

The United States Court of Appeals for Veterans Claims: Has It Mastered *Chevron's* Step Zero?

Linda D. Jellum¹

INTRODUCTION

It has been twenty-five years since *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,² was decided. *Chevron* was originally welcomed as a revolutionary hero: a tool that the Reagan administration could use to protect deregulation.³ *Chevron* transformed deference analysis into a simple, two step test. First, a court should determine whether Congress had decided the issue, if not, the court was obligated to defer to any *reasonable* agency interpretation.⁴ While Justice Stevens, the author of *Chevron*, never intended *Chevron* to revolutionize deference jurisprudence, *Chevron* did just that.⁵ It shifted interpretive power from the courts to the agencies.⁶

¹ Associate Professor of Law, Mercer School of Law. The article was prepared for and presented at the Eleventh Judicial Conference of the United States Court of Appeals for Veterans Claims (Veterans Court) held in March 2010 in Washington, D.C. I would like to thank the organizers of the conference, Judge Davis and Judge Hagel, and especially, Professor Michael Allen, for inviting me to speak. I also thank Mercer University School of Law for research and technological assistance. Finally, I would like to thank my research assistant, Troy Clark (JD expected 2010) for his outstanding and tireless help with the research for this paper.

² 467 U.S. 837 (1984). Although many commentators insert a comma in the official cite, there are no commas in the petitioner's name in the official U.S. Reports. Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMIN. LAW STORIES 399 n.1 (Peter L. Strauss ed., 2006).

³ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087 (2008).

⁴ *Id.* at 1086.

⁵ Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 738-39 (2007); GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 449 (5th ed. 2009). According to Professor Lawson, the D.C. Circuit was responsible for the revolution. *Id.* at 449-50. It adopted a broad reading of *Chevron*, believing that the opinion substituted a simple two-step test for the more complicated multiple factor analysis previously in existence. *Id.*

⁶ Jellum, *supra* note 5, at 742; cf. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 997 (1992) (stating that *Chevron* "seriously weakens the primary check on agency abuses while offering no adequate alternative in its place").

[W]hen courts defer to agency interpretations, power to say what the law means shifts from the judiciary to the executive branch. Because of this shift in power, the appropriate level of deference has changed over time as the Justices have been more or less comfortable with deferring to the executive.⁷

Apparently, viewing its concession as too big, the United States Supreme Court (Supreme Court or “Court”) has retreated from *Chevron*’s broad grant of power to agencies, but not by explicitly recalling the beast. Rather the Supreme Court has added a series of steps to *Chevron*’s application, turning *Chevron* from a simple two step into a multi-faceted flamenco.

While many thought that *Chevron* would simplify and streamline an otherwise uncertain area—deference to agency interpretations—ultimately, the Supreme Court has introduced unwanted and unexpected complexity.⁸ Indeed, in 2005, Professor Lisa Bressman criticized the Supreme Court jurisprudence in this area and coined the term “*Mead*’s Mess.”⁹ A year later, Professor Cass Sunstein similarly lamented the craziness of the Court’s jurisprudence and fashioned the term “*Chevron* Step Zero.”¹⁰ More recently, Professor William Eskridge expressed the following complaint: “Although the complicated and unevenly applied deference continuum is working fine for deciding cases before the Supreme Court, [it] is not a satisfactory regime for providing guidance to lower courts, legislators, agencies, and the citizenry. The Court should simplify the continuum”¹¹ No doubt.

⁷ LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 209 (2008) (citation omitted).

⁸ See generally Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 *CONN. L. REV.* 779 (2010) (discussing overlapping reasons why *Chevron* should be overruled).

⁹ Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 *VAND. L. REV.* 1443, 1486 (2005).

¹⁰ Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 207-09 (2006) (exploring the disagreement between Justices Scalia and Breyer regarding *Chevron*’s first step).

¹¹ Eskridge & Baer, *supra* note 3, at 1091-92. The authors also stated that “the courts of appeals are the primary venue for judicial review of agency interpretations. Given its discretionary

Hence, while *Chevron* initially appeared to offer an uncomplicated and predictable framework for agency deference, “*Chevron* has proved to be less clear, predictable, and simple than originally envisioned. Its guidance is unclear; its application has been, at best, uncertain.”¹² In just twenty-five years, the Supreme Court has transformed *Chevron*’s simple two step into a complicated dance suitable only for experts. Commentators have been quick to offer alternatives,¹³ although the suggestions seem to have fallen on deaf ears.

Whether *Chevron* should have been decided as it was is irrelevant today.¹⁴ It is here for the long term. Hence, what is relevant today is whether those individuals bound to follow the Supreme Court’s direction in this area can do so. This article explores *Chevron* and its progeny and examines one court’s application of this complicated doctrine: the United States Court of Appeals for Veterans Claims (“Veterans Court”).¹⁵ To do so, in Part I of this article, I explain briefly why agencies are entitled to deference when they interpret statutes. In Parts II and III, I explore

jurisdiction over appeals and the Justices’ disinclination to exercise that discretion, the Supreme Court reviews only a small percentage of agency interpretations that make their way through the federal court system.” *Id.* at 1096.; *accord* Beerman, *supra* note 8 (calling for an end to *Chevron*).

¹² Jellum, *supra* note 5, at 726.

¹³ *See, e.g.*, Beerman, *supra* note 8, at 843-50 (proposing replacements to the basic two-step *Chevron* framework).

¹⁴ Compare Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988) (arguing that interpretations of terms in statutes are policy decisions best left to agencies), and The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) (suggesting that *Chevron* is correct because of congressional intent), with Merrill, *supra* note 6 (lamenting that *Chevron* gives agencies too much power), and Beerman, *supra* note 8 (arguing that *Chevron* has proven to be a complete and total failure and thus should be overruled immediately).

¹⁵ The Veterans Court was created by Congress in 1988 as an Article I Court. Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (codified as amended in scattered sections of 38 U.S.C.). It exercises exclusive jurisdiction over the decisions of the Board of Veterans’ Appeals (Board) on the motion of claimants. *Id.*; *see generally* Michael P. Allen, *Significant Developments in Veterans Law (2004–2006) and What They Reveal about the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 MICH. J.L. REFORM 483 (2007) (discussing the history of the Veterans Court by describing its significant decisions from 2004 to 2006).

the Court's jurisprudence in this area to explain *Chevron's* Step Zero: including the law pre-*Chevron*, the law of *Chevron*, and the law post-*Chevron*—the development of *Chevron's* complicated Step Zero. Simply put, *Chevron* applies when Congress intends that an agency be given deference for interpretations, regardless of how the agency reached the interpretation.¹⁶ In these situations, *Chevron* is appropriate because Congress intended for the agencies, not the courts, to develop this area of law. In contrast, when Congress does not so intend, then the agency is deserving of only *Skidmore*¹⁷ deference at best. In this situation, Congress intended the courts to be the final arbiters of these types of legal issues.¹⁸ After explaining and identifying an approach to this complicated area of law, in Part IV, I examine recent jurisprudence from the Veterans Court to see if it is accurately applying *Chevron's* Step Zero. Not surprisingly given the poor guidance from the Supreme Court, the Veterans Court struggles with this area of jurisprudence. Additionally, within this part, I briefly explore an issue unique to veterans' law, the *Gardner*¹⁹ presumption—which provides that interpretive doubt should be resolved in the veteran's favor²⁰—and suggest that this presumption conflicts with *Chevron*.

¹⁶ See *infra* Part III.

¹⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁸ WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES* 401 (3d ed. 2006) (stating that “the Court is using hypothetical intent, focusing on whether it is reasonable to assume that Congress meant for the courts to defer to the agency’s interpretation or application of a statutory provision”). In determining whether Congress has intent, the United States Supreme Court (Supreme Court or “Court”) does not review legislative history for actual intent, rather it looks for “hypothetical intent,” based on the factors identified above. See *id.*

¹⁹ See *Brown v. Gardner*, 513 U.S. 115 (1994).

²⁰ See *infra* Part IV.

I. THE BASIS FOR DEFERENCE

Article III of the Constitution grants the judiciary all “judicial Power.”²¹ According to *Marbury v. Madison*,²² this language means that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²³ But the judiciary is not the only branch of government that must interpret statutes; administrative agencies, which are part of the executive branch, must also interpret the statutes they administer and implement.²⁴ A formalist constitutional scholar might suggest that agencies should have no interpretive role or at least not one that trumps the judicial role.²⁵ Yet, this view is extreme.

For many reasons, agency interpretation is necessary and judicial deference is appropriate. The modern administrative state is vastly complex. Agencies have expertise in their area of responsibility; consider the Department of Veterans Affairs (VA), the Environmental Protection Agency (EPA), or the Food and Drug Administration (FDA). Each of these agencies have experts and specialists trained in the relevant field. Judges, who are generalists, are experts in the law, not in the environment or food safety. Hence, it simply makes more sense for personnel within the VA to determine disability benefits for veterans, for scientists within the EPA to determine acceptable levels of pollutants in the air, and for nutritionists within the FDA to determine the composition of public school lunches.

Moreover, agencies may be more responsive to the electorate than the judiciary would be. National goals and policies change as society evolves. Because administrators are accountable

²¹ U.S. CONST. art. III, § 1

²² 5 U.S. (1 Cranch) 137 (1803).

²³ *Id.* at 177.

²⁴ JELLUM, *supra* note 7, at 207-08.

²⁵ See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 11 (1994) (arguing that “[u]nder a pure formalist approach, most, if not all, of the administrative state is unconstitutional”).

to the public, while judges are not, administrators will be more likely to adapt policy to match populist expectations.²⁶ Judges, who are elected for life,²⁷ are more insulated from political backlash. Thus, agencies should receive some deference when they interpret statutes within their area of expertise.²⁸ Even *Marbury*'s author, Chief Justice John Marshall, suggested that courts should respect an agency's "uniform construction" of "doubtful" statutes.²⁹

Today, there is no question that agencies have the power to enact rules with the force and effect of law, so long as Congress provides an "intelligible principle" for the agency to follow when it does so.³⁰ The issue here is what level of deference judges should give to an agency when, in the process of developing such a rule, the agency interprets a statute. As the Supreme Court has addressed this issue over the last seventy years, it has oscillated among three options: (1) complete deference, (2) limited deference, or (3) no deference. Rather than settle on just one standard, the Supreme Court has opted to vary deference based on the circumstances of the interpretation. To see what I mean, we need to review the Supreme Court's jurisprudence in this area from 1941 to today.

II. *CHEVRON*'S CREATION

A. The Law Pre-*Chevron*

In the civil context, appellate courts decide question of law *de novo*. After all, appellate judges are experts in this area. This same standard does not apply in the administrative context.

²⁶ Cf. Bressman, *supra* note 9, at 1449 (reasoning that "by placing the interpretive role in administrative rather than judicial hands, it allows agency interpretations to evolve as presidential administrations and executive priorities change").

²⁷ U.S. CONST. art. III, § 1.

²⁸ See generally Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 741 (2002) ("*Skidmore*, *Chenery*, and *Cement Institute* all invoke[d] enhanced agency expertise as the rationale for affording agency work product deference on judicial review.").

²⁹ *United States v. Howell*, 9 U.S. (5 Cranch) 368, 372 (1810).

³⁰ *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409–11 (1928).

Instead, agencies have long received deference for their legal determinations.³¹ Yet the precise parameters of this deference have been the subject of much debate among academics, judges, and even the Justices of the Supreme Court. Indeed, this area of law is still unsettled, despite years of analysis. To understand the law as it exists today, it is helpful to understand its evolution.

In the 1940s and 1950s, the Supreme Court decided three cases that addressed this issue. First, in 1941, the Court decided *Gray v. Powell*.³² In that case, the Court resolved two issues: (1) whether coal that was transferred from one entity to another without any transfer of title has been “sold or otherwise disposed of” within the meaning of the Bituminous Coal Act of 1937; and (2) whether the regulated entity qualified for a tax exemption as a “producer” of coal.³³ While both issues involved questions of law—specifically, the meaning of statutory language—the first issue was a pure question of law, while the second issue was a question of the application of the law to the facts of the case. The Court applied two different deference standards to resolve the two issues. For the pure question of law issue, the Court applied a *de novo* standard and independently determined what the language of the statute meant; the Court did not defer to the agency’s interpretation of the statutory language.³⁴ But as to the second issue, the Court deferred to the agency’s interpretation and application of the statute to the facts before it.³⁵ The precise amount of deference was not clearly defined,³⁶ but the Court stated that deference was appropriate because “Congress . . . found it more efficient to delegate [this issue] to those whose experience in a particular field gave promise of a better informed, more equitable [resolution of the issues].”³⁷

³¹ LAWSON, *supra* note 5, at 411.

³² 314 U.S. 402 (1941).

³³ *Id.* at 411, 415.

³⁴ *Id.* at 415.

³⁵ *Id.* at 412.

³⁶ *Id.* (saying “this delegation will be respected and the administrative conclusion left untouched”).

³⁷ *Id.* at 411-12.

Similarly, in 1944, in *National Labor Relations Board v. Hearst Publications, Inc.*,³⁸ the Court decided whether to defer to the National Labor Relations Board's (NLRB) interpretation of the Wagner Act. Again, the Court addressed two issues: (1) whether the term "employee" in the Act included common law understandings of that term; and (2) whether the term "employee," if it were not limited by common law understandings, applied to the newsboys in the case.³⁹ And like *Gray*, the first issue involved a pure question of law, while the second involved a question of the application of law to the facts of the case. The Court applied the same deference standards as it had in *Gray*: The Court approached the pure question of law *de novo*,⁴⁰ while it approached the question involving the application of law to fact with deference to the NLRB.⁴¹ Because the NLRB would have "familiarity with the circumstances and backgrounds of employment relationships in various industries," the Court held that the NLRB's application of the law to the facts of the case was entitled to deference.⁴² According to the Court, so long as an agency's interpretation had "'warrant in the record' and a reasonable basis in law" a court should not substitute its own interpretation for that of the agency entrusted with administering the statute.⁴³ Thus, the Court relied on agency expertise and express congressional delegation to support its decision to defer.⁴⁴ According to these two cases then, courts should defer to agency interpretations involving questions of law application when the agency's interpretation is reasonable.

Again, in 1951, the Court confirmed this two-tracked deference approach in *O'Leary v. Brown-Pacific-Maxon, Inc.*⁴⁵

³⁸ 322 U.S. 111 (1944), *overruled in part* by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

³⁹ *Id.* at 120.

⁴⁰ *Id.* at 124-29.

⁴¹ *Id.* at 130.

⁴² *Id.*

⁴³ *Id.* at 131.

⁴⁴ *Id.* at 130.

⁴⁵ 340 U.S. 504 (1951). In this case, an employee of Brown-Pacific-Maxon, Inc. drowned during non-work hours when he attempted to rescue two men trapped on a reef. *Id.* at 505. The employer maintained the recreation area for its employees. *Id.* The employee's mother

There were two issues in the case, one involving a pure question of law—specifically, what did the term “course of employment” mean in the Longshoremen’s and Harbor Workers’ Compensation Act—and the other involving a question of the application of that law to the facts of the case—specifically, if the term was broader than the common law understanding of the term, did the statute apply to the acts at issue.⁴⁶ The Court talked about the second issue as a question of fact,⁴⁷ but the Court was simply wrong in its characterization; the issue of whether the term “course of employment” includes common law understanding of that term is a pure question of law. To resolve the issue, the Court applied a *de novo* standard of review.⁴⁸ And the Court suggested that the second issue—the issue involving the application of law to fact—required a deference standard similar to the Administrative Procedure Act’s substantial evidence standard,⁴⁹ a standard relatively close to the reasonableness standard articulated in *Hearst*.⁵⁰

Together, these three cases offered a coherent, two-tracked approach to the issue of judicial review of agency interpretations:

When the issue is one of pure interpretation, the courts are at least as well situated as are the agencies to determine the correct meaning of statutory terms, so agencies get no deference. When, however, the issue is one of law application, and one must determine whether an ambiguous statute should be extended to cover a specific fact pattern, then the twin considerations of agency expertise and probable

filed for compensation, claiming the drowning arose out of the course of his employment. *Id.* at 505-06. The agency granted the petition; the district court denied the employer’s petition to set aside the award; and the Ninth Circuit reversed. *Id.* at 506.

⁴⁶ *Id.* at 506-07.

⁴⁷ *Id.* at 507.

⁴⁸ *Id.* at 508.

⁴⁹ *Id.*; see 5 U.S.C. § 706(2)(E) (2006) (noting that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be, among other things, not supported by substantial evidence).

