FOREWORD

Chevron's Interstitial Steps

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ABSTRACT

The Chevron *doctrine's apparent simplicity has long captivated judges, lawyers, and scholars. According to the standard formulation,* Chevron *involves just two straightforward steps: (1) Is a statute clear? (2) If not, is the agency's interpretation of the statute reasonable? Despite the influence of this two-step framework,* Chevron *has come under fire in recent years. Some critics bemoan what they perceive as the Supreme Court's incoherent application of the* Chevron *framework over time. Others argue that* Chevron*'s second step, which calls for courts to defer to reasonable agency interpretations of ambiguous statutory provisions, amounts to an abdication of judicial responsibility. Yet as this Foreword shows, both criticisms draw on a mistaken understanding of* Chevron*. Despite the conventional view that* Chevron *analysis has only two steps, the reality is that it has always comprised a series of steps constituting a veritable* Chevron *staircase. If a statute is unclear at Step 1, a court must confront a number of important legal questions*—Chevron*'s "Interstitial Steps"—before considering deference at Step 2. After all, the legal justification for* Chevron *deference—legislative delegation of authority to the*

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September 2017 Vol. 85 No. 5

agency to resolve statutory ambiguity—requires judicial analysis of whether the statute can properly be construed as having made such a delegation. Recognizing the Interstitial Steps embedded in Chevron *analysis not only reveals that the Supreme Court has been more consistent in its application of the framework than is generally acknowledged, but such recognition also rebuts the mistaken notion that* Chevron *automatically requires judicial deference on the mere showing of statutory ambiguity. The full* Chevron *staircase—Step 1, Interstitial Steps, and Step 2—reveals how much work* Chevron *demands of judges and it makes clear that, far from abdicating their responsibility, judges actually fulfill their duty to uphold the law when they defer to agency interpretations at Step 2. The staircase also affords a basis for seeing why a popular alternative* Chevron *"Step 0" framework is misplaced and why, contrary to yet another scholarly account, the* Chevron *doctrine cannot be meaningfully collapsed into a single step. Properly understood, the* Chevron *doctrine, with its Interstitial Steps, ensures that courts act responsibly by answering crucial legal questions at every step of the way.*

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INTRODUCTION

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[1] holds a position of unmistakable centrality in administrative law. Having inspired a vast number of judicial opinions and scholarly writings,[2] today the decision finds itself at the center of an intensive debate over its legitimacy and even its continued existence.[3] The *Chevron* decision

1 467 U.S. 837 (1984).

2 Scholars characterize *Chevron* as "foundational" or "landmark." *See, e.g.*, Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 398 (Peter L. Strauss ed., 2006); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188 (2006).

3 Some scholars have even pronounced the "death" or "demise" of *Chevron*. *See, e.g.*, Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1868 (2015); Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 729–30 (2007). In Congress, legislation purporting to extinguish the *Chevron* doctrine has been passed by the House and could very well become law. *See* Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. (2017); *see also* Orrin G. Hatch, *The Proposed Separation of Powers Restoration Act: Making Agencies Accountable*, ADMIN. & REG. L. NEWS, Summer 2016,

has assumed its salient position in contemporary policy and legal deliberations because it touches the rawest of administrative law's nerves. Its underlying aspiration is essentially administrative law's aspiration: to constrain agency discretion within the bounds of the law.

By focusing on the interpretation of statutory language governing and authorizing administrative action, *Chevron* seeks to strike a balance or demarcation of roles between the judiciary, with its responsibility for determining the meaning of legislation, and the agency, with its authority and responsibility to implement legislation.[4] To *Chevron*'s critics, the decision—or at least its application by the courts—strikes very much the wrong balance by purportedly abdicating the judiciary's responsibility to define the boundaries within which agency decisions must remain in order to respect the principle of government under law.[5] Such charges are serious, even if they ultimately prove unpersuasive, but their intensity serves if nothing else to reinforce what it is that has made *Chevron* so fascinating for so long: its centrality to administrative law's core concern about constraining agency discretion.

