Chevron Deference: A Primer

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September 19, 2017

Congressional Research Service
7-5700
www.crs.gov
R44954

Summary

When Congress delegates regulatory functions to an administrative agency, that agency's ability to act is governed by the statutes that authorize it to carry out these delegated tasks. Accordingly, in the course of its work, an agency must interpret these statutory authorizations to determine what it is required to do and to ascertain the limits of its authority. The scope of agencies' statutory authority is sometimes tested through litigation. When courts review challenges to agency actions, they give special consideration to agencies' interpretations of the statutes they administer. Judicial review of such interpretations is governed by the two-step framework set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council*.

The *Chevron* framework of review usually applies if Congress has given an agency the general authority to make rules with the force of law. If *Chevron* applies, a court asks at step one whether Congress directly addressed the precise issue before the court, using traditional tools of statutory construction. If the statute is clear on its face, the court must effectuate Congress's stated intent. However, if the court concludes instead that a statute is silent or ambiguous with respect to the specific issue, the court proceeds to *Chevron*'s second step. At step two, courts defer to an agency's reasonable interpretation of the statute.

Application of the *Chevron* doctrine in practice has become increasingly complex. Courts and scholars alike debate which types of agency interpretations are entitled to *Chevron* deference, what interpretive tools courts should use to determine whether a statute is clear or ambiguous, and how closely courts should scrutinize agency interpretations for reasonableness. A number of judges and legal commentators have even questioned whether *Chevron* should be overruled entirely. Moreover, *Chevron* is a judicially created doctrine that rests in large part upon a presumption about legislative intent, and Congress could modify the courts' use of the doctrine by displacing this underlying presumption.

This report discusses the *Chevron* decision, explains the circumstances in which the *Chevron* doctrine applies, explores how courts apply the two steps of *Chevron*, and highlights some criticisms of the doctrine, with an eye towards the potential future of *Chevron* deference.

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Background

Congress has created numerous administrative agencies to implement and enforce delegated regulatory authority. Federal statutes define the scope and reach of agencies' power,[1] granting them discretion to, for example, promulgate regulations,[2] conduct adjudications,[3] issue licenses,[4] and impose sanctions for violations of the law.[5] The Administrative Procedure Act (APA) confers upon the judiciary an important role in policing these statutory boundaries, directing federal courts to "set aside agency action" that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations."[6] Courts will thus invalidate an action that exceeds an agency's statutory authorization or otherwise violates the law. Of course, in exercising its statutory authorities, an agency necessarily must determine what the various statutes that govern its actions mean. This includes statutes the agency specifically is charged with administering as well as laws that apply broadly to all or most agencies.

As this report explains, when a court reviews an agency's interpretation of a statute it is charged with administering,[7] the court will generally apply the two-step framework outlined by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[8] Pursuant to that rubric, at step one, courts examine "whether Congress has directly spoken to the precise question at issue."[9] If so, "that is the end of the matter" and courts must enforce the "unambiguously expressed intent of Congress."[10] In the case of statutory silence or ambiguity, however, step two requires courts to defer to a reasonable agency interpretation of the statutory text, even if the court would have otherwise reached a contrary conclusion.[11]

This report discusses the *Chevron* decision, explains the circumstances in which the *Chevron* doctrine applies, explores how courts apply the two steps of *Chevron*, and highlights some criticisms of the doctrine, with an eye towards the potential future of *Chevron* deference.

What Is *Chevron* Deference?

The *Chevron* case itself arose out of a dispute over the proper interpretation of the Clean Air Act (CAA). The contested statutory provision required certain states to create permitting programs for "new or modified major stationary sources" that emitted air pollutants.[12] In 1981, the

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[1] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it.").

[2] *See* CRS Report RL32240, *The Federal Rulemaking Process: An Overview*, coordinated by Maeve P. Carey.

[3] *See* 5 U.S.C. §§ 556, 557 (mandating certain procedures when agencies conduct formal adjudications).