⁵⁰ See Nat’l Labor Relations Bd. v. Hearst Publ’ns, Inc., 322 U.S. 111, 130-31 (1944).

congressional intent justify giving agency decisions a level of deference comparable to the level afforded to agency factfinding.⁵¹

Yet, this summary is misleading.⁵² In the middle of deciding these three cases, the Court added a wrinkle to its developing two-track approach with *Skidmore v. Swift & Co.*⁵³ *Skidmore* was decided after *Hearst* but before *O'Leary*. At issue in the case was whether employees of Swift & Co. were entitled to overtime pay for on-call time under the Fair Labor Standards Act of 1938 (FLSA).⁵⁴ Again, resolution of the case involved two issues: first, whether the FLSA specifically precluded on-call time from being included as working time; and second, assuming the FLSA did not, whether the Swift & Co. employees' on-call time

⁵¹ LAWSON, *supra* note 5, at 433.

⁵² The above analysis of this trilogy suggests that the Court employed a simple, clear, and consistent approach. While the Court was deciding these three cases, it was simultaneously deciding other cases in which it did not use its simple two-tracked approach. For example, in 1947, the Court decided *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1947). The issue in that case was whether the term "employees" in the Wagner Act covered foremen with specific, supervisory responsibilities. *Id.* at 486. Much like the second issue in *Hearst*, this issue really involved the application of law to the specific facts of the case. LAWSON, *supra* note 5, at 436. Yet, the Court did not defer to the Board's interpretation in this case, as the Court had in *Hearst*.

It is unclear why the Court took a different approach. Some commentators have suggested that the issue in *Packard* was much more important than the issue in *Hearst* because the entire nation would be affected by the Court's determination of whether foreman could be members of a union. See LAWSON, *supra* note 5, at 436 & n.16 ("[I]n *Hearst* the Justices . . . did not regard the classification as raising a *significant* legal issue. In *Packard* they did.") (alteration and omission in original) (quoting LOUIS B. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 561 (1965)). Hence, because of the "importantness" of the issue, a little deference was warranted. *Id.* at 436-37. Other commentators suggest that the pro-labor reputation of the agency and its acknowledgement that it had applied the statute inconsistently played a strong role in lowering the deference afforded by the Court. *Id.* at 437. Perhaps, though, the Court's decision to apply a different standard was less calculated and more inadvertent. Possibly, because the Court mischaracterized the issue as a "naked question of law," it then applied the applicable (*de novo*), albeit wrong, standard for questions of law. *Packard*, 330 U.S. at 493. Or maybe the Court was simply unaware that it had, vis-à-vis the *Grey/Hearst/O'Leary* trilogy, crafted this two-tracked approach. It is simply unknown.

⁵³ 323 U.S. 134 (1944).

⁵⁴ *Id.* at 135.

should be compensated.⁵⁵ The first issue involved a question of law, while the second involved a question of the application of that law to the facts of the case. Like it had in the *Gray* trilogy, the Court resolved the first issue, the pure question of law, without deferring to the Department of Labor (DOL) at all and resolved the second issue, the question of law application, by directing the lower courts to defer.⁵⁶ Yet the Court added a wrinkle: the Court used a less deferential standard for the question of law application than it had in the other three cases. Why?

One possible answer is that the facts in *Skidmore* differed from the facts in *Gray*, *Hearst*, and *O'Leary* in two important ways: first, *Gray*, *Hearst*, and *O'Leary* had all involved statutes that the relevant agency was charged with administering. This fact was not true for *Skidmore*: the DOL did not have delegated power to administer the FLSA.⁵⁷ Rather, Congress expressly gave that power to the judiciary; however, the agency did have a role under the FLSA, which included the power to seek injunctions.⁵⁸ The Court could have refused to defer to the DOL at all because Congress had not delegated to the DOL the power to administer and thus interpret the FLSA. But the Court did not take that approach; even though the DOL did not administer the FLSA, the Court found that some deference was appropriate.⁵⁹ According to the Court, deference was appropriate because agencies have expertise in their field and are aware of the industry customs.⁶⁰ That expertise could help inform a court's decision. You will remember that this rationale was also used in *Gray*, *Hearst*, and *O'Leary*. Thus, administering a statute was apparently not a prerequisite to deference according to *Skidmore*.

⁵⁵ *Id.* at 136-37.

⁵⁶ *Id.* at 137-38.

⁵⁷ *Id.* at 139-40.

⁵⁸ *Id.* at 137.

⁵⁹ *Id.* at 137-40.

⁶⁰ *Id.* at 137-38. The Supreme Court directed the lower court to consider the agency's interpretation because the agency had "accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution." *Id.*

A second possible answer to the question of why the Court applied a lower deference level in *Skidmore* is that *Gray*, *Hearst*, and *O'Leary* all involved agency actions that were expected to have the "force of law" and were enacted through procedurally prescribed procedures.⁶¹ In contrast, in *Skidmore*, the DOL did not act in a way designed to have "force of law"; rather, it issued its interpretation via non-legislative rulemaking. Specifically, the DOL drafted an interpretive bulletin that set forth its views regarding the application of the FLSA in various situations.⁶² While the bulletin did not specifically address facts identical to the Swift & Co. employees' situation, the DOL filed an amicus brief, arguing that the bulletin generally resolved the issue.⁶³ The lower court ignored the DOL's bulletin and brief entirely.⁶⁴

The Supreme Court had to decide whether the interpretations in the bulletin should receive any deference from courts.⁶⁵ Again, the Court could have refused to defer to the DOL at all simply because the process used was less deliberative and thus likely to be less informed than the processes used in the other cases. Yet, the Court did not take that approach. As the Court stated in *Skidmore*, "The fact that the [agency's] policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect."⁶⁶ Instead, the Court held that some form of deference was appropriate and remanded so that the lower court could consider the interpretation.⁶⁷

While the Court had suggested in *Hearst* that courts should defer to reasonable agency interpretations that "ha[ve] 'warrant in the record,'"⁶⁸ the Court specifically indicated that interpretations

⁶¹ See *Christensen v. Harris County*, 529 U.S. 576 (2000).

⁶² *Id.* at 586-87.

⁶³ *Id.* at 582-83.

⁶⁴ See *id.* at 587.

⁶⁵ *Id.*

⁶⁶ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁶⁷ *Id.*

⁶⁸ *Nat'l Labor Relations Bd. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944).

like those in *Skidmore* were “not controlling.”⁶⁹ Rather, courts should consider whether the interpretations were persuasive, taking into account “all those factors which give [the agency interpretation] power to persuade, if lacking power to control.”⁷⁰ This “power to persuade” test, known as *Skidmore* deference, was to be determined by three factors: (1) the consistency of the agency’s interpretation; (2) the thoroughness of the agency’s consideration; and (3) the soundness of the agency’s reasoning.⁷¹ In other words, the more thoroughly considered and reasoned an agency interpretation was, the more a court should defer to that interpretation:

[*Skidmore* deference] offered agencies some deference, but the . . . amount of deference would vary depending on the circumstances surrounding the agency’s interpretation in each case. In effect, agencies faced a balancing test: The more consistent, thorough, and considered their interpretations were, the more likely a court would defer. Agency interpretations that were persuasive received deference; those that were not persuasive received little to no deference. Under *Skidmore*, deference was earned, not automatic.⁷²

When the Court decided *Skidmore*, only *Gray* and *Hearst* had been decided; *O’Leary* was not yet on the docket.⁷³ So perhaps the Court simply did not recognize that it was in the process of developing a two-track approach and that, with *Skidmore*, it was altering one of those tracks. Alternatively, the differences in the delegation and interpretive procedures of the relevant agency in *Skidmore*, *Gray*, *Hearst*, and *O’Leary* may have played a role in the Court’s choice to alter the level of deference, even though the

⁶⁹ *Christensen*, 529 U.S. at 596 (Breyer, J., dissenting).

⁷⁰ *Skidmore*, 323 U.S. at 140.

⁷¹ *Id.*

⁷² JELLUM, *supra* note 7, at 214.

⁷³ *Skidmore* and *Hearst* were both decided in 1944. *Hearst* was decided in April, while *Skidmore* was decided in December.

opinion was not clear that the approach was being altered. In any event, one of these differences, whether the agency uses “force of law” procedures, has come to matter greatly in the post-*Chevron* era.

B. *Chevron*

The standards developed in *Gray*, *Hearst*, *O’Leary*, and *Skidmore* remained untouched for forty years. Then, in 1984, with the landmark case of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁷⁴ the *Gray-Hearst-O’Leary* deference two-track disappeared completely, and *Skidmore* deference disappeared for a time.⁷⁵ In *Chevron*, the Court flipped the existing deference standard in which courts were the final arbiters of what an ambiguous statute meant while agencies offered little more than expertise.

Chevron involved a question about the Clean Air Act. The provision at issue required permits when a plant wished to modify or build a “stationary source” of pollution.⁷⁶ “Stationary source” was not defined in the act.⁷⁷ Thus, the EPA, the agency in charge of administering the Clean Air Act, had to interpret the term. It issued two notice and comment rulemakings interpreting “stationary source.”⁷⁸ The first regulation defined “stationary source” as the construction or installation of any new or modified equipment that emitted air pollutants.⁷⁹ But the following year, the EPA repealed that regulation and issued a new one that expanded the definition to encompass a plant-wide or bubble concept

⁷⁴ 467 U.S. 837 (1984). Although many commentators insert a comma in the official cite, there are no commas in the petitioner’s name in the official U.S Reports. Merrill, *supra* note 2, at 399 n.1.

⁷⁵ *Hearst* was cited in *Chevron*. *Chevron*, 467 U.S. at 844. It is still cited by the Supreme Court today. *See, e.g.,* *Negusie v. Holder*, 129 S. Ct. 1159, 1171 (2009) (“We accordingly acknowledged that a complete interpretation of a statutory provision might demand both judicial construction and administrative explication.” (citing *Nat’l Labor Relations Bd. v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944))).

⁷⁶ *Chevron*, 467 U.S. at 840.

⁷⁷ *Id.* at 841.

⁷⁸ *Id.* at 840, 858-59.

⁷⁹ *Id.* at 840 n.2.

definition.⁸⁰ The bubble concept interpretation allowed a plant to offset increased air pollutant emissions at one part of its plant so long as it reduced emissions at another part of the plant. Under the new interpretation, as long as total emissions at the plant remained constant, no permit was required.⁸¹ The environmentalists sued.

The issue for the Supreme Court was whether the EPA's interpretation of "stationary source" in the Clean Air Act was valid.⁸² The Supreme Court upheld the agency's interpretation.⁸³ In doing so, the Court ignored the *Gray-Hearst-O'Leary* deference two-track and *Skidmore's* "power-to-persuade" test and instead created a new, two-step deference framework. Under the first step, a court should determine "whether Congress ha[d] directly spoken to the precise question at issue."⁸⁴ When applying this first step, courts should not defer to agencies at all. Rather, "[t]he judiciary is the final authority on issues of statutory construction."⁸⁵ Assuming Congress's intent is unclear, then, under step two, a court must accept any "permissible" or "reasonable" agency interpretation, even if the court believes a different policy choice would be better.⁸⁶ The Court ignored its earlier distinction between pure questions of law and questions of application of law to fact without explanation. In addition, the Court ignored *Skidmore* entirely. Instead, the Court created an entirely new deference standard, one much more deferential to agencies.

⁸⁰ *Id.* at 858.

⁸¹ *Id.* at 852-53.

⁸² *Id.* at 840.

⁸³ *Id.* at 845, 866.

⁸⁴ *Id.* at 842. In other words, is Congress's intent clear—however clarity may be discerned—or is there a gap or ambiguity to be resolved? According to the Court, clarity was to be determined by "employing traditional tools of statutory construction." *Id.* at 843 n.9.

⁸⁵ *Id.* at 843 n.9.

⁸⁶ *Id.* at 843-44. Deference to the agency under *Chevron's* second step is much higher. Indeed, if a litigant challenges an agency interpretation and loses at step one—meaning the court finds ambiguity—that litigant will likely lose the case. According to one empirical study of decisions of the United States Courts of Appeals in 1995 and 1996, agencies prevail at step one 42% of the time and at step two 89% of the time. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 *YALE J. ON REG.* 1, 31 (1998).

The Court justified this increased level of deference to agencies for three reasons. First, the Court continued *Skidmore*'s deference rationale that agency personnel are experts in their field; judges are not.⁸⁷ Congress entrusts agencies to implement law in a particular area because of this expertise. As mentioned earlier,⁸⁸ scientists and analysts working for the FDA are more knowledgeable about food safety and drug effectiveness than are judges. Because agencies are specialists in their field, they are in a better position to implement effective public policy. Judges are more limited in both their knowledge of complex topics and their method of gathering such information. While agencies can develop policy using a wide array of methods, courts are limited to the adversarial process. Hence, deferring to the experts makes sense.

Second, Congress simply cannot legislate every detail in a comprehensive regulatory scheme.⁸⁹ Gaps and ambiguities are inevitable; when Congress delegates, an agency must fill and resolve these gaps and ambiguities. In *Chevron*, the Supreme Court presumed that by leaving gaps and ambiguities, Congress impliedly delegated to the agency the authority to resolve them.⁹⁰

Third, and finally, administrative officials, unlike federal judges, have a political constituency to which they are accountable.⁹¹ “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”⁹² Thus, in creating its two-step deference framework, the Supreme Court identified three reasons for its decision: agency expertise, implied congressional delegation, and democratic theory. Deference, which had been earned by agencies through reasoned decision-making under *Skidmore* and the *Gray-Hearst-O’Leary* trilogy, became essentially an all-or-nothing grant of power from Congress

⁸⁷ *Chevron*, 467 U.S. at 865.

⁸⁸ See *supra* Part I.

⁸⁹ *Chevron*, 467 U.S. at 865-66.

⁹⁰ *Id.* at 843-44.

⁹¹ *Id.* at 865-66.

⁹² *Id.* at 866.

under *Chevron*. Either Congress was clear when it drafted the statute, and the judiciary should not defer to the agency at all, or Congress was ambiguous or silent, and the judiciary should defer completely so long as the agency's interpretation was reasonable. In a *Chevron*-only world, deference is "an all-or-nothing grant of power from Congress . . . either the court adopt[s] or reject[s] the agency's reasonable interpretation in full."⁹³ But ours is not a *Chevron*-only world.⁹⁴

III. THE LAW POST-CHEVRON: CHEVRON STEP ZERO

Ours is not a *Chevron*-only world because of *Chevron* Step Zero. Not all agency interpretations are entitled to *Chevron* deference. Rather, before a court can apply *Chevron*, the court must make sure that the interpretation is one deserving of *Chevron*. This step has become known as "*Chevron* Step Zero." There are a number of questions to ask at this stage: (1) *What* did the agency interpret? (2) *Which* agency interpreted the statute? (3) *How* did the agency interpret the statute? And (4) *Can* this agency interpret the statute? Below, I explore each question in more detail.

A. What Did the Agency Interpret?

Chevron deference is an option only when an agency interprets the appropriate kind of legal text. Illustratively, *Chevron* does not apply when agencies interpret the Federal Constitution,⁹⁵ court opinions,⁹⁶ and legal instruments.⁹⁷

⁹³ Jellum, *supra* note 5, at 739.

⁹⁴ See Eskridge & Baer, *supra* note 3, at 1097-98 (noting that many doctrinal questions exist because of the Supreme Court's post-*Chevron* administrative law decisions).

⁹⁵ See LAWSON, *supra* note 5, at 460 (citing *Gulf Power Co. v. Fed. Commc'ns Comm'n*, 208 F.3d 1263, 1271 (11th Cir. 2000), *rev'd on other grounds sub nom. Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002)).

⁹⁶ See *id.* (citing *Negusie v. Holder*, 129 S. Ct. 1159 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000)).

⁹⁷ See *id.* (suggesting that *Chevron* should not apply when interpreting legal instruments, but noting that sometimes courts do apply it).

Similarly, *Chevron* does not apply when agencies interpret regulations. While judicial deference to agency interpretations of statutes has varied widely through time, judicial deference to an agency's interpretation of its own regulations has remained more constant. Traditionally, courts defer almost completely to an agency's interpretation of its own regulation. This high level of deference should come as no surprise; after all, it was the agency that drafted the regulation in the first place. Thus, in 1945, the Supreme Court held that an agency's interpretation of its regulation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation."⁹⁸ The Supreme Court reasoned that when Congress delegates the authority to promulgate regulations, it also delegates authority to interpret those regulations.⁹⁹ Such power is a necessary corollary to the former. This substantial level of deference is generally known as either *Seminole Rock* or *Auer* deference. The latter term refers to the Supreme Court case of *Auer v. Robbins*,¹⁰⁰ which followed *Chevron* and confirmed that *Seminole Rock* deference had survived *Chevron*.¹⁰¹

⁹⁸ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁹⁹ *Id.*

¹⁰⁰ 519 U.S. 452 (1997).

