statutes.

Since the Supreme Court decided *Mead*, circuit courts have construed the decision to mean that reasonable agency interpretations of ambiguous statutes receive *Chevron* deference "as long as Congress has delegated to agencies the power to make policy by interpreting ambiguous statutory language or filling gaps in regulatory laws."[158] Scholars have characterized the congressional delegation theory as the Supreme Court's new "consensus view."[159] Thus, congressional delegation has been elevated rhetorically as the single, definitive test for *Chevron* deference, neglecting other comprehensive rationales for flexible agency administration.

As one would expect, critics of the congressional delegation theory have greeted this development with consternation and disdain. Shortly after the Supreme Court decided *Mead*, Ronald Krotoszynski decried the delegation theory as a "bad farce" that would yield insupportable results; an agency decision based upon public deliberation and expertise – but without implied delegation – would not qualify for *Chevron* deference, while agency policies adopted with no deliberation and contrary to expert judgment would qualify.[160] More troubling still were concerns that the congressional delegation theory was an emperor with no clothes. As discussed previously, the evidentiary record supporting *Chevron*'s presumption that Congress intends to give agencies law-interpretive authority is perilously thin,[161] leading many

[155] *See id.* at 226-27.

[156] 323 U.S. 134 (1944).

[157] *Id.* at 140, *quoted in Mead*, 533 U.S. at 228.

[158] Elizabeth Garrett, *Legislating* Chevron, 101 MICH. L. REV. 2637, 2637 (2003); *see also* Gonzales v. Oregon, 546 U.S. 243, 255-56 (2006) (emphasizing the congressional delegation inquiry).

[159] Garrett, *supra* note 158, at 2637.

[160] Krotoszynski, *supra* note 3, at 753.

[161] *See* Sunstein, *Beyond* Marbury, *supra* note 3, at 2590 (arguing that when congressional delegation is "explored on a case-by-case basis, . . . it is likely that courts will be unable to find any clear expression of congressional will to that effect"). The *Chevron* decision itself expressed skepticism in drawing inferences about congressional intent from statutory text. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 861 (1984) ("We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress.").

commentators to characterize the theory as a "legal fiction."[162] For some scholars, the very fact that congressional delegation was a "legal fiction" at all was a sufficiently grievous sin to justify abandoning *Mead* on principle.[163] Others raised more mundane concerns: as a legal fiction, the congressional delegation standard was simply too incoherent, too amorphous, and too indeterminate in practice to guide courts in defining *Chevron*'s reach.[164] Far from quelling confusion regarding *Chevron*'s theoretical underpinnings, the Supreme Court's delegation fiction simply deepened lower courts' uncertainty about *Chevron*'s scope.

B. Mead*'s Veiled Consensus*

Taken at face value, the Supreme Court's embrace of *Mead*'s delegation fiction could be construed as an abandonment of *Chevron*'s consensus. As with any legal fiction, however, the impact of *Mead*'s delegation trope cannot be evaluated adequately without taking into account the ends to which it has been employed in practice. Over a century ago, an article in the *Harvard Law Review* observed that legal fictions "may appear not merely absurd, but positively unjust and wrongful."[165] However, when viewed "in their proper relations[,] noting their cause and effect[,] the people among whom and the conditions under which they flourished[] – the absurdity and injustice may perhaps disappear."[166] So it is with *Mead*'s delegation fiction: on a superficial level, *Mead* appears to abandon *Chevron*'s pluralist consensus in favor of an unprincipled, unpredictable case-by-case analysis. Dig deeper, however, and it becomes apparent that the Supreme Court actually employs *Mead*'s delegation fiction strategically to reach outcomes consistent with *Chevron*'s consensus-based approach.

In the Supreme Court's recent jurisprudence, *Chevron*'s domain has been circumscribed by five core rationales. As explained in Part I, agency statutory

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[162] *See, e.g.*, Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1212 (1990).

[163] *See, e.g.*, Steven Croley, *The Applicability of the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 103, 115 (John F. Duffy & Michael Herz eds., 2005) (arguing that *Mead* compounds the delegation fiction by construing notice-and-comment procedures as evidence of congressional intent); Sunstein, *Beyond* Marbury, *supra* note 3, at 2589-94.

[164] *See, e.g.*, Bressman, *How* Mead *Has Muddled*, *supra* note 10, at 1448 (arguing that *Mead*'s rationale has spawned uncertainty and confusion); Krotoszynski, *supra* note 3, at 751 (arguing that the congressional delegation's fictional character makes it too easy for courts to infer delegation depending on how they want to decide a given case); Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 ADMIN. L. REV. 771, 772, 782 (2002) (criticizing *Mead* for endorsing a "daunting set of abstractions" and arguing that the *Chevron*/*Skidmore* distinction has "no functional justification").

[165] Oliver R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?*, 7 HARV. L. REV. 249, 251 (1893).

[166] *Id.*

interpretations qualify for *Chevron* deference when the agency (1) exercises delegated lawmaking authority; (2) respects expert judgment; (3) reflects political responsiveness and accountability; (4) promotes deliberative rationality; and (5) facilitates national uniformity. Although the Supreme Court generally presumes as a preliminary matter that agency statutory interpretations qualify for *Chevron* deference, litigants may rebut this presumption by demonstrating that one or more of the five rationales remains unsatisfied. If an agency's policymaking process fails to satisfy a core constituency of *Chevron*'s consensus, the Supreme Court declines to apply *Chevron*'s two-step test, citing concerns that Congress could not have intended to delegate interpretive authority under the circumstances. Thus, the Supreme Court applies *Chevron* deference only in contexts where agency decision-making processes support a robust consensus.

The *Mead* decision itself reflects the continuing relevance of *Chevron*'s consensus. At the outset of the majority opinion, Justice Souter took pains to distinguish *Chevron* as a distinct "category of interpretive choices," which involved not only agency expertise, presidential influence, formality, and deliberation – the traditional *Skidmore* factors – but also the crucial "additional" ingredient of congressionally delegated lawmaking authority.[167] Having drawn this distinction between *Chevron* and *Skidmore*, however, Justice Souter immediately proceeded to deconstruct the delegation theory by considering all of the *Skidmore* factors under the pretense of looking for congressional intent. One "very good indicator of delegation," Souter reasoned, would be "express congressional authorizations to engage in . . . relatively formal administrative procedure" such as "rulemaking or adjudication that . . . tend[s] to foster the fairness and *deliberation* that should underlie a pronouncement of such force."[168] Souter noted further that tariff classification letters were not ordinarily approved by the Commissioner of Customs or the Secretary of the Treasury (much less the White House) prior to issuance and thus did not bear the hallmarks of political responsiveness or accountability.[169] In addition, tariff classification letters could not reasonably be construed as an instrument for setting uniform national policy, Souter suggested, because the Custom Service's forty-six offices around the country promulgated roughly 10,000 to 15,000 letters during the same year,[170] and all such letters were subject to de novo review by the Court of International Trade.[171]

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[167] United States v. Mead Corp., 533 U.S. 218, 227-29 (2001).

[168] *Id.* at 229-30 (emphasis added); *see also id.* at 231 n.13.

[169] *Id.* at 238 n.19; *cf.* Cassidy v. Chertoff, 471 F.3d 67, 84-85 (2d Cir. 2006) (deferring to a Coast Guard determination that particular vessels represented a "high risk" of terrorist attack because the relevant security plan was "approved at a national level by the Coast Guard Commandant").

[170] *Mead*, 533 U.S. at 233.

[171] *Id.* at 232-33.