[4] *See* 5 U.S.C. § 558 (imposing certain requirements on agencies when reviewing applications for a license).

[5] *See, e.g.*, Wilson v. Commodity Futures Trading Comm'n, 322 F.3d 555, 560 (8th Cir. 2003) (noting that "[t]he Commission's choice of sanctions" under 7 U.S.C. § 9 for a violation of the Commodity Exchange Act "will be upheld in the absence of an abuse of discretion").

[6] 5 U.S.C. § 706(2)(A), (C).

[7] These agency interpretations may be explicitly announced in agency rules or adjudications, or they may be implicit in an agency's action and later announced in court as a defense of that action.

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

[9] *Id*. at 842.

[10] *Id*. at 842-43.

[11] *Id*. at 843.

[12] *Id*. at 840; 42 U.S.C. § 7502.

Environmental Protection Agency (EPA) promulgated a regulation that defined "stationary source," as used in that statute, to include all pollution-emitting activities within a single "industrial grouping," [13] and thus let states "bubble," or group together, all emitting sources in a single plant for the purposes of assessing emissions.[14] This allowed a facility to construct new pollution-emitting structures so long as the facility as a whole—that is, the "stationary source"—did not increase its emissions.[15] The Natural Resources Defense Council (NRDC) filed a petition for judicial review, arguing that this definition of "stationary source" violated the CAA.[16] The NRDC claimed that the text of the CAA required the EPA "to use a dual definition—if either a component of a plant, or the plant as a whole, emits over 100 tons of pollutant, it is a major stationary source."[17]

A unanimous Supreme Court disagreed and upheld the regulation, determining that the EPA's definition was "a permissible construction of the statute."[18] The Court explained that when a court reviews an agency's interpretation of a statute it administers, it faces two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[19]

Applying this two-step inquiry to review the challenged EPA regulation, the Court first considered the text and structure of the CAA, along with the legislative history regarding the definition of "stationary source."[20] The text of the statute did not "compel any given interpretation of the term 'source,'"[21] and did not reveal Congress's "actual intent."[22] The Justices concluded that the statutory text was broad, granting the EPA significant "power to regulate particular sources in order to effectuate the policies of the Act."[23] The legislative history of the CAA was similarly "unilluminating."[24] However, the ambiguous legislative history was "consistent with the view that the EPA should have broad discretion in implementing the policies of" the CAA.[25] Ultimately, the Court decided that the EPA had "advanced a reasonable explanation" for

[13] *Chevron*, 467 U.S. at 840-41, 857-58.

[14] *Id.* at 840.

[15] *See id.* at 856.

[16] *Id.* at 841, 859.

[17] *Id.* at 859.

[18] *Id.* at 866.

[19] *Id.* at 842-43.

[20] *Id.* at 848-53.

[21] *Id.* at 860.

[22] *Id.* at 861.

[23] *Id.* at 862.

[24] *Id.*

[25] *Id.*

determining that its definition of "source" advanced the policy concerns that had motivated the CAA's enactment,[26] and upheld this "permissible construction."[27]

The Court gave three related reasons for deferring to the EPA: congressional delegation of authority, agency expertise, and political accountability.[28] First, the Court invoked a judicial presumption about legislative intent, which has subsequently become one of the leading justifications for deferring to agencies under *Chevron*:[29]

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.... Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[30]

In the view of the Court, because the statutory term "source" was ambiguous and could be read either to prohibit or to allow "bubbling,"[31] Congress had implicitly delegated to the EPA the ability to choose any definition that was reasonably permitted by the statutory text.[32] The statutory ambiguity constituted a limited delegation of interpretive authority from Congress, and the agency had acted within that delegation.[33]

Second, the Court cited the greater institutional competence of agencies, as compared to courts, to resolve the "policy battle" being waged by the litigants.[34] The Court reasoned that, with its superior subject matter expertise, the EPA was better able to make policy choices that accommodated "manifestly competing interests" within a "technical and complex" regulatory scheme.[35] Finally, the opinion of the Court also rested implicitly on concerns about the constitutional separation of powers.[36] While *judges* should not be in the business of "reconcil[ing]

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[26] *Id.* at 863.

