

CHEVRON DEFERENCE AND INTERPRETIVE AUTHORITY AFTER *CITY OF ARLINGTON V. FCC*

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INTRODUCTION

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹ the Supreme Court announced a two-part test for reviewing an administrative agency’s interpretation of its organic statute. This test requires a reviewing court to defer to an agency’s interpretation of its organic statute as long as Congress has not “directly spoken” to the precise question at issue and the agency’s interpretation is “reasonable.”² Since the case was decided in 1984, it has become one of the most cited public law cases in modern history.³ Many questions about its effects remain unanswered, however, especially regarding the scope of the doctrine’s domain.⁴ In *City of Arlington, Texas v. Federal Communications Commission* (“*FCC*”),⁵ the Supreme Court settled one of those unan-

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¹ 467 U.S. 837 (1984).

² See *id.*

³ See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006).

⁴ See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497 (2009); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

⁵ 133 S. Ct. 1863 (2013).

swered questions, holding that *Chevron* deference extends to agencies' determinations of their own jurisdiction.⁶ This Comment argues that the Court's decision was wrong as a matter of policy and precedent. Moreover, although *Arlington* was heralded as the "most significant administrative law decision [of the] decade,"⁷ this Comment argues that *Arlington*'s impact will be largely academic and will have little bearing on the outcome of future administrative law cases.

I. BACKGROUND: ARLINGTON AND CHEVRON DOCTRINE

A. *Step Zero? The Development of Chevron Doctrine and City of Arlington v. FCC*

Chevron's basic premise is that where Congress has left gaps or ambiguities in an agency's enabling act, it has delegated to the agency—not the courts—the power to fill in the statutory gaps.⁸ In *United States v. Mead Corp.*,⁹ the Court clarified that *Chevron*'s presumption is ultimately a function of congressional intent; courts extend deference only where Congress has delegated to the agency authority to act with the force of law. After *Mead*, a court reviewing an agency decision must first determine whether Congress intended for the agency's interpretations of the statute to receive deference before proceeding to the *Chevron* two-step inquiry. This threshold inquiry is commonly referred to as "*Chevron* Step Zero."¹⁰

Although the Court in *Mead* recognized the need for a threshold inquiry prior to the application of *Chevron*, it left open important questions about this inquiry. One such question was whether agencies would receive *Chevron* deference when interpreting a statutory provision governing the scope of their own jurisdiction.¹¹ The Court resolved this question in the affirmative in *Arlington* last term.¹²

The Telecommunications Act of 1996 amended the Communications Act of 1934, adding, among other things, provisions regarding the siting of wireless telecommunications networks' towers and antennas.¹³ Section 332(c)(7)(A) asserts that states and localities have "general authority" over wireless siting ap-

⁶ See *id.* at 1875.

⁷ Jonathan H. Adler, *Chevron Revisited in City of Arlington v. FCC, VOLOKH CONSPIRACY* (Jan. 15, 2013, 10:06 PM), <http://perma.law.harvard.edu/5YET-HL8H>. The case was argued by the Solicitor General himself, suggesting that he believed the resolution of the case to be of great importance to the United States government.

⁸ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.") (internal citations and quotations omitted).

⁹ 533 U.S. 218 (2001).

¹⁰ See Sunstein, *supra* note 4.

¹¹ See Sales & Adler, *supra* note 4; Sunstein, *supra* note 4.

¹² See *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

¹³ *Id.* at 1866.

plications,¹⁴ including decisions regarding “the location, construction and modification of [wireless] facilities.”¹⁵ Section 332(c)(7)(B) then lays out five “substantive limitations” on this “traditional authority,” including the requirement in section 332(c)(7)(B)(ii) that zoning authorities act “within a reasonable period of time after [a siting application for a wireless facility] is duly filed.”¹⁶