For each of these reasons, the Court declined to infer delegation from the Customs Service's statutory authority to "fix the final classification and rate" for tariff classifications.[172] Instead, the Court looked beyond the mere delegation of lawmaking authority to the formality of the agency's decision, whether the rule represented administration policy, and the degree of care and deliberation required in the decision-making process.[173] Because the customs letter did not satisfy these factors crucial to *Chevron*'s consensus, Justice Souter and seven other Justices concluded the evidence of congressional delegation was insufficient.[174]

Although *Mead* formally endorsed the congressional delegation theory as the definitive test for *Chevron* deference, the Supreme Court actually employed *Mead*'s delegation fiction primarily as a heuristic for highlighting the concerns that a reasonable legislator might consider when deciding whether to delegate interpretive authority to an administrative agency. Because reasonable legislators of diverse perspectives might very well choose to condition *Chevron* deference on agency deliberation, applied expertise, political responsiveness, or other leading rationales, the Court must likewise consider these factors at Step Zero. If any of the leading comprehensive theories for flexible agency administration remained unsatisfied, the Court could not be confident that Congress would have delegated interpretive authority to the Customs Service under the circumstances presented in *Mead*. Thus framed, *Mead*'s delegation fiction simply directed the Supreme Court back to *Chevron*'s original consensus.

That the *Mead* majority employed the delegation fiction as a heuristic for considering multiple rationales for deference was not lost on the Court's lone dissenter, Justice Scalia. The majority's multifactor inquiry was unacceptable, he argued, because *Chevron* rested on one, and only one, consideration: "[A] presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved . . . by the agency . . . ."[175] In characteristically colorful prose, Justice

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[172] *Id.* at 222 (quoting 19 U.S.C. § 1500(b) (2000)).

[173] *Id.* at 230.

[174] *Id.* at 231-32.

[175] *Id.* at 240 (Scalia, J., dissenting) (quoting Smiley v. Citibank, 517 U.S. 735, 740-41 (1996)) (internal quotation marks omitted). In fairness to Justice Scalia, many of the Supreme Court's pre-*Mead* decisions did treat statutory gaps as prima facie evidence of congressional delegation. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 290 (1988) (holding that "a reviewing court must give deference" to a reasonable agency interpretation of a statute where Congress "is silent or ambiguous with respect to the specific issue"). On the other hand, the Court had also withheld deference in other cases where it found "reason to hesitate before concluding that Congress has intended . . . an implicit delegation." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). For example, the Court declined to defer to: agency litigation positions, *see, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988); interpretations raising "serious constitutional concerns," *see, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,

Scalia condemned the majority's rejection of this simple delegation presumption for "th'ol 'totality of the circumstances' test" as an "avulsive change in judicial review of federal administrative action."[176] Justice Scalia mocked the majority's concern for the lack of formality in Customs Service letters, noting that "[t]here is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law."[177] More generally, he belittled "the utter flabbiness" of the majority's approach, which incorporated "a grab bag of other factors – including [but not limited to] the factor that used to be the sole criterion for *Chevron* deference: whether the interpretation represented the *authoritative* position of the agency."[178] The majority's consideration of "the multifarious ways in which congressional intent can be manifested" would only lead to debilitating uncertainty in the lower federal courts, Justice Scalia prophesied.[179]

The last six years have witnessed the fulfillment of Justice Scalia's prophecy. Indeed, federal circuit courts have struggled mightily to apply *Mead*'s multifactor test in a principled fashion, assuming (as did Justice Scalia) that delegation must now be determined by juggling a grab bag of disparate concerns.[180] What these courts and *Mead*'s critics have failed to appreciate is that Justice Souter's multifactor analysis was never intended to operate as a flexible balancing test. Contrary to Justice Scalia's characterization, the *Mead* majority did not attempt to ascertain whether the preponderance of evidence before the Court raised an inference of delegation. Instead, *Mead* held tariff classification rulings to a higher standard. *Chevron* did not apply, the majority held, because the Customs Service's procedures for promulgating tariff classification letters did not satisfy *several* essential criteria.[181] Unlike the notice-and-comment procedures in *Chevron*, the Customs Service's decision-making procedures were not conducive to open public deliberation, lacked precedential authority, and did not require the Superintendent's contemporaneous approval.[182] For each of these three independent reasons, the

531 U.S. 159, 172 (2001), and Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); and so-called "major questions" that Congress would be unlikely to delegate to agency policymakers, *see, e.g.*, *Brown & Williamson*, 529 U.S. at 159 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

[176] *Mead*, 533 U.S. at 239, 241 (Scalia, J., dissenting).

[177] *Id.* at 243.

[178] *Id.* at 245.

[179] *Id.* at 251.

[180] *See, e.g.*, United States v. W.R. Grace & Co., 429 F.3d 1224, 1235 (9th Cir. 2005) ("Following *Mead*, the continuum of agency deference has been fraught with ambiguity."); Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 847-48 (9th Cir. 2003) (stating that *Mead* has "further obscured the already murky administrative law surrounding *Chevron*").

[181] *See Mead*, 533 U.S. at 231.

[182] *See id.* at 231-33.

tariff classification rulings could not support a consensus for flexible agency administration. The Supreme Court applied *Mead*'s delegation fiction in a manner that preserved the domain of *Chevron*'s consensus.

C. *Piercing* Mead*'s Delegation Fiction*

In subsequent cases, the Supreme Court has continued to apply *Chevron*'s pragmatic consensus under the veil of *Mead*'s delegation fiction. During the period from June 2001 – when *Mead* was decided – through the end of December 2007, the Supreme Court cited *Chevron* or *Mead* in forty-three cases.[183] The Court explicitly applied Step Zero analysis – evaluating whether an agency action fell within *Chevron*'s domain – in fourteen of the cases.[184] While critics might quibble with the results reached in these fourteen cases, the Court's explanations for granting or withholding *Chevron* deference therein is facially consistent with the consensus thesis advanced in this Article. Another six cases apply *Chevron* or *Skidmore* without expressly addressing the Step Zero question.[185] In seven cases, the Court denied *Chevron* deference based on

[183] These forty-three cases were identified through a search of the Westlaw database in January 2008.

[184] *See* Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339, 2350-51 (2007) (granting *Chevron* deference); Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc., 127 S. Ct. 1513, 1520 (2007) (granting *Chevron* deference based on congressional delegation); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 127 S. Ct. 1534, 1540-41 (2007) (granting *Chevron* deference based on delegation and expertise); Gonzales v. Oregon, 546 U.S. 243, 258-69 (2006) (denying *Chevron* deference based on lack of delegation and expertise); Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-86 (2005) (granting *Chevron* deference based on delegation); Household Credit Servs. v. Pfennig, 541 U.S. 232, 238-39 (2004) (granting *Chevron* deference based on delegation); Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487-88 (2004) (denying *Chevron* deference to internal guidance memoranda since it "lack[s] the force of law"); Wash. Dep't of Health & Human Servs. v. Keffeler, 537 U.S. 371, 383 n.6 (2003) (denying *Chevron* deference to a Social Security Administration internal manual since it was not "a product[] of formal rulemaking); Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45 (2002) (granting *Chevron* deference based on delegation); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-11 n.6 (2002) (denying *Chevron* deference to EEOC compliance manual due to poor agency deliberative process); Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 501-02 (2002) (granting *Chevron* deference based on delegation and expertise); Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (granting *Chevron* deference based on expertise and deliberative rationality); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 151 n.5 (2002) (denying *Chevron* deference based, in part, on lack of agency deliberation); Wis. Dep't of Health and Family Servs. v. Blumer, 534 U.S. 473, 497 (2002) (granting only *Skidmore* deference to proposed Medicaid rule despite finding both congressional delegation and administrative expertise).

[185] *See* Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2534 (2007); Raymond B. Yates Profit Sharing Plan v. Hendon, 541 U.S. 1, 17-18 (2004); Barnhart v. Thomas, 540 U.S. 20, 24-26 (2003); SEC v. Zandford, 535 U.S. 813, 819-20

perceived statutory clarity at Step One without addressing Step Zero.[186] The remaining sixteen cases are inconclusive; the Court either sidestepped *Chevron* entirely or cited *Chevron* or *Mead* without considering the scope of *Chevron*'s domain.[187]

The precedential impact of *Mead*'s delegation fiction is probably best assessed by examining the fourteen cases in which the Supreme Court expressly addressed the scope of *Chevron*'s domain. Collectively, these decisions strongly support the *Chevron*/*Mead* five-factor consensus: where agency decision-making processes arguably satisfied all five rationales at the core of *Chevron*'s consensus – delegated authority, expertise, political accountability, deliberative rationality, and national uniformity – the Court applied *Chevron*'s two-step formula. On the other hand, where any one of these five rationales for deference was demonstrably lacking, the Court withheld *Chevron* treatment.

