

# THE ENDURING NATURE OF THE *CHEVRON* DOCTRINE

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*On November 10, 2015, the D.C. Bar's Administrative Law and Agency Practice Section held its annual Harold Leventhal Lecture. The address was given by John Cruden, U.S. Department of Justice's Assistant Attorney General for the Environment and Natural Resources Division. Mr. Cruden's remarks follow.*

It is a great honor for me to give a speech named on behalf of one of the lions of the bar, Judge Harold Leventhal. Judge Leventhal was nominated to the D.C. Circuit by President Lyndon B. Johnson in 1965 and served on the Court until 1979.<sup>1</sup> In that 15-year span, Judge Leventhal had a profound impact on a range of legal issues, but he is best known for his influence on the development of administrative law.

Before becoming a judge, Harold Leventhal was quite accomplished. He clerked for two Supreme Court Justices and then worked in the Solicitor General's office, the Department of the Interior, and the Office of Price Administration.<sup>2</sup> After serving as General Counsel for the Office of Price Administration, he was a noted prosecutor of war crimes at the Nuremberg war trials.<sup>3</sup> When he returned to Washington he founded a law firm, taught at Yale Law School, and served as general counsel to the Democratic National Committee for several years.<sup>4</sup> His diverse experience in both the public and private sector gave Judge Leventhal the ideal background to help frame administrative law.

Today I will discuss *Chevron*<sup>5</sup> deference from an environmental perspective. And, I recognize that many of you are true experts in the field of administrative law, so I approach the issue with some trepidation. That is particularly true since several years ago I spoke to the annual conference of the ABA's Section on Administrative Law, with the thesis that environmental law had now swallowed whole the field of administrative law, since all of the leading administrative law cases—like *Chevron*—were really environmental in nature. While I convinced absolutely no one in that audience, it was great fun to go

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1. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <https://perma.cc/R85U-GPJH>.

2. *Id.*

3. Leventhal's insider account of the Nuremberg verdict was published shortly after the trials concluded. See Harold Leventhal et al., *The Nuernberg Verdict*, 60 HARV. L. REV. 857, 858 (1947).

4. *Biographical Directory of Federal Judges*, *supra* note 1.

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

over so many of the leading administrative law decisions, like the preliminary injunction decision by the Supreme Court in 2008 in *Winter v. Natural Resources Defense Council*,<sup>6</sup> and discuss the underlying environmental litigation.

Therefore, I recognize the depth of knowledge of my audience. And, in the immortal words of Justice Scalia, “Administrative law is not for sissies . . .”<sup>7</sup> Without question the last Supreme Court term was a memorable one, led by the decisions in the Affordable Care Act<sup>8</sup> and same-sex marriage cases.<sup>9</sup> One of the key aspects of *King v. Burwell*, the Affordable Care decision (which Justice Scalia said in dissent should now be called the “SCOTUScare” law), was the majority’s discussion of *Chevron*.<sup>10</sup> The decision not to apply *Chevron* has spawned an endless series of comments, ranging from outrage to predictions of the future demise of the deference concept, and has led many to poke around in a number of decisions from the past decade to find bits and pieces of evidence to shore up their dire predictions.<sup>11</sup> All this reminds me of the great 1897 “quote” of Mark Twain: “The reports of my death have been greatly exaggerated.”<sup>12</sup>

It is, of course, true that the *Chevron* doctrine, which many of us apply with confidence borne of years of experience, has now matured to the point that we all understand that what we call a doctrine is really an umbrella of legal theories that apply judicial deference to administrative interpretations of law. And, we have the benefit of scores of thoughtful law review articles with authors who invent new terms to discuss their theories, and open up new avenues for discourse and debate. Our *Chevron* lexicon has expanded to include concepts such as *Chevron* step zero,<sup>13</sup> *Skidmore* deference,<sup>14</sup> and what some call the “major questions” doctrine.<sup>15</sup>

6. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).
7. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511.
8. *King v. Burwell*, 135 S. Ct. 2480 (2015).
9. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
10. *King*, 135 S. Ct. at 2488–89.
11. See generally, e.g., Leandra Lederman & Joseph C. Dugan, *King v. Burwell: What Does It Portend for Chevron’s Domain?*, 2015 PEPP. L. REV. 72; Jody Freeman, *The Chevron Side-step: Professor Freeman on King v. Burwell*, HARV. ENVTL. L. PROGRAM, <https://perma.cc/UE4G-48DU>.
12. This often cited “quote” is actually inaccurate. OXFORD DICTIONARY OF QUOTATIONS 706 (1996). The correct quote is: “The report of my death was an exaggeration.” *Id.*
13. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).
14. According to a Westlaw search, the first use of the phrase “*Skidmore* deference” in a Supreme Court case occurred in the year 2000 in *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Souter, J., concurring).
15. The “major questions” doctrine evolved largely in response to the Supreme Court’s decision to bypass the deferential *Chevron* framework in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). See generally Emily Deddens, *Rules Versus Standards in City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), 37 HARV. J.L. & PUB. POL’Y 695 (2014).

It is my intention in this presentation to do three things: First, I will look back in history and review the development of administrative law as it intersects with environmental law, including the standard of review before *Chevron*. Next, showing that I am at heart a trial lawyer, I will attempt to refresh your recollection by summarizing Justice Stevens's seminal *Chevron* decision and consider its legal underpinnings. Then, I will breeze through some of the *Chevron* spin-offs, such as the *Skidmore/Christensen v. Harris* line of cases.<sup>16</sup> Following that, I turn to my principal topic, the *Chevron* portions of the *King* decision,<sup>17</sup> which will include some mention of Justice Thomas's concurring opinion in *Michigan v. EPA*.<sup>18</sup>

Just so there is no mystery in my position, I strongly believe that *Chevron* was correctly decided by a unanimous court in 1984. U.S. administrative law is the envy of many foreign countries, and the cornerstone of U.S. administrative law is *Chevron*. *Chevron* is firmly grounded in the Constitution and common sense, and it will and should be the guiding principle of judicial deference to administrative interpretations of the law in the future.