For twelve years after the enactment of section 332(c)(7), the FCC left the responsibility of ensuring that zoning boards acted promptly to state and local authorities.¹⁷ In 2008, CTIA—The Wireless Association¹⁸ petitioned the FCC to clarify what period of delay should be considered unreasonable under section 332(c)(7)(B)(ii).¹⁹ The FCC found that, “in practice, wireless providers often faced long delays” regarding applications for wireless facilities.²⁰ The agency issued a declaratory ruling in response, relying on section 201(b) of the Communications Act, which “empowers the [FCC] to prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions.”²¹ The Commission defined a “reasonable period of time” under section 332(c)(7)(B)(ii) as 90 days for an application for a “new antenna on an existing tower” and 150 days for all other applications.²² The cities of Arlington and San Antonio, Texas, objected to the Declaratory Ruling and petitioned for review in the U.S. Court of Appeals for the Fifth Circuit.²³ Petitioners argued that the FCC did not have the “statutory authority to adopt the 90- and 150-day time frames” because section 332(c)(7)(A) “preclud[ed] the FCC from exercising authority to implement” the language in the unreasonable delay provision.

The Fifth Circuit noted that the Supreme Court had not yet decided the question,²⁴ but concluded that *Chevron* deference was appropriate for interpretations regarding the scope of the agency’s jurisdiction.²⁵ Applying the two-step test, the court concluded that the statute did not provide a “clear answer” on whether defining a “reasonable time” was the sole prerogative of the states and localities or not.²⁶ However, the agency’s claim of interpretive authority was a

¹⁴ See 47 U.S.C. § 332(c)(7)(A) (2012).

¹⁵ *Arlington*, 133 S. Ct. at 1866 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)).

¹⁶ *Id.*

¹⁷ *Id.* at 1867.

¹⁸ CTIA-The Wireless Association is an industry trade group representing the wireless communications industry. See *id.* at 1867 n.1.

¹⁹ See Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd. 13994, 13995 (2009).

²⁰ *Arlington*, 133 S. Ct. 1863, 1866 (2013).

²¹ *Id.* (quoting 47 U.S.C. § 201(b) (2012)).

²² *Id.* at 1867.

²³ *City of Arlington v. FCC*, 668 F.3d 229, 236–37 (5th Cir. 2012). The Fifth Circuit has jurisdiction to review the Declaratory Ruling under 28 U.S.C. § 2344 and 47 U.S.C. § 402(a), which together provide the court power to review final orders of the FCC, provided that petitions are filed within 60 days after entry of the order. *Id.* at 237. The Fifth Circuit dismissed San Antonio’s petition for lack of jurisdiction, because it was not filed within the 60-day window. See *id.*

²⁴ *Id.* at 248.

²⁵ *Id.*

²⁶ *Arlington*, 668 F.3d at 250.

permissible construction of the statute and “entitled to deference.”²⁷ The Fifth Circuit panel also found on the merits that the 90- and 150-day windows constituted a reasonable interpretation of the substantive provisions of the statute and were entitled to *Chevron* deference.²⁸

B. Jurisdictional or Nonjurisdictional: The Court’s Reasoning and the Dissenting Opinion

The Supreme Court granted certiorari on the question whether administrative agencies should be given deference on determinations of their own jurisdiction.²⁹ Justice Scalia, writing for the majority, affirmed the Fifth Circuit’s holding.³⁰ He found that *Chevron* deference is warranted regarding “an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (that is, its jurisdiction).”³¹ He reasoned that there is no discernible distinction between jurisdictional and nonjurisdictional questions.³² Thus, an agency should receive *Chevron* deference whenever it uses general rulemaking or adjudicative authority to interpret its organic statute, regardless of whether the provision interpreted is jurisdictional or nonjurisdictional.³³

Justice Breyer wrote a brief concurrence, agreeing with the Court that the relevant inquiry is generally “whether the agency has stayed within the bounds of its statutory authority.”³⁴ However, he argued that courts should determine the appropriateness of *Chevron* deference on a case-by-case basis, considering factors such as “the interstitial nature of the legal question,” the “expertise of the Agency,” and “the importance of the question to administration of the statute.”³⁵

Chief Justice Roberts, dissenting, argued that courts should consider de novo whether an agency has interpretive authority to act under the statutory provision in question.³⁶ According to the Chief Justice, the appropriate inquiry

²⁷ *Id.* at 254.

²⁸ *Id.* at 256.