To be sure, in the years following *Mead* the Court has steadfastly characterized congressional delegation as the crucial factor that distinguishes *Chevron*'s domain from *Skidmore*,[188] and the Court appears to take seriously its commitment to honor Congress's intent. At the same time, however, the Court routinely reaches beyond statutory text, legislative history, and "traditional tools of statutory construction"[189] to consider evidence of agency expertise, political accountability, deliberative rationality, and national

(2002); New York v. FERC, 535 U.S. 1, 18-20 (2002); Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 333 (2002).

[186] *See* Massachusetts v. EPA, 127 S. Ct. 1438, 1460 n.26 (2007); Rapanos v. United States, 547 U.S. 715, 739 (2006); Meyer v. Holley, 537 U.S. 280, 287-88 (2003); Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002); Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88-89 (2002); Barnhart v. Sigmon Coal Co. 534 U.S. 438, 462 (2002); INS v. St. Cyr, 533 U.S. 289, 320-21 n.45 (2001).

[187] *See* Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2781 n.18 (2007) (Thomas, J., concurring); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2515 (2007) (Scalia, J., concurring); Watters v. Wachovia Bank, 127 S. Ct. 1559, 1584 (2007) (Stevens, J., dissenting); Envtl. Def. v. Duke Energy Corp., 127 S. Ct. 1423, 1428 (2007); Schaffer v. Weast, 546 U.S. 49, 70 (2005) (Breyer, J., dissenting); Smith v. City of Jackson, 544 U.S. 228, 243-47, 264-67 (2005); Clark v. Martinez, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 269 (2004) (Breyer, J., dissenting); General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004); Black & Decker Disability Plan v. Nord, 538 U.S. 822, 831 (2003); Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 809 (2003); Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 680-81 (2003) (Thomas, J., concurring); Utah v. Evans, 536 U.S. 452, 472 (2002); Chevron U.S.A., Inc. v. Echazbal, 536 U.S. 73, 84 (2002); Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002); Household Int'l Tax Reduction Inv. Plan v. Matz, 533 U.S. 925, 925 (2001).

[188] *See, e.g.*, *Gonzales*, 546 U.S. at 258.

[189] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

uniformity. In so doing, the Court has surreptitiously breathed new life into *Chevron*'s consensus.

1. *Barnhart v. Walton*

One vivid illustration of this trend is *Barnhart v. Walton*,[190] the Supreme Court's 2002 decision upholding the Social Security Administration's interpretation of the statutory definition of "disability" under the Social Security Act ("SSA") as requiring that a claimant's "inability to engage in any substantial gainful activity" last for at least twelve months.[191] Preliminarily, the Court acknowledged that the Agency had formulated its interpretation of the SSA "through means less formal than 'notice and comment rulemaking'" but concluded that this would not necessarily disqualify the interpretation from *Chevron* deference because, under *Mead*, less formal decision-making processes might also qualify for deference.[192] After *Mead*, *Chevron* deference would apply when supported by a robust consensus. The Court explained:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[193]

Because all these overlapping rationales favored deference, the Court applied *Chevron* deference and upheld the Social Security Administration's reasonable statutory interpretation.[194]

2. *Long Island Care at Hom*e*, Ltd. v. Coke*

More recently, the Supreme Court employed a similar consensus-based approach to *Chevron* Step One in *Long Island Care at Home, Ltd. v. Coke*.[195] In a unanimous opinion authored by Justice Breyer, the Court considered a Department of Labor regulation exempting domestic workers who provide "companionship services" to the elderly and infirm from the Fair Labor Standards Act's minimum wage and overtime wage requirements. At the outset, Justice Breyer affirmed *Mead*'s delegation fiction by echoing *Chevron*'s insight that the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of

[190] 535 U.S. 212 (2002).

[191] *Id.* at 214 (quoting 42 U.S.C. § 423(d)(1)(A) (2000)).

[192] *Id.* at 221-22.

[193] *Id.* at 222 (citing United States v. Mead Corp., 533 U.S. 218, 230-31 (2001); 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 1.7, 3.3 (3d ed. 1994)).

[194] *Id.* at 215.

[195] 127 S. Ct. 2339 (2007).

policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[196] Observing that the Agency's regulation addressed "an interstitial matter,"[197] the Court concluded that Congress had "entrusted the agency to work out"[198] the details through flexible agency administration: "[I]t is . . . reasonable to infer (and we do infer) that Congress intended its broad grant of definitional authority to the Department to include the authority to answer these kinds of questions."[199]

The Court's Step Zero analysis did not rely exclusively upon this textual delegation analysis, however. As in *Barnhart*, the Court considered a variety of other rationales for *Chevron* deference under the veil of *Mead*'s delegation fiction. The Court stressed, for example, that "[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert."[200] In addition, the Court observed that the Agency had adopted the regulation through a robust deliberative process: "The Department focused fully upon the matter in question. It gave notice, it proposed regulations, it received public comment, and it issued final regulations in light of that comment."[201] Although the Court concluded by asserting that "the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule . . . as within, or outside, its delegation to the agency," the Court emphasized that this inquiry required consideration of a variety of factors.[202] These factors included whether "the agency focuses fully and directly upon the issue" as through "full notice-and-comment procedures" – not simply whether "the resulting rule falls within the [agency's] statutory grant of authority."[203]

3. *Gonzales v. Oregon*

The Court employed a similar consensus-based analysis in *Gonzales v. Oregon*[204] when it rejected Attorney General John Ashcroft's interpretive rule declaring physician-assisted suicide a violation of the Controlled Substances Act ("CSA").[205] Like *Barnhart* and *Long Island Care*, Justice Anthony Kennedy's opinion for a six-Justice majority invoked *Mead*'s delegation fiction as the authoritative test for determining whether the Attorney General's

[196] *Id.* at 2345 (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1983)) (internal quotation marks omitted).

[197] *Id.* at 2346.

[198] *Id.*

[199] *Id.* at 2347.

[200] *Id.* at 2346.

[201] *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 230 (2001)).

[202] *Id.* at 2350.

[203] *Id.*

[204] 546 U.S. 243 (2006).

[205] *Id.* at 268.

interpretation warranted *Chevron* deference.[206] In the majority's view, the CSA's text and structure did not support the assertion that Congress intended to authorize the Attorney General to declare physician-assisted suicide "outside 'the course of professional practice,' and therefore a criminal violation of the CSA."[207] But Justice Kennedy's *Chevron* analysis did not end there. Looking beyond the statutory text and structure, he also took pains to address other factors from *Chevron*'s consensus that Congress might have considered important. He stressed, for example, that Attorney General Ashcroft issued the interpretive rule "without consulting Oregon or apparently anyone outside his Department."[208] Therefore, the interpretive rule could not be attributed to a presidential directive or deliberative-democratic process. Moreover, Justice Kennedy reasoned that the Attorney General's lack of experience and expertise were important factors in discerning congressional delegation (or the lack thereof), "[b]ecause historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to [an] agency."[209] The Attorney General's relative lack of experience and expertise in matters of medical ethics militated "against a conclusion that the Attorney General ha[d] authority to make quintessentially medical judgments" relating to physician-assisted suicide.[210] Once again, *Mead*'s delegation fiction invited the Court to address multiple comprehensive rationales for *Chevron* deference under the pretext of searching for evidence of congressional intent.