My discussion today is intended to be general, and does not establish the position of the United States with respect to any particular litigation being undertaken by the Department of Justice.

## I. ADMINISTRATIVE LAW AND THE DEVELOPMENT OF ENVIRONMENTAL LAW

Though this is sometimes forgotten, *Chevron* is an environmental case, involving a significant interpretation of the Clean Air Act—an Act administered by the Environmental Protection Agency. Of particular relevance to my remarks today is the relationship of administrative law to the developing body of environmental law in the 1970s and 1980s, a body of law that also was and is administered by the Environmental Protection Agency.

The EPA was established by President Richard Nixon through an executive order, and began operation on December 2, 1970.<sup>19</sup> A few years ago I had the honor of interviewing former Secretary of State George Shultz on the Stanford campus. At that time I was the President of the Environmental Law Institute and we were giving Secretary Shultz an award for his environmental work.<sup>20</sup> Before we began filming he asked me how I would start the interview. I

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16. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Christensen*, 529 U.S. at 589.

17. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

18. *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2014) (Thomas, J., concurring).

19. EPA was established by the Executive Order of President Nixon entitled Reorganization Plan No. 3 of 1970. 3 C.F.R. 198 (1971), reprinted in 5 U.S.C. app., at 609 (1970).

20. The Environmental Law Institute presented Secretary of State George Shultz with an Environmental Achievement Award on October 22, 2013. See *George P. Shultz and Thomas F. Steyer Receive 2013 Environmental Achievement Award from Environmental Law Institute*, ENVTL. L. INST., <https://perma.cc/6PLZ-4HQU>.

advised that I would briefly summarize his extraordinary career, but wanted to start the questions with something “environmental.” He quickly responded, something like, “Well, as the Director of OMB under President Nixon, I did assemble the group that led to the creation of EPA. Will that work?” It worked fine.

Nineteen seventy was truly a pivotal year in the history of environmental law and many call that the birth year of the law, as the first Earth Day in 1970 prompted 20 million people to gather in support of environmental issues.<sup>21</sup> From that moment, and even before, legislation nearly exploded out of Congress, at once defining and expanding the body of law we now call environmental law. This can be seen in the passage of the National Environmental Policy Act in 1969,<sup>22</sup> the Clean Air Act in 1967<sup>23</sup> (significantly revised in 1970<sup>24</sup>), the Resource Conservation and Recovery Act in 1976,<sup>25</sup> the Marine Mammal Protection Act in 1972,<sup>26</sup> and the Safe Drinking Water Act in 1974.<sup>27</sup> This is just a small sample of the boom in laws focused on regulating the air we breathe, the land we live on, the water we drink, and the waste our nation generates. And, each of these statutes passed in Congress by overwhelming bipartisan majorities.<sup>28</sup> While the United States has not invented many areas of the law, as we have relied on a history driven by Greco-Roman and then English law, it is fair to say that we did invent environmental law. And, after we invented it, we quickly exported it. Most countries of the world now have something quite similar to our National Environmental Policy Act, and many other foreign en-

21. Jack Lewis, *The Birth of EPA*, EPA, <https://perma.cc/N8JN-ES9F>.
22. Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–47 (2012)).
23. The first federal legislation dealing specifically with air pollution was signed in 1955, though it was dissimilar from the modern Clean Air Act. *See* Pub. L. No. 84-159, 69 Stat. 322 (1955). The first federal air pollution law contained an enforcement provision that became law in 1963. *See* Pub. L. No. 88-206, 77 Stat. 392 (1963). On November 21, 1967, President Johnson signed the Air Quality Act of 1967, an early version of our modern Clean Air Act. *See* Pub. L. No. 90-148, 81 Stat. 485 (1967).
24. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401–7671q (2012)).
25. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901–6992 (2012)).
26. Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified as amended at 16 U.S.C. §§ 1361–1423h (2012)).
27. Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f–300j-25 (2012)).
28. Robert V. Percival, *Skeptical Environmentalist or Statistical Spin-Doctor?: Bjorn Lomborg and the Relationship Between Environmental Law and Environmental Progress*, 53 CASE W. RES. L. REV. 263, 281 (2002) (“During the late 1960s and early 1970s, public concern for the environment led Congress to enact a remarkable set of environmental laws with overwhelming, bipartisan support.”).

vironmental statutes owe their inspiration, if not their wording, to our laws governing land, air, and water.<sup>29</sup>

These environmental laws were, and are, expansive and complicated to administer, and led to the development of sophisticated administrative agencies to implement the regulatory requirements mandated by Congress. Soon the courts took notice, and great jurists, like Judge Leventhal, led the way. Though Judge Leventhal was not on the bench when *Chevron* was decided, he helped frame both the law and the type of judicial thinking that culminated in the *Chevron* test we are familiar with today.

Judge Leventhal's approach to the development of administrative law was framed by two key questions: "Will it work?" and "Is it fair?"<sup>30</sup> This pragmatic outlook formed the foundation for what we would now call *Chevron* deference.<sup>31</sup> In Judge Leventhal's own words, the new environmental statutes added the "feature of administrative implementation through rules and orders rooted in technical expertise and inquiry."<sup>32</sup> Given this arrangement, Judge Leventhal acknowledged that the courts no longer are responsible for the direct formulation of the pertinent legal rules.<sup>33</sup> Instead, he believed that the role of the courts in this new regulatory context was supervision of the agencies charged by Congress with the primary responsibility for administering the environmental laws.<sup>34</sup>

This approach posed new challenges for the courts. Working with a proliferation of sophisticated administrative agencies tasked with developing a body of regulatory law requires the courts to, in many cases, consider non-judicial expertise. In this setting, Judge Leventhal helped to develop the "hard look" doctrine—an approach to judicial review that ensures full allowance is given for the reality that agency decision-making typically involves a kind of expertise—sometimes scientific expertise, but sometimes expertise born of regulatory specialization.<sup>35</sup> Even in the face of this reality, Judge Leventhal did not believe technical complexity should restrict the role of the courts. Instead, he argued that complex administrative law cases, most notably, environmental cases, should be watched over with care, and that courts should take a "hard

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29. See, e.g., Jeffrey E. Gonzalez-Perez & Douglas A. Klein, *The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act*, 62 GEO. WASH. L. REV. 757 (1994); Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615 (2009).

30. Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 896 n.3 (1980) (citing Harold Leventhal, *Cues and Compasses for Administrative Lawyers*, 20 ADMIN. L. REV. 237, 239 (1967)).

31. *Id.*

32. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 510 (1974).

33. *Id.*

34. *Id.*

35. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (establishing the "hard look" doctrine); see also Leventhal, *supra* note 32, at 511.

look” not only at the conclusions asserted by an administrative agency, but also the underlying problem the agency faced, and the process used to address that problem.<sup>36</sup> In other words, the courts and administrative agencies were both part of a larger administrative process,<sup>37</sup> and a review of an agency action “requires a generalist who can penetrate the scientific explanation just enough to test its soundness”<sup>38</sup> without intruding into expert judgment on technical issues. In *International Harvester Co. v. Ruckelshaus*,<sup>39</sup> Judge Leventhal took an approach that foreshadowed the deferential *Chevron* standard, explaining that the court was approaching the issues presented with “the utmost diffidence” because “the legal issues are intermeshed with technical matters, and as yet judges have no scientific aides.”<sup>40</sup>

As the law developed, differing views arose as to what degree of consideration should be given to the views of federal agencies who had the responsibility of implementing environmental legislation. Describing the pre-*Chevron* law, Justice Scalia, in a lecture at Duke Law School, quoted Judge Henry Friendly’s description of the two different pre-*Chevron* viewpoints as follows:

Leading cases support[ ] the view that great deference must be given to the decisions of [an] administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis. . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question[s] involv[e] the meaning of a statutory term.<sup>41</sup>

Justice Scalia then concluded that “*Chevron* . . . essentially chose between these two conflicting lines of decisions.”<sup>42</sup> With that holding, *Chevron* became a

36. See *Md.-Nat’l Capital Park & Planning Comm’n v. U.S. Postal Serv.*, 487 F.2d 1029, 1040 (D.C. Cir. 1973); see also *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 451 n.126 (D.C. Cir. 1980) (explaining that the phrase “hard look” “evolved to connote the rigorous standard of judicial review applied to increasingly utilized informal rulemaking proceedings or to other decisions made upon less than a full trial-type record.”). The “hard look” doctrine requires the agency itself to have taken a hard look at the issue. See generally *Pike’s Peak Broad. Co. v. FCC*, 422 F.2d 671 (D.C. Cir. 1969). The doctrine has also been described as requiring a court to take a hard look at the agency’s decision. See *Nat’l Lime Ass’n*, 627 F.2d at 451 n.126; see also, e.g., *Md. Wildlife Fed’n v. Dole*, 747 F.2d 229, 237 (4th Cir. 1984) (stating that the court itself must observe “the rule of reason and practicality and take[ ] a ‘hard look’ at the relevant factors”).

37. *Greater Bos. Television Corp.*, 444 F.2d at 851–52 (writing that “[t]he court is in a real sense part of the total administrative process” that supervises agencies in order to ensure their adherence to reason and the intent of the legislative branch, and participating with the agency in a “‘partnership’ in furtherance of the public interest”).

38. Leventhal, *supra* note 32, at 517–18.

39. 478 F.2d 615 (D.C. Cir. 1973).

40. *Id.* at 641.

41. Scalia, *supra* note 7, at 513.

42. *Id.*

linchpin of administrative law and one of the most frequently cited cases in our nation's history. And, I would argue, *Chevron* preserves and enhances the separation of powers, central to our form of government, and forms an admirable basis for administrative law principles.

Administrative law attempts to develop rules that strike the right balance between the judicial, executive, and legislative branches. Because of this, the central questions in administrative law are fundamentally related to some of the primary challenges in a constitutional democracy—how to balance individual freedom and majority rule, and how to ensure that policies developed by elected representatives are implemented in a constitutional manner. These challenges led to the American three-branch system of government where an elected legislature creates laws implemented by the executive branch headed by an elected president who appoints the heads of administrative agencies. The judicial branch protects against the “tyranny of the majority”—this branch is, by design, independent from the others and from the electorate, and its purpose is to protect against legislative and executive abuses of power.<sup>43</sup> Article III federal judges are appointed to lifetime terms and a salary that cannot be diminished during office and the resulting, more politically independent, view of the courts is important to balance our political system. In a regulatory context, the courts perform a similar function—ensuring that an administrative agency does not overstep the authority granted by Congress.

This is all a way of saying that administrative law is vitally important because it manages the relationship between our three branches of government. And, it incorporates federal agencies that can, and should, add their expertise when appropriate. Because agencies often fill voids created by legislative ambiguity, there is an inherent tension between their acts and that of the legislative body. This tension, along with the fact that administrative agencies are designed to make exactly the type of expertise-driven policy decisions that a generalist court cannot, ultimately led to a choice, and that choice is embodied in the two-step test set out in the *Chevron* decision.

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43. Alexis de Tocqueville believed that just as a powerful individual could abuse that power through its improper exercise against his or her adversaries, a majority in a democratic republic could do the same. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 250–64 (J.P. Mayer ed., George Lawrence trans., First Perennial Classics 2000) (1835); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–104 (1980) (arguing that our political process is broken when minority rights are not preserved, and that judicial review is necessary to ensure sufficient process).

*Brown v. Board of Education*, 347 U.S. 483 (1954), is the classic example of the Court stepping in to protect minority rights, but there are many other examples. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (distinguishing cases in which greater judicial scrutiny might be appropriate, including situations where prejudice against “discrete and insular minorities” may be a factor).

## II. CHEVRON

The *Chevron* standard is absolutely iconic—and its two-step test, the starting point for most judicial assessments of agency action, is so ingrained in the consciousness of most practicing attorneys in Washington, D.C. that I've been talking about the case for fifteen minutes now and I have not yet summarized it. As I do in trial, this will only refresh your recollection of a case you all know well.