Chevron has no doubt also captivated scholars, judges, and lawyers in part due to its beguiling simplicity. In an altogether complex, dynamic, and varied field of law (which administrative law clearly is), *Chevron* came along and held out hope for clarity and elegance, promising to fulfill administrative law's core purpose in two seemingly straightforward steps. Step 1 asks merely if a statute's meaning is clear; if it is not, Step 2 asks if the agency's interpretation of the statute is reasonable.[6] What could be more alluring than two steps that

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at 4, 4 (describing the Separation of Powers Restoration Act, sponsored by Senator Hatch, which has been folded into the Regulatory Accountability Act introduced in the 115th Congress).

4 Herz, *supra* note 3, at 1909 (viewing *Chevron* as centrally concerned with the proper "allocation" of power between the branches of government). Moreover, even though courts and scholars alike routinely refer to "agency interpretations" of statutes—as do I in this Foreword—such references do not imply that agencies are acting in a judicial capacity when they are construing ambiguous statutory provisions. What agencies do when construing statutes they have been charged with implementing can be properly characterized as executive.

5 *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (arguing that "*Chevron* deference raises serious separation-of-powers questions" and suggesting that it is "potentially unconstitutional"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing that under *Chevron*, "*courts* are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations"); RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 217–18 (2016); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 12–13 (2014); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788 (2010).

6 *Chevron*, 467 U.S. at 842–43.

can be articulated so succinctly?[7] In a fanciful world, if Supreme Court opinions were advertised to lawyers on late-night infomercials along with the likes of kitchen gadgets and house-cleaning miracles, *Chevron* would be ready made for a high-pressured sales pitch: "It resolves important administrative law questions in just two easy steps! That's right, just two steps!"

Despite their allure, *Chevron*'s two steps have never been easy ones.[8] Under Step 1, determining whether a statute speaks clearly to the issue at hand calls for, according to *Chevron* itself, the use of the "traditional tools of statutory construction."[9] What constitutes an appropriate tool of construction can be open to debate.[10] The application of these tools in specific instances will often be contested[11] and metrics for assessing statutory clarity are not widely shared.[12] When judges do find a statute sufficiently ambiguous at Step 1, they then move along a path to Step 2, where the test of "reasonableness," while deferential, is still far from precise or self-evident.

The application of *Chevron*'s two steps to particular cases has thus proven anything but simple. This Foreword emphasizes another consideration that makes legal analysis under *Chevron* less simple than it might have once seemed: the *Chevron* framework involves more than just two steps. Supreme Court decisions have variously applied and extended *Chevron*—and at times even appeared to ignore it—with the effect that what constitutes *Chevron* analysis demands more than Step 1 and Step 2. Some commentators have already

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7 *See* Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1253, 1258 (1997) (noting the "allure of *Chevron*" and its "single unifying framework for review of agencies' statutory interpretations").

8 Just a few years after the Court decided *Chevron*, Clark Byse recognized that "the *Chevron* model may not be as simple to administer as its literal terms suggest." Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 266 (1988).

9 *Chevron*, 467 U.S. at 843 n.9.

10 *See generally, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).

11 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (arraying pairs of canons in which one canon operates in a manner completely opposite of the other canon).

12 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118–19, 2121, 2134–44 (2016) (book review).

claimed that *Chevron* and its progeny actually call for three steps, with a Step 0 preceding the standard two.[13] Moving in the opposite direction, though, other scholars have urged that, despite the Supreme Court's invocation of two main steps, in actuality, *Chevron* only contains one step: a test of reasonableness.[14] The lack of clarity or agreement today even over the number of steps required by *Chevron* may explain why still other scholars have forecasted—if not already declared—*Chevron*'s "death."[15]

What seems most clearly to have died, of course, is any illusion of doctrinal simplicity that *Chevron*'s two basic steps might have promised.[16] That illusion, though, should never have come to life in the first place. Statutory interpretation, especially in cases involving administrative discretion in construing legislation, has never been straightforward, and nothing in *Chevron* could ever have made it so.[17] We should only be shocked at the supposed demise of *Chevron* in the way that Captain Renault was shocked to hear of gambling in Casablanca.[18]

Despite the evident loss of *Chevron*'s once-promising allure of simplicity, the opinion's basic framework remains, for now, doctrinally intact as a way of defining the strategy courts use when reviewing agency decisions about statutory meaning. At a broad level of generality, something like the two-step framework may always exist, even if relabeled or disavowed.[19] This is because, for as long as Congress continues to give agencies discretion in how they administer statutes, and as long as courts continue to review agency actions for compliance with law, judges will continue to confront the same questions presented by *Chevron*'s two steps: To what extent does a statute constrain agency discretion? To what extent has the statute delegated implementing authority, including a kind of interpretive authority, to the agency? These questions are by no means exhaustive, and judges'

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13 *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 873–89 (2001); Sunstein, *supra* note 2, at 207–31.