4. *Wisconsin Department of Health and Family Services v. Blumer*

If the Supreme Court only invoked considerations such as agency expertise, deliberation, and political responsiveness as supplemental support for conclusions predetermined by the congressional delegation theory, it might be reasonable to conclude that *Mead*'s delegation theory controls Step Zero while other rationales for *Chevron* deference are mere window dressing. The Court's decision in *Wisconsin Department of Health and Family Services v. Blumer*[211] challenges this hypothesis.

[206] *Id.* at 255-56, 259.

[207] *Id.* at 262-63 (quoting Fed. Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 744 (1973)).

[208] *Id.* at 253-54.

[209] *Id.* at 266-67 (quoting Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 153 (1991)).

[210] *Id.* at 267; *cf.* Am. Bar Ass'n v. FTC, 430 F.3d 457, 469-71 (D.C. Cir. 2005); Jody Freeman and Adrian Vermeule have argued that *Gonzales* and other recent Supreme Court decisions reflect a movement away from a political accountability model and toward a renewed focus on agency expertise. *See* Freeman & Vermeule, *supra* note 83, at 54. More accurately, perhaps, *Gonzales* and other recent cases suggest that *both* rationales must be satisfied to trigger *Chevron* deference.

[211] 534 U.S. 473 (2002).

At issue in *Blumer* was whether the Medicare Catastrophic Coverage Act of 1988 ("MCCA") would permit states to use an "income-first" method for calculating resource allowances for a person living at home after their spouse had been institutionalized, and thereby become eligible for Medicaid.[212] Over the preceding decade, the Secretary of Health and Human Services had weighed in on the issue several times, issuing formal statements in favor of the income-first method.[213] By 2001, the Secretary had announced a proposed rule that would permit states to make "the threshold choice of using either the income-first or [an alternative] method."[214] Wisconsin resident Irene Blumer challenged her state's adoption of the "income-first" method and, indirectly, the Secretary's interpretation of the MCCA, seeking expedited access to Medicaid funds.[215]

On review, the Supreme Court held that Congress had delegated to the Secretary "the authority to prescribe standards relevant to the issue"[216] and that the Secretary had exercised that authority by promulgating a proposed rule and subjecting the rule to public notice and comment.[217] Justice Ruth Bader Ginsburg's majority opinion also noted parenthetically that the Secretary's "'significant expertise' . . . in the context of 'a complex and highly technical regulatory program'" would ordinarily warrant deference.[218] Despite the evidence of delegation and expertise, however, the Court accorded the Secretary's interpretation of the MCCA only "respectful consideration" under the *Skidmore* standard rather than full *Chevron* deference.[219] Until the Secretary completed his deliberations, considered all submissions, and promulgated a definitive final rule, *Chevron*'s consensus would remain unsatisfied and *Skidmore*, not *Chevron*, would apply. *Blumer* thus implicitly rejects the notion that either delegation of lawmaking authority or agency expertise alone is sufficient to trigger *Chevron* deference.[220]

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[212] *Id.* at 478.

[213] *Id.* at 484-85 (citing Chi. Reg'l State Letter No. 22-94 from the Health Care Fin. Admin. (July 1994), *reprinted in* Petition and Appendix for Writ of Certiorari at 87a, *Blumer*, 534 U.S. 473 (No. 00-952); Chi. Reg'l State Letter No. 51-93 from the Health Care Fin. Admin. (Dec. 1993), *reprinted in* Petition and Appendix for Writ of Certiorari at 78a, *Blumer*, 534 U.S. 473 (No. 00-952)).

[214] *Blumer*, 534 U.S. at 485.

[215] *Id.* at 478.

[216] *Id.* at 496.

[217] *Id.* at 485 (citing 66 Fed. Reg. 46,763, 46,765 (2001)).

[218] *Id.* at 497 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1995)).

[219] *Id.*

[220] Although Justices Stevens, O'Connor, and Scalia dissented, all nine Justices agreed that *Skidmore*, not *Chevron*, provided the appropriate standard of deference. *See id.* at 505 (Stevens, J., dissenting) (citing United States v. Mead Corp., 533 U.S. 218, 228 (2001)) (arguing that the Secretary's position was "devoid of any 'power to persuade'" under *Skidmore* because the Secretary had expressed different views over time). *Blumer* thus challenges the assumption that *Chevron*'s overlapping rationales are merely redundant, as

5. *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*

In other recent cases, the Supreme Court has cited *Mead*'s delegation fiction at Step Zero without expressly addressing agency expertise, presidential administration, deliberative process, or other leading rationales for *Chevron* deference. It would be a mistake, however, to construe such cases as rejecting *Chevron*'s consensus-based approach in favor of a streamlined congressional delegation theory. Consider, for instance, *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*,[221] where the Supreme Court upheld a Federal Communications Commission ("FCC") interpretation of the Communications Act of 1934.[222] In explaining the basis for its decision, the Court stated without elaboration that the FCC's interpretation merited *Chevron* deference because Congress had delegated authority to the FCC to promulgate "regulations and orders with the force of law."[223] While the Court did not expressly discuss the other leading rationales for *Chevron* deference, neither did the Court give any indication that the FCC's decision-making process would not satisfy these other rationales. The Court's invocation of *Mead*'s delegation theory in *Global Crossing* and other recent cases scarcely diminishes the continued salience of *Chevron*'s consensus.

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If Karl Llewellyn is right that inductive reasoning – the "heaping up of concrete instances" – most accurately reveals the law's meaning, then a strong argument can be made that *Mead* and its progeny counter-intuitively affirm *Chevron*'s consensus under the veil of legal fiction.[224] A close reading of the Supreme Court's recent cases suggests that *Mead*'s delegation fiction provides an incomplete account of the Court's decision-making process at *Chevron* Step Zero. A far better explanation can be found in *Chevron*'s consensus: the

some scholars have suggested. *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676, 690 (2007) (arguing that when tensions arise between agency expertise and political accountability, "the executive may pursue either a technocratic course or a political one; on the logic of *Chevron*, either approach is permissible"). The better reading of *Chevron* and *Mead* is that none of the overlapping rationales for deference is truly redundant; a single faulty thread in *Chevron*'s consensus compromises the integrity of the whole weave. *See, e.g.*, De La Mota v. U.S. Dep't of Educ., 412 F.3d 71, 79 (2d Cir. 2005).

[221] 127 S. Ct. 1513 (2007).

[222] *Id.* at 1516 (holding that "the FCC's application of § 201(b) [of the Communications Act of 1934] to the carrier's refusal to pay compensation is a reasonable interpretation of the statute").

[223] *Id.* at 1522 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-81 (2005)).

[224] KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 2 (William S. Hein & Co. 2007) (1930).

Supreme Court applies *Chevron* in contexts where agencies formulate regulatory policy through robust decision-making processes that reflect delegated authority, expertise, political responsiveness and accountability, deliberative rationality, and national uniformity. Conversely, the Supreme Court withholds *Chevron* deference in contexts where one or more of these rationales for deference are not satisfied. As the Court's *Chevron*-related decisions accumulate, it is becoming increasingly apparent that the Court has not, in fact, embraced a strong congressional delegation theory that turns solely upon delegation of lawmaking authority to the exclusion of other prevailing rationales for *Chevron* deference. Rather, the Court employs congressional delegation under *Mead* primarily as a heuristic for exploring the various core rationales within *Chevron*'s consensus.[225] The Court therefore grants *Chevron* deference only in contexts where diverse political, philosophical, and jurisprudential traditions favor flexible agency administration.

D. *The Puzzling Resilience of* Mead*'s Delegation Fiction*

Assuming the foregoing analysis accurately captures the Supreme Court's recent *Chevron* jurisprudence, why has the Court not abandoned the congressional delegation fiction in favor of a more transparent consensus-based approach?