Let's start with the environmental underpinnings of *Chevron*. The case involves EPA's definition of a "stationary source."<sup>44</sup> In the always-interesting Clean Air Act lexicon of words, a "stationary source" is not mobile. Before 1977, EPA applied a "bubble" concept to the meaning of "stationary source," allowing all pollution emissions within a single facility to be treated "as though they were encased within a single bubble."<sup>45</sup> In 1980, EPA changed its approach, and adopted regulations abandoning the bubble concept.<sup>46</sup> This new approach made compliance more difficult as it reduced flexibility at the facility but it also resulted in less pollution. In 1981, EPA reverted back to its original plant wide "bubble" approach, and that EPA regulation was challenged in the *Chevron* case.<sup>47</sup>

This back-and-forth shift was, at least in part, due to a shift in administrations. The Carter Administration was in place when EPA shifted away from the more flexible, yet less restrictive bubble concept. The Reagan Administration moved back toward the bubble concept, which was challenged, and the Reagan Administration sought deference to its decision.

The D.C. Circuit disagreed with EPA and found that the bubble concept was contrary to the purpose of the Clean Air Act.<sup>48</sup> The Supreme Court reversed, holding that the D.C. Circuit had "misconceived the nature of its role in reviewing the regulation at issue."<sup>49</sup> Once the reviewing court determined that Congress did not "have an intent regarding the applicability of the bubble concept," the question was only whether EPA's interpretation was "reasonable" in the context of this particular regulatory program.<sup>50</sup>

In taking this approach, the Court found that the Act and its legislative history did not speak precisely to whether a more flexible "bubble" concept was permissible, but also did not foreclose that interpretation.<sup>51</sup> Therefore, the

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44. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

45. *Id.*

46. *Id.* at 857.

47. *Id.* at 858; see also Requirements for Preparation, Adoption and Submittal of Implementation Plans and Approval and Promulgation of Implementation Plans, 46 Fed. Reg. 50,766 (Oct. 14, 1981).

48. *Nat. Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 718 (D.C. Cir. 1982), *rev'd sub nom. Chevron*, 467 U.S. at 837.

49. *Chevron*, 467 U.S. at 845.

50. *Id.*

51. *Id.* at 863–64.



Court agreed that the Reagan Administration's bubble concept, as opposed to a more rigid court-established definition of the term "source," was an acceptable interpretation.<sup>52</sup>

All this, of course, led to the *Chevron* two-step dance that you are all familiar with.

In *Chevron* step one, courts, using "traditional tools of statutory construction," ask if Congress had a "specific intention" with respect to the issue.<sup>53</sup> "If the intent of Congress is clear, that is end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>54</sup> If the issue is ambiguous, however, then a court must move to *Chevron* step two, and determine whether the agency interpretation was a "permissible construction of the statute."<sup>55</sup>

Step two of *Chevron* is primarily based on the theory that in drafting ambiguous statutory provisions Congress has, in certain instances, either implicitly or explicitly delegated authority to the executive branch to fill the gaps.<sup>56</sup> Statutory ambiguity can be attributed to agency implementation either where:

- (1) Congress intended a particular result, but was not clear about it;  
or,
- (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency.<sup>57</sup>

Looking at the issue of interpretation through that lens, the pre-*Chevron* cases generally attempted to determine which of these two scenarios was intended by Congress. If the Court believed Congress intended a particular result, the Court would resolve the issue as a question of law.<sup>58</sup> If the reviewing Court believed that Congress intended to confer discretion, then discretion was conferred to the agency and any reasonable resolution of the ambiguity was permissible.<sup>59</sup> Prior to *Chevron*, courts would decide on a case-by-case basis whether Congress intended a particular result, or, alternately, whether Congress intended to leave resolution to the agency. *Chevron* replaced this statute-by-statute evaluation with a presumption that, in the face of ambiguity, agencies are awarded discretion.<sup>60</sup>

*Chevron* provided predictability in approach. And, the existence of *Chevron* ensures that Congress is aware of this default rule, and can act accordingly.

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52. *Id.* at 856.

53. *Id.* at 843 n.9, 845.

54. *Id.* at 842–43.

55. *Id.* at 843.

56. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000) (citing *Chevron*, 467 U.S. at 844).

57. Scalia, *supra* note 7, at 516.

58. *Id.*

59. *Id.*

60. *Id.*

Prior to *Chevron* it was unclear whether those gaps would be filled by a politically accountable administrative agency, and those decisions could later be reversed through any reasonable change in policy, or whether gaps would be interpreted by a judge in a manner that could be reversed only by Congress passing a law.

If Congress thinks that the deferential approach dictated by *Chevron* is the wrong one, it has the power to constrain agency action in its legislation.<sup>61</sup> This reminds me of *Kelley v. EPA*,<sup>62</sup> a Superfund case I was involved in during the early 1990s. The issue in *Kelley* was whether EPA had the authority to define the scope of lender liability under CERCLA, the Superfund statute. There were conflicting judicial interpretations of the scope of a statutory exemption to liability, and to clarify the scope of that exemption EPA issued a rule.<sup>63</sup> That rule, which provided a measure of protection to banks and lending institutions, was quickly challenged in court.<sup>64</sup> The D.C. Circuit ultimately invalidated the rule as beyond the authority of EPA. The court examined the language of CERCLA, highlighting that Congress appeared “to have quite consciously distinguished between EPA’s role in determining the appropriate cleanup,” where EPA was entitled to deference, “from the agency’s position on liability when a party disputes claims,” which are decided by the court.<sup>65</sup> Because the court found that Congress had intended to limit EPA’s authority, it held that EPA therefore lacked authority to clarify the confusion surrounding the scope of the statutory exemption. I provide this example for only one point: as *Chevron* is grounded in the concept that when courts give agencies deference to their interpretation of ambiguous statutory terms they are doing so under an implied grant of authority from Congress, Congress can also narrow or even eliminate that discretion. And, even more instructive, is that Congress can then review the actions of courts and make corrections if they disagree. In the example I just summarized, Congress quickly responded to the invalidation of EPA’s lender liability rule by passing legislation that essentially enacted the rule as a statute.<sup>66</sup>

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61. See generally Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2653 (2003) (“Congress can provide more or less detail to constrain the discretion, and the level of detail may be affected by the congressional view of the institution that will exercise the discretion.”).