[27] *Id.* at 866.

[28] *Id.* at 843-44, 865-66. Justice Scalia later noted another justification for *Chevron* deference, rooted in the history of federal court review of agency action before passage of the federal question jurisdiction statute in 1875. United States v. Mead Corp., 533 U.S. 218, 241-42 (2001) (Scalia, J., concurring) (asserting that the *Chevron* decision "was in accord with the origins of federal-court judicial review [as] [j]udicial control of federal executive officers was principally exercised through the prerogative writ of mandamus").

[29] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 192 (2006) (describing how Justices Stephen Breyer and Antonin Scalia, with very different views of the *Chevron* analysis, "both approved of resort to that [legal] fiction").

[30] *Chevron*, 467 U.S. at 843-44 (citations omitted).

[31] *Id.* at 860-61.

[32] *Id.* at 866.

[33] *See id.*

[34] *Id.* at 864.

[35] *Id.* at 865.

[36] *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."); Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 990 (2016) (explaining the "constitutional roots" of "the delegation foundation of *Chevron*"); *but cf.* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 222 (2001) ("We have argued ... that separation-of-powers law usually neither prohibits nor requires *Chevron* deference."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989) ("[T]he notion that administrators may interpret statutes that they administer is inconsistent with separation of powers principles that date back to the early days of the American republic and that retain considerable vitality today. The basic case for judicial review depends on the proposition that foxes should not guard henhouses.") (citations omitted).

competing political interests," the Court stated, it was "entirely appropriate for this *political* branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[37]

Does *Chevron* Deference Apply?

An important threshold question for a court reviewing an agency's interpretation of a statute is whether *Chevron* deference should apply at all. As an initial matter, the *Chevron* framework of review is limited to agencies' interpretations of statutes they administer.[38] Even when an agency is interpreting a statute that it administers, however, the Supreme Court has prescribed important limits on the types of agency statutory interpretations that qualify for *Chevron* deference. One crucial inquiry, sometimes referred to as *Chevron* "step zero," is whether Congress has delegated authority to the agency to speak with the force of law.[39] This analysis often turns on the formality of the administrative procedures used in rendering a statutory interpretation. The Court has indicated that an agency's determination of the scope of its jurisdictional authority is entitled to *Chevron* deference in appropriate circumstances.[40] Another situation where the Court has occasionally declined to follow *Chevron* occurs when an agency's interpretation implicates a question of major "economic and political significance."[41] However, this "major questions" doctrine has been invoked in a somewhat ad hoc manner, leaving unclear exactly how this consideration fits into the *Chevron* framework.

Importantly, even if the *Chevron* framework of review does not apply, a court might still give *some weight* to an agency's interpretation of a statute.[42] In the 2000 case of *United States v. Mead Corp.*,[43] the Court explained that even when *Chevron* deference was inapplicable to an agency's interpretation, it might still merit some weight under the Court's pre-*Chevron* decision in *Skidmore v. Swift & Co*.[44] Under *Skidmore*, when an agency leverages its expertise to interpret a

[37] *Chevron*, 467 U.S. at 865-66 (emphasis added). *See also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2373-74 (2001) (arguing the "*Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President," and is best justified as ensuring that policymaking functions track political accountability).

[38] Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that "when it comes to statutes administered by several different agencies—statutes, that is, like the APA and unlike the standing provision of the Atomic Energy Act—courts do not defer to any one agency's particular interpretation").

[39] Sunstein, *supra* note 29, at 191; Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[40] *See infra* "Agency Interpretations of the Scope of Its Authority ("Jurisdiction")."

[41] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) [hereinafter *Brown & Williamson*].