It might be tempting to conclude the Justices actually believe they can discern Congress's intent to delegate interpretive authority from circumstantial evidence in an agency's enabling legislation. This hypothesis does not withstand close scrutiny, however. The Supreme Court's leading luminaries in administrative law – Justices Breyer and Scalia – have confessed in separate law review articles that the congressional delegation theory is a legal fiction.[226] In Justice Scalia's words, "the quest for the 'genuine' legislative intent is probably a wild-goose chase" because in most contexts "Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all."[227]

Notwithstanding the delegation fiction's formal inadequacy, Justices Breyer and Scalia defend the congressional delegation fiction on functionalist grounds. Justice Breyer asserts that the delegation fiction "has institutional virtues" because it constrains judicial discretion; when judges ask whether

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[225] *See* H. VAIHINGER, THE PHILOSOPHY OF "AS IF" 39-42 (C.K. Ogden trans., 2d ed. 1935) (1924) (discussing "heuristic fictions").

[226] Breyer, *supra* note 73, at 370 ("[Courts] have looked to practical features of the particular circumstance to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation."); Scalia, *supra* note 138, at 517 ("[A]ny rule adopted in this field represents merely a fiction, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

[227] Scalia, *supra* note 138, at 517.

Congress intended to delegate interpretive authority to an agency, they commit themselves to scrutinizing the statute closely and providing persuasive policy rationales for deference to administrative agencies.[228] Justice Scalia adds that once the Supreme Court has clarified the factors it will accept as evidence of delegation, Congress should be able to adjust its legislative drafting practices accordingly.[229] By the Justices' logic, *Mead*'s delegation fiction arguably operationalizes theories of congressional policymaking and judicial restraint.[230]

The flaws in this functionalist defense of the delegation fiction should be readily apparent. First, Justice Breyer's assertion that the Court's search for congressional delegation constrains judicial reasoning is debatable, to say the least. Indeed, the reverse is true: as a legal fiction of indeterminate content, *Mead* liberates the Court from having to ground its application of *Chevron* deference in any objectively verifiable criteria. Cloaking *Chevron* in *Mead*'s delegation fiction allows the Supreme Court to "appeas[e] the longing for an appearance of [methodological] conservatism,"[231] while remaining free to define *Chevron*'s domain based upon undisclosed normative criteria of its own choosing. Far from enhancing judicial restraint and accountability, *Mead*'s flexible delegation inquiry enhances judicial discretion and conceals judicial policymaking.

Second, Justice Scalia's assertion that the delegation fiction provides a clearer standard to guide future congressional action is unpersuasive. One need look no further than Justice Scalia's own dissent in *Mead* to appreciate that the congressional delegation fiction does not ipso facto ensure interpretive clarity.[232] Experience has shown, moreover, that *Mead*'s delegation fiction has spawned confusion and discord in the circuit courts, which have failed to appreciate the continuing relevance of *Chevron*'s consensus.[233] There is little

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[228] *See* Breyer, *supra* note 73, at 371 ("Using these factors as a means of discerning a hypothetical congressional intent about 'deference' . . . allows courts to allocate the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme.").

[229] Scalia, *supra* note 138, at 517; *see also* Laurence H. Silberman, Chevron – *The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 824 (1990) (stating that Congress's awareness of *Chevron* and distrust of "executive branch interpretation" should lead Congress to be more careful in its drafting).

[230] *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 798 (2007) [hereinafter Bressman, *Deference*]; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 824 (2002) (arguing that the congressional delegation fiction "has resuscitated the axiom that Congress is the primary source of authority to make law within our system of separation of powers"); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1439-40 (2007).

[231] LON L. FULLER, LEGAL FICTIONS 37 (1967).

[232] *See* United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

[233] *See* Bressman, *How* Mead *Has Muddled*, *supra* note 10, at 1445-47 (identifying inconsistencies in circuit courts' application of *Mead* and concluding that *Chevron*'s domain now hinges on whatever particular factors "the first panel to evaluate a particular

reason to believe that members of Congress have found the delegation fiction any more intelligible than the courts themselves.

If I am correct that the Supreme Court actually employs *Mead*'s delegation fiction as a heuristic for the five core rationales in *Chevron*'s consensus, concerns about judicial activism and doctrinal indeterminacy might fade somewhat. But this observation simply demonstrates the inadequacy of *Mead*'s nebulous delegation fiction as a positive theory of *Chevron* deference and underscores the need for courts to develop a more transparent framework for defining the scope of *Chevron*'s domain.

III. RECONSTRUCTING *CHEVRON*'S CONSENSUS

> What you have been doing by the fiction, – could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.[234]

Nearly a century ago, John Chipman Gray observed that "as a system of Law becomes more perfect, . . . better definitions and rules are laid down which enable us to dispense with the historic fictions which have been already created. Such fictions are scaffolding, . . . but, after the building is erected, serv[e] only to obscure it."[235] Lon Fuller would later elaborate upon Gray's scaffolding analogy, explaining that a legal "fiction is like a scaffolding in that it can be removed with ease. The fiction seldom becomes a 'vested interest'; it does not gather about it a group of partisan defenders. No one will mourn its passing."[236] According to this view, legal fictions function primarily to ease the law's transition toward a new regime. Once the new edifice has been completed, however, the old scaffolding can be disassembled and discarded.

In this spirit, I propose that the time is ripe to set aside *Mead*'s congressional delegation fiction and allow *Chevron*'s consensus to stand freely on its own merits. Few would mourn *Mead*'s passing and the benefits flowing from an express consensus-based approach would be significant. First, *Chevron*'s consensus would clarify the scope of *Chevron*'s domain. Agencies would be free to interpret ambiguous statutes flexibly as long as they employ procedures reflecting rational deliberation and expertise, conducive to national uniformity, consistent with actual congressional authorization, and subject to the incumbent administration's general guidance and accountability. Second, *Chevron*'s pragmatic consensus would strengthen *Chevron*'s political stability by disarming legal realists' criticisms of *Mead* and laying the groundwork for

interpretive procedure" deigns to select); Amy J. Wildermuth, *Solving the Puzzle of* Mead *and* Christensen*: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1895-96 (2006).

[234] JEREMY BENTHAM, *Rationale of Judicial Evidence*, *in* 7 THE WORKS OF JEREMY BENTHAM 283 (John Bowring ed., Russell & Russell, Inc. 1962) (1843).

[235] JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 35 (MacMillan Co. 1921) (1909).

[236] FULLER, *supra* note 231, at 70; *see also* VAIHINGER, *supra* note 225, at 88.

mutual respect and reciprocity among conflicting comprehensive theories of the administrative state. Third, expressly endorsing *Chevron* as a multifactor consensus would make the Supreme Court's own decisions more transparent. This enhanced transparency would in turn augment the Court's political accountability, aid Congress in drafting future legislation, and facilitate decisional uniformity in the lower federal courts.

A. *Mapping* Chevron*'s Consensus*

One virtue of *Chevron*'s consensus is that it draws a sharper distinction between decision-making processes that fall within *Chevron*'s domain and those beyond the pale. Rather than rely on *Mead*'s controversial delegation fiction, a consensus-based inquiry at Step Zero would consider whether an agency's decision-making process could sustain a consensus between the leading foundational theories for flexible agency administration. Courts reviewing agency action might reasonably presume in the first instance that an agency's exercise of lawmaking authority merits *Chevron* deference. Where litigants demonstrate that an agency's decision-making process does not satisfy one of *Chevron*'s overlapping rationales, however, the agency would not be entitled to *Chevron* deference and courts would proceed to evaluate the agency's statutory construction under the residual *Skidmore* factors.[237] This consensus-based, burden-shifting framework would provide a far clearer standard for defining *Chevron*'s domain than *Mead*'s nebulous delegation fiction or *Skidmore*'s fuzzy balancing test.

The EPA rulemaking reviewed in *Chevron* represents one obvious locus of consensus. However, agency statutory interpretations need not be adopted through notice-and-comment rulemaking procedures to qualify for *Chevron* deference. Under certain circumstances, a variety of agency policymaking procedures could satisfy *Chevron*'s consensus, as courts have recognized under *Mead*.[238] For example, formal adjudications satisfy the cumulative criteria for flexible agency administration under *Chevron*'s consensus.[239] In *INS v. Aguirre-Aguirre*,[240] the Supreme Court granted *Chevron* deference to a Board of Immigration Appeals ("BIA") decision interpreting the statutory language

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

[238] *See, e.g.*, Texas v. United States, 497 F.3d 491, 513 (5th Cir. 2007) (citing United States v. Mead Corp., 533 U.S. 218, 227 (2001)) ("Congressional delegation to an administrative agency . . . may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rule-making, or by some other indication of a comparable congressional intent.").