¹⁰¹ *Id.* at 461-63. There is at least one limit on when an agency will receive this high level of deference. When an agency does little more than parrot the statutory language in its regulation, then claims that it is interpreting the regulation and not the statute, the agency will not receive *Seminole Rock* deference because the agency is interpreting Congress's language, not its own. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). Because *Seminole Rock* would not apply, either *Chevron* or *Skidmore* would apply instead. For example, in *Gonzales*, the Supreme Court refused to defer to the Attorney General's decision that physician assisted suicide was not a legitimate medical purpose for prescribing medication, and thus if a physician prescribed medication for this reason, the physician violated the federal Controlled Substances Act. *Id.* at 257-69. The Attorney General issued an interpretative rule stating that "'assisting suicide [was] not a 'legitimate medical purpose' within the meaning of [the regulation].'" *Id.* at 254 (quoting 66 Fed. Reg. 56607, 56608 (Nov. 9, 2001)). An Attorney General regulation stated that prescriptions be issued "'for a legitimate medical purpose.'" *Id.* at 256 (quoting 21 C.F.R. § 1306.04 (2005)). Thus, the United States Government argued that the interpretive rule was entitled to *Auer* deference because the Attorney General was simply interpreting its own regulation. *Id.* The Court rejected that argument. *See id.* In doing so, the Supreme Court stated that *Auer* deference is appropriate when agencies interpret regulations bringing "specificity" to the statutes they are enforcing. *See id.* at 256-57. When the agency interprets a regulation that simply repeats or paraphrases the statutory text, the interpretation does not warrant *Seminole Rock* deference because the agency is interpreting Congress's language, not its own. *See id.* at 257. Additionally, the Supreme Court refused to give *Chevron* deference to the interpretive

Thus, *Chevron* applies only when an agency interprets a statute, not when an agency interprets any other form of legal language.

B. Which Agency Interpreted the Statute?

But it is not enough that an agency interpret the correct type of legal text; *Chevron* applies only when an agency “administers” that legal text or statute. Agencies often interpret and apply statutes, including statutes that the agency does not administer. While the Court has never clearly articulated what it means to “administer” a statute, the lower court cases that have addressed this issue suggest that agencies administer a statute when they have a special and unique responsibility for that statute.¹⁰² When more than one agency administers a statute, *Chevron* is inappropriate.¹⁰³ So, for example, although multiple agencies must interpret the Internal Revenue Code, only the Internal Revenue Service (IRS) actually administers that Code.¹⁰⁴ Thus, only the IRS should receive *Chevron* deference for its interpretations of that Code.

In some cases, no agency is entitled to *Chevron* deference even when the agency interprets a statute. Many agencies must interpret and apply generally applicable statutes, such as the Administrative

rule because it was not promulgated pursuant to authority Congress delegated to the Attorney General. *Id.* at 258-65. Ultimately, the Court applied *Skidmore* and found the agency’s interpretation entirely unpersuasive. *Id.* at 269.

¹⁰² See, e.g., *Wagner Seed Co. v. Bush*, 946 F.2d 918, 925-26 (D.C. Cir. 1991) (Williams, J., dissenting) (arguing that the Environmental Protection Agency did not administer the reimbursement provisions of the Superfund Amendments and Reauthorization Act of 1986).

¹⁰³ See *Rapaport v. U.S. Dep’t of the Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995) (declining to apply *Chevron* where the agency shared responsibility for the administration of the statute with another agency); *Ill. Nat’l Guard v. Fed. Labor Relations Auth.*, 854 F.2d 1396, 1400 (D.C. Cir. 1988) (declining to apply *Chevron* deference); cf. *CF Indus., Inc. v. Fed. Energy Regulatory Comm’n*, 925 F.2d 476, 478 n.1 (D.C. Cir. 1991) (stating in a footnote that there “might well be a compelling case to afford deference if it were necessary for decision [where] both agencies agree as to which of them has exclusive jurisdiction”).

¹⁰⁴ See LAWSON, *supra* note 5, at 461.

Procedure Act,¹⁰⁵ the Regulatory Flexibility Act,¹⁰⁶ the Freedom of Information Act,¹⁰⁷ and others. When an agency interprets a generally applicable statute, *Chevron* is not appropriate.¹⁰⁸

C. How Did the Agency Interpret the Statute?

Agencies interpret statutes regularly and in varied ways, with more or less procedural formality and deliberation. For example, an agency might interpret a statute as part of a notice and comment rulemaking process, like the EPA did in *Chevron*.¹⁰⁹ Similarly, an agency might interpret a statute during a formal adjudication. Or, an agency might interpret a statute when drafting an internal policy manual or writing a letter to a regulated entity—a non-legislative rulemaking.¹¹⁰ With the former processes (adjudication and notice and comment, or legislative, rulemaking), Congress has given the agency the authority to issue interpretations that carry the “force of law,” and the agency has used that authority to issue the particular interpretation.¹¹¹ For this reason, these processes are considered more formal, or procedurally prescribed, while the latter processes are thought to be less formal, or less procedurally prescribed.¹¹²

¹⁰⁵ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

¹⁰⁶ 5 U.S.C. §§ 601-12 (2006).

¹⁰⁷ Pub. L. No. 111-83, 123 Stat. 2142 (2009) (codified as amended in scattered sections of 5 U.S.C.).

¹⁰⁸ See, e.g., *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) (interpreting the Federal Advisory Committee Act); *Fed. Labor Relations Auth. v. U.S. Dep’t of Treasury*, 884 F.2d 1446, 1451 (D.C. Cir. 1989) (refusing to apply *Chevron* to the Federal Labor Relation Authority’s (FLRA) interpretation of the Freedom of Information Act (FOIA) or the Privacy Act because “FLRA is not charged with a special duty to interpret [these statutes]”); *Reporters Comm. for Freedom of the Press v. U.S. Dep’t of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987) (stating that no deference would be given to agency’s interpretation of the FOIA because “it applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation”), *rev’d on other grounds*, 489 U.S. 749 (1989).

¹⁰⁹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 855 (1984).

¹¹⁰ See *Christensen v. Harris County*, 529 U.S. 576, 580-81, 586-89 (2000) (interpreting a statute in response to a letter inquiry from the county); see also *United States v. Mead Corp.*, 533 U.S. 218, 221-27 (2001) (interpreting a tariff classification ruling).

¹¹¹ *Mead*, 533 U.S. at 231-32.

¹¹² See, e.g., Bressman, *supra* note 9, at 1447 (questioning “whether *Chevron* deference

In *Chevron*, the Court did not indicate, expressly or implicitly, whether the deliberateness of the agency's procedures affected the applicability of the two step analysis.¹¹³ Before *Chevron* was decided, however, the deliberative nature of the agency's interpretive process was factored into the Court's analysis. Pursuant to *Skidmore* deference, interpretations that were made through a more deliberative process, such as notice and comment rulemaking, were considered more persuasive than interpretations made through a less deliberative process, such as interpretations in policy manuals.¹¹⁴ But in *Chevron*, the Court did not distinguish between deliberative agency decisionmaking and non-deliberative agency decisionmaking.¹¹⁵ Indeed, shortly after *Chevron* was decided, the Court applied its two-step analysis to all types of agency interpretations, regardless of the deliberative nature of the procedure involved.¹¹⁶ But, ultimately, the importance of the procedure gained currency.

Beginning in 2000, the Supreme Court decided a trilogy of cases that limited *Chevron's* application based on how the agency interpreted the statute. In *Christensen v. Harris County*,¹¹⁷ *United States v. Mead Corp.*,¹¹⁸ and *Barnhart v. Walton*,¹¹⁹ the Court substantially checked *Chevron's* applicability based, in part, upon the formality of the procedure the agency used to reach the interpretation being challenged.

applies to interpretations issued through informal procedures”).

¹¹³ Jellum, *supra* note 5, at 774.

¹¹⁴ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see Sunstein, *supra* note 10, at 211 (explaining the difference between the *Chevron* and *Skidmore* doctrines).

¹¹⁵ See Jellum, *supra* note 5, at 774-75.

¹¹⁶ *Id.* (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)) (suggesting that *Chevron* should apply to an agency's internal guideline); see also *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (applying *Chevron's* framework to an agency's interpretation made informally); *Fed. Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (suggesting that *Chevron* should apply to an agency's longstanding “practice and belief”); cf. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499-03 (1998) (applying *Chevron* to an agency's approval of a credit union's charter).

¹¹⁷ 529 U.S. 576 (2000).

¹¹⁸ 533 U.S. 218 (2001).

¹¹⁹ 535 U.S. 212 (2002).

Christensen was decided first. At issue in *Christensen* was whether the United States Department of Labor's Wage and Hour Division (the Division) should receive *Chevron* deference for an interpretation the agency expressed in an opinion letter.¹²⁰ The defendant in the case, Harris County, had been concerned about the fiscal consequences of having to pay its employees for accrued but unused compensatory time.¹²¹ For this reason, the County wrote to the Division and asked whether the County could require its employees to take, rather than continue to accrue, their unused compensatory time.¹²² Responding by letter, the Division told the County that absent an employment agreement to the contrary, the Fair Labor Standards Act of 1938 (FLSA) prohibited an employer from requiring employees to use accrued compensatory time.¹²³ The County ignored the letter and forbade its employees from accumulating more compensatory time than it deemed reasonable.¹²⁴ The employees sued, arguing that the County's policy violated FLSA.¹²⁵

The issue for the Supreme Court was whether the agency's interpretation of FLSA, which was contained in an informal opinion letter, was entitled to *Chevron* deference.¹²⁶ For the first time since *Chevron* had been decided, the Court directly addressed whether the agency process mattered in the deference analysis; in other words, did a different deference standard apply when an agency acted with less deliberation and process.¹²⁷ The Court had not addressed this issue in *Skidmore*.¹²⁸

¹²⁰ *Christensen*, 529 U.S. at 586-87.

¹²¹ *Id.* at 578.

¹²² *Id.* at 580.

¹²³ *Id.* at 581.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 586-87.

¹²⁷ *Id.* at 587.

¹²⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-40 (1944). Prior to *Chevron*, the Court held in *Skidmore* that a non-legislative rule was entitled to deference to the extent that the interpretation was persuasive. *Id.* at 140; *see also supra* Part II.

A majority of the justices found that the level of process was determinative.¹²⁹ The majority reasoned that the agency's opinion letter was not entitled to *Chevron* deference because it lacked the "force of law."¹³⁰ Agency interpretations have the "force of law" when "Congress has delegated legislative power to the agency and . . . the agency . . . exercise[d] that power in promulgating the rule."¹³¹ In other words:

An interpretation will have the force of law when the agency has exercised delegated power, as to both subject matter and format, reflecting congressional intent that such an interpretation is to bind. "Force of law" . . . merely connotes the binding effect given the kinds of agency interpretations that Congress through its delegations *intends* to bind the courts. And that binding effect (force of law) means simply that the courts may not subject the interpretations to independent judicial review, but rather must accept them subject only to limited review for reasonableness and consistency with the statute. Thus, an interpretation carrying the force of law gets only limited review because by definition it is covered by delegation that contemplates only limited review.¹³²

According to *Christensen*, procedurally prescribed actions, such as formal adjudication and notice and comment rulemaking, have the "force of law".¹³³ Less procedurally prescribed actions, such as "opinion letters . . . policy statements, agency manuals, and enforcement guidelines . . . lack the force of law."¹³⁴ The

¹²⁹ *Christensen*, 529 U.S. at 587.

¹³⁰ *Id.*

¹³¹ *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (defining "force of law").

¹³² Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 *YALE J. ON REG.* 1, 39 (1990) (footnotes omitted).

¹³³ *Christensen*, 529 U.S. at 587.

¹³⁴ *Id.*

Court explained that “interpretations contained in [informal] formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore*, but only to the extent that those interpretations have the ‘power to persuade.’”¹³⁵ Thus *Christensen* seemingly divided agency interpretations into two, well-defined categories: those subject to *Chevron* analysis—the “force of law” category—and those subject to *Skidmore* analysis—the non-“force of law” category.¹³⁶

Christensen appeared to present a simple, albeit, formalistic test: If the agency acted deliberately, using a process that solicited input from a variety of sources, was binding, and was well considered, then the agency’s interpretation would be entitled to great deference.¹³⁷ If the agency acted less deliberately, more quickly, and with less public involvement, then less deference was

¹³⁵ *Id.* (citation omitted).

¹³⁶ *Id.* Justice Scalia filed a separate opinion that concurred only in part with the Court’s decision and argued that *Chevron* had replaced *Skidmore*. *Id.* at 589-91 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia rejected the majority’s “force of law” dichotomy, arguing instead that deference should be bestowed whenever an agency’s interpretation was “authoritative” and reasonable; process was irrelevant. *Id.* at 589-90. Had Justice Scalia’s view prevailed, deference would have been all or nothing as it was under *Chevron*: Either a court would defer to an agency interpretation or a court would not. Degrees of deference would not have existed. *See id.* But the majority disagreed with Justice Scalia’s black-and-white approach, recognizing, perhaps, that different deference standards would save courts from the stark choice between *Chevron* deference and no deference at all. JELLUM, *supra* note 7, at 219.

Justice Breyer dissented in *Christensen* and wrote separately to point out that in his view *Chevron* and *Skidmore* did not provide different standards. *Christensen*, 529 U.S. at 596-97 (Breyer, J., dissenting). Rather, these cases articulated different reasons for affording deference to agency interpretations: *Skidmore* directed courts to pay particular attention to an agency’s interpretation of a statute when the agency had “specialized experience,” even though the agency’s interpretation had not been formulated through an exercise of delegated lawmaking authority. *Id.* at 596 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944)). Hence, *Skidmore* pointed out that the agency’s views may possess the “power to persuade,” even where those views lack the “power to control.” *Skidmore*, 323 U.S. at 140. According to Justice Breyer, the Court in *Chevron* did not significantly change the level of deference due to an agency’s interpretation; rather, the Court merely added a new reason for deferring to agency interpretations, namely, that by enacting gaps and ambiguities, Congress had implicitly delegated legal authority to the agency to make those interpretations. *Christensen*, 529 U.S. at 596-97 (Breyer, J., dissenting).

¹³⁷ *Christensen*, 529 U.S. at 587.

due.¹³⁸ While *Christensen's* “force of law” test was more complex than Justice Scalia would have preferred in his concurring opinion, it was infinitely less complex than what it was about to become.¹³⁹

The following year, in *United States v. Mead Corp.*,¹⁴⁰ the Court confirmed that it meant what it had said in *Christensen*: *Chevron* deference would be appropriate when an agency undertook notice and comment (or formal) rulemaking or formal adjudication, but would likely be inappropriate when less deliberative procedures were used.¹⁴¹ In *Mead*, the issue was whether the United States Customs Service’s (Customs) informal ruling letters were entitled to *Chevron* deference.¹⁴² *Mead* imported planners.¹⁴³ Customs had classified the planners as “day planners” for several years; day planners were tariff-free.¹⁴⁴ Without warning, Customs changed its interpretation and sent a letter informing *Mead* that the planners would henceforth be considered “bound diaries,” which were subject to tariff.¹⁴⁵ Customs’s ruling letters, which describe the goods being imported and identify any applicable tariff amount, are issued without any preliminary procedure, are not published, and are non-binding.¹⁴⁶ Given the lack of procedures and non-binding effect, the majority refused to defer under *Chevron* and used *Skidmore* deference instead.¹⁴⁷ In doing so, the majority reinforced *Christensen's* reasoning that *Chevron* applied only “when it appears that Congress delegated authority to the agency generally to make rules carrying the “force of law”, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹⁴⁸ Had the majority stopped there, many trees might

¹³⁸ *Id.*

¹³⁹ *See infra* Part IV.

¹⁴⁰ 533 U.S. 218 (2001).

¹⁴¹ *Id.* at 230-31.

¹⁴² *Id.* at 226.

¹⁴³ *Id.* at 224.

¹⁴⁴ *Id.* at 224-25.

¹⁴⁵ *Id.* at 225.

¹⁴⁶ *Id.* at 223.

¹⁴⁷ *Id.* at 227.

¹⁴⁸ *Id.* at 226-27.

have been saved, for the “force of law” test was clear enough to warrant little academic comment and, so far, *Mead* had offered nothing new to the analysis.

But *Mead* did not stop there. Writing for the majority, Justice Souter agreed that an explicit grant of notice and comment rulemaking or formal adjudication authority would be “a very good indicator of delegation meriting *Chevron* treatment” because “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”¹⁴⁹ Justice Souter then changed the analysis by suggesting that the formality of the procedure *alone* was not decisive: “[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”¹⁵⁰ While Justice Souter was absolutely correct that the Court had applied *Chevron* in the past despite the lack of formal procedure, that application likely occurred because the issue had not been raised directly.

In any event, without further explanation, Justice Souter suggested that *Chevron*’s application might be appropriate in less procedurally prescribed situations. In other words, Justice Souter added a new step to *Christensen*’s “force of law” test: “Delegation of such authority may be shown in variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, *or by some other indication of a comparable*

¹⁴⁹ *Id.* at 229-30; see David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 216-19 (2001) (arguing that whether Congress empowered an agency with the power to issue binding rules and orders does not necessarily imply anything about its intent regarding judicial deference and thus the Court’s test regarding whether an agency can take action with the “force of law” is misconceived).