62. 15 F.3d 1100 (D.C. Cir. 1994).

63. 57 Fed. Reg. 18,344 (1992).

64. *Id.* at 1103–04.

65. *Id.* at 1107.

66. See Asset Conservation, Lender Liability, and Deposit Insurance Protection Act, Pub. L. No. 104-208, 110 Stat. 3009-462 (1996) (amending CERCLA to restore lender liability protection).

### III. IS *CHEVRON* REALLY LEGAL AND, IF SO, DOES IT MAKE PRACTICAL SENSE?

Given the current pricks and bites at *Chevron*, it is worthwhile to take a brief look at its legal underpinnings. I believe courts recognize that congressional language can be ambiguous. In fact, one of my favorite quotes about an environmental statute came from District Court Judge Smalkin in Maryland attempting to read and apply CERCLA. When discussing the confusion in CERCLA's legislative history, Judge Smalkin stated in an opinion that the statute's legislative history provides more of an "Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature," observing in a footnote that "criticizing Congress is the judicial equivalent of shooting fish in a barrel."<sup>67</sup> This highlights the fact that congressional intent is often hard to determine, making the explanatory role of both agencies and the courts vital.

Although the legal underpinnings of *Chevron* have received a great deal of attention, and—as many commentators have observed—courts have not always been consistent in applying the doctrine over the years, the fundamentals are clear and unassailable, premised on a separation of powers or, at least, the recognition of congressional authority. As the Court stated in *Smiley v. Citibank (South Dakota), N.A.*,<sup>68</sup> the *Chevron* doctrine is based on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>69</sup> Justice Scalia stated in his Duke lecture:

In my view, the theoretical justification for *Chevron* is no different from the theoretical justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations. As the D.C. Circuit, quoting the First Circuit, expressed it: "The extent to which courts should defer to agency interpretations of law is ultimately 'a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue."<sup>70</sup>

After exploring pre-*Chevron* standards, Justice Scalia observed: "*Chevron*, however, if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."<sup>71</sup>

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67. *HRW Sys., Inc. v. Wash. Gas Light Co.*, 823 F. Supp. 318, 327 n.5 (D. Md. 1993).

68. 517 U.S. 735 (1996).

69. *Id.* at 740–41.

70. Scalia, *supra* note 7, at 516.

71. *Id.*

As many courts point out, *Chevron* also makes good, practical sense. Administrative agencies can develop deep expertise, and can create an infrastructure to be responsive to regulatory concerns. Courts, at least in their traditional function, cannot be responsive because the job of the court is to decide the law. The law does not change when our scientific understanding changes. If a court's role was to determine the one true meaning of a statute, the law ossifies quickly.<sup>72</sup> For example, if a court, acting in this static role, determined that Congress intended for the bubble concept to apply in 1977, then no change in administration, no change in policy, no change in science, no change in underlying facts, could justify a decision not to apply the bubble concept in the future. If there are a range of reasonable outcomes, and the decision is delegated to an agency, then the agency's views can evolve and be taken into account, just as the *Chevron* Court found the Reagan Administration interpretation acceptable, even though it differed from the original view of the Agency during the Carter Administration.

Similarly, Congress cannot possibly anticipate every possible way its statutory words may be used. It is not only lawful, but quite unremarkable that a legislature would choose broad words, expecting implementing agencies to carry out their overall goals in the best possible manner, using their years of expertise to properly interpret any ambiguous phrases in an appropriate fashion.

These reasons, in addition to creating a level of political accountability and responsiveness, explain why a delegation of policymaking authority to administrative agencies makes sense. And, *Chevron* is not just for the benefit of federal agencies, but rather for all who seek some measure of predictability from our judiciary. For instance, eighteen years after *Chevron* was decided, the Chevron Corporation itself was able to invoke its namesake deferential framework to win another case in the Supreme Court.<sup>73</sup> In a unanimous decision, the Court applied *Chevron* deference and upheld as reasonable an Equal Employment Opportunity Commission regulation, which allowed an employer to refuse to hire an applicant when the applicant's disability on the job would pose a "direct threat" to the applicant's own health.<sup>74</sup> Ironically, Chevron prevailed because of the *Chevron* doctrine.

What I have discussed so far provides only a small window into the huge volume of work actually done by the agencies but shows that, as a country, we are absolutely dependent on the proper functioning of executive agencies, and Congress is well aware of, and reliant on, active administrative agencies. In that regard, I would like to briefly mention three of the federal agencies that the

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72. As Justice Scalia pointed out in his dissent in *United States v. Mead Corp.*, the resolution of statutory ambiguities by federal judges would produce "ossification of large portions of our statutory law." 533 U.S. 218, 247 (2001) (Scalia, J., dissenting).

73. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 73 (2002).

74. *Id.*

Environment and Natural Resources Division of DOJ works with regularly: EPA, the Department of the Interior, and the Department of Energy. Each have broad-reaching responsibilities under a number of statutes, and the scope of the work of these agencies is seen both in their budgets and the number of people each agency employs. As of 2014, EPA had an enacted budget of over \$8 billion and a workforce of more than 15,000 people.<sup>75</sup> In the same year, the Department of the Interior had a total budget authority of more than \$17 billion and an estimated workforce of more than 69,000 people.<sup>76</sup> DOE had an enacted 2014 budget of more than \$27 billion<sup>77</sup> and employed more than 13,000 people (more than 15,000 if employees of the Federal Energy Regulatory Commission are included).<sup>78</sup> These numbers do not include the tens of thousands of contractors these agencies employ and oversee.

The tasks these agencies undertake are immense. The expertise these institutions develop is crucial. The United States, in a very real and tangible way, needs to be able to rely on the interpretations and judgments of these vast and complicated administrative agencies in order to know how to invest private capital and private resources. And the regulated public needs to be able to rely on those interpretations and regulations, because without regulatory certainty it can be difficult to justify capital investments.