²⁹ See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867–68 (2013). The Court declined to hear the second question presented regarding the merits of the FCC’s interpretation of jurisdiction and the validity of the 90- and 150-day rules. See *id.* at 1868; see also *Petition for Writ of Certiorari at i, City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545), 2012 WL 2516693.

³⁰ *Arlington*, 133 S. Ct. at 1875. Justice Scalia was joined by Justices Thomas, Kagan, Sotomayor, and Ginsburg.

³¹ *Id.* at 1868.

³² *Id.*

³³ *Id.* at 1874–75.

³⁴ *Arlington*, 133 S. Ct. at 1875 (2013) (Breyer, J., concurring in part and concurring in the judgment) (emphasis omitted).

³⁵ *Id.* (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

³⁶ See *id.* at 1880 (Roberts, C.J., dissenting) (“Before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue.”).

would turn on whether Congress has delegated the authority to act pursuant to the *specific provision* in question.³⁷

II. ARLINGTON WAS WRONGLY DECIDED ON THE BASIS OF PRECEDENT AND POLICY

Arlington marks a sharp break from the approach followed in *Mead*. *Mead* held that, before applying the *Chevron* framework, courts must conduct a threshold inquiry to determine if the agency's interpretation has been adopted pursuant to a congressional delegation of authority "to make rules carrying the force of law."³⁸ The Court clearly stated that congressional intent to delegate lawmaking power to the agency is "the touchstone" for the threshold inquiry.³⁹ While *Mead*'s holding was not challenged in *Arlington*,⁴⁰ *Arlington*'s rule-bound approach departed from *Mead*'s case-by-case inquiry into congressional intent and the Court's prior approach to deference more generally.

A. Interpreting the Organic Statute: The Arlington Court Breaks with Prior Practice

Arlington is difficult to reconcile with three important cases in which the Court declined to grant *Chevron* deference to an agency's interpretation of its organic statute: *Louisiana Public Service Commission v. Federal Communications Commission*,⁴¹ *Adams Fruit Co. v. Barrett*,⁴² and *Gonzales v. Oregon*.⁴³ In *Louisiana Public Service Commission*, the Court refused to grant *Chevron* deference to the FCC's interpretation of a provision of its enabling act that purported to limit the agency's authority to preempt state regulations.⁴⁴ Despite finding ambiguity in the statute, the Court conducted a *de novo* inquiry regarding the meaning of the provision and concluded that the agency lacked authority to preempt state regulation under these provisions.⁴⁵

In *Adams Fruit Co.*, the Court explained that a "congressional delegation of administrative authority" is a necessary precondition to *Chevron* deference.⁴⁶

³⁷ See *id.* at 1881.

³⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

³⁹ *Sales & Adler*, *supra* note 4, at 1526; see also *Mead*, 533 U.S. at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").

⁴⁰ See *Arlington*, 133 S. Ct. at 1874 (noting that *Mead* "requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that.").

⁴¹ 476 U.S. 355 (1986).

⁴² 494 U.S. 638 (1990).

⁴³ 546 U.S. 243 (2006).

⁴⁴ See 476 U.S. at 359 (considering whether the FCC had rulemaking authority specifically under sections 151 and 152(b) of the Communications Act).

⁴⁵ *Id.* at 379 (noting that the Communications Act "contains some internal inconsistencies, vague language, and areas of uncertainty").

⁴⁶ 494 U.S. at 649.

The Court refused to defer to the Department of Labor's interpretation of a provision establishing a private right of action, because "Congress ha[d] expressly established the Judiciary and not the Department of Labor as the adjudicator" of this section's meaning.⁴⁷ The statute's general grant of authority to the Department to administer the statute was deemed insufficient evidence of a delegation of interpretive authority over the provision in question.⁴⁸ Furthermore, the Court expressly cautioned against deferring to agencies' interpretations of their own jurisdiction, noting that an agency should not be allowed to "bootstrap itself into an area in which it has no jurisdiction."⁴⁹