[239] *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)); Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417-19 (1992); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574 (1988)); *see also* Croley, *supra* note 163, at 106-07 (discussing *Chevron*'s applicability to formal adjudications).

[240] 526 U.S. 415 (1999).

"serious nonpolitical crime" under the Immigration and Nationality Act.[241] The Court observed that Congress had expressly charged the Attorney General "with the administration and enforcement" of the Act and specified that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[242] The Attorney General, in turn, had "vested the BIA with power to exercise the discretion and authority conferred upon the Attorney General by law in the course of considering and determining cases before it."[243] Having established congressional delegation to its satisfaction, the Court proceeded to look beyond the delegation inquiry to other rationales within *Chevron*'s consensus. The Court noted, for instance, that the BIA's expertise and responsiveness to presidential agenda-setting weighed strongly in favor of *Chevron* deference – particularly given that the BIA's adjudicatory role entailed "sensitive political functions that implicate questions of foreign relations."[244] Thus, insofar as the BIA sought to give "ambiguous statutory terms concrete meaning through [the deliberative, precedential] process of case-by-case adjudication," the Supreme Court reasoned that the BIA's statutory interpretations "should be accorded *Chevron* deference."[245] *Aguirre-Aguirre* thus underscores the continued relevance of *Chevron*'s consensus in formal adjudication as a guide to the scope of *Chevron*'s domain.

Conversely, *Chevron*'s consensus counsels against deference to statutory interpretations developed through notice-and-comment rulemaking or formal agency adjudication in the absence of congressional delegation, expertise, uniformity, or political accountability. By definition, formal agency adjudication provides procedural safeguards that facilitate public participation and agency deliberation;[246] an agency's failure to employ these mandatory procedures would rule out *Chevron*'s deference. Administrative law judges who lack policymaking authority would not receive deference under

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[241] *Id.* at 418 (quoting 8 U.S.C. § 1253(h)(2)(C) (1994), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 307, 110 Stat. 3009-612 (1996)).

[242] *Id.* at 424 (quoting 8 U.S.C. § 1103(a)(1) (Supp. III 1994) (current version at 8 U.S.C. § 1103(a)(1) (2000))) (internal quotation marks omitted).

[243] *Id.* at 425 (quoting 8 C.F.R. § 3.1(d)(1) (1998) (current version at 8 C.F.R. § 1003.1(d)(i) (2008))) (internal quotation marks omitted).

[244] *Id.* (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)) (internal quotation marks omitted). *But see* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1682 (2007) (discussing circuit courts' reluctance to grant *Chevron* deference to the BIA's interpretations of law based on skepticism about the BIA's expertise).

[245] *Aguirre-Aguirre*, 526 U.S. at 425 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)) (internal quotation marks omitted).

[246] *See* 5 U.S.C. §§ 554(b), 555(b), 556(d), 557(c) (2000) (mandating that, under the Administrative Procedure Act ("APA"), agencies must provide notice to persons potentially affected by the agency's action, allow for the presentation of evidence in oral or documentary form, permit cross-examination by participating parties, and base findings and conclusions of fact exclusively on record evidence).

Chevron.[247] Similarly, the consensus approach would withhold *Chevron* deference from informal agency adjudications and rulemakings that systematically neglect expert evidence[248] or impede the establishment of a unitary national standard.[249] On the rulemaking side, the APA's notice-and-comment requirements for informal rulemaking would be insufficient to justify flexible agency administration where agencies lack a reasonable claim to expertise or their chosen interpretation would not provide a uniform national standard. Thus, *Chevron*'s consensus challenges the popular misconception that *all* agency statutory constructions adopted through notice-and-comment rulemaking merit *Chevron* deference.[250]

The consensus approach also provides a useful framework for clarifying *Chevron*'s application to other forms of agency policymaking. For example, the U.S. Commerce Department's antidumping determinations, which do not fall neatly into either the rulemaking or adjudication paradigms, could qualify for *Chevron* deference based on either expertise or political accountability – but only where the agency voluntarily engages in an open deliberative process

[247] Examples include administrative law judges within the Federal Mine Safety and Health Review Commission ("FMSHRC") and the Occupational Safety and Health Review Commission ("OSHRC"). *See* Martin v. OSHRC, 499 U.S. 144, 152-53 (1991) (holding that the OSHRC was not entitled to deference because Congress had committed policymaking authority to another agency body, the Occupational Safety and Health Administration).

[248] *See, e.g.*, Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 642 n.30 (1986) (denying *Chevron* deference to the Department of Health and Human Services' interpretation of the Rehabilitation Act, a statute of general applicability, because the agency lacked expertise).

[249] *See, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 478-80, 482 (1999) (denying *Chevron* deference where the statute was administered by multiple federal agencies). *But see* Individual Reference Servs. Group v. FTC, 145 F. Supp. 2d 6, 23-24 (D.D.C. 2001) (granting *Chevron* deference where agencies authored a coordinated interpretation of an ambiguous statutory term). Some circuits have elevated the uniformity inquiry by framing *Chevron* as an inquiry into whether the agency interpretation would have decisive precedential value within the agency. *See, e.g.*, Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1012-13 (9th Cir. 2006) (citing Miranda Alvarado v. Gonzalez, 449 F.3d 915, 922 (9th Cir. 2006)). Even these courts have recognized, however, that precedential uniformity is insufficient for *Chevron* deference unless other factors are satisfied, such as the administrator's "imprimatur" of authority. *Miranda Alvarado*, 449 F.3d at 922 (citing 8 C.F.R. § 100.3(d)(1) (2006)) (describing an immigration judge's decision as "without precedential value and without the imprimatur of the Attorney General or the Attorney General's delegate"); *see also* United States v. Mead, 533 U.S. 218, 232 (2001).

[250] *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 227 (2002) (Scalia, J., concurring in part and concurring in the judgment) ("The SSA's recently enacted regulations emerged from notice-and-comment rulemaking and merit deference. No more need be said."); Groff v. United States, 493 F.3d 1343, 1350 (Fed. Cir. 2007).

that results in a precedential standard.[251] Similar standards could apply to agency interpretive rules, giving structure to *Mead*'s vague admonition that, although interpretive rules "enjoy no *Chevron* status as a class," some interpretive rules might yet fall within *Chevron*'s domain.[252] Even agency "interpretations contained in policy statements, agency manuals, and enforcement guidelines" – traditionally "beyond the *Chevron* pale"[253] – might sometimes warrant *Chevron* deference if they emerge from a robust decision-making process that achieves precedential authority within the agency.[254] In these contexts and many others, *Chevron*'s multifactor consensus would set the Supreme Court's deference jurisprudence on a more coherent and intelligible foundation.

As for recent scholarly efforts to extend *Chevron* deference to new fields such as criminal law and foreign relations law,[255] *Chevron*'s pluralist consensus sounds a cautionary note. Although the executive branch's superior expertise furnishes an important functional justification for judicial deference in these fields, the *Chevron* analogy loses force as consideration shifts to other factors in *Chevron*'s pluralist consensus such as congressional delegation, deliberative rationality, or regulatory uniformity. For example, it would be a mistake to apply *Chevron*-style deference to the State Department's interpretation of multilateral treaties and customary norms, because this approach would undermine one of *Chevron*'s core rationales – regulatory uniformity – by inviting conflict between domestic law and international consensus.[256] The case for applying *Chevron* deference to federal criminal law is similarly flawed. Even those who advocate applying *Chevron* deference in

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[251] *See, e.g.*, Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001) (granting *Chevron* deference to a Commerce Department antidumping determination).