¹⁵⁰ *Mead*, 533 U.S. at 230-31.

congressional intent.”¹⁵¹ Unfortunately, Justice Souter did not elaborate on exactly what those other indications of comparable congressional intent might be, shrouding the inquiry in mystery:

Prior to *Mead*, the test was bright-lined: *Chevron* applied when the agency acted with more procedure, and *Skidmore* applied when the agency acted with less procedure. Now, the bright-line was blurring; *Mead* suggested, without explaining, that some agency actions might qualify for *Chevron* deference even though the agency used less formal procedures. Exactly what types of “other indication[s]” would be sufficient to trigger *Chevron* was not readily apparent from [*Mead*] alone.¹⁵²

As for the ruling letters at issue in *Mead*, the Court reasoned that there was simply no indication in the Harmonized Tariff Schedule that Congress meant to delegate authority to the agency to issue classification letters with the “force of law.”¹⁵³ Moreover, there were simply too many such rulings each year for Customs to carefully and deliberately consider every issue.¹⁵⁴ Hence, Congress could not have intended for the courts to apply *Chevron* deference.¹⁵⁵

Justice Scalia scathingly dissented in a lengthy opinion.¹⁵⁶ He criticized the majority’s new test, saying, “[t]he Court’s new doctrine is neither sound in principle nor sustainable in practice.”¹⁵⁷ Moreover, he chastised the majority for resurrecting *Skidmore*.¹⁵⁸ Perhaps most

¹⁵¹ *Id.* at 227 (emphasis added).

¹⁵² JELLUM, *supra* note 7, at 220-21.

¹⁵³ *Mead*, 533 U.S. at 233.

¹⁵⁴ *Id.* Forty-six different Customs offices issued 10,000 to 15,000 classifications each year. *Id.* The Court also placed importance upon the fact that Customs regarded the classification decisions as conclusive only between itself and the importer to whom it was issued. *Id.*

¹⁵⁵ *Id.* at 234.

¹⁵⁶ *Id.* at 239-61 (Scalia, J., dissenting).

¹⁵⁷ *Id.* at 241.

¹⁵⁸ *Id.* at 250 (arguing that totality-of-the-circumstances *Skidmore* deference would create excess litigation).

ominously, he foreshadowed that “[w]e [would] be sorting out the consequences of the *Mead* doctrine . . . for years to come.”¹⁵⁹ Justice Scalia iterated his view that deference to reasonable, authoritative (or final) agency interpretations should be all or nothing: either *Chevron* deference or no deference at all.¹⁶⁰ In response, Justice Souter was critical of Justice Scalia’s preferred test, suggesting that “Justice Scalia’s first priority over the years has been to limit and simplify [the *Chevron* doctrine]. The Court’s choice has been to tailor deference to variety.”¹⁶¹

Despite Justice Scalia’s heartfelt adherence to a black-and-white world without *Skidmore*, he lost the battle. *Skidmore* deference has returned to stay. Continuing its assault on *Chevron*’s applicability, the Court in 2002 again confirmed that formality of procedure alone did not resolve the deference issue. In *Barnhart v. Walton*,¹⁶² the Court reaffirmed that “the fact that the Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking [did] not automatically deprive that interpretation of the judicial deference otherwise its due.”¹⁶³ Importantly, for the first time, the Court identified some factors that would show other indications of comparable congressional intent sufficient to trigger *Chevron* deference.

In *Barnhart*, the Court had to determine how much, if any, deference to give a Social Security Administration’s regulation interpreting the Social Security Act.¹⁶⁴ The regulation had been issued after notice and comment rulemaking; hence, the majority, written by Justice Breyer, applied *Chevron* deference.¹⁶⁵ Indeed, Justice Scalia concurred separately to note that because the agency decision was reached as a result of notice and comment

¹⁵⁹ *Id.* at 239 (citation omitted).

¹⁶⁰ *See id.* at 239-61.

¹⁶¹ *Id.* at 236.

¹⁶² 535 U.S. 212 (2002).

¹⁶³ *Id.* at 221 (citation omitted).

¹⁶⁴ *Id.* at 214-15.

¹⁶⁵ *Id.* at 222.

rulemaking, *Chevron* applied.¹⁶⁶ That was the sum total of his analysis precisely because that was all that was needed to resolve the case.

But it was not the end of Justice Breyer's analysis. Justice Breyer, in dictum, took the opportunity to again reject the *Christensen* formality dichotomy. Prior to issuing its regulation, the agency had reached the same interpretation in less formal ways, including by letter, by manual, and by informal adjudication.¹⁶⁷ Indeed, the notice and comment rulemaking had been promulgated only in response to the pending litigation challenging the agency's interpretation.¹⁶⁸ Both the majority and concurring opinions found the fact that the agency issued the regulation in response to the pending litigation irrelevant to the deference analysis.¹⁶⁹ But because the agency had previously offered the same interpretation in less formal ways, Justice Breyer turned to the question of whether *Chevron* deference would have been appropriate had the agency not gone through the trouble of issuing the notice and comment rulemaking during the litigation.¹⁷⁰ In dictum, Justice Breyer was quick to affirm, without deciding in this case, that even though the original interpretation was arrived at by less formal procedures, such informality "[did] not automatically deprive that interpretation of the judicial deference otherwise its due."¹⁷¹ This statement was consistent with *Mead*.

Justice Breyer then identified a number of factors for courts to use to determine whether *Chevron* analysis would be appropriate when formal procedures were lacking. These factors included: "[T]he interstitial nature of the legal question, the related expertise

¹⁶⁶ *Id.* at 226-27 (Scalia, J., concurring in part and concurring in the judgment).

¹⁶⁷ *Id.* at 219-20. The Social Security Administration had originally issued the interpretation in various interpretive documents, including a 1957 OASI Disability Insurance Letter, a 1965 Disability Insurance State Manual, and a 1982 Social Security Ruling. *Id.*

¹⁶⁸ *Id.* at 217.

¹⁶⁹ *Id.* at 222; *id.* at 226-27 (Scalia, J., concurring).

¹⁷⁰ *Id.* at 221-22.

¹⁷¹ *Id.* at 221. Further, Justice Breyer used the opportunity to resurrect the point of his dissent in *Christensen*, namely that *Skidmore* and *Chevron* are not different standards, but rather provide different rationales for deferring to agency interpretations. *Id.* at 221-22.

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”¹⁷² Simply put, (1) the more difficult the issue and the regulatory scheme, (2) the more experience the agency has in the particular area, (3) the more important resolution of this issue is to the agency’s ability to administer a program, and finally, (4) the more carefully the agency considers the interpretation, the more likely that Congress intended courts to defer to the agency. Interestingly, some of these factors “are eerily reminiscent of pre-*Chevron* days [where] the more reasoned and considered the agency opinion, the more deference due.”¹⁷³ Thus, *Chevron* applies when Congress explicitly or implicitly shows that it wants *Chevron* to apply:

[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply. In delineating the types of delegations of agency authority that trigger *Chevron* deference, it is therefore important to determine whether a plausible case can be made that Congress would want such a delegation to mean that agencies enjoy primary interpretational authority.¹⁷⁴

According to the *Christensen-Mead-Barnhart* trilogy, deliberateness of procedure is merely one indication, among many, that Congress intended deference. If the dictum in *Barnhart* holds, and it is by no means certain that it will, then *Chevron* deference applies both (1) when Congress delegates relatively formal procedures and the agency uses them *and* (2) when Congress provides other evidence that it intended courts to defer to the agency interpretation.¹⁷⁵

¹⁷² *Id.* at 222.

¹⁷³ Jellum, *supra* note 5, at 777.

¹⁷⁴ Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001).

¹⁷⁵ As one scholar has noted:

[After] *Christensen*, *Mead*, and *Barnhart*, the real question is Congress’s (implied) instructions in the particular statutory scheme. The grant of authority to act with

Although these two options seem straightforward in application, they are not.¹⁷⁶ *Barnhart* has not aided clarity for either the lower courts or the classroom.¹⁷⁷ While the *Gray-Hearst-O'Leary* deference two-track was relatively clear, *Chevron's* two-step deference was relatively clear, and *Christensen's* "force-of-law" dichotomy was relatively clear, *Mead* and *Barnhart* are anything but. According to *Barnhart*, the appropriate level of deference is based on what a court thinks Congress intended; which can be problematic.¹⁷⁸ In any event, despite the Supreme Court's rhetoric, to date the Court has not applied *Chevron* to an agency interpretation lacking the "force-of-law."¹⁷⁹ However, lower courts have done so.¹⁸⁰ Perhaps all the scholarly criticism about *Mead* is much ado about nothing?¹⁸¹

the "force of law" is a sufficient but not necessary condition for a court to find that Congress has granted an agency the power to interpret ambiguous statutory terms. Sunstein, *supra* note 10, at 218.

¹⁷⁶ See Beerman, *supra* note 8, at 781-82 (stating that "the *Chevron* doctrine: as a legal doctrine, . . . has proven to be a complete and total failure").

¹⁷⁷ See Sunstein, *supra* note 10, at 219-21 (noting, with examples, how the Step Zero trilogy has produced much complexity in lower court rulings).

¹⁷⁸ Not all scholars agree on what the appropriate level of deference is:

That Congress's delegatory intent must sometimes be sought through inference and construction, rather than from direct manifestations of congressional will, does not diminish the indispensability of this inquiry. Under our system of limited government, an agency cannot announce actions that bind citizens and the courts unless Congress has delegated to it the authority to do so.

Anthony, *supra* note 132, at 5.

¹⁷⁹ See *Ala. Dep't of Env'tl. Conservation v. Env'tl. Prot. Agency*, 540 U.S. 461, 487-88 (2004) (refusing to apply *Chevron* deference because the agency interpretation appeared in an internal guidance memorandum which does not carry the "force of law"); see also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165-73 (2007) (applying *Chevron* deference to the agency's notice and comment regulation even though the agency identified the regulations as only interpretative).

¹⁸⁰ See *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1011-12 (9th Cir. 2002) (holding that a Statement of Policy from Housing and Urban Development was entitled to *Chevron* deference based on an analysis of the *Barnhart* factors); see also Bressman, *supra* note 9, at 1457-69 (reviewing appellate cases that attempt to reconcile *Mead*, *Barnhart*, and *Chevron*).

¹⁸¹ See, e.g., Bressman, *supra* note 9, at 1486-91 (offering an alternative to the "*Mead* Mess").

D. Can the Agency Interpret the Statute?

But apparently the Court did not believe that the *Christensen-Mead-Barnhart* trilogy was sufficiently complex to resolve the deference question. During the same years that this trilogy was being decided, the Supreme Court further limited *Chevron's* applicability in another trilogy of cases beginning with *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,¹⁸² including *Gonzales v. Oregon*,¹⁸³ and ending with *Hamdan v. Rumsfeld*.¹⁸⁴ In this trilogy, the Court added a new step to the *Chevron* Step Zero: that of determining whether Congress had intended to delegate interpretive authority at all. In all three cases, the Court held that Congress did not delegate interpretive power to the agency despite gaps and ambiguities in the statute.¹⁸⁵

In *Chevron*, one of the Court's rationales for deferring to the agency's interpretation was that by enacting gaps and creating ambiguities, Congress intended, albeit implicitly, to delegate to the agency.¹⁸⁶ But in this trilogy, starting with *Brown & Williamson*, the Court rejected, or at least limited, this rationale:¹⁸⁷

Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. [*Brown & Williamson*] is hardly an ordinary case.¹⁸⁸

¹⁸² 529 U.S. 120 (2000).

¹⁸³ 546 U.S. 243 (2006).

¹⁸⁴ 548 U.S. 557 (2006).

¹⁸⁵ *Brown & Williamson*, 529 U.S. at 132-33; *Gonzales*, 546 U.S. at 267; *Hamdan*, 548 U.S. at 578.

¹⁸⁶ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

¹⁸⁷ *Brown & Williamson*, 529 U.S. at 159-61.

¹⁸⁸ *Id.* at 159 (citations omitted).

Specifically, in 2000, the same year that *Christensen* was decided, the majority rejected the Food and Drug Administration's (FDA) attempt to regulate tobacco in *Brown & Williamson*.¹⁸⁹ The FDA was authorized to regulate “drugs,” “devices,” and “combination products.”¹⁹⁰ The statute defined these terms as “articles . . . intended to affect the structure or any function of the body.”¹⁹¹ Considering nicotine to be a drug, the FDA concluded that it had authority to regulate.¹⁹² Thus, the FDA interpreted this broad language as allowing it to regulate tobacco and cigarettes.¹⁹³ Disagreeing, big tobacco sued.

The Supreme Court rejected the FDA's decision to regulate.¹⁹⁴ The FDA had acted with “force of law”, specifically by enacting regulations through notice and comment rulemakings.¹⁹⁵ However, the issue, according to the Court was not whether the FDA's interpretation was entitled to deference under *Chevron's* first or second step, but whether the agency could act at all; a Step Zero question.¹⁹⁶ Despite the fact that the language of the statute alone was broad enough to support the agency's interpretation and that the agency had acted with “force of law” procedures, the majority concluded “that Congress ha[d] directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products.”¹⁹⁷ The majority supported its holding by noting that Congress had: (1) created a distinct regulatory scheme for tobacco products; (2) squarely rejected proposals to give the FDA jurisdiction over tobacco; and (3) acted repeatedly to preclude other agencies from exercising authority in this area.¹⁹⁸

¹⁸⁹ *Id.* at 159-61.

¹⁹⁰ *Id.* at 126.

¹⁹¹ *Id.* (quoting 21 U.S.C. § 321 (g)(1)(C)).

¹⁹² *Id.* at 125.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 126, 133.

¹⁹⁵ *Id.* at 126-27.

¹⁹⁶ *Id.* at 132.

¹⁹⁷ *Id.* at 133.

¹⁹⁸ *Id.* at 155-56.

After concluding that *Chevron* deference was inappropriate, the Court did not even consider whether the lesser, *Skidmore*, deference would be appropriate, perhaps because *Mead* and *Barnhart* had not yet been decided.¹⁹⁹ In *Brown & Williamson* then, the majority held that while Congress may not have spoken to the precise issue, it had spoken broadly enough on related issues to prevent the agency from acting at all.²⁰⁰ No deference whatsoever (neither *Skidmore* nor *Chevron*) was accorded the agency's interpretation, even though the agency used "force of law" procedures.

Six years later, in *Gonzales v. Oregon*,²⁰¹ the Court refused to apply *Chevron* to the Attorney General's interpretation of the Controlled Substances Act of 1970. The issue before the Court was "whether the Controlled Substances Act allow[ed] the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure."²⁰² The Attorney General's interpretive rule had been developed through informal procedures.²⁰³ The Justices disagreed over whether the Attorney General's interpretation was entitled to *Chevron* deference. Justice Kennedy, writing for the majority, reasoned that because Congress had not intended the Attorney General to have interpretative power in this area, Congress had not delegated this issue to the agency: "The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Act's] registration provision is not sustainable."²⁰⁴ Hence, *Chevron* deference was inappropriate.

¹⁹⁹ *Id.* at 133. Justice Breyer dissented and found that the statute's language and general purpose both supported the FDA's finding that cigarettes were within its statutory authority. *Id.* at 161-63 (Breyer, J., dissenting).

²⁰⁰ *Id.* at 155-56.

²⁰¹ 546 U.S. 243 (2006).

²⁰² *Id.* at 248-49.

²⁰³ *Id.* at 253-54.

²⁰⁴ *Id.* at 267.

Unlike *Brown & Williamson*, where the Court refused to defer at all, this time the majority determined that the interpretation was entitled to some deference, albeit only *Skidmore* deference.²⁰⁵ At this point, the *Christensen-Mead-Barnhart* trilogy had been decided and so the *Gonzales* Court, following *Christensen*'s "force of law" direction, applied *Skidmore*.²⁰⁶ Yet, the majority concluded that even applying this lesser form of deference, the Attorney General's interpretation was unsustainable.²⁰⁷ Given the importance of the issue to the nation, the majority was particularly skeptical of the Attorney General's attempt to backdoor its overly broad interpretation of the statute.²⁰⁸ Thus, the majority rejected the Attorney General's interpretation after applying *Skidmore*'s "power-to-persuade" deference test.²⁰⁹

A frustrated Justice Scalia dissented, arguing that the interpretation was entitled to *Chevron* deference because Congress had delegated authority to "control" controlled substances.²¹⁰ He added that even if the interpretation were entitled to no deference, "the most reasonable interpretation of the Regulation and of the statute would produce the same result."²¹¹

Finally, in *Hamdan v. Rumsfeld*,²¹² the Court, for a third time, hinted that deference was not always appropriate despite broad statutory language. In this case, the Court rejected President Bush's executive order creating military commissions for "enemy combatant[s]."²¹³ The commissions were established after the

²⁰⁵ *Id.* at 268.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 272.