14 *See, e.g.*, Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 597–98 (2009); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 138 (2010).

15 *See supra* note 3.

16 *See* Sunstein, *supra* note 2, at 190.

17 *Cf.* Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1567 (2010) (noting that "neither in theory nor in fact do alternative methods of statutory interpretation, by themselves, decide most cases of any difficulty").

18 *See* CASABLANCA (Warner Bros. 1942).

19 *See* Kristin E. Hickman & Nicholas R. Bednar, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398 (2017) ("*Chevron* deference, or something much like it, is a necessary consequence of and corollary to Congress's longstanding habit of relying on agencies . . . .").

tasks in reviewing agency implementation of statutes have never been confined to any tidy set of steps; but *Chevron*'s two fundamental steps do serve as bookends demarcating administrative law's core subject matter: law and discretion. Step 1 cannot disappear under the rule of law, for clear legislative meaning will always make unlawful any agency action that conflicts with that meaning. Step 2 will also remain, in some form or another, because the law's meaning is not always clear. As long as statutes contain broad and ambiguous language, agency discretion will necessarily continue to exist and courts will continue to grapple with when and how to respect agencies' delegated authority by allowing them to exercise reasonable statutory discretion.[20]

Chevron's centrality to administrative law presumably helps explain the emerging criticism of its deference principle. What is needed to assess this criticism, though, is greater clarity about the *Chevron* framework. What merits highlighting most are the doctrinal interstices between *Chevron*'s two famous steps: the lesser-known steps that must be traveled before courts conclude, at Step 2, that they must defer to agencies' reasonable exercise of their authorized interpretive discretion.[21] Recognition of these intervening steps runs contrary to a prevailing view among scholars that inserts a Step 0 prior to *Chevron*'s two-step analysis.[22] But as I explain in this Foreword, Step 1 always begins the analysis, demarcating the ground floor in the doctrinal edifice the Court has constructed. Before judges can reach the second floor, where *Chevron* deference takes hold, they must ascend a stair-

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20 For this reason, some observers have suggested that critics of *Chevron* have really hidden in their objections to *Chevron* still larger concerns about delegation to administrative agencies. *See* Emily Bazelon & Eric Posner, *The Government Gorsuch Wants to Undo*, N.Y. TIMES (Apr. 1, 2017), https://www.nytimes.com/2017/04/01/sunday-review/the-government-gorsuch-wants-to-undo.html.

21 This Foreword is certainly not the first to suggest multiple steps, nor even necessarily intervening ones. *See, e.g.*, Michael P. Healy, *Reconciling* Chevron*,* Mead*, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 33–50 (2011) (renumbering *Chevron* analysis into three main steps with substeps); Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760–61 (2017) (discussing D.C. Circuit decisions that reveal an expectation that agencies assert statutory ambiguity in order to receive *Chevron* deference); Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 537–39 (2014) (stating that "the *Mead* steps can arise either as a Step Zero or as a Step One-and-a-Half," and then presenting a model with four steps: two *Mead* steps, followed by the traditional two *Chevron* steps). However, this Foreword presents a structure to *Chevron* analysis that departs in significant ways from these other formulations and it offers an extended account of the doctrinal virtues—indeed the necessity—of *Chevron*'s Interstitial Steps.

22 See *infra* Part III for discussion of the so-called Step 0 analysis and why it is misplaced.

case comprising several further steps of structured inquiry. The accretion of steps between Step 1 and Step 2 has, without a doubt, made the *Chevron* doctrine appear less simple than it might have once seemed, but acknowledging what I will refer to as *Chevron*'s Interstitial Steps makes the deference called for at Step 2 more understandable and even more defensible.