In *Gonzales*, the Court refused to grant deference to a rule issued by the Attorney General pursuant to the Controlled Substances Act ("CSA") even though "the statute [was] ambiguous and an administrative official [was] involved."⁵⁰ *Gonzales* considered whether the Attorney General could, by rule, prohibit doctors from "prescribing regulated drugs for use in physician-assisted suicide" in a state that legalized such use.⁵¹ The Court inquired de novo whether Congress had authorized the Attorney General to promulgate rules interpreting the phrase "legitimate medical purpose."⁵² Even though the Attorney General had "rulemaking power to fulfill his duties under the CSA . . . [t]he specific respects in which he is authorized to make rules . . . instruct[ed] that he [was] not authorized" to make the rule at issue in that case.⁵³

In all three cases, the Court's threshold inquiry considered whether Congress had delegated interpretive authority to the agency over the specific provision at issue. Together, *Louisiana Public Service Commission*, *Adams Fruit Co.*, and *Gonzales* suggest that *Arlington* was incorrect to find that the threshold inquiry should always be satisfied where the agency is interpreting its organic statute.

The most persuasive precedent cited by the *Arlington* majority is *Commodity Futures Trading Commission ("CFTC") v. Schor*.⁵⁴ *Schor* reversed a Second Circuit decision that held the agency's position was "not deserving of deference because of the 'statutory interpretation-jurisdictional' nature of the question at issue."⁵⁵ However, the Court in *Schor* did not rely solely on "the language of deference."⁵⁶ The Court also considered congressional intent in

⁴⁷ *Id.* at 659.

⁴⁸ *See id.* at 651 ("No such delegation regarding [the Act's] enforcement provisions is evident in the statute.").

⁴⁹ *Id.* at 650 (quoting *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)).

⁵⁰ *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006).

⁵¹ *Id.* at 249.

⁵² *Id.* at 258-59.

⁵³ *Id.* at 258.

⁵⁴ 478 U.S. 833 (1986). Justice Scalia also cited *Chemical Manufacturers Association v. Environmental Protection Agency*, 470 U.S. 116 (1985) and *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), for the proposition that agencies have previously been given deference on interpretations of statutory provisions designed to *constrain* their discretion. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013).

⁵⁵ *Id.* at 845.

⁵⁶ *Sales & Adler, supra* note 4, at 1511. The Court did, however, note that "the CFTC's long-held position that it has the power to take jurisdiction over counterclaims . . . is eminently reasonable and well within the scope of its delegated authority. Accordingly, as the CFTC's contemporaneous

light of factors like the text and legislative history, including the fact that Congress had repeatedly amended the statute without overruling the agency's position.⁵⁷

B. Courts Are Better Suited than Agencies to Decide Whether Congress Has Delegated Interpretive Authority

The majority's argument rests on the contention that it is impossible to distinguish between jurisdictional and nonjurisdictional provisions.⁵⁸ Assuming this predicate to be true, Justice Scalia found that the threshold inquiry must be limited to whether there has been a general grant of rulemaking or adjudicative authority.⁵⁹ Although the difficulty in articulating a definition of "jurisdictional" makes this argument persuasive, it cannot bear the weight the majority placed on it. Courts make determinations between jurisdictional and nonjurisdictional inquiries all the time, especially in the administrative context. In *Adams Fruit Co., Food and Drug Administration ("FDA") v. Brown & Williamson Tobacco Corp.*,⁶⁰ *Louisiana Public Service Commission, Solid Waste Agency of Northern Cook County ("SWANCC") v. U.S. Army Corps of Engineers*,⁶¹ *Rapanos v. United States*,⁶² and *Massachusetts v. Environmental Protection Agency ("EPA")*,⁶³ to name a few "jurisdictional" cases, the Court had no trouble distinguishing the existence of the agency's interpretive authority from its exercise. Nor did the lower courts in the *Arlington* case.⁶⁴ For example, in both *Rapanos* and *SWANCC*, the Court acknowledged the agency's jurisdiction to administer regulations over the "waters of the United States."⁶⁵ At issue was whether the agency's regulations were too broad to be reasonable under the statute, an archetypal *Chevron* question.⁶⁶ By contrast, the *Arlington* majority used a broad definition of "jurisdictional," and in so doing, conflated the question of an agency's interpretive authority over a particular provision with the question of the permissible substantive breadth of those interpretations. Courts are entirely capable of conducting a threshold inquiry as to whether Congress granted the agency the interpretive authority to administer the specific provision at issue.