[42] For more information, *see* CRS Report R44699, *An Introduction to Judicial Review of Federal Agency Action*, by Jared P. Cole.

[43] 533 U.S. 218, 235 (2001).

[44] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under [the Fair Labor Standards] Act ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); United States v. Shimer, 367 U.S. 374, 383 (1961) ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."); Hon. (continued...)

"highly detailed" "regulatory scheme," a court may accord the agency's interpretation "a respect proportional to its 'power to persuade.'"[45] In other words, a court applying *Skidmore* deference accords an agency's interpretation of a statute an amount of respect or weight that correlates with the strength of the agency's reasoning.[46]

Finally, when an agency interprets legal requirements that apply broadly across agencies, it is not operating pursuant to delegated interpretive authority to resolve ambiguities or relying on its particular expertise in implementing a statute, and the agency's interpretation is not afforded deference by a reviewing court.[47] For instance, courts will review de novo, or without any deference at all,[48] procedural provisions of the APA,[49] the Freedom of Information Act,[50] and the Constitution.[51]

How Did the Agency Arrive at Its Interpretation?

Determining whether *Chevron* deference applies to an agency's interpretation typically requires a court to examine whether Congress delegated authority to the agency to speak with the force of law in resolving statutory ambiguities or to fill statutory gaps. One important indicator of such a delegation is an agency's use of formal procedures in formulating the interpretation. As background, the APA requires agencies to follow various procedures when taking certain actions. For instance, agencies issuing legislative rules that carry the force of law generally must follow notice and comment procedures; and adjudications conducted "on the record" must apply formal court-like procedures.[52] In contrast, non-binding agency actions, such as agency guidance documents, are exempt from such requirements. In *Christensen v. Harris County*, the Court ruled that nonbinding interpretations issued informally in agency opinion letters, "like [those] contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," do not receive deference under *Chevron*.[53] In contrast, the Court indicated, *Chevron*

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Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (1989) ("It should not be thought that the *Chevron* doctrine ... is entirely new law. To the contrary, courts have been content to accept 'reasonable' executive interpretations of law for some time.").

[45] *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

[46] *Skidmore*, 323 U.S. at 140.

[47] *See Chevron*, 467 U.S. at 843-44, 865.

[48] Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006) (explaining that *de novo* review requires the court to "review the matter anew, the same as if it had not been heard before, and as if no decision previously had been rendered").

[49] Sorenson Commc'ns Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014) ("[A]n agency has no interpretive authority over the APA.").

[50] Fed. Labor Relations Auth. v. U.S. Dep't of the Treasury, Fin. Mgmt. Serv., 884 F.2d 1446, 1451 (D.C. Cir. 1989); Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice, 164 F. Supp. 3d 145, 155-56 (D.D.C. 2016) ("FOIA, of course, affords complainants who bring suit under Section 552(a)(4)(B) a de novo review of the agency's withholding of information.").

[51] *See, e.g.*, Emp'r Solutions Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer, 833 F.3d 480, 484 (5th Cir. 2016); *see also* Miller v. Johnson, 515 U.S. 900, 923 (1995) (declining to extend deference to an agency interpretation that "raises a serious constitutional question").

[52] 5 U.S.C. § 553 (rulemaking); §§ 556, 557 (adjudications).

[53] 529 U.S. 576, 587 (2000).

deference is appropriate for legally binding interpretations reached through more formal procedures, such as formal adjudications and notice-and-comment rulemaking.[54]

Likewise, in *United States v. Mead Corp.*, the Court ruled that tariff classification rulings by the U.S. Customs Service were not entitled to *Chevron* deference because there was no indication that Congress intended those rulings "to carry the force of law."[55] The Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[56] Such a delegation could be shown by an agency's authority to conduct formal adjudications or notice-and-comment rulemaking, "or by some other indication of a comparable congressional intent."[57] The Court found no such indication here—the tariff classifications were not issued pursuant to formal procedures and the rulings did not bind third parties.[58] Further, their diffuse nature and high volume—over 10,000 classifications issued every year at 46 different agency field offices—indicated that such classifications did not carry the force of law.[59]