The remainder of this Foreword proceeds by first presenting the *Chevron* framework, focusing on principal aspects of Supreme Court doctrine that make *Chevron* Steps 1 and 2 the first and last steps on a staircase, with necessary Interstitial Steps in between. My purpose in Part I is to show that the prevailing legal justification for *Chevron* deference at Step 2 depends on courts ascending several additional steps after Step 1.[23] These Interstitial Steps that follow Step 1 speak to whether a court should make a legal determination that Congress has explicitly or implicitly granted the agency the authority to define ambiguous statutory terms. Part II then maps out more concretely what these Interstitial Steps entail and how they interact with each other, presenting the conceptual order that follows from *Chevron* and its progeny.

Judges and scholars have characterized the last several decades' worth of *Chevron* developments as "muddled" and as having caused "protracted confusion,"[24] but I show that the Court's prevailing *Chevron* analysis, when it is understood to include the Interstitial Steps, does have a clear structure to it, one that is designed to justify the ascent to deference. I also explain the advantages the Interstitial Steps model holds over alternative doctrinal frameworks that scholars have offered. Part III shows why Step 0 is misplaced. In Part IV, I explain why efforts to collapse *Chevron*'s two main steps into a single one are misguided. Unlike these alternatives, not only does a framework with Interstitial Steps bookended by distinct Steps 1 and 2 fit the legal rationale the Supreme Court has articulated for *Chevron* deference, but

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23 I certainly do not claim in this Foreword to offer a fully comprehensive treatment of all the academic commentary or judicial developments that have surrounded *Chevron* over the last several decades. Furthermore, I make no claims to articulate an empirical framework for how judges actually go about deciding cases involving issues of agencies' statutory interpretations, nor to evaluate consequentialist claims about the institutional virtues of *Chevron*, vis-à-vis alternative institutional norms. Rather, my aim is to offer conceptual clarity, from an internal perspective, to prevailing *Chevron* doctrine and its legal justification.

24 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 245 (2001) (Scalia, J., dissenting); Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005).

this framework also blunts the normative criticism that scholars and judges have leveled at *Chevron*.

I. THE *CHEVRON* STAIRCASE

Chevron's conceptual framework begins with a first step that should be neither controversial nor very confusing. If the law is clear, then that truly is "the end of the matter," and courts as well as agencies must conform to the law.[25] Determining whether the law clearly addresses the matter at hand is the responsibility of a court, using traditional methods of statutory interpretation.[26] Only if a court finds that the statute does not squarely resolve the question at hand should it proceed up the staircase toward Step 2.[27] To appreciate why the Supreme Court has insisted on additional steps between Step 1 and Step 2—the Interstitial Steps outlined below—it is important to keep in mind what Step 2 entails. It may seem obvious but it bears noting that Step 2 is what distinguishes and defines *Chevron* "deference."[28] In contrast to Step 1, where the courts make the authoritative determination of a statute's meaning, at Step 2 the agency has primary responsibility, subject to the longstanding constraint that agency actions are reasonable.[29] The judicial question at Step 2 becomes "whether the Administrator's view . . . is a reasonable one."[30] If it is, then the agency's view prevails.[31] Courts have a duty to uphold all reasonable agency constructions of relevant statutory provisions that are not clearly specified.[32]

The controversy that *Chevron* has engendered over the years stems from Step 2. Critics of *Chevron* ask why judges' views about the best meaning of an ambiguous statute must give way to the agency's views.[33] After all, since at least *Marbury v. Madison*,[34] the judiciary

25 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

26 *Id.* at 843 n.9.

27 *See id.* at 843.

28 *See id.* at 843, 845. Sometimes scholars and judges use the phrase "*Chevron* deference" to describe the entire two-step framework—and even on occasion to refer to Step 1. *See, e.g.*, Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 34 (2017) (referring to "*Chevron* deference interpretations at step one"); *see also infra* notes 163–69.

29 *Chevron*, 467 U.S. at 842–44.

30 *Id.* at 845.

31 *Id.* at 844.

32 *See id.* at 866.