Justice Scalia would fold into Step One of the *Chevron* inquiry any evidence that Congress did not intend to delegate to the agency interpretive au-

interpretation of the statute it is entrusted to administer, considerable weight must be accorded the CFTC's position." *Schor*, 478 U.S. at 841–46 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

⁵⁷ *Schor*, 478 U.S. at 841–46.

⁵⁸ *Arlington*, 133 S. Ct. at 1868–69.

⁵⁹ *Id.*

⁶⁰ 529 U.S. 120 (2000).

⁶¹ 531 U.S. 159 (2001).

⁶² 547 U.S. 715 (2006).

⁶³ 549 U.S. 497 (2007).

⁶⁴ See *City of Arlington v. FCC*, 668 F.3d 229, 247–48 (5th Cir. 2012).

⁶⁵ See *Rapanos*, 547 U.S. at 731; *SWANCC*, 531 U.S. at 167.

⁶⁶ See *Rapanos*, 547 U.S. at 739; *SWANCC*, 531 U.S. at 167.

thority over a specific provision.⁶⁷ However, the traditional justifications for deference suggest the inquiry into the existence of a congressional delegation must be separate from and antecedent to the *Chevron* inquiry. Deference is warranted where agencies possess the necessary expertise to make the specialized and substantive policy choices Congress left unanswered in the statute.⁶⁸ However, agencies possess no specialized expertise with regard to this delegation inquiry. The existence of a delegation from Congress is a legal inquiry, not a policy choice, and should be answered by the judiciary. Otherwise, the prospect of “the fox guarding the henhouse”⁶⁹ threatens the carefully crafted balance of power established by the Constitution.⁷⁰ As the Chief Justice wrote, separation of powers concerns require the judiciary to “ensur[e] that the Legislative Branch *has in fact delegated lawmaking power* to an agency within the Executive Branch” before deference is granted.⁷¹

III. LOOKING FORWARD: ARLINGTON AND FUTURE CASES

A. *An Academic Exercise: The Threshold Inquiry After Arlington*

Although the Court resolved an important open question of administrative law in *Arlington*, the results will have limited consequences for future cases. Furthermore, even if the Chief Justice’s approach had prevailed, the majority of cases would still reach the same disposition. Some recent environmental Supreme Court cases illustrate this point: *Massachusetts v. EPA* and *Rapanos*, which both presented a jurisdictional question, would likely have had similar outcomes had they been decided after *Arlington*. In *Massachusetts*, the Court had “little trouble concluding” that the Clean Air Act (“CAA”) had authorized EPA to prescribe “standards applicable to the emission of any air pollutant from any class of new motor vehicles.”⁷² After *Arlington*, the threshold inquiry would likely go no further. Congress provided the EPA with general rulemaking authority to administer the CAA, and under the majority opinion no provision-specific inquiry is required. The *Arlington* threshold inquiry would have no impact on whether the greenhouse gases fell within the ambit of the CAA. The Court could rule against the agency’s interpretation at Step One or Step Two of the *Chevron* analysis.⁷³

⁶⁷ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

⁶⁸ See Sales & Adler, *supra* note 4, at 1523 (“[A]gencies have more familiarity with and expertise in the statute in question and its subject matter. Federal judges are, of necessity, legal generalists. Agency officials are specialists.”) (internal citations omitted).

⁶⁹ *Arlington*, 133 S. Ct. at 1874.

⁷⁰ See Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1018 (1999).

⁷¹ *Arlington*, 133 S. Ct. at 1880 (emphasis added).

⁷² 549 U.S. at 528.