Mead and *Christensen* thus indicate that a key indicator of a congressional delegation of power to interpret ambiguity or fill in the gaps of a statute is authority to utilize formal procedures such as notice-and-comment rulemaking or formal adjudications to implement a statute.[60] An agency's interpretation of a statute reached through these means is thus more likely to qualify for *Chevron* deference than is an informal interpretation,[61] such as one issued in an opinion letter or internal agency manual.[62]

Nonetheless, the Supreme Court has indicated that an agency's use of formal procedures in interpreting a statute is not a *necessary* condition for the application of *Chevron* deference.[63] *Mead* indicated that a delegation of interpretive authority could be shown by an agency's power to conduct notice-and-comment rulemaking or formal adjudications, "or by some other indication of a comparable congressional intent."[64] In *Barnhart v. Walton*, the Court deferred under *Chevron* to the Social Security Administration's interpretation of the Social Security Act's provisions

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[54] *Id*.

[55] *Mead*, 533 U.S. at 221.

[56] *Id*. at 226-27.

[57] *Id.* at 227.

[58] *Id.* at 233.

[59] *Id*. at 230-34.

[60] *Mead*, 533 U.S at 226-27; Christensen v. Harris County, 529 U.S. 576, 587 (2000).

[61] *See* Gonzales v. Oregon, 546 U.S. 243, 268 (2006) (declining to accord *Chevron* deference because the Controlled Substances Act "does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law"); Sunstein, *supra* note 29, at 218; *see, e.g.*, N.Y. Pub. Interest Research Grp. v. Whitman, 321 F.3d 316, 328-29 (2d Cir. 2003); Shotz v. City of Plantation, 344 F.3d 1161, 1179 (11th Cir. 2003).

[62] *Christensen*, 529 U.S. at 587.

[63] Nat'l Cable & Telecommunications Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) ("It is not surprising that the Court would hold that the existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference to an agency's interpretation of a statute. It is not a necessary condition because an agency might arrive at an authoritative interpretation of a congressional enactment in other ways, including ways that Justice Scalia mentions. It is not a sufficient condition because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.") (citations omitted).

[64] *Id.* at 227.

regarding disability benefits.[65] The majority opinion, written by Justice Breyer, examined a variety of factors in finding that *Chevron* deference was applicable to the agency's interpretation.[66] The Court noted that, under *Mead*, the application of *Chevron* deference depended on "the interpretive method used and the nature of the question at issue."[67] In this case, while the agency interpretation was reached informally, it was nonetheless "one of long standing," having apparently been in place for over 40 years.[68] Rejecting a bright-line rule that would require formal procedures to merit *Chevron* deference, the Court noted that a number of factors could be relevant in determining whether the *Chevron* framework is appropriate, such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time."[69]

Following *Barnhart*'s case-by-case approach to when the *Chevron* framework governs judicial review of agency statutory interpretations, some lower courts have applied *Chevron* deference to certain agency statutory interpretations reached through informal means (e.g., a letter ruling issued to parties), particularly when an agency has expertise in implementing a complex statutory scheme.[70]

Agency Interpretations of the Scope of Its Authority ("Jurisdiction")

The Supreme Court has also ruled that an agency's statutory interpretation concerning the scope of its jurisdiction is eligible for deference.[71] In *City of Arlington v. FCC*, the Court rejected the contention that *Chevron* deference should not apply to an agency's "interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority,"[72] reasoning that "there is no difference, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has."[73] In that case, the Court examined the Telecommunications Act, which requires state and local governments to act on an application for siting a wireless telecommunications facility within a "reasonable period of time."[74] The Federal Communications Commission (FCC) issued a declaratory ruling specifying the number of days that it considered

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[65] 535 U.S. 212, 222 (2002).