²⁰⁹ *Id.* at 272-75. A particularly scathing Justice Scalia dissented. *Id.* at 275-99 (Scalia, J., dissenting). He argued that the interpretation was entitled to *Chevron* deference and that even if the interpretation was not entitled to deference, "the most reasonable interpretation of the Regulation and of the statute would produce the same result." *Id.* at 285.

²¹⁰ *Id.* at 281-84 (Scalia, J., dissenting).

²¹¹ *Id.* at 285.

²¹² 548 U.S. 557 (2006).

²¹³ *Id.* at 567, 570.

tragic events of 9/11: First, Congress adopted a joint resolution, granting the President the power to ““use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.””²¹⁴ Second, acting pursuant to this resolution, President Bush issued the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” order, which provided that any non-citizens determined to be members of al Qaeda or terrorists would be tried by military commission.²¹⁵

Hamdan, a Yemeni national who had been detained at Guantanamo Bay, Cuba, and who had been charged with various terrorism-related offenses, was set for trial before a military commission pursuant to the President’s order.²¹⁶ He petitioned for habeas relief.²¹⁷ The United States District Court for the District of Columbia granted the petition.²¹⁸ The government appealed, and the United States Court of Appeals for the District of Columbia, reversed.²¹⁹ The Supreme Court granted certiorari and reversed. The relevant issue for purposes of this article was whether, and to what extent, the Uniform Code of Military Justice (UCMJ) authorized the President to establish procedures for military commissions that were different from the procedures for traditional court martials.²²⁰ The UCMJ explicitly provided that the procedures for the two proceedings should be the same, so far as “practicable.”²²¹ Yet, persons subject to trial by military

²¹⁴ *Id.* at 568 (quoting Authorization for Use of Military Force, 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 & Supp. III)).

²¹⁵ *Id.* (citing 66 Fed. Reg. 57,833 (Nov. 13, 2001)).

²¹⁶ *Id.* at 566.

²¹⁷ *Id.* at 567.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.* (citing 10 U.S.C. §§ 801 et seq.).

²²¹ *Id.* at 620 (“The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.” (quoting Article 36(a) of the Uniform Code of Military Justice, 10 U.S.C. §§ 801 et seq.)).

commissions could not confront the evidence against them while persons subject to trial by court martial could.²²² The Government argued:

[First, that] military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. [Second, that] the President's determination that 'the danger to the safety of the United States and the nature of international terrorism' renders it impracticable 'to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts' is, in the Government's view, explanation enough for any deviation from court-martial procedures.²²³

The Court rejected both arguments and concluded, on its own authority, that the procedures the President established for the military commissions violated the UCMJ.²²⁴ Moreover, even though the UCMJ language gave the President broad flexibility to determine what procedures were "practicable" and when uniformity would be required, the majority applied neither *Chevron* nor *Skidmore* deference to resolve the issue.²²⁵

Thus, in the *Brown & Williamson-Gonzales-Hamdan* trilogy, the Court concluded that there are situations when Congress does not intend to delegate interpretive authority to an

²²² *Id.* at 621.

²²³ *Id.* at 622 (citation omitted) (quoting 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001)).

²²⁴ *Id.* at 622-25. *Cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (failing to apply *Chevron* or *Skidmore* in evaluating the President's interpretation of Congress's joint resolution entitled Authorization for the Use of Military Force).

²²⁵ *See generally* Deborah N. Pearlstein, *A Measure of Deference: Justice Stevens from Chevron to Hamdan*, 43 U.C. DAVIS L. REV. 1063, 1070 (2010) (arguing that the "mere assertion of authority without a clear indication of process, without a clear reliance on actual expertise, [and] without a contextual factual record simply wasn't enough" for either deference standard).

agency at all, despite gaps and ambiguities.²²⁶ When Congress did not intend to delegate, then no deference, or only limited, *Skidmore* deference, would be due. These holdings were surprising because in *Chevron*, the Court had based its decision to defer to agencies, in part, on the notion that Congress implicitly intends for agencies to fill gaps and ambiguities in the statutes they administer.²²⁷ Yet, in each of these cases, the Court limited *Chevron*'s reach. Prior to these cases, courts could assume that when Congress left a gap or drafted ambiguously, Congress intended, albeit implicitly, to delegate the power to interpret the statute to the agency. After these cases, courts must first ensure that Congress actually intended to delegate the interpretive power: gaps and ambiguities are no longer enough.

E. Understanding *Chevron*'s Step Zero

Pre-*Mead*, the deference choice seemed relatively clear: An agency received *Chevron* deference when it reached an interpretation only after using legislative rulemaking or formal adjudication. All other interpretations were entitled to *Skidmore* deference. But *Mead* and *Barnhart* suggested that at least some interpretations reached through non-legislative rulemaking might receive *Chevron* deference. Whether the agency acts with “force of law” is no longer the exclusive test; rather, the test is whether Congress *intended* the courts to defer to the agency in light of the “interpretive method used” and the “nature of the question at issue.” Whereas *Chevron* and *Christensen* established bright line rules that provided some certainty, *Barnhart* and *Mead* returned the analysis to a case by case approach, similar to *Skidmore*'s “power-to-persuade” test. Predictability was lost.

²²⁶ See *Gonzales v. Oregon*, 546 U.S. 243, 281(2006) (Scalia, J., dissenting) (complaining that the majority had ignored “the implicit delegation inherent in Congress’s use of the undefined term ‘prescription’” in the Controlled Substances Act).

²²⁷ Jellum, *supra* note 5, at 741 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

And then there is the *Brown & Williamson-Gonzales-Hamdan* trilogy. Even when an agency uses “force of law” procedures, *Chevron* still may not apply if a fundamental issue is involved; one that goes to the heart of the regulatory scheme at issue and one that Congress would not have intended to delegate to the agency. Indeed, *Brown & Williamson* and *Hamdan* both implied that even *Skidmore* deference was not applicable in these cases. However, the majority in *Gonzales*, which was decided after *Mead* and *Barnhart*, did apply *Skidmore* deference to a similar issue. *Gonzales* is the better approach to these issues for two reasons; first, it appears the members of the Court in *Brown & Williamson* and *Hamdan* did not even consider whether *Skidmore* deference would be appropriate. Second, because *Skidmore* deference requires a court do little more than consider the agency’s interpretation, a court can relatively easily reject that interpretation if the interpretation is inconsistent with the regulatory scheme. Indeed, the Court in *Gonzales* did just that.²²⁸ Because agencies have expertise, have access to data and information, and are politically accountable, their input is relevant even if not decisive.²²⁹

At this point, you may wonder how to reconcile all the sub-steps in *Chevron*’s Step Zero. Assuming the agency is interpreting a statute that that agency has sole authority to administer, then the following four-step approach should be applied. First, ask whether Congress intended to delegate the specific issue to the agency at all. If the issue is one of such major importance that Congress never intended to delegate, then the agency likely has no power to interpret the statute. Such a finding should be rare. This step is based on the holdings in *Brown & Williamson*, *Gonzales*, and *Hamdan*. If Congress did not intend to delegate, then, *Skidmore* deference should apply regardless of the procedure the agency used.²³⁰

²²⁸ *Gonzales*, 546 U.S. at 275.

²²⁹ *Id.* at 255.

²³⁰ *Id.* at 256.

Second, assuming Congress did intend to delegate interpretive power to the agency, determine whether Congress intended the courts to defer to that agency's interpretation. To do so, look first to the type of agency action at issue. In other words, look to see if the agency acted with "force of law." If the agency interpreted the statute during notice and comment rulemaking, formal rulemaking, or formal adjudication, then *Chevron* deference is appropriate. This step is based on the holding in *Christensen*.²³¹

Third, determine whether *Chevron* deference is appropriate even though "force of law" procedures were not used. To do so, determine whether Congress intended *Chevron* to apply as shown by the *Barnhart* factors. Those factors include (1) the interstitial nature of the legal question, (2) the relevance of the agency's expertise, (3) the importance of the question to administration of the statute, (4) the complexity of the statutory scheme, and (5) the careful consideration the agency has given the question over a long period of time. If these factors suggest that Congress did not intend for courts to defer, then *Chevron* is inapplicable. Instead, apply *Skidmore*'s "power-to-persuade" test. This step is based on the holdings from *Mead* and *Barnhart*.²³²

Fourth, apply the appropriate deference standard. If you determined at step three that *Chevron* should apply, then using traditional tools of statutory interpretation, ask whether Congress has spoken to the precise issue before the court.²³³ This is *Chevron*'s

²³¹ See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

²³² See *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Barnhart v. Walton*, 535 U.S. 212 (2002).

²³³ Should a court turn to the agency's interpretation only after first exhausting all possible sources of meaning or only after viewing just the text? *Chevron* suggested the former. According to the Court, clarity should be determined by "employing traditional tools of statutory construction." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). And in the years following *Chevron*, the Court generally first looked searchingly for legislative intent at step one. Jellum, *supra* note 5, at 747. But in 1986, Justice Scalia joined the Supreme Court. Soon after Justice Scalia joined the bench, the Court's *Chevron* rhetoric changed. The Court's inquiry at step one became more focused on the text. Today, *Chevron*'s first step has been transformed from a search for legislative intent into a search for textual clarity. *Id.*

step one. If Congress has spoken, then analysis is complete for Congress has the authority to interpret its own statutes when it so chooses. But if Congress has not directly spoken to the precise issue, if Congress has left a gap or impliedly delegated to the agency, then proceed to *Chevron's* second step: Ask whether the agency's interpretation is reasonable in light of the underlying law. If the agency's interpretation is unreasonable, no deference is due. If the agency's interpretation is reasonable, full deference is due.²³⁴

"Some writers fault the textualist approach for causing Justice Scalia to cede too much authority to federal agencies under *Chevron*." Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 394 (1996) (presenting various views on Justice Scalia's adherence to textualism); see, e.g., Bernard Schwartz, "Shooting the Piano Player"? *Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 50 (1995) (discussing administrative law principles through use of Justice Scalia's opinions); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 430 n.91 (1989) (suggesting that textualism under *Chevron* would substantially increase the Executive's power); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597, 1639 (1991) (suggesting that textualism encompasses more than just Justice Scalia's views); Arthur Stock, Note, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 188 ("Justice Scalia recognizes that textualism with statutes reduces the power of individual Members of Congress. . ."); Shane M. Sorenson, Note, *Immigration and Naturalization Service v. Cardoza-Fonseca: Two Steps in the Right Direction*, 3 ADMIN. L.J. 95, 125 (1989) (explaining how Justice Scalia's interpretation of *Chevron* "suggests that Congress should be presumed to have delegated lawmaking authority to an agency whenever legislators fail to clearly spell out their intentions"); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 872 n.36 (1993) (calling Justice Scalia a "surface textualist" who accepts the text as the law for the purpose of avoiding judicial responsibility); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 315, 354 (1994) ("[T]extualism poses a threat to the future of the deference doctrine.").

Other writers "contend that, because of his adherence to textualism, Justice Scalia too often fails to defer to administrative agencies under the *Chevron* doctrine." Maggs, *supra*, at 394 (citing Michael Herz, *Textualism and Taboo: Interpretations and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1670 (1991)); see Jonathan D. Newman, Note, *Lechmere, Inc. v. NLRB: Plain Meaning and the Supreme Administrative Agency*, 4 MD. J. CONTEMP. LEGAL ISSUES 287, 288 (1993) (arguing that the Court occasionally manipulates the *Chevron* doctrine to reverse agency and executive policy that the Court opposes); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (averring that a hypertextualist method of statutory construction will lead to incoherence in the administrative state).

²³⁴ For an interesting approach to *Chevron's* second step, see Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254-55 (1997) (suggesting that there should be no difference between *Chevron's* second step and arbitrary and capricious review under § 706(2)(a) of the Administrative Procedure Act).

If, instead, you determined at step three that *Skidmore* should apply, then apply the *Skidmore*'s "power-to-persuade" factors to the agency's interpretation. The agency's interpretation is entitled to deference based on the following factors: (1) the consistency in the agency's interpretation over time; (2) the thoroughness of the agency's consideration; and (3) the soundness of the agency's reasoning.²³⁵ Deference under this standard is earned, not automatic.²³⁶

²³⁵ The cases above all addressed what level of deference, if any, a court should give to an agency interpretation when there are no pre-existing judicial interpretations of the same statute. The obvious next question is what if there is a prior judicial opinion? Prior judicial opinions exist when a court is forced to interpret the meaning of a statutory provision when the agency has not yet rendered an interpretation of it. The issue for a court is whether thereafter the agency is bound to follow a court's interpretation or the agency is free to make its own interpretation. The Court resolved this issue in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). In that case, the Court held that if the prior court had determined that the statute was clear under *Chevron*'s first step, then the agency is bound by that judicial interpretation. *Id.* at 982-83. But, if the court did not decide that the statute was clear, then the court's interpretation would not bind the agency. *Id.* In other words, a court's interpretation does not eliminate a pre-existing ambiguity. The court's decision merely reflects a determination that either there is no ambiguity or that there is ambiguity. If there is no ambiguity, then Congress has spoken and the agency, as well as the courts, must abide by Congress's intent. But if the statute is ambiguous, then when a court issues the first interpretation of an ambiguous statute, the agency is not bound by that interpretation.

²³⁶ Understanding the difference between *Chevron* and *Skidmore* in application is not always easy. Professor Gary Lawson has offered a way of thinking of the difference, which he defines as the difference between legal deference and epistemological deference. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 2-10 (2007). Legal deference is deference earned solely based on the identity of the interpreter and method of interpretation. *Id.* at 9. For example, lower courts must defer to interpretations of higher courts within the same jurisdiction, but need not defer to interpretations from courts in other jurisdictions solely because of the identity of the decisionmaker. *Chevron* deference is a form of legal deference: agencies earn deference simply because they are agencies and they interpret statutes in a particular way. In contrast, epistemological deference is deference earned because of the persuasiveness of the reasoning. *Id.* at 10. Courts in neighboring jurisdictions need not follow each other's opinions, but can choose to do so because the reasoning is persuasive. *Skidmore* deference is a form of epistemological deference: agencies earn deference based on the soundness of their reasoning, but deference is not automatic.

Not all academic administrative law experts would agree that this simplified, four step process completely or even accurately captures *Chevron* Step Zero analysis. Rightly, they would note that the interaction of these cases is extremely complex. Illustratively, one scholar has stated that the “force of law” phrase is one of the most confusing in administrative law.²³⁷ Another has stated that “*Mead* is not particularly coherent and raises tough issues about when *Chevron* does (should) apply.”²³⁸ A recent discussion on the lawprof list serv makes clear that even the experts disagree on exactly how to understand and reconcile these cases. These experts are correct; *Chevron*'s Step Zero is a mess. Yet the lower courts—judges in the field—need help with the guidance the Supreme Court has provided to date, even if that guidance is less clear than it could or even should be. This article and the four step process present my attempt to provide that help.

IV. THE VETERANS COURT & *CHEVRON*

As we have seen, agencies play a leading role in statutory interpretation. Throughout the last forty years, the Court has struggled with the appropriate level of deference to give agency interpretations. This struggle reflects the Court's concern with interpretive power and the appropriate role for the executive, legislative, and judicial branches of government. While the members of the executive and legislative branches are generally accountable to the public, and members of the judiciary are not, it is the judiciary who says what the law is.²³⁹ This tension permeates the jurisprudence in this area. Yet, underlying this tension is respect

²³⁷ Posting of Richard Murphy, richard.murphy@ttu.edu, to owner-adminlaw@chicagokent.kentlaw.edu (June 11, 2010) (on file with author).

²³⁸ Posting of Mark Seidenfeld, MSeidenf@law.fsu.edu, to owner-adminlaw@chicagokent.kentlaw.edu (June 11, 2010) (on file with author). For his view about the role of *Mead*, *Barnhart*, and *Christensen*, see Mark Seidenfeld, *Chevron's Foundation* 7 (Fla. State Univ. Coll. of Law, Pub. Law Research Paper No. 403, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1489982 (stating “[i]f *Mead* is confused, the Supreme Court's later decision in *Barnhart v. Walton* is downright perverse when viewed with a focus on congressional intent” (footnote omitted)).

²³⁹ See *supra* Part I.

for the role that agencies play and for their legal interpretations. In the veterans' arena, this respect may be getting lost. The Veterans Court does not, on balance, defer to the VA.

The Veterans Court approaches *Chevron* in some unusual and inapposite ways. First, the Veterans Court does not apply *Chevron*'s Step Zero analysis, or, if it does, the Veterans Court is not clear that it is so doing. Second, the Veterans Court applies an unusual "tie to the veteran" rule (*Gardner*'s presumption) that conflicts with *Chevron*.²⁴⁰ Moreover, the Veterans Court seems less deferential to the VA's interpretations than *Chevron*, *Skidmore*, and *Auer* would suggest. I discuss each point below in more detail.