Congress has never demonstrated intent to handle the day-to-day level of activity and executive direction that is needed to administer the laws in our country. Congress, over the past several decades, has passed increasingly complicated and scientifically dependent laws, and federal agencies continue to evolve to handle the on-the-ground implementation of these laws. The Constitution grants the executive branch this authority, authority that necessarily involves the ability to determine what statutes mean in particular factual situations. If we relied on the imperfect implementation of either Congress or the courts it could lead to an unresponsive, inconsistent government overwhelmed with its tasks and crippled by inaction. Healthy administrative agencies ensure that our government can function.

Agencies must respond to citizen concerns via notice-and-comment processes, and Congress can ensure agency responsiveness through oversight tools (including hearings and appropriations), so the systems of accountability are not limited to elections and legislations. Stakeholder input is an integral

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75. *EPA's Budget and Spending*, EPA (Feb. 12, 2016), <https://perma.cc/L6S5-N93K>.

76. U.S. DEP'T OF THE INTERIOR, FY 2014: INTERIOR BUDGET IN BRIEF (listing estimated workforce); U.S. DEP'T OF THE INTERIOR, FY 2015: INTERIOR BUDGET IN BRIEF (listing actual 2014 budget).

77. U.S. DEP'T OF ENERGY, FY 2016 CONGRESSIONAL BUDGET REQUEST: BUDGET IN BRIEF 7-9 (setting out total funding by appropriation).

78. U.S. Office of Pers. Mgmt., *Employment Cube (March 2014)*, FEDSCOPE, <https://perma.cc/5VY6-V6KJ>.

part of the administrative process, and is often a component of the types of agency actions that receive *Chevron* deference from courts.

#### IV. BEYOND *CHEVRON*: OTHER TYPES OF DEFERENCE

I frequently have to remind agency general counsels that I work with that *Chevron* is a tool of statutory analysis for the Courts. In his unanimous decision in *Chevron*, Justice Stevens conceded that “[j]udges are not experts in the field,” and thus when interpreting statutory gaps courts should “rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>79</sup> This position implicitly relies on agencies’ expertise, and the politically accountable nature of the executive, as two reasons for justifying the deferential *Chevron* standard.<sup>80</sup> Moreover, *Chevron* was based on a final, well-stated position that clearly reflected the position of the agency.

Another judicial doctrine, derived from the Supreme Court decision in *Skidmore v. Swift*,<sup>81</sup> sets a much less deferential standard when the agency has spoken through something less than APA rulemaking. This approach, often referred to as “*Skidmore* deference,” arose in 1944, decades prior to *Chevron*. The *Skidmore* approach then lay relatively dormant in the years immediately following *Chevron*. Beginning in the 1990s, however, *Skidmore* arose again as a separate standard.<sup>82</sup>

In 2000 the Supreme Court decided *Christensen v. Harris County*, holding that an opinion letter issued by the Department of Labor was not entitled to *Chevron* deference, and the Court would defer to such letters only where they had the “power to persuade.”<sup>83</sup> The following term, in *United States v. Mead Corp.*, the Supreme Court characterized *Skidmore* as the starting point for a

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79. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

80. *Id.* (“[T]he Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference. . . . Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.”).

81. 323 U.S. 134 (1944).

82. For example, in 1991 in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (ARAMCO)*, the Supreme Court found that review of EEOC guidance merited only *Skidmore*, rather than *Chevron* deference. 499 U.S. 244, 256–58 (1991); accord *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (applying *Skidmore*’s standard); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (affording Bureau of Prisons internal guidelines “some deference”).

83. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

deference analysis, while acknowledging that *Chevron* recognizes that Congress may implicitly delegate authority to an administrative agency.<sup>84</sup>

These cases were widely read at the time as a significant constriction of the scope of *Chevron*. I don't see it that way. *Skidmore* and its progeny are fundamentally different from *Chevron*. In each of the cases I've just discussed, courts are not really deferring to an agency judgment, but rather considering agency pronouncements in making their analysis and final judgment. While an agency has the "power to persuade," that power is based on the agency's ability to convince a court that its approach is the correct one. Deference, in my view, comes into play where a court adopts an agency interpretation even if it thinks that approach may not be the best one. Also, I do not see *Skidmore*, *Christensen*, *Mead*, or any similar cases actually limiting *Chevron* in a manner inconsistent with Justice Stevens's 1984 decision. Where an agency gives its official position in a sufficiently formal and thoughtful manner, *Chevron* applies. Clearly deferential review does not apply to support every statement made by any of the thousands of federal agency employees. The cases discussing lesser forms of "deference" are just an attempt to articulate where *Chevron* applies—a line that existed, though in an unarticulated form, even prior to *Mead* and *Christensen*.

Another recent academic invention is the *Chevron* step zero language, most notably advanced by Cass Sunstein.<sup>85</sup> Professor Sunstein argues that before a court addresses the traditional *Chevron* two-step framework, it must determine whether *Chevron* applies at all. This initial step, which he termed "step zero," relies on what I have stated is the theory underlying *Chevron*, one of implicit congressional delegation. If agency authority depended on delegated authority, logic would hold that a court must first determine that such authority has been delegated. Again, *Chevron* step zero is not new—and no one should argue, for example, that purely by virtue of taking action, any federal agency is entitled to deference for any administrative interpretation. There have always been boundaries. *Kelley v. EPA*—the CERCLA case involving EPA's lender liability rule that I previously mentioned—is one such example, but there are many others.

## V. THE SUPREME COURT CONTINUES TO VIEW ADMINISTRATIVE DECISIONS THROUGH THE LENS OF *CHEVRON*

And now I turn to what you all want to hear, and that is the application of the *King* decision to my review of *Chevron* deference. As has been widely reported, Chief Justice Roberts, writing for six members of the Court, said this about *Chevron*:

This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill

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84. *United States v. Mead Corp.*, 533 U.S. 218, 228–29 (2001).