33 *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) (worrying that *Chevron* doctrine "risks trampling the constitutional design by affording executive agencies license to overrule a judicial declaration of the law's meaning prospectively, just as legislation might"); CSX Transp. v. United States, 867 F.2d 1439, 1445 (D.C.

has claimed that it must serve as the final arbiter of the law's meaning,[35] a responsibility reinforced by section 706 of the Administrative Procedure Act ("APA") which instructs that "court[s] shall decide all relevant questions of law" and "interpret . . . statutory provisions."[36] Yet *Chevron* does not actually call for abdication of the judiciary's responsibility under section 706, as some have suggested,[37] because, at both steps in the *Chevron* framework, the judiciary is very much engaged in interpreting statutory provisions.[38] At Step 1, judges determine the clear meaning of the statute and, at Step 2, they make pivotal interpretive judgments about whether an agency's view falls within a reasonable range of constructions that an ambiguous statutory provision can support.[39]

Still, the role that courts perform at Step 2 is different than what normally would apply outside of the administrative setting. Ordinarily, to decide a case when an agency is not in the picture, a court would seek to give its own best interpretation of an ambiguous statute.[40] But when an agency is involved and has construed an ambiguous statute that it is charged with implementing, *Chevron*'s Step 2 tells the court not to offer its best interpretation but instead to defer to the agency's interpretation as long as it is reasonable.[41]

The *Chevron* Court itself explained why courts must defer. When an agency is involved, the role of the court typically needs to be more circumscribed because Congress has either explicitly or implicitly delegated authority to the agency to fill the gaps that exist within a statute:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to

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Cir. 1989) (Edwards, J., dissenting) ("The *Chevron* test is hard to square with the foregoing traditional views of the court's role in cases of statutory interpretation. . . . [I]t is the court, not the agency, that should be responsible for construing congressional statutes.").

34 5 U.S. (1 Cranch) 137 (1803).

35 *Id.* at 177.

36 5 U.S.C. § 706 (2012).

37 *See, e.g.*, *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) ("*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."); *see also supra* note 5.

38 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

39 *Id.*

40 *See Marbury*, 5 U.S. at 177.

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

> the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[42]

These kinds of explicit or implicit delegations change the responsibility of a court compared with other cases not involving an agency, not because of some extralegal judicial abdication but precisely out of full respect for the law Congress has enacted.[43]

The legally altered responsibility of a court is easiest to see when statutes explicitly delegate to an agency the authority to define broad or ambiguous terms. For example, the Affordable Care Act[44] requires that health insurance plans provide for "essential health benefits," but leaves undefined what specific health benefits will count as "essential."[45] The power to define these terms is expressly delegated to the Secretary of Health and Human Services: "the Secretary shall define the essential health benefits," subject to certain statutory constraints.[46] Similarly, the Dodd-Frank Act[47] expressly states that financial-related administrative agencies "shall jointly define the term 'qualified residential mortgage' for purposes of th[e] subsection" related to exemptions from credit risk retention regulation.[48] These provisions from the Dodd-Frank Act and the Affordable Care Act are but two examples of a longstanding practice of express congressional delegation of authority to define ambiguous terms. Surely it cannot be an abdication of judicial responsibility for the courts to defer in such instances to reasonable interpretations that agencies give to these ambiguous stat-

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42 *Id.* at 843–44 (footnote omitted); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520 (noting "the assumed delegation of 'law-making' discretion upon which *Chevron* rests"). It is true that, toward the end of its opinion in *Chevron*, the Supreme Court also made note of agencies' greater expertise and political accountability relative to judges. *Chevron*, 467 U.S. at 865–66. Such considerations, however, cannot provide independent legal justifications for *Chevron* deference as much as they reinforce the wisdom of judicial recognition in appropriate circumstances of an implicit delegation to "the agency charged with the administration of the statute." *Id.*

43 *See* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 28 (1983) ("[I]t would be violating legislative supremacy by failing to defer to the interpretation of an agency to the extent that the agency had been delegated law-making authority.").

44 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S.C.).

45 *See* 42 U.S.C. § 18022 (2012).

46 *Id.* § 18022(b)(1).

47 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

48 15 U.S.C. § 78o-11(e)(4)(B) (2012).

utory terms. Quite the contrary, a court doing anything other than deferring would be failing to honor the law itself, as these statutes expressly give the agencies the responsibility to define pertinent statutory terms.

When a statute expressly delegates to an agency the authority to define general or ambiguous terms, one of the