[66] *See* Kristin Hickman & Nicholas Bednar, Chevron*'s Inevitability*, 85 GEO. W. L. REV. (forthcoming 2017) (manuscript at 146); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1003–04 (2005) (Breyer, J., concurring) (noting that United States v. Mead Corp., 533 U.S. 218, 237 (2001) taught that delegation meriting *Chevron* deference can be shown "in a variety of ways").

[67] *Id.*

[68] *Id*. at 221.

[69] *Id*. at 222.

[70] *See, e.g*., Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs., 766 F.3d 560, 572 (6th Cir. 2014) (extending *Chevron* deference to the Center for Medicare and Medicaid Service's interpretation of the Medicare Act contained in an agency manual); Mylan Labs., Inc. v. Thompson, 389 F.3d 1272, 1279-80 (D.C. Cir. 2004) (extending *Chevron* deference to an interpretation contained in an agency's letter ruling); Davis v. EPA, 336 F.3d 965, 972-75, 972 n.5 (9th Cir. 2003) (extending *Chevron* deference to informal agency adjudication of request to waive emissions requirement).

[71] City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

[72] *Id*. at 1867-68, 1870-71.

[73] *Id*. at 1870.

[74] 47 U.S.C. § 332(c)(7)(B).

reasonable to reach a decision on those applications,[75] but this decision was challenged on the ground that the agency did not have delegated authority to adopt a binding interpretation of that portion of the statute.[76]

The Supreme Court granted certiorari on the question of whether a court should apply *Chevron* to an agency's determination of its own jurisdiction.[77] In other words, the Court asked: did *Chevron* apply to the FCC's decision that it possessed authority to adopt a binding interpretation of this part of the statute? Or should courts refuse to defer to the FCC's "jurisdictional" decision that it enjoyed such authority? The Court ruled that the *Chevron* doctrine did apply, questioning whether an agency's jurisdictional authority could sensibly be distinguished from its nonjurisdictional power.[78] According to the majority opinion, every new application of an agency's statutory authority could potentially be reframed as a questionable extension of the agency's "jurisdiction"; but ultimately, the question for a court in any case is simply "whether the agency has stayed within the bounds of its statutory authority."[79]

The Court majority rejected the dissent's view that even when an agency has general rulemaking authority, courts should first conduct a de novo review to determine if Congress has delegated interpretive authority to speak with the force of law on a particular issue.[80] Instead, the majority held, the *Chevron* doctrine applied because Congress had vested the FCC with the authority to administer generally the Telecommunications Act through adjudication and rulemaking, and the agency had promulgated the disputed interpretation through the exercise of that authority.[81]

One way to understand *City of Arlington* is that the Court majority rejected the inclusion of a "jurisdictional" test at *Chevron* "step zero."[82] The dissent urged that, before applying the *Chevron* framework, courts should conduct a threshold examination of whether an agency has received a delegation of interpretive authority over particular issues,[83] essentially a "step zero" inquiry. The majority opinion, however, rejected examining that issue as a threshold matter. Instead, once the "preconditions to deference under *Chevron* are [otherwise] satisfied," the Court should proceed to the *Chevron* two-step framework and determine if the agency has reasonably interpreted the parameters of its statutory authority.[84] In this case, Congress delegated to the agency the power to speak with the force of law in administering a statute, and the agency reached an interpretation through the exercise of that authority. Accordingly, the court held that *Chevron*'s two-step

[75] The agency determined that 90 days was appropriate for some applications and 150 days was proper for others. *See In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14001.

[76] *See City of Arlington*, 133 S. Ct. at 1867; 47 U.S.C. § 332(c)(7)(A).

[77] *City of Arlington*, 133 S. Ct. at 1867-68.

[78] *See id.* at 1868 ("The argument against deference rests on the premise that there exist two distinct classes of agency interpretations.... That premise is false, because the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage.").

[79] *Id*.