85. See Sunstein, *supra* note 13, at 187.

in the statutory gaps.” [*FDA v. Brown & Williamson*.] “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” [*Id.*]

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.<sup>86</sup>

Some have argued that this language breathes new life into the “major federal question” doctrine, which finds its genesis in *Brown & Williamson*, the tobacco case. In that regard, let me make a few points.

First, the *King* decision was a highly unique case. The Court determined that the tax crediting process was so important that Congress would, necessarily, have addressed it expressly.<sup>87</sup> That is unusual in and of itself. In fact, this reminds me of the doctrine of constitutional avoidance—where constitutional issues are deemed so important they are to be avoided if possible.<sup>88</sup> Similarly, here, the Supreme Court appears to be saying that it is possible for the statutory structure of a congressional enactment to elevate an issue to a level of such importance that only Congress, and no other body, can address it. These types of “major questions” have been identified only rarely, and this approach seems related to the idea I previously discussed that Congress has the authority to explain how deference works in a particular statutory setting. Additionally, the Supreme Court in *King* made it clear that if Congress had intended to delegate this type of question to an administrative agency, the Internal Revenue Service, which has no expertise in crafting health insurance policy, would have been an unlikely delegatee.<sup>89</sup> Given these facts, it would be easy to read this case’s *Chevron* analysis narrowly.

Second, the Supreme Court case relied on, *Brown & Williamson*, is famous for other reasons. When EPA was initially confronted with the challenge of regulating greenhouse gases, it demurred, finding that it lacked authority to do so under the Clean Air Act, relying primarily upon *Brown & Williamson*. The Supreme Court completely rejected that argument in *Massachusetts v. EPA*,<sup>90</sup>

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86. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

87. *Id.* at 2489.

88. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). Justice Stevens has characterized this concurrence as “one of the most respected opinions ever written by a member of this Court.” *Delaware v. Van Arsdall*, 475 U.S. 673, 693 (1986) (Stevens, J., dissenting).

89. *King*, 135 S. Ct. at 2489.

90. 549 U.S. 497 (2007).



finding that EPA jurisdiction over greenhouse gases would not lead to “extreme measures”—indicating that regulation of a pollutant is exactly what Congress expected EPA to be doing under the Clean Air Act, whereas Congress would not have expected government agencies to regulate tobacco products as “drugs.”<sup>91</sup> This is related to my first point. In *Massachusetts v. EPA*, the Supreme Court expressed concerns where an agency refused to act within its prescribed role. When it did, it was given deference to its decisions. *King v. Burwell* is the other side of that coin—the Court was concerned that the IRS was interpreting matters outside of its prescribed role.

Third, another environmental case decided a few days after *King*—*Michigan v. EPA*—directly applied *Chevron* to another “major case” interpreting the Clean Air Act. In *King*, the question at issue was determined to be “major” and “extraordinary” primarily because of the magnitude of the economic issues at stake—subsidies involving “billions of dollars in spending each year” impacting “the price of healthcare for millions of people.”<sup>92</sup> In *Michigan v. EPA*, the Supreme Court faced a case involving challenges to a regulation that had estimated costs of \$9.6 billion a year.<sup>93</sup> While not agreeing with EPA, the majority clearly applied the standard *Chevron* analysis in making its decision, in spite of the extreme costs of the regulation.<sup>94</sup>

Both the *King* and *Michigan* cases rely on a 2014 case, *Utility Air Regulatory Group v. EPA*.<sup>95</sup> *UARG*, another Clean Air Act case (like *Michigan* and *Chevron*) involving regulations that could be hugely expensive, was also decided within the *Chevron* framework. In *UARG*, the Court partially upheld and partially rejected EPA’s approach to greenhouse gas regulation under a particular Clean Air Act permit program. There are actually two takeaway messages from the *UARG* case, in my view. First, and most importantly, is the fact that the *UARG* decision shows that the Court is continuing to apply the *Chevron* framework even to matters it views as having great regulatory and economic consequence. Second, *UARG* is one of those rare cases where the Court found an agency’s approach (in part) to be unreasonable under step two of *Chevron*, based to some extent on those very same consequences.

I have mentioned *Michigan v. EPA*, so I will also address Justice Thomas’s concurring opinion in that case. This concurrence, which challenges the legal underpinnings of *Chevron*, probably has its roots in a prior concurrence in *Whitman v. American Trucking* where Justice Thomas argued that the parties failed to address a “genuine constitutional problem”—the constitutional grant of “[a]ll legislative Powers” to Congress.<sup>96</sup> In *Whitman*, Justice Thomas indi-

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91. *Id.* at 531.

92. *King*, 135 S. Ct. at 2489.

93. *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

94. *Id.* at 2711.

95. 134 S. Ct. 2427 (2014).

96. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

cated that he believed Congress, not executive agencies, is the sole branch authorized to exercise any legislative power, stating that he would “be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”<sup>97</sup> In *Michigan*, he appears to do exactly that, arguing that *Chevron* raises serious separation-of-powers questions.<sup>98</sup> Thomas appears primarily concerned that a court’s exercise of its own independent judgment could be circumscribed by *Chevron*’s deferential approach to an agency’s interpretation. He believes that deference allows the executive to supplant both the policymaking role of Congress and the independence of the judiciary.

I believe Justice Thomas’s view of the roles of the three branches of government is important, and it is always a worthy endeavor to assure that even established doctrines do not morph into areas that are well beyond the original concept. I would not, however, have chosen *Michigan* to challenge the *Chevron* doctrine, and no other Justice did so. *Michigan* dealt with a narrow question of whether the word “appropriate” was vague enough to allow EPA not to consider costs in deciding whether to regulate emissions of hazardous air pollutants from certain stationary sources. Relevant precedent hardly made this an open and shut issue. For example, in *Whitman v. American Trucking*, another Clean Air Act case, the Court had previously held that EPA was precluded from considering costs when setting health-based air quality standards.<sup>99</sup> To state that EPA was somehow acting well beyond the bounds of legal doctrine overlooks that this was a 5-4 decision, and Justice Scalia’s majority opinion looks again to agency views in interpreting the statute: “We need not and do not hold that the law unambiguously required the Agency . . . to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value. It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.”<sup>100</sup> In short, even when the Court did not provide deference through *Chevron* step two, it still looked to the implementing agency to best decide how to implement its decision.