A. The Veterans Court & *Chevron*'s Step Zero

First, the Veterans Court is not using the *Chevron* doctrine of today, or if the Veterans Court is using *Chevron* correctly, then it is not explaining itself clearly. Specifically, the Veterans Court does not clearly apply *Chevron*'s Step Zero, including *Christensen*'s "force of law" analysis,²⁴¹ *Barnhart*'s factors analysis, and *Brown & Williamson*'s initial inquiry: did Congress intend to defer in the first place.²⁴² In almost every case decided in the past year that involves the VA's interpretation of a statute, the Veterans Court, *without explanation*, applies *Chevron* or *Skidmore*.²⁴³

²⁴⁰ See *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

²⁴¹ See, e.g., *McCormick v. Gober*, 14 Vet. App. 39, 47 (2000) (citing *Chevron*, but failing to articulate the two step analysis or examine the force-of-law inquiry).

²⁴² The Veterans Court has not directly addressed this issue; however, in one case, the Veterans Court did conclude that the Secretary had authority to issue substantive, as opposed to procedural, regulations. See *Robinson v. Shinseki*, 22 Vet. App. 440 (2009). In that case, the relevant statute authorized the Secretary "to prescribe *all rules and regulations which are necessary and appropriate* to carry out the laws administered by the Department . . . including. . . ." *Id.* at 443 (quoting 38 U.S.C. § 501(a) (2006)). Because this general rule was then followed by four examples that were all procedural, the surviving spouse argued that the Secretary did not have authority to issue substantive rules. *Id.* The Veterans Court rejected the argument, finding the examples illustrative and not restrictive. *Id.* at 444-45.

²⁴³ I say almost because in some cases, the Veterans Court does not apply either *Chevron* or *Skidmore*. For example, in *Robinson*, the Veterans Court did not discuss deference at all. In that case, the Secretary had issued a regulation regarding whether benefits were available when

For example, in *Osman v. Peake*,²⁴⁴ the Veterans Court noted that *Skidmore* deference was the appropriate analysis for reviewing a VA General Counsel opinion that interpreted a statute.²⁴⁵ However, the Veterans Court never explained why *Skidmore*, rather than *Chevron*, was the appropriate standard.²⁴⁶ The issue in *Osman* was whether the son of two permanently disabled veterans was entitled to one dependent educational benefit or whether he was entitled to two separate awards, one based on each parent's disability.²⁴⁷ The text of the relevant statute provided: "'Each eligible person shall . . . be entitled to receive educational assistance.'"²⁴⁸ "Person" in the statute was defined as a "'child of a person who, as a result of qualifying service . . . has a disability permanent in nature resulting from a service-connected disability.'"²⁴⁹ The VA General Counsel had, prior to the case, issued a "precedent opinion" interpreting the term "eligible person" in the statute to prohibit dual awards.²⁵⁰ VA General Counsel precedential opinions are binding on the Board of Veterans' Appeals (Board); hence, the Board denied the son's request for benefits based on the mother's disability because the son had already received benefits based on his father's disability.²⁵¹

a surviving spouse had killed her veteran husband. *Robinson*, 22 Vet. App. at 441-42. The Board had denied benefits under its regulation because the spouse had entered a *nolo contendere* plea to a manslaughter charge in state court. *Id.* at 442. However, on appeal, the Secretary agreed with the spouse that the issue should be remanded for further factfinding: "[T]he Board's reliance upon appellant's conviction alone as the determinative factor regarding whether she wrongfully and intentionally caused the veteran's death under these circumstances is not sustainable and the Board's decision should be remanded." *Id.* at 444 (quoting Secretary's Brief at 9). The Veterans Court did not defer to the Secretary's position at all; neither *Chevron* nor *Skidmore* was mentioned. Instead, the Veterans Court simply ignored the Secretary's position, found the conviction sufficient, and affirmed the Board's decision to deny benefits. *Id.* at 447. It seems odd that the Veterans Court did not even consider whether deference was due to the Secretary's position on appeal. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (saying that deference should be afforded even when the agency announces its interpretation of its regulation for the first time in litigation documents).

²⁴⁴ 22 Vet. App. 252 (2008).

²⁴⁵ *Id.* at 256.

²⁴⁶ See *id.*; cf. *Sursely v. Peake*, 551 F.3d 1351, 1354-55 (Fed. Cir. 2009) (stating, without explaining, that *Skidmore* analysis was appropriate to apply to an advisory opinion interpreting a statute).

²⁴⁷ *Osman*, 22 Vet. App. at 253.

²⁴⁸ *Id.* at 255 (omission in original) (quoting 38 U.S.C. § 3510 (2006)).

²⁴⁹ *Id.* (quoting 38 U.S.C. § 3501 (a)(1)(A)(i-ii)).

²⁵⁰ *Id.* at 256 (quoting DVA Op. Gen. Counsel Prec. 1-2002, at 1 (Jan. 25, 2002)).

²⁵¹ *Id.* at 256-57 (citing 38 U.S.C. § 7104(c)).

The Veterans Court reversed the Board's denial.²⁵² In doing so, the Veterans Court noted that it reviewed VA statutory interpretations de novo and that *Skidmore* deference applied.²⁵³ Pursuant to *Skidmore*, the Veterans Court noted that it would defer to the VA's interpretation to the extent the interpretation was persuasive because "such opinions do constitute a body of experience and informed judgment."²⁵⁴ The Veterans Court then correctly identified the *Skidmore* factors: "thoroughness, reasoning, and consistency with earlier and later pronouncements on the specific issue."²⁵⁵ After reviewing the statutory language, the Veterans Court found the VA's interpretation unpersuasive and inconsistent; hence, it rejected the VA's interpretation entirely.²⁵⁶

The Veterans Court's initial statements were both correct and incorrect. It was incorrect that it should review agency interpretations of statutes de novo. Agency interpretations of ambiguous statutes are entitled to deference, under either *Chevron* or *Skidmore*.²⁵⁷ Indeed, in its next sentence, the Veterans Court recognized that some deference was due, choosing *Skidmore* deference.²⁵⁸ And while the Veterans Court was likely correct—that *Skidmore* and not *Chevron* was the appropriate deference standard—it never explained why *Skidmore* rather than *Chevron* was appropriate.²⁵⁹ Specifically, the Veterans Court never examined whether the VA had acted with "force of law," nor whether the *Barnhart* factors suggested that *Chevron* should apply. Instead, it simply identified *Skidmore* as the appropriate deference standard and moved on.²⁶⁰

²⁵² *Id.* at 257.

²⁵³ *Id.* at 256.

²⁵⁴ *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 256-60.

²⁵⁷ See *supra* Parts II, III.

²⁵⁸ *Osman*, 22 Vet. App. at 256.

²⁵⁹ *Id.* The Veterans Court noted that the Secretary agreed that "the correct standard of deference in this matter is governed by *Skidmore*." *Id.* at 254 n.3.

²⁶⁰ *Id.* at 256.

The Veterans Court's *Skidmore* choice was likely correct. Let's see why using the four-step approach identified earlier.²⁶¹ Using this approach, a court should ask first whether Congress intended to delegate the specific issue to the agency. Here, Congress had specifically delegated to the VA the power to make rules related to benefits;²⁶² thus, there would be no *Brown & Williamson* concern.

Next a court should ask whether Congress intended the courts to defer to the VA's interpretation under either *Christensen's* "force of law" test or *Barnhart's* factors test.²⁶³ Here, the VA opinions were not enacted pursuant to any procedurally prescribed process (neither informal or formal rulemaking nor formal adjudication);²⁶⁴ hence, under *Christensen*, *Chevron* deference is not appropriate. In addition, the *Barnhart* factors suggest that *Skidmore* is appropriate, although the outcome of this analysis is much less clear and simple. The *Barnhart* factors include the following: (1) the interstitial nature of the legal question, (2) the relevance of the agency's expertise, (3) the importance of the question to administration of the statute, (4) the complexity of the statutory scheme, and (5) the careful consideration the agency has given the question over a long period of time.²⁶⁵ In short, who would Congress likely have intended to answer this question: the judiciary or the agency? In this case, Congress likely did not intend for the VA to have final say. The issue does not appear to be essential to the VA's administration of its program, and the VA's expertise in this area does not seem to be essential to resolving the ambiguity in the statute, although these are close questions. Moreover, it appears that the agency considered the

²⁶¹ See *supra* Part II.A.

²⁶² 38 U.S.C. § 501(a) (2006).

²⁶³ See *supra* Part III.C.

²⁶⁴ *Osman*, 22 Vet. App. at 254.

²⁶⁵ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). Or, as I noted earlier, (1) the more difficult the issue and the regulatory scheme, (2) the more experience the agency has in the particular area, (3) the more important resolution of this issue is to the agency's ability to administer a program, and finally, (4) the more carefully the agency considers the interpretation, the more likely that Congress intended courts to defer to the agency. See *supra* note 172 and accompanying text.

interpretation in response to a prior inconsistent position, but we do not know from the opinion how carefully the interpretation was considered.²⁶⁶ Thus, under either *Christensen's* “force of law” test or *Barnhart's* factors test, the Veterans Court would likely have found that Congress did not expect the court to defer under *Chevron* to VA General Counsel precedent opinions. The more important issue in this case is not whether the choice was correct, but rather that the analysis was missing.

The final step in the process is to apply the selected standard accurately.²⁶⁷ Here, the Veterans Court needed to apply *Skidmore* by examining three factors: (1) the consistency in the agency interpretation over time; (2) the thoroughness of the agency’s consideration; and (3) the soundness of the agency’s reasoning.²⁶⁸ In its opinion, the Veterans Court did mention the consistency of the agency’s interpretation over time.²⁶⁹ In doing so, the Veterans Court found that the VA was inconsistent because it had interpreted the statute once in an advisory opinion to allow multiple benefits before it issued General Counsel Precedential Opinion 1-2002.²⁷⁰ For the Veterans Court, one different interpretation was sufficient to find that the VA had been inconsistent.²⁷¹

Even assuming the Veterans Court was correct—that one prior contradictory interpretation made the VA inconsistent—the Veterans Court did not clearly analyze the other two factors. Instead, the Veterans Court turned to *Chevron's* first step, determining whether Congress had directly spoken to the issue.²⁷² *Chevron* simply has no role when *Skidmore* is the appropriate deference

²⁶⁶ See *Osman*, 22 Vet. App. at 259-60.

²⁶⁷ See *supra* Part III.C.

²⁶⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁶⁹ *Osman*, 22 Vet. App. at 259-60.

²⁷⁰ *Id.* at 259-60. It appears that the award of multiple benefits on *one* occasion led the VA to issue the precedential opinion at issue in the case. See DVA Op. Gen. Counsel Prec. 1-2002, at 1 (Jan. 25, 2002).

²⁷¹ *Id.*

²⁷² *Id.* at 257 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

standard, not even as a citation. Essentially, in this part of its analysis, the Veterans Court determined what it thought the statute meant and concluded that the VA's interpretation was unpersuasive simply because the VA had come to a different conclusion.²⁷³ Hence, in *Osman*, the Veterans Court neither explained why *Skidmore* was the appropriate deference standard, nor applied *Skidmore* accurately. And in doing so, the Veterans Court did not defer to the VA.

Similarly, in *Wanless v. Shinseki*,²⁷⁴ the Veterans Court again noted, without explanation, that *Skidmore* deference applied to interpretations of VA General Counsel precedential opinions.²⁷⁵ The Veterans Court cited *Osman* for support of its choice and its reasoning.²⁷⁶ Yet in *Wanless*, the Veterans Court upheld the VA's interpretation, whereas it had rejected the VA's interpretation in *Osman*.²⁷⁷

In *Wanless*, the issue was whether a privately owned prison qualified as a “Federal, State, or local penal institution.”²⁷⁸ The Veterans Court found this language ambiguous, suggesting that the language “[did] not explicitly include or exclude private

²⁷³ To interpret the statute, the Veterans Court examined the text of the statute and explored the statutory context. *Id.* at 255-56. The Veterans Court found “the applicable statutes, and amendments thereto” clear. *Id.* at 258. In addition, the Veterans Court examined the codified purpose, which stated that the purpose of the statute at issue was to “provid[e] opportunities for education to children whose education would otherwise be impeded or interrupted by reason of the disability or death of a parent . . . and . . . [to aid] such children in attaining the educational status which they might normally have aspired to and obtained but for the disability or death of such parent.” *Id.* at 255 (quoting 38 U.S.C. § 3500 (2006)). The Veterans Court found that the purpose of the statute *further* supported its interpretation of the text and said: “We believe that our interpretation of the applicable statutory language is most consistent with the intent of Congress in enacting it.” *Id.* at 259. Finally, the Veterans Court suggested that even if the question were “a close one,” it would apply a policy-based canon to resolve the conflict; namely that any interpretational tie would be resolved in the Veteran’s favor. *Id.* (referring to the presumption that interpretive doubt should be resolved in favor of the veteran pursuant to *Brown v. Gardner*, 523 U.S. 115 (1994)).

²⁷⁴ 23 Vet. App. 143 (2009), *aff’d*, 618 F.3d 1333 (Fed. Cir. 2010).

²⁷⁵ *Id.* at 150.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 151.

²⁷⁸ *Id.* at 144 (quoting 38 U.S.C. § 5313(a)(1) (1993)).

prisons under State contract.”²⁷⁹ However, rather than turning immediately to the VA’s interpretation, the Veterans Court turned to other sources of meaning first.²⁸⁰ The Veterans Court reviewed the statute’s title and structure, which “support[ed] the conclusion that Congress intended the compensation reduction provision to apply to all veterans . . . regardless of whether the facility in which they were incarcerated was publicly or privately operated.”²⁸¹ In addition, the Veterans Court exhaustively examined the legislative history of the statute: “The legislative history of section 5313 provides significant insight into the congressional intent underlying the section 5313 provision regarding benefits reduction for veterans incarcerated for a felony.”²⁸² Moreover, the Veterans Court found the Veteran’s²⁸³ interpretation was unpersuasive, in part, because the Veteran had “provide[d] no support in the legislative history” for his argument that Congress intended to exclude State-contracted private prisons from the statute’s coverage.²⁸⁴ Finally, the Veterans Court rejected the Veteran’s second argument regarding an amendment to the statute.²⁸⁵ In the amendment, Congress had specifically added “other penal institution or correctional facility” to the list of relevant prisons.²⁸⁶ The Veteran had argued that the subsequent amendment to the statute showed that Congress believed that the statute as originally written did not apply to privately run prisons.²⁸⁷ The Veterans Court rejected the Veteran’s argument, finding it contrary to the legislative history: “[T]he legislative history of the [amendment]

²⁷⁹ *Id.* at 147.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 148.

²⁸² *Id.*

²⁸³ In January 2009, Secretary Shinseki issued a directive indicating that in all written documents issued by VA the “v” in “veteran” should be capitalized to read “Veteran” when used as a proper noun. See E-mail from Ken Greenberg, Exec. Sec’y to the Dep’t, U.S. Dep’t of Veterans Affairs, to VA Cent. Office Exec. Secretariat (Jan. 23, 2009, 9:20 AM EST) (on file with the Veterans Law Review).

²⁸⁴ *Id.* at 149.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 146 n.3.

²⁸⁷ *Id.*

states that it was promulgated as part of ‘technical and clarifying amendments to title 38.’”²⁸⁸ This legislative-amendment history “further demonstrate[d] . . . that the prior version of the statute adequately expressed the *congressional intent* to provide for a reduction of benefits to veterans incarcerated for commission of a felony, regardless of whether the institution in which a veteran is confined is a State institution or a State-contracted institution.”²⁸⁹ Only after concluding that the ambiguous language included state contracted facilities, did the Veterans Court turn to the VA’s interpretation.²⁹⁰

In doing so, the Veterans Court simply noted that *Skidmore* deference was appropriate.²⁹¹ However, in justifying its deference choice, the Veterans Court said little more than it had in *Osman*. The Veterans Court merely indicated that it “reviews VA’s statutory interpretation de novo” and that the “VA’s interpretation of the statute is entitled to respect to the extent that has ‘the power to persuade.’”²⁹² It cited *Osman* and *Skidmore* for proof of its choice.²⁹³ As it had in *Osman*, the Veterans Court never examined whether *Chevron* deference might be appropriate under either *Christensen*’s “force of law” test or under *Barnhart*’s factors analysis. Given that the VA issued the interpretation in the same way that it issued the interpretation in *Osman*, the analysis of this issue would likely end with the same result: namely, that *Skidmore* deference was appropriate.²⁹⁴ Had the Veterans Court in *Osman* performed a full analysis, then perhaps in this later case it would have been justified in citing *Osman* for the proposition and moving on. However, up to this point, the Veterans Court had not fully considered whether *Chevron* or *Skidmore* was the appropriate deference standard for VA precedential opinions.

²⁸⁸ *Id.* at 149 (quoting 152 Cong. Rec. H9015 (statement of Rep. Steve Buyer)).

²⁸⁹ *Id.* (emphasis added).

²⁹⁰ *Id.* at 150.

²⁹¹ *Id.*

²⁹² *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

²⁹³ *Id.*

²⁹⁴ See *supra* notes 241-71 and accompanying text.