[252] *Mead*, 533 U.S. at 232 (citing Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472-73 (1992)). *Compare* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995) (granting deference to an interpretive rule issued by the Secretary of the Interior), *with Martin*, 499 U.S. at 157 (1991) (stating that "interpretive rules" are not entitled to the same level of "deference as norms that derive from the exercise of . . . delegated lawmaking powers" (citations omitted)).

[253] *Mead*, 533 U.S. at 234 (quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000)) (internal quotation marks omitted).

[254] *See id.* at 230; *cf.* Smiley v. Citibank, 517 U.S. 735, 741 (1996) ("Of course we deny deference 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' The deliberateness of such positions, if not indeed their authoritativeness, is suspect." (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988))).

[255] *See supra* notes 24-25 and accompanying text.

[256] Criddle, *supra* note 25, at 1930-33; *see also* Jinks & Katyal, *supra* note 25, at 1248-49 (arguing that courts cannot reasonably infer a delegation of interpretive authority to the executive branch in contexts where treaties or customary norms operate as constraints upon executive authority).

criminal law recognize that Congress has delegated interpretive authority over federal criminal law to the courts, not the executive branch.[257] Moreover, the Justice Department's interpretations of criminal statutes generally arise as ad hoc litigation positions, which do not necessarily reflect the robust deliberation or national uniformity required for *Chevron* deference. To honor *Chevron*'s spirit, federal courts should resist appeals to extend *Chevron*-style deference literally or by analogy to these and other contexts that fall outside the scope of *Chevron*'s multifactor consensus.

Chevron's consensus thus illuminates the borders of *Chevron*'s domain. Where all of *Chevron*'s five core rationales are satisfied, federal courts should defer to agencies' flexible interpretations of ambiguous statutes. Conversely, where any of these core rationales remains unsatisfied, courts should determine instead whether the agency's preferred interpretation is otherwise persuasive under *Skidmore*'s residual balancing test. Reconstructing *Chevron*'s consensus in this manner would provide a more coherent guide to *Chevron*'s domain than *Mead*'s nebulous delegation fiction.

B. Chevron *Deference, Legal Pluralism, and Political Stability*

A second virtue of the consensus approach is that it offers a politically stable foundation for *Chevron* deference. At a time when no single comprehensive theory of the administrative state has gained universal approval and diverse theories of statutory interpretation abound, a pragmatic consensus-based approach fosters greater harmony in *Chevron* jurisprudence. Whether a judge approaches problems in administrative law from the perspective of pluralist or civic republican theory, inherent executive authority or deliberative democracy, agency independence or political accountability, *Chevron*'s consensus offers a serviceable framework for addressing the judge's core jurisprudential commitments while according reciprocity to other judges with different views.

To be sure, reasonable judges might continue to disagree as to whether agency expertise, political accountability, congressional delegation, or some other factor provides the best theoretical grounding for *Chevron* deference. From time to time, cases will fall outside the scope of *Chevron*'s consensus, triggering actual conflicts between its competing rationales. In such cases, courts should pass over *Chevron* deference and apply the residual *Skidmore* test to determine whether agency interpretations merit deference in the face of persistent theoretical friction. Statutory interpretations adopted through *Skidmore*'s balancing test would not qualify for flexible agency administration – *Chevron*'s exclusive domain – but would instead be subject to traditional principles of stare decisis. This approach would enhance the political stability

[257] Kahan, *supra* note 24, at 474 (explaining that Congress allows for ambiguity in federal criminal statutes and is "perfectly aware that this approach [shifts] a great deal of law-defining authority to courts").

of *Chevron* Step Zero in the face of enduring theoretical pluralism and draw a more coherent distinction between *Chevron* and *Skidmore*.

Chevron's antifoundationalist consensus will not appeal to everyone. Some might agree with Ronald Dworkin that the Supreme Court should pursue a unitary theory that would lend greater coherence to the interrelationship between courts and agencies in statutory interpretation.[258] Significant practical obstacles impede Dworkin's quest for coherence, however. At present, no single rationale for *Chevron* deference can provide a politically stable foundation for flexible agency administration because none has achieved anything close to a consensus among judges and scholars. Nor do any of the prevailing rationales appear likely to emerge victorious from the current scrum. Thus, the Dworkinian yearning for a comprehensive theory of court-agency relations, admirable though it may be, does not at present furnish a viable alternative to *Chevron*'s consensus. Until a usable comprehensive theory takes shape, the consensus-based approach best satisfies the pragmatic imperative for a second-best solution to stabilize *Chevron*'s domain amidst enduring theoretical pluralism.

C. *Demystifying* Chevron*'s Domain*

Piercing *Mead*'s delegation fiction would also demystify the Supreme Court's decision-making process at *Chevron* Step Zero for the benefit of Congress, agencies, and the lower federal courts. For the past seven years, *Mead*'s delegation fiction has cast a shadow of uncertainty over *Chevron*'s domain, perplexing courts and commentators alike. To address this problem, the Supreme Court should acknowledge *Mead*'s delegation theory for what it is – a legal fiction – and candidly invoke *Chevron*'s five-factor consensus as the definitive test for *Chevron* deference.[259]

Judicial candor has many advocates, of course. David Shapiro has emphasized that courts' duty to provide reasoned explanations for their decisions – "grounds of decision that can be debated, attacked, and defended – serves a vital function in constraining the judiciary's exercise of power."[260]

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[258] *See* RONALD DWORKIN, LAW'S EMPIRE 265 (1986). For example, judges and scholars who defend *Chevron* as an extension of the President's constitutional powers would likely oppose a consensus-based approach to *Chevron* deference.

[259] Professor Bressman has argued in a similar vein that courts should "simply . . . acknowledge that *Chevron* is based on a fiction about congressional intent in the service of broader democratic values." Bressman, *Deference*, *supra* note 230, at 765.

[260] David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (footnote omitted). *But see* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194 (1979) (arguing that the law's legitimacy depends more on perception than reality and that a judicial system's "paramount" objective may be simply to provide an "authoritative resolution" to disputes).

The argument for judicial candor "carries special force" for judges "in a constitutional democracy,"[261] observes Peter Smith:

> Specifically, because a requirement of candor makes transparent a judge's reasons, it also makes transparent his choices. Sometimes those choices will be factually contingent, and sometimes they will be purely normative. When the choices are factually contingent, the public – lay people, political officials in other branches, and scholars – can measure the descriptive validity of the factual claims. And, more important, when the choices are normative, candor enables the public to assess both the appropriateness in general of judges' making such choices and the desirability of the particular normative choice at issue in the case.[262]

Judicial candor also serves the interests of justice by illuminating the law's application for those who are themselves subject to it.[263]

Mead's delegation fiction does not rest easily with the constitutional imperative of judicial candor. To be sure, Justices Scalia and Breyer might be right that courts could employ *Mead*'s delegation fiction to operationalize a theory of judicial restraint.[264] But to the extent courts actually deploy *Mead*'s delegation inquiry without acknowledging its fictional character, the fog of fiction can also obscure judicial self-deception and subterfuge. This threat is arguably heightened in the *Chevron* context where courts lack empirically verifiable evidence of actual congressional intent. Because courts must infer congressional intent to delegate interpretive authority from ambiguous evidence, they can easily manipulate the delegation fiction to grant or deny *Chevron* deference based solely on how they wish to decide particular cases.[265] Moreover, whether or not courts employ legal fictions generally as a "cover for rascality,"[266] as Bentham memorably quipped, the fact remains that *Mead*'s delegation fiction tends to undermine judicial candor in practice by cloaking the deeper normative judgments that sustain *Chevron*'s consensus. Therefore, advocates of judicial candor are likely to greet *Mead*'s delegation fiction with suspicion.

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[261] Smith, *supra* note 230, at 1482.

[262] *Id.* at 1482-83.