## VI. LOOKING TO THE FUTURE

*Chevron* is evolutionary, not revolutionary.<sup>101</sup> *Chevron* was not new law when it was decided, but rather provided a reasoned rationale for court decisions already being made, and predictability for the future. Judge Leventhal recognized that while his “hard look” approach allowed a “thoroughgoing in-

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97. *Id.*

98. *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring).

99. *Am. Trucking*, 531 U.S. at 465.

100. *Michigan*, 135 S. Ct. at 2711.

101. See generally Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398 (Peter L. Strauss ed., 2006).

quiry,” that searching and careful inquiry ultimately led to a narrow standard of review—the court is not empowered “to substitute its judgment for that of the agency.”<sup>102</sup> The question of the day is whether the Supreme Court is shifting away from the deferential *Chevron* framework and toward a paradigm of administrative review that increasingly relies on the courts to determine statutory interpretation on a statute-by-statute basis. The answer, I believe, is no.

As I mentioned in my opening remarks, every current Supreme Court Justice has applied *Chevron* at some point to justify their decision. For example, Justice Thomas—currently the most vocal critic of agency deference in general and *Chevron* in particular—is also the author of *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, a major administrative law case that stands for the proposition that an administrative agency can change its interpretation of ambiguous statutory law. In *Brand X*, Thomas, writing for the Court, stated that “[a]gency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”<sup>103</sup>

Justice Scalia championed *Chevron* in *City of Arlington v. FCC*. The *City of Arlington* case addresses whether *Chevron* deference applies to agencies’ interpretations of their own regulatory authority.<sup>104</sup> Scalia points out that the Supreme Court has “consistently held ‘that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers.’”<sup>105</sup> Based on those consistent holdings, the Supreme Court found that “an agency’s interpretation of a statutory ambiguity that concerns the scope of its regulatory authority” is entitled to deference.<sup>106</sup> It’s worth noting that even though Justice Scalia favors strong deference even to agency jurisdictional interpretations,<sup>107</sup> in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>108</sup> when he was faced with a case where a majority believed that a federal agency had construed its own jurisdiction too broadly, Justice Scalia voted to strike down a broad jurisdictional interpretation.<sup>109</sup> As Justice Scalia has recognized:

Broad delegation to the Executive is the hallmark of the modern administrative state; agency rulemaking powers are the rule rather than,

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102. Leventhal, *supra* note 32, at 514 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

103. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

104. *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1865 (2013).

105. *Id.* at 1871 (citation omitted).

106. *Id.* at 1866.

107. *See Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380–82 (1988) (Scalia, J., concurring in the judgment) (arguing in favor of granting deference to agency interpretations of jurisdictional statutes).

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

109. Chief Justice Roberts disagreed with the majority in *City of Arlington*, and in a dissenting opinion set out a much narrower view of *Chevron*, arguing that agency interpretation warrants *Chevron* deference “only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner.” *City of Arlington*, 133 S. Ct. at 1883.

as they once were, the exception; and as the sheer number of modern departments and agencies suggest, we are awash in agency “expertise.” If the *Chevron* rule is not a 100% accurate estimation of modern congressional intent, the prior case-by-case evaluation was not so either—and was becoming less and less so, as the sheer volume of modern dockets make it less and less possible for the Supreme Court to police diverse application of an ineffable rule.<sup>110</sup>

Chief Justice Roberts has previously held that “the principles underlying our decision in *Chevron* apply with full force in the tax context.”<sup>111</sup> In *National Ass’n of Home Builders v. Defenders of Wildlife*, Justice Alito, writing for the Court, accorded *Chevron* deference to an agency interpretation that attempted to resolve potentially conflicting statutory requirements of the Clean Water Act and the Endangered Species Act.<sup>112</sup> In other words, all of the Justices recognize the utility of *Chevron* though, for a wide range of reasons, individual Justices continue to express concerns about the approach in particular factual situations.

Cases like *Brown & Williamson*, *UARG*, and *King* certainly indicate that the Supreme Court will take an especially hard look at statutory questions involving matters of great economic and regulatory consequence. Even in these rare situations the Court, at most, is applying the existing framework and boundaries of the *Chevron* framework in a more critical fashion, not abandoning *Chevron*. For example, *Chevron* deference, as a whole, has always been limited to statutory issues that Congress meant to delegate to a particular agency (the determinative *Chevron* issue in *King*), and even in the face of ambiguity, courts have only been bound to defer to “reasonable” or “permissible” agency interpretations.

This is not to say that the courts have been entirely consistent in the degree of scrutiny they apply to the elements of *Chevron*. As Kenneth Starr noted back in 1986, because of the tension “between the judiciary’s law-declaring function and the need to defer to congressional delegation, application of the deference doctrine in the federal courts has been rather erratic.”<sup>113</sup> This trend continues with *King v. Burwell*, and the continuing inconsistency supports yet another round of *Chevron* obituaries.

My takeaway message is that *Chevron* is not, in environmental terms, a dead, dying, or threatened species. It remains the starting point for any analysis of agency discretion, and rightly so. There are judicially created deviations from the standard *Chevron* analysis from time to time, and similar deviations have occurred for decades now without significant long-term consequences. At bot-

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110. Scalia, *supra* note 7, at 516–17.

111. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).

112. *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

113. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986).

tom, the *Chevron* structure is so ingrained in our approach to administrative law, and in our approach to government, that it will and must endure. As Justice Scalia concluded in his *Chevron* lecture:

I tend to think, however, that in the long run *Chevron* will endure and be given its full scope—not so much because it represents a rule that is easier to follow and thus easier to predict (though that is true enough), but because it more accurately reflects the reality of government, and thus more adequately serves its needs.<sup>114</sup>

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114. Scalia, *supra* note 7, at 521.