Moreover, the Veterans Court did not apply *Skidmore*'s "power-to-persuade" test completely or accurately. The three factors are (1) the consistency of the agency's interpretation; (2) the thoroughness of the agency's consideration; and (3) the soundness of the agency's reasoning.²⁹⁵ As to the first factor, the Veterans Court rejected the Veteran's argument that the VA had been inconsistent.²⁹⁶ As to the second and third factors, it concluded that the VA's interpretation was "persuasive" because it was consistent with the Veterans Court's own, independent interpretation of the statute.²⁹⁷ The Veterans Court then deferred to the VA's interpretation.²⁹⁸ However, in doing so, the Veterans Court reasoned that "the Secretary's interpretation [was] not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁹⁹ These are not *Skidmore*'s "power-to-persuade" factors.³⁰⁰ Rather, the arbitrary and capricious standard is a completely different standard than *Skidmore*.³⁰¹ The arbitrary and capricious standard generally applies when courts review agency findings of fact or policy, not agency findings of law.³⁰²

Perhaps most importantly, in both *Osman* and *Wanless*, the Veterans Court erroneously equated persuasiveness with conformity. In other words, the Veterans Court found the VA's interpretation persuasive only when that interpretation agreed with the Veterans Court's own interpretation of the ambiguous language. Yet *Skidmore* requires a court to review an agency's process of interpretation along with the actual interpretation to determine

²⁹⁵ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

²⁹⁶ *Wanless*, 23 Vet. App. at 150 (rejecting the Veteran's argument that the VA's interpretation regarding foreign prisons was relevant to the VA's interpretation regarding state contracted prisons).

²⁹⁷ *Id.* at 151.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Skidmore*, 323 U.S. at 140.

³⁰¹ *Id.*

³⁰² *E.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

whether the agency's interpretation is persuasive, regardless of whether the court would make the same interpretation.³⁰³ In these cases, the Veteran's Court usurped the agency's interpretive role.

Again in *Sharp v. Shinseki*,³⁰⁴ the Veterans Court confused *Chevron's* Step Zero analysis. The facts of the case are complicated: In 1995, a VA regional office had granted a Veteran's service connection claim.³⁰⁵ In the letter granting the claim, the VA told the Veteran that he had one year to file additional information if he wanted additional compensation benefits for his dependents and wanted those benefits to be retroactive to the date of the award; he failed to timely forward the information.³⁰⁶ When he did send in the additional information, the VA awarded the benefits, but because he forwarded the information after the one-year deadline, the award was effective only back to the date of the late filing (January 1997), not to the date of the original award (August 1995).³⁰⁷ The Veteran did not appeal the additional compensation award.³⁰⁸ This is the first award (the January 1997 award).³⁰⁹

In 1998, the VA regional office determined that the Veteran was unemployable due to service-related injuries and awarded him benefits effective from the date of his injury, December 1988.³¹⁰ The Veteran challenged this award because it did not include additional compensation for his dependents retroactive to 1988.³¹¹ This is the second award (the 1998 award).³¹² When the regional office denied the challenge, the Veteran sought Board review; however, he died while the appeal was pending.³¹³

³⁰³ *Skidmore*, 323 U.S. at 140.

³⁰⁴ 23 Vet. App. 267 (2009).

³⁰⁵ *Id.* at 269.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

After the Veteran died, the Veteran's wife filed for the additional compensation based on the second award.³¹⁴ The regional office denied the request, reasoning that the first award was final and that the law did not allow for an earlier effective date once entitlement to additional compensation had been established.³¹⁵ The Board affirmed; the wife appealed to the Veterans Court.³¹⁶ The issue before the Veterans Court was whether the statute required that additional compensation benefits be awarded to dependents based on the *first* qualifying rating (in this case the first award) or whether it could be based on *any* qualifying rating (in this case the second award).³¹⁷ To resolve this issue, the Veterans Court had to interpret two related statutes: 38 U.S.C. § 1115, which allowed for additional compensation for dependents and 38 U.S.C. § 5110(f), which established the effective date for such awards.³¹⁸

Although the VA had promulgated two regulations that related to the issue, the Veterans Court failed to mention either initially, stating that “[t]he [Veterans] Court reviews statutory and regulatory interpretation de novo.”³¹⁹ The Veterans Court then described its process for interpreting statutory language, quoting *Chevron* in the process.³²⁰ As it had in the other cases identified above, the Veterans Court simply selected a deference standard without explanation.³²¹ In this case, the VA had issued its interpretation via two regulations promulgated after notice

³¹⁴ *Id.*

³¹⁵ *Id.* at 270.

³¹⁶ *Id.*

³¹⁷ *Id.* at 271.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ The Veterans Court could have been clearer that it was choosing *Chevron* for evaluating the agency's regulation. Rather, it appears to have independently evaluated the language of the statute without noting the regulation. However, later in the opinion, it noted that it was turning to step two of *Chevron* to discuss “whether the Secretary has promulgated regulations that provide a reasonable interpretation of the statutes.” *Id.* at 274 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

and comment procedures;³²² hence, *Chevron* would have been the correct standard under *Christensen*'s "force of law" test if no other factors were involved. However, the Veterans Court did not provide this analysis. Moreover, as we will see in a moment, *Chevron* was not the correct standard, as the Veterans Court later concluded; thus, it should not have started with *Chevron*'s first step. *Chevron* was simply irrelevant to the analysis.

In any event, pursuant to *Chevron*'s first step, the Veterans Court ignored both regulations and examined the text of 38 U.S.C. § 1115³²³ first and found that the statute "clearly and succinctly address[ed] when a veteran [was] entitled to additional compensation for dependents."³²⁴ Indeed, contrary to the VA's argument, the Veterans Court held that a veteran could recover additional compensation pursuant to this statute when the veteran met the statutory criteria; no separate claim need be filed.³²⁵ Yet, a finding of implicit entitlement was not enough to resolve the issue before the Veterans Court.³²⁶ The primary issue, the effective date of the additional compensation award, was still unresolved.³²⁷ Hence, the Veterans Court next turned to the effective date of awards statute, section 5110(f),³²⁸ to determine whether that statute conclusively resolved the issue.³²⁹ The Veterans Court concluded

³²² The regulations in question, 38 C.F.R. §§ 3.4(b)(2) & 3.401(b) (2009), were initially promulgated following notice and comment rulemaking; amendments of the regulations have also followed that procedure. *See, e.g.*, 45 Fed. Reg. 34,886 (May 23, 1980) (announcing amendments to several sections, including 38 C.F.R. § 3.401); 44 Fed. Reg. 22,717 (Apr. 17, 1979) (announcing amendments to several sections, including 38 C.F.R. § 3.4).

³²³ "Any veteran entitled to compensation at the rates provided in section 1114 of this title, and whose disability is rated not less than 30 percent, shall be entitled to additional compensation for dependents . . ." 38 U.S.C. § 1115 (2006).

³²⁴ *Sharp*, 23 Vet. App. at 271.

³²⁵ *Id.* at 272.

³²⁶ *Id.* at 273.

³²⁷ *Id.*

³²⁸ An award of additional compensation on account of dependents based on the establishment of a disability rating in the percentage evaluation specified by law for the purpose shall be payable from the effective date of such rating; but only if proof of dependents is received within one year from the date of notification of such rating action. 38 U.S.C. § 5110(f) (2006).

³²⁹ *Sharp*, 23 Vet. App. at 272-74.

that “neither statute [§ 1115 nor § 5110(f)] on its face nor legislative history provides any guidance in answering the precise question at issue.”³³⁰

Having exhaustively and unsuccessfully reviewed the text and legislative history of both statutes,³³¹ the Veterans Court turned to *Chevron*’s second step, determining whether the interpretations in the regulations were reasonable.³³² At this stage, after applying *Chevron*’s first step, the Veterans Court promptly discarded *Chevron* as the appropriate deference standard.³³³ Why? Because in *Gonzales*, the Supreme Court had held that when regulations merely parrot statutory language, *Chevron* is inappropriate.³³⁴ In *Sharp*, the Veterans Court found that the implementing regulations did exactly that; they parroted the underlying statutory language.³³⁵

³³⁰ *Id.* at 274.

³³¹ The Veterans Court noted that 38 U.S.C. § 1115 was silent regarding how the effective date for such additional compensation should be determined. *Id.* at 272. In the face of this silence, it turned to the legislative history of the statute. According to the Veterans Court, the legislative history suggested that the purpose of the statute was to “defray the costs of supporting the veteran’s . . . dependents’ when a service-connected disability is of a certain level hindering the veteran’s employment abilities.” *Id.* at 272 (omission in original) (quoting S. REP. NO. 95-1054, as reprinted in 1978 U.S.C.C.A.N. 3465). While this purpose might favor a broad interpretation of section 1115 generally, the legislative history did not specifically identify the effective date that should apply to additional compensation claims under section 1115:

The limited legislative history enlightens the [Veterans] Court as to the purpose of providing additional compensation for dependents, but such history does not assist the [Veterans] Court in determining whether Congress intended additional compensation for dependents under section 1115 to be on (1) *only the first* rating decision meeting statutory criteria of section 1115 or (2) *any* rating decision meeting the statutory criteria.

Id.

Finding the legislative history unenlightening, the Veterans Court returned to the text and concluded that entitlement to section 1115 benefits should accrue whenever the statutory factors were met. *Id.* In other words, although the statute did not explicitly so provide, the Veterans Court concluded that whenever a veteran met section 1115’s criteria, the veteran’s dependents were impliedly entitled to additional compensation. *Id.*

³³² *Id.* at 274.

³³³ *Id.* at 275.

³³⁴ *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (pointing out that the “existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute”).

³³⁵ First, the Veterans Court quickly found the regulation that interpreted the additional compensation statute (section 1115) unreasonable because the regulation “merely

Thus, the Veterans Court correctly determined that *Skidmore*, rather than *Chevron*, applied; and it clearly articulated its choice.³³⁶ Yet, assuming that *Skidmore* was the appropriate standard, the Veterans Court never should have turned to *Chevron*.

After determining that *Skidmore* was appropriate, however, the Veterans Court did not actually apply *Skidmore*'s "power-to-persuade" factors; instead, it said simply that the position was unpersuasive because "the Secretary ha[d] offered no support for his interpretation."³³⁷ To resolve the issue, the Veterans Court turned to the *Gardner* presumption that "'interpretative doubt is to be resolved in the veteran's favor."³³⁸ In doing so, it rejected the VA's interpretation and substituted its own based on a faulty presumption.³³⁹

parrot[ed] the statutory language [of section 1115]." *Sharp*, 23 Vet. App. at 274. The regulation provided: "An additional amount of compensation may be payable for a spouse, child, and/or dependent parent where a veteran is entitled to compensation based on disability evaluated as 30 per centum or more disabling." 38 C.F.R. § 3.4(b)(2) (2009). Second, the Veterans Court found the second regulation, which interpreted the effective date of awards statute (section 5110(f)), similarly unenlightening because it also mostly parroted the regulation. *Sharp*, 23 Vet. App. at 275. This regulation provided:

Awards of pension or compensation payable to or for a veteran will be effective as follows:

....

(b) *Dependent, additional compensation or pension for*. Latest of the following dates:

(3) Effective date of the qualifying disability rating provided evidence of dependency is received within 1 year of notification of such rating action.

38 C.F.R. § 3.401. In court, the VA had argued that the word "the" before the term "qualifying disability rating" implied that there could be only one such rating; had the VA anticipated more than one award, the VA would have used the article "a" instead. *Sharp*, 23 Vet. App. at 274-75. The Veterans Court rejected this argument, finding it unpersuasive. *Id.* at 275.

³³⁶ *Sharp*, 23 Vet. App. at 275 ("Deference to the regulation that offers no additional clarity to the interpretive issue would be inappropriate. Under such circumstances, the Secretary's interpretation of the statute is not subject to *Chevron* deference but his interpretation is entitled to respect to the extent it has the 'power to persuade.'" (citations omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

³³⁷ *Id.*

³³⁸ *Id.* (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

³³⁹ *See supra* Part IV.B.

In an unusual opinion, the Veterans Court applied *Skidmore* analysis when it should have applied *Auer* deference. When an agency interprets its own regulations, *Chevron* Step Zero analysis is inapplicable.³⁴⁰ Rather, an agency's interpretation of its own regulations is controlling unless plainly wrong.³⁴¹ Deference under this standard is close to automatic.

Yet, the Veterans Court often does not defer under *Auer*.³⁴² Illustratively, in *Haas v. Nicholson*,³⁴³ the issue for the Veterans Court was whether a Veteran who served on a ship that traveled near the coastal waters of Vietnam but who never went ashore “serv[ed] in the Republic of Vietnam.”³⁴⁴ A statute presumed that a veteran who “serv[ed] in the Republic of Vietnam” during a specified time period was exposed to Agent Orange.³⁴⁵ The Secretary had promulgated a regulation interpreting this statutory phrase to apply only to those service members whose service involved “duty or visitation” in Vietnam.³⁴⁶ The Secretary then interpreted the phrase “duty or visitation” in the regulation to apply only to veterans who had physically set foot in Vietnam, even if only for a short time.³⁴⁷ Because the Veteran had served on a ship that was located near Vietnam but never set foot in the country, the Board affirmed the regional office's denial of benefits.³⁴⁸ The Veteran appealed, and the Veterans Court reversed.³⁴⁹ In doing so, the Veterans Court rejected the VA's interpretation of its

³⁴⁰ See *supra* Part III.A.

³⁴¹ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

³⁴² See, e.g., *Smith v. Nicholson*, 19 Vet. App. 63, 78 (2005) (applying *Gardner* analysis rather than *Auer* to reject the Board's interpretation of its regulation); *Otero-Castro v. Principi*, 16 Vet. App. 477, 484 (1999) (applying *Chevron* analysis rather than *Auer* to reject the Board's interpretation of its regulation); *Meakin v. West*, 11 Vet. App. 183, 186 (1998) (failing both to cite *Auer* and to defer to an implementing regulation regarding the Board's jurisdiction).

³⁴³ 20 Vet. App. 257 (2006), *rev'd sub nom.* *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

³⁴⁴ *Id.* at 259 (quoting 38 U.S.C. § 1116(f) (2006)).

³⁴⁵ *Id.* at 263 (quoting 38 U.S.C. § 1116(f)).

³⁴⁶ *Id.* at 269 (quoting 38 C.F.R. § 3.307(a)(6)(iii) (2009)).

³⁴⁷ *Id.* at 267.

³⁴⁸ *Id.* at 259.

³⁴⁹ *Id.*

own regulation—that “duty or visitation” meant a veteran must have actually stepped onto the land—because the regulation was “inconsistent with prior, consistently held agency views, [was] plainly erroneous in light of its interpretation of legislative history, and [was] unreasonable as an interpretation of VA’s own regulations.”³⁵⁰ The Veterans Court specifically cited *Skidmore*, along with *Seminole Rock*, to support its decision.³⁵¹ Yet, the *Skidmore* factors are not a part of the *Auer/Seminole Rock* deference standard.³⁵² Rather, *Auer* requires that the interpretation be rejected only if it is plainly wrong.³⁵³ It is hard to see how the VA’s interpretation in this case could be considered plainly wrong. The term “duty or visitation” is at least ambiguous regarding whether a veteran had to step onto Vietnam soil. Because the VA’s interpretation in its regulation was not plainly wrong, the Veterans Court should have upheld the regulation. Instead, it appears that the Veterans Court simply disagreed with the interpretation, and so substituted its own. Indeed, the case was reversed on appeal for this reason.³⁵⁴

In conclusion, while the Veterans Court may be aware of *Chevron’s* Step Zero, its jurisprudence could be clearer on when and why *Chevron*, *Skidmore*, or even *Auer* deference is appropriate. Moreover, the Veterans Court occasionally reverts to *Skidmore* analysis when *Skidmore* has no application.³⁵⁵ Additionally, when it applies its deference standard, the Veterans Court often does not apply the selected standard accurately. Perhaps most importantly, the Veterans Court is less deferential than the three standards would suggest it should be. The VA’s interpretation should control more often than not; instead, the Veterans Court substitutes its own interpretation of ambiguous statutory language regularly.

³⁵⁰ *Id.* at 270.

³⁵¹ *Id.* (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

³⁵² *See supra* Part III.A.

³⁵³ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

³⁵⁴ *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

³⁵⁵ *See supra* notes 303-40 and accompanying text.

B. The Veterans Court & Gardner's Presumption

Within veterans' law, there is an odd presumption that exists regarding interpretive doubt. This odd presumption, which I will call "*Gardner's* presumption," conflicts directly with *Chevron*.