[263] *See* Diver, *supra* note 74, at 575 (citing LON L. FULLER, THE MORALITY OF LAW 63-65 (2d ed. 1969)) ("As Lon Fuller has argued, the 'internal morality' of law requires that it be comprehensible to those whose conduct it regulates.").

[264] *See supra* note 230 and accompanying text.

[265] *See* Miles & Sunstein, *supra* note 2, at 825-27.

[266] JEREMY BENTHAM, *A Comment on the Commentaries and a Fragment on Government*, *in* COLLECTED WORKS OF JEREMY BENTHAM 511 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1977) (1838); *see also* JEREMY BENTHAM, LETTERS ON SCOTCH REFORM (1808), *reprinted in* 5 THE WORKS OF JEREMY BENTHAM 3, 13 (John Bowring ed., 1962) ("Fiction [in law is] a willful falsehood, uttered by a judge, for the purpose of giving to injustice the colour of justice.").

In contrast, the Supreme Court could enhance the transparency of its deference jurisprudence by employing *Chevron*'s consensus. Under the consensus-based approach, the Court would engage in a more robust form of public reasoning, explaining in concrete terms why an agency's decision-making process satisfies or does not satisfy each of the rationales for flexible agency administration. Where any of the leading rationales for deference remains unsatisfied, the *Skidmore* test would similarly require the Court to address each of the rationales for deference and explain why certain factors should overcome others in deciding whether deference is appropriate to the statutory interpretation under review. The consensus framework thus transforms the controversial *Chevron*/*Skidmore* distinction into a useful device for promoting judicial candor and opening judicial reasoning to public scrutiny, holding judges accountable for their deference determinations.

By making the Supreme Court's *Chevron* jurisprudence more accessible and intelligible, the consensus-based approach would also foster decisional uniformity in the circuit courts. Federal courts would no longer have to parse the tea leaves of Supreme Court decisions such as *Mead* and *Barnhart* to determine which comprehensive rationale for *Chevron* deference is currently in vogue. *Chevron*'s consensus would thus lay the foundation for a more uniform *Chevron* jurisprudence throughout the federal system.

D. *Legal Fictions All the Way Down*

Although *Chevron*'s consensus has many functional advantages over *Mead*'s congressional delegation fiction, it is not a panacea for the legal fictions that pervade *Chevron* jurisprudence. The ubiquity of legal fictions in statutory interpretation generally, and in *Chevron* jurisprudence specifically, is reminiscent of the classic tale recounted by Justice Scalia in *Rapanos v. United States*:[267]

> [A]n Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies "Ah, after that it is turtles all the way down."[268]

The more closely one scrutinizes the various rationales for *Chevron* deference, the clearer it becomes that *Chevron*'s revolution, like the guru's earth, rests on legal fictions "all the way down." *Chevron*'s various

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[267] 547 U.S. 715 (2006).

[268] *Id.* at 754 n.14 (paraphrasing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 28-29 (1973)). In *Chevron* itself, Justice Stevens cited Roscoe Pound's assertion that the very concept of "interpretation" could be characterized as a "general fiction" insofar as it obscures a court's prescriptive function. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.10 (1984) (citing ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174-75 (1921)).

comprehensive rationales are each legal fictions to the extent they depend upon contextually contingent factual assumptions.[269] Indeed, the very concept of a consensus in *Chevron* jurisprudence might be characterized as a legal fiction. Although *Chevron* achieved unanimity within the Supreme Court, flexible agency administration has not achieved unanimous approval within the legal academy.[270] Moreover, the search for zones of consensus in *Chevron* jurisprudence has a fictional quality given the proliferation of rationales for *Chevron* deference. As a matter of practical necessity, courts have no choice but to confine their inquiry at Step Zero to a limited set of factors, such as the five core rationales discussed in *Chevron*, *Mead*, and *Barnhart*. For these reasons alone, *Chevron*'s consensus arguably falls short of a genuine consensus and remains firmly entrenched in legal fictions.

Nevertheless, the idea that *Chevron*'s consensus rests on legal fictions should not be viewed as cause for alarm. As Eben Moglen and Richard Pierce have stressed, *Chevron* is hardly unique in its reliance on legal fictions; "*all* interpretive regimes are built on a series of [legal] fictions."[271] Moreover, even assuming courts could purge *Chevron* jurisprudence of its legal fictions, it is not self-evident that this course of action would be desirable. "If all fictions were eliminated," R.A. Samek cautions, "we would be saddled with the dead fictions of yesterday. . . . To engage in a witch-hunt for fictions is to entrench the doctrine of the day."[272]

Rather than attempt to eradicate all legal fictions from *Chevron* jurisprudence, courts should focus their energies on selecting interpretive principles that foster political stability and advance rule-of-law values, while candidly acknowledging the strengths and weaknesses of their chosen fictions. *Chevron*'s consensus substantially advances these objectives. By employing *Chevron*'s two-step test exclusively in contexts where all of the leading rationales counsel deference, the Supreme Court could clarify *Chevron*'s domain, broaden its appeal, and bolster its political stability. At the same time, the consensus-based approach would provide the flexibility needed to allow *Chevron*'s domain to evolve over time in response to new theoretical perspectives and institutional arrangements. As today's leading theories for *Chevron* deference wax and wane and other theories arise to take their place,

[269] *See* Moglen & Pierce, *supra* note 162, at 1210, 1213-15; Smith, *supra* note 230, at 1470 (characterizing as "new legal fictions" the utilization of over-inclusive socio-political factual presumptions to obscure contestable normative judgments).

[270] *See, e.g.*, Farina, *supra* note 144, at 456; Tyler, *supra* note 57, at 1430.

[271] Moglen & Pierce, *supra* note 162, at 1213; *see also* JEROME FRANK, LAW AND THE MODERN MIND 167 (Tudor Publ'g Co. 1936) (1930) ("[J]udges have failed to see . . . that, *in a sense, all legal rules, principles, precepts, concepts, standards – all generalized statements of law – are fictions.*"); FULLER, *supra* note 231, at 2. *But see* Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1256 (1990) (arguing that legal fictions "are not indispensable" but are rather "obstacles to thought" and should be replaced with "interpretive principles – ones that can be defended in substantive or institutional terms").

[272] R.A. Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290, 313, 315 (1981).

the consensus would reposition the borders of *Chevron*'s domain to reflect these developments. Properly applied, therefore, *Chevron*'s consensus would lend clarity, stability, and transparency to *Chevron*'s domain while satisfying the needs of a dynamic, pluralist society over time.

CONCLUSION

If *Chevron* has taken a seat alongside *Marbury* and *Brown* in the pantheon of American public law, the decision's pluralist vision sets it apart as a distinctly postmodern super-precedent. Contrary to conventional wisdom, Justice Stevens's unanimous *Chevron* opinion does not embrace any single rationale for deference to agency statutory interpretation. Instead, *Chevron* clears a space for flexible agency administration at the intersection between several leading rationales for deference: congressional delegation, administrative expertise, agency political responsiveness and accountability, deliberative rationality, and national uniformity.

In *Mead*, the Supreme Court appeared to abandon *Chevron*'s pragmatic consensus by endorsing congressional delegation as the touchstone for *Chevron* deference. By all accounts, *Mead* has sown confusion and discord in the circuit courts. What *Mead*'s critics have failed to appreciate, however, is that the Supreme Court actually employs the congressional delegation theory instrumentally to sustain *Chevron*'s consensus. Where agency decision-making processes satisfy all of the leading rationales for deference, the Court applies *Chevron*. Conversely, where any of the leading rationales for deference remains unsatisfied, the Court evaluates agency statutory interpretations under the residual *Skidmore* test.

The time has come to dismantle *Mead*'s delegation fiction and expressly reconstruct *Chevron*'s consensus. In future cases, the Supreme Court should acknowledge candidly that *Chevron*'s consensus governs the scope of *Chevron*'s application. Affirming *Chevron*'s consensus in this manner would clarify *Chevron*'s scope, bolster *Chevron*'s political stability, and promote judicial accountability in federal statutory interpretation.