[80] *Compare City of Arlington*, 133 S. Ct. at 1874 (majority opinion), *with* id. at 1880 (Roberts, J., dissenting) ("But 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.").

[81] *City of Arlington*, 133 S. Ct. at 1874 (majority opinion).

[82] *See supra* "How Did the Agency Arrive at Its Interpretation?" at 6-7.

[83] *City of Arlington*, 133 S. Ct. at 1880 (Roberts, J., dissenting).

[84] *City of Arlington*, 133 S. Ct. at 1874 (majority opinion).

framework was applicable to the agency's determination that it had authority to decide what constituted a "reasonable period of time."[85]

Major Questions Doctrine

The Court has sometimes declined to defer to an agency interpretation under *Chevron* when a particular case presents an interpretive question of such significance that "there may be reason to hesitate before concluding that Congress ... intended" to delegate resolution of that question to the agency.[86] Although the Court has not fully articulated when the so-called "major questions doctrine" applies, and indeed, has never used this phrase itself,[87] previous applications of this principle seem to rest on a determination by the Court that one of the core assumptions underlying *Chevron* deference—that Congress intended the agency to resolve the statutory ambiguity—is no longer tenable.[88] The fact that an agency interpretation implicates a major question is sometimes deemed to render the *Chevron* framework of review inapplicable.[89] However, the Court has also invoked this concern while applying *Chevron*,[90] to justify concluding that under the two-part test, the Court should not defer to the agency's construction of the statute.[91]

The Court first held that a question of great "economic and political significance" might displace *Chevron* deference in *FDA v. Brown & Williamson Tobacco Corp*.[92] The impetus for that dispute was the decision of the Food and Drug Administration (FDA) to regulate tobacco products.[93] The Supreme Court decided that Congress had not given the FDA the authority to regulate tobacco products and invalidated the regulations.[94] The Court acknowledged that its analysis was governed by *Chevron*, because the FDA regulation was based upon the agency's interpretation of

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[85] *Id.* at 1866, 1874.

[86] *Brown & Williamson*, 529 U.S. 120, 159 (2000).

[87] The phrase "major questions doctrine" emerged from academic work. *E.g.*, *id.* at 159, citing Hon. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration"). *See also* Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 n.3 (2016) (listing other scholarly labels for the doctrine and noting that "the Court itself does not use a particular name").

[88] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2489 (2015). Some commentators have argued that both the *Chevron* step zero doctrine and major questions doctrine serve to align *Chevron* deference more closely with those situations in which Congress has actually delegated to an agency the authority to interpret a particular statutory provision. *See, e.g.*, Adler, *supra* note 36, at 993, 994.

[89] *See King*, 135 S. Ct. at 2489 (invoking major questions doctrine at outset of opinion); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (invoking major questions doctrine during step zero inquiry).

[90] *See City of Arlington*, 133 S. Ct.at 1872 (describing major-questions cases as applications of *Chevron*).

[91] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (invoking major questions doctrine during *Chevron* step one); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014) (invoking major questions doctrine during *Chevron* step two).

[92] *Brown & Williamson*, 529 U.S. 120, 159-60 (2000). *Cf.* Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 453-57 (2016) (discussing intellectual precursors to *Brown & Williamson*); Asher Steinberg, *Another Addition to the* Chevron *Anticanon: Judge Kavanaugh on the "Major Rules" Doctrine*, THE NARROWEST GROUNDS (May 7, 2017, 8:44 PM), http://narrowestgrounds.blogspot.com/2017/05/another-addition-to-chevron-anticanon.html ("[T]he best view of the major-questions exception is that it didn't truly exist until *King v. Burwell* was decided ... Major-questions cases before *Burwell* had,.... far from applying an exception to *Chevron*, applied *Chevron* itself, albeit in ways that felt less deferential than traditional *Chevron* review.").

[93] *Brown & Williamson*, 529 U.S. at 125.

[94] *Id.* at 161.