⁷³ Justice Stevens found the statute clear at Step One: “The statutory text forecloses EPA’s reading. The CAA’s sweeping definition of ‘air pollutant’ includes ‘any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or

Similarly, in *Rapanos*, the Court found that the Army Corps of Engineers had clear authority to regulate and define “navigable waters” under the Clean Water Act.⁷⁴ The dispute focused on whether the Corps’ definition of “navigable waters,” which included certain wetlands went beyond a “permissible construction” of the Clean Water Act.⁷⁵ Applying the *Arlington* framework would have no impact. The threshold inquiry would again be satisfied by the general grant of rulemaking authority to the agency. The Court would proceed to apply the *Chevron* framework and could still find the agency’s chosen approach was “not authorize[d]” by the “plain language of the statute.”⁷⁶

B. A Counterfactual World: Outcomes Had the Chief Justice Prevailed

Under the Chief Justice’s approach in *Arlington*, in most cases, including both *Massachusetts* and *Rapanos*, nothing in the specific provision at issue would disrupt the agency’s general rulemaking authority.⁷⁷ Thus, a court would quickly dispatch with the provision-specific threshold inquiry and proceed to the *Chevron* framework to decide whether the agency had contravened the law. In cases where Congress clearly intended to deny interpretive authority with regard to a specific provision, both approaches would again yield the same result. Under Chief Justice Roberts’s approach, the provision would be invalid because a *de novo* inquiry would find that the agency had no interpretive authority to promulgate rules under that provision. Under the majority’s approach, the regulation would be invalid at Step One because Congress had spoken clearly.

Only in a case where the specific provision is ambiguous regarding the agency’s interpretive authority could the results possibly differ under the Chief Justice’s and the majority’s approaches. Consider as a hypothetical the facts of a case like *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁷⁸ The Court considered the Secretary of the Interior’s authority to define the meaning of terms within the statutory definition of the term “take” in section 9 of the Endangered Species Act (“ESA”).⁷⁹ Respondents challenged the interpretation and the Court upheld it as reasonable under *Chevron*.⁸⁰ Had the case

otherwise enters the ambient air The statute is unambiguous.” *Id.* at 529 (emphasis in original).

⁷⁴ See *Rapanos*, 547 U.S. at 731–32; see also *id.* at 758 (“Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer [T]he Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.”) (Roberts, C.J., concurring) (emphasis in original).

⁷⁵ *Id.* at 733 (“The plain language of the statute simply does not authorize [the Corps’ chosen] approach The Corps’ expansive interpretation of ‘the waters of the United States’ is thus not ‘based on a permissible construction of the statute.’”) (plurality opinion).

⁷⁶ *Id.*

⁷⁷ See *Massachusetts*, 549 U.S. at 528; *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

⁷⁸ 515 U.S. 687 (1995). Note that *Babbitt* was decided before *Mead* so the Court did not conduct any threshold inquiry.

⁷⁹ *Id.* at 690.

⁸⁰ See *id.* at 703.

been decided after *Arlington*, the result would have likely been the same, given that the Interior Department has general rulemaking authority under the ESA.⁸¹ Under the approach advocated by Chief Justice Roberts, however, the outcome might have differed. Assuming the Court found the definition of “take” to bear on the scope of Interior’s jurisdiction, the Court would have considered de novo whether the agency had the authority to make rules expanding the statutory definitions expounded by Congress. Because the Court would not owe deference to any reasonable agency interpretation, it could determine under the statute that the best reading of the ESA is that Congress did not intend to delegate interpretive authority over the Act’s definition sections.

However, any de novo inquiry under the Chief Justice’s approach will likely consider the same evidence a court relies on under the *Chevron* framework. Often Step One is effectively a de novo inquiry into whether Congress clearly denied interpretive authority.⁸² Courts, at Step One, frequently decide that the text of the statute is clear, even in cases that do not seem particularly clear to the lay reader.⁸³ Only in a situation where the court reaches Step Two would the results potentially differ. Even then, however, the evidence that is persuasive to the court as part of a *Chevron* inquiry at Step Two is also likely to persuade the court in a de novo inquiry, so often the results will be similar.

CONCLUSION: EXPLAINING THE DISTANCE BETWEEN THE MAJORITY AND DISSENT

Perhaps Justice Scalia and Chief Justice Roberts’s differing opinions in *Arlington* were the result of how they each view the role of the judiciary and its relationship to agencies in the U.S. constitutional scheme. Justice Scalia’s real concern likely was, as he mentioned, that courts would use the de novo juris-

⁸¹ See 16 U.S.C. § 1540(f) (“The Secretary . . . [is] authorized to promulgate such regulations as may be appropriate to enforce this chapter . . .”).