Gardner's presumption—that interpretive doubt is to be resolved in favor of the veteran—was first articulated in two cases that predated *Chevron*: *Boone v. Lightner*³⁵⁶ and *Fishgold v. Sullivan Drydock & Repair Corporation*.³⁵⁷ The presumption was cited again, after *Chevron*, in *King v. St. Vincent's Hospital*.³⁵⁸ The issue for the Supreme Court in *King* was whether a provision in the Veterans Reemployment Rights Act provided a member of the reserve services with an unlimited right to civilian reemployment.³⁵⁹ No agency had interpreted the statute; rather, the employer sought a declaratory judgment that the statute should be read to include a reasonable limit on the length of time that the reservist's position had to remain open.³⁶⁰ Rejecting the employer's interpretation, the Supreme Court found the text of the statute clear.³⁶¹ In a footnote, the Court suggested, in dictum, that even if the employer had had a reasonable argument that the statute was ambiguous, the Court would have resolved the ambiguity in favor of the reservist: "[the Court] would ultimately read the provision in [the reservist's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."³⁶² The Court further noted that Congress was likely aware of this interpretive principle and had drafted accordingly.³⁶³

³⁵⁶ 319 U.S. 561, 575 (1943) (holding that a veteran was not entitled to a continuance under the Soldiers' and Sailors' Civil Relief Act).

³⁵⁷ 328 U.S. 275, 285 (1946) (holding that a veteran who returned to his former position as a welder could be laid off during slow work periods pursuant to Selective Training and Service Act of 1940).

³⁵⁸ 502 U.S. 215 (1991).

³⁵⁹ *Id.* at 216.

³⁶⁰ *Id.* at 219.

³⁶¹ *Id.* at 222.

³⁶² *Id.* at 220-21 n.9.

³⁶³ *Id.*

Just three years later, the Supreme Court referred to its *King* dictum in *Brown v. Gardner*,³⁶⁴ an opinion involving the VA's interpretation of a statute.³⁶⁵ In *Gardner*, the Supreme Court held that a VA regulation that required a veteran to prove that a disability resulted from the VA's negligent treatment or from an accident occurring during VA treatment was inconsistent with the plain language of the controlling statute.³⁶⁶ Finding the language of the statute clear under *Chevron's* first step, the Court rejected the VA's regulation as inconsistent with this clear text.³⁶⁷ Indeed, the Court went further and stated that even if the Government could show ambiguity—which the Government could not—any “interpretive doubt [was] to be resolved in the veteran’s favor.”³⁶⁸ In creating *Gardner's* presumption, the Court cited the footnote dictum from *King*.³⁶⁹ But the Court in *Gardner* never reached *Chevron's* second step because there was no ambiguity to resolve.³⁷⁰

Gardner's presumption has become somewhat of a legend in veterans' jurisprudence. It is raised often by veteran litigants³⁷¹ and cited regularly by the Veterans Court,³⁷² by the United States Court of Appeals for the Federal Circuit (Federal Circuit),³⁷³

³⁶⁴ 513 U.S. 115 (1994).

³⁶⁵ *Id.* at 116.

³⁶⁶ *Id.* at 118-20.

³⁶⁷ *Id.* at 120.

³⁶⁸ *Id.* at 118.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 120.

³⁷¹ *E.g.*, Haas v. Peake, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (raising the issue for the first time in a petition for rehearing); Smith v. Nicholson, 19 Vet. App. 63, 69 (2005), *rev'd*, 451 F.3d 1344 (Fed. Cir. 2006).

³⁷² *See, e.g.*, Nielson v. Shinseki, 23 Vet. App. 56, 59 (2009); Osman v. Peake, 22 Vet. App. 252, 259 (2008) (indicating that even if the issue were a “close one,” the court was required to resolve any interpretive doubt “in the veteran’s favor” (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994))); Otero-Castro v. Principi, 16 Vet. App. 375, 380 (2002) (applying *Gardner* presumption to resolve ambiguity in favor of Veteran).

³⁷³ *See, e.g.*, Sursely v. Peake, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (stating “in the face of statutory ambiguity, we must apply the rule that ‘interpretive doubt is to be resolved in the veteran’s favor’”) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)); Terry v. Principi, 340 F.3d 1378, 1383 (Fed. Cir. 2003).

and even occasionally by the Supreme Court.³⁷⁴ Yet, *King* did not involve an agency interpretation, nor did it raise *Chevron* issues.³⁷⁵ Whether the presumption should apply in the face of a contradictory interpretation by the VA was not directly addressed in either *Brown* or *King*. Importantly, *Gardner*'s presumption collides head on with the Supreme Court's *Chevron* approach, in which *agencies* are awarded the power to interpret statutes because of their expertise, because of Congress's implied delegation to them, and because agencies are more politically accountable than courts.³⁷⁶ In other words, Congress gives power to fill the interstices of the law to the VA, not to veterans.³⁷⁷ When the VA does not interpret a statute, it makes sense for a court to use *Gardner*'s presumption to resolve any ambiguity. The purpose of the veterans' statutes in general is to help veterans;³⁷⁸ hence, the presumption simply makes sense from a statutory interpretation approach. And, even when the VA has interpreted a statute, but did so without "force of law" procedures, then *Gardner*'s presumption may be relevant as one more factor to add to *Skidmore*'s "power-to-persuade" test.³⁷⁹ But when the VA interprets a statute with more deliberative procedures, it is less clear that *Gardner*'s presumption should apply. For if *Gardner*'s presumption applies, then *Chevron*'s second step would no longer be about the reasonableness of the VA's interpretation; rather, *Chevron*'s second step would become a question of which interpretation was more favorable to the veteran. The power to fill interstices in the law would be in veterans' hands.

³⁷⁴ See, e.g., *Shinseki v. Sanders*, 129 S. Ct. 1696, 1709 (2009) (Souter, J., dissenting) (writing that "even if there were a question in my mind, I would come out the same way under our longstanding 'rule that interpretive doubt is to be resolved in the veteran's favor.'" (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

³⁷⁵ *King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991).

³⁷⁶ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984).

³⁷⁷ See *supra* Part II.B.

³⁷⁸ See, e.g., 38 U.S.C. § 525 (2006) (discussing "Federal laws relating to veterans' relief").

³⁷⁹ Indeed, in *Sursely*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) specifically suggested that *Gardner*'s presumption was appropriate because "the Secretary ha[d] not provided an interpretation of the statute eligible for *Chevron* deference." *Sursely v. Peake*, 551 F.3d 1351, 1357 n.5 (Fed. Cir. 2009).

For precisely this reason, the Federal Circuit cautioned that courts “must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case.”³⁸⁰ In *Sears v. Principi*, the Federal Circuit soundly rejected a Veteran’s argument that “ambiguity must always be resolved in favor of the veteran because the pro-claimant policy underlying the veterans’ benefits scheme overrides *Chevron* deference.”³⁸¹ Unfortunately, the Federal Circuit did not explain how to resolve the tension between *Gardner*’s presumption and *Chevron*’s second step.³⁸² In the same year, in *Terry v. Principi*,³⁸³ the Federal Circuit further directed that *Gardner*’s presumption “is a canon of statutory construction that requires that resolution of interpretive doubt arising from statutory language be resolved in favor of the veteran. It does not affect the determination of whether an agency’s regulation is a permissible construction of a statute.”³⁸⁴ In other words, the Federal Circuit seems to be suggesting that courts ignore *Gardner*’s presumption when *Chevron* applies.

The first time that the Veterans Court directly addressed the conflict between *Gardner* and *Chevron*, the Veterans Court upheld the Board’s interpretation; however, the opinion was subsequently

³⁸⁰ *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003); cf. *DeBeaord v. Principi*, 18 Vet. App. 357, 364-65 (2004) (cautioning that the “Federal Circuit has also stated in discussing the *Chevron* standard and *Gardner* canon [sic] of construction: ‘Moreover, where the application of customary canons of statutory construction points in opposite directions, we resort to the *Chevron* principle’” (quoting *Paralyzed Veterans of Am. v. Sec’y of Veterans Affairs*, 345 F.3d 1334, 1340 (Fed. Cir. 2003)), *appeal dismissed*, No. 05-7003, 2005 WL 290002 (Fed. Cir. Jan. 14, 2005).

³⁸¹ *Sears*, 349 F.3d at 1331.

³⁸² *Id.* at 1332 (indicating only that the Veteran failed to identify any VA regulation that did not operate in his favor).

³⁸³ 340 F.3d 1378 (Fed. Cir. 2003).

³⁸⁴ *Id.* at 1384 (footnote and citation omitted) (“Ordinarily at this juncture in the analysis—where application of the usual canons of statutory construction [i.e., canon to resolve interpretive doubt in favor of the veteran and canon to consider legislative history] push in opposite directions—we would resort to the *Chevron* principle, which mandates that we defer to an agency’s reasonable interpretation of an ambiguous statute.” (quoting *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001))).

vacated. In *Jordan v. Principi*,³⁸⁵ the Veterans Court concluded that *Gardner*'s presumption only applied where there were two *reasonable* interpretations:

[W]e hold that, under *Brown v. Gardner*, we must resolve interpretative doubt in favor of claimants only where there are competing *reasonable* interpretations of an ambiguous statutory provision and that, consequently, that interpretive doctrine cannot, by definition, be applied to lead to a statutory interpretation that produces an absurd result . . . because such an interpretation would be inherently not "reasonable."³⁸⁶

Subsequently, however, the Veterans Court has cited to both *Sears* and *Terry* and exercised increasing restraint in resorting to *Gardner*'s presumption.

Resolving the tension between *Chevron* and *Gardner* is problematic, but necessary. In addition, there is another concern with *Gardner*'s presumption: exactly when is an interpretation sufficiently favorable to veterans? The Federal Circuit raised this concern with *Gardner*'s presumption in *Haas v. Peake*.³⁸⁷ As noted earlier, the issue in that case was whether a Veteran who served on a ship that traveled near Vietnam but who never went ashore had "serv[ed] in the Republic of Vietnam."³⁸⁸ The VA had promulgated a regulation interpreting this phrase to apply only to those service members whose service involved "duty or visitation" in Vietnam.³⁸⁹ The VA then interpreted the phrase "duty or visitation" in the regulation to apply only to veterans who had physically set foot in Vietnam, even if only for a short time.³⁹⁰ The

³⁸⁵ 16 Vet. App. 335 (2002), *withdrawn*, No. 00-206, 2002 WL 31445159 (Vet. App. Nov 1, 2002).

³⁸⁶ *Id.* at 348.

³⁸⁷ 544 F.3d 1306, 1308 (Fed. Cir. 2008).

³⁸⁸ *Id.* at 1307-08 (quoting 38 C.F.R. § 3.307(a)(6)(iii) (2009)).

³⁸⁹ *Id.* (quoting 38 C.F.R. § 3.307(a)(6)(iii)).

³⁹⁰ *Id.* at 1308-09.

Veteran had appealed the VA's decision and, ultimately, lost before the Federal Circuit.³⁹¹ Petitioning for rehearing, the Veteran argued that *Gardner's* presumption should have applied.³⁹² The Federal Circuit disagreed.³⁹³ Because the Veteran had neglected to raise the issue during his original appeal, the Federal Circuit held that the argument had been waived.³⁹⁴ However, in doing so, it noted this difficulty of applying *Gardner's* presumption: "[T]his case would present a practical difficulty in determining what it means for an interpretation to be 'pro-claimant.'" ³⁹⁵ Specifically, the Federal Circuit noted that the VA had already interpreted the statute in a pro-veteran manner by applying the language to any veteran who set foot on land, for however long.³⁹⁶ Thus, *Haas* raised the question: Exactly how veteran-friendly must a rule be to survive a *Gardner* attack? The answer is simply unclear.

In short, *Gardner's* presumption has morphed from a simple assumption in non-agency interpretation cases to a claim of right in VA cases. The Veterans Court has relied on *Gardner's* presumption often as added support for its decision to reject the VA's interpretation of a statute.³⁹⁷ In dictum, the Veterans Court recognized the quandary:

If we had been required to deal with an ambiguous statutory scheme, however, it is not altogether clear that we would have to abandon the directive of the Supreme Court in *Gardner*, that 'interpretive doubt is to be resolved in the veteran's favor', a directive derived from *King*, a case issued seven years after *Chevron*, that applied that interpretive principle to 'read [a regulation] in [the veteran's] favor', and

³⁹¹ *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), *rehearing denied*, 544 F.3d at 1310.

³⁹² *Haas*, 544 F.3d. at 1308.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 1308-09.

³⁹⁷ *E.g.*, *Sharp v. Shinseki*, 23 Vet. App. 267, 275 (2009).

that drew that principle from *Fishgold v. Sullivan Drydock & Repair Corp.* a case decided long before *Chevron*. Not only was that canon confirmed by the Supreme Court in *Gardner* ten years after *Chevron*, but it is one tailored specifically to veterans benefits statutes as contrasted with the more general statutory-construction principle set forth in *Chevron*. In the last analysis, guidance from the Supreme Court would appear necessary to resolve this matter definitively.³⁹⁸

As the Veterans Court suggests, this conflict should be explored and resolved.

CONCLUSION

It is no wonder that lower courts are struggling to apply the Supreme Court's guidance in this area. The Court has turned what was once a relatively simply two-step into a complicated flamenco. Whereas *Chevron* established a bright line rule that provided some certainty, the Court's jurisprudence has returned the analysis to a case-by-case approach. Predictability and straightforwardness have both been lost. *Chevron* analysis has been transformed from a simple deference test to a choice of deference tests. At *Chevron*'s Step Zero, a court must choose *Chevron* or *Skidmore* or even no deference. Today, that choice is not an easy one.

According to the Court, that choice depends on whether Congress intends that an agency have deference for interpretations of statutes.³⁹⁹ If so, then courts should apply *Chevron*, regardless of how the agency reached the interpretation.⁴⁰⁰ In these situations,

³⁹⁸ DeBeaord v. Principi, 18 Vet. App. 357, 368 (2004) (citations omitted) (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 220-21 n.9 (1991) (citing Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946))).

³⁹⁹ See *supra* Part II.B.

⁴⁰⁰ See *id.*

Chevron is appropriate because Congress intended for the agencies, not the courts, to develop this area of law. As the Court has held, “*Chevron* govern[s] only those cases where the agency was acting under a congressional delegation of lawmaking authority to the agency” or acts with “force of law.”⁴⁰¹ Other deference standards govern when the agency does not act with the “force of law.”⁴⁰² In contrast, when Congress does not so intend, then the agency is deserving of only *Skidmore* deference.⁴⁰³ In this situation, Congress intended the courts to be the final arbiters of these types of legal issues.

Unsurprisingly, the Veterans Court’s approach to *Chevron* and its prodigy could use some fine-tuning; the Veterans Court’s recent jurisprudence shows confusion regarding when and how *Chevron* should apply and when and how *Skidmore* should apply.⁴⁰⁴ For example, the Veterans Court regularly states that it reviews issues of agency interpretation of statutes de novo, even when it subsequently applies one of the deference standards.⁴⁰⁵ Additionally, the Veterans Court often fails to analyze clearly, if at all, *Chevron*’s Step Zero—the *Christensen* force-of-law test and the *Barnhart* factors analysis.⁴⁰⁶ And even when the Veterans Court selects a deference standard, it does not always apply the selected standard accurately.⁴⁰⁷ Finally, it turns often to a presumption that is completely at odds with *Chevron*.⁴⁰⁸

Yet, despite my criticisms, I cannot fault the Veterans Court for its confusion; the Supreme Court left a mess for the lower courts to resolve. Recently, a number of administrative

⁴⁰¹ Eskridge & Baer, *supra* note 3, at 1088 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)).

⁴⁰² *Id.* at 1098-1100.

⁴⁰³ *Id.* at 1109-11.

⁴⁰⁴ *See supra* Part IV.

⁴⁰⁵ *See supra* Part IV.A.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Whether *Gardner*’s presumption should play any role in *Chevron* analysis should be more fully examined than has been done to date.

law scholars debated this issue in a listserv discussion on how to present deference issues in the classroom. Professor Ronald Levin noted that the “*Mead* issue is the toughest of the tough. It really confuses the students because the *Mead* Court’s distinctions are obscure and the difference between *Chevron* and *Skidmore* is also obscure.”⁴⁰⁹ And Professor Peter Strauss noted simply, but eloquently, that “the courts are confused.”⁴¹⁰

Justice Scalia direly predicted that “We will be sorting out the consequences of the *Mead* doctrine . . . for years to come.”⁴¹¹ Illustratively, the Veterans Court’s jurisprudence proves that he was right.

⁴⁰⁹ Posting of Ronald Levin, Levin@wulaw.wustl.edu, to owner-adminlaw@chicagokent.kentlaw.edu (June 9, 2010) (on file with author).

⁴¹⁰ Posting of Peter Strauss, strauss@law.columbia.edu, to owner-adminlaw@chicagokent.kentlaw.edu (June 9, 2010) (on file with author). In a separate e-mail to me, he later added, “I don’t understand how confused they are, and find the basic *Mead* proposition a simple one, and a correct one.” E-mail from Peter Strauss, Betts Professor of Law, Columbia Law School, to Linda Jellum, Associate Professor of Law, Mercer University Law School (June 28, 2010 12:11 EST) (on file with author).

⁴¹¹ *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (citation omitted).