⁸² Whether Step One is a broad inquiry into congressional intent or an inquiry limited to the statutory text has been hotly debated by scholars and judges for years. Compare *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (“[W]e agree . . . that Congress did not have a *specific intention* on the applicability of the bubble concept in these cases, and conclude that the EPA’s use of that concept here is a reasonable policy choice for the agency to make.”) (emphasis added), with Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 990–91 (1992) (“Then, beginning in 1988 with the *K Mart Corp. v. Cartier, Inc.* [486 U.S. 281 (1988)] decision, a more dramatic change emerged: the Court began to describe the inquiry at step one in terms of whether the statute has a “plain meaning.” This rubric, an offspring of the ‘new textualism’ espoused more generally by Justices Scalia and Kennedy, has not been followed uniformly The trend, however, has been strongly away from the original *Chevron* formulation of step one.”). See also Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 778 (2007). However, it is clear that at Step One the Court relies on its judgment, not the agency’s, to decide whether Congress has “spoken directly” to the issue. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

⁸³ See, e.g., *Brown & Williamson*, 529 U.S. 120, 160–61 (holding that Congress clearly did not intend tobacco to be regulated by the FDA as a drug despite ambiguous language in the statutory text).

dictional inquiry to cut back on the reach of the *Chevron* doctrine.⁸⁴ Justice Scalia is the Court's most ardent defender of *Chevron*.⁸⁵ *Chevron* is a clear rule, and as such, provides predictability and flexibility for agencies, and better guidance to Congress and lower courts.⁸⁶ In *Arlington*, he described the dissent's approach as opening the door for "ad hoc judgment[s]" by lower courts that would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."⁸⁷ Justice Scalia believes the Court should subscribe to rules like *Chevron* because, when "tak[en] seriously and appl[ie]d rigorously,"⁸⁸ they better serve the judiciary in its constitutional role by empowering courts to give effect to Congress's intent to delegate decision-making power to agencies.

By contrast, perhaps Chief Justice Roberts viewed this case as a larger separation-of-powers question regarding the judiciary's role in the constitutional system.⁸⁹ His opinion is underlined by distrust of agencies' vast powers and language echoing famous separation-of-powers decisions such as *Marbury v. Madison*.⁹⁰ He described his approach as necessary because the Court must "police the boundary between the Legislature and the Executive."⁹¹ Thus, the Chief Justice's *Arlington* dissent might be explained by his concern over protecting the role of the judiciary in the federal system and, ultimately, can be seen as an effort to bolster the Court's role as the decision-maker even where it may not affect the outcome.

⁸⁴ *City of Arlington v. FCC* 133 S. Ct. 1863, 1873 (2013) ("Make no mistake—the ultimate target here is *Chevron* itself").

⁸⁵ See, e.g., Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 353 (1994) ("Although *Chevron* itself was decided before Justice Scalia joined the Court, he has long been perceived as the Court's most enthusiastic partisan of the two-step method associated with the decision"); Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1663 (1991) ("Justice Scalia is a fierce, sometimes strident defender of *Chevron*"); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

⁸⁶ See Scalia, *Judicial Deference to Administrative Interpretations of Law*, *supra* note 85, at 517; Merrill, *supra* note 85, at 353; Sunstein, *Chevron* Step Zero, *supra* note 4, at 205; *Mead*, 533 U.S. at 247 (Scalia, J., dissenting).

⁸⁷ *Arlington*, 133 S. Ct. at 1874.

⁸⁸ *Id.*

⁸⁹ See *id.* at 1879–80 (Roberts, C.J., dissenting).

⁹⁰ *Id.* at 1880. For example, he quotes from *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), on the role of the judiciary, *id.* and The Federalist No. 47, by James Madison, on the danger of accumulating "legislative, executive, and judic[i]al]" power in the same entity. *Id.* at 1877.

⁹¹ *Arlington*, 133 S. Ct. at 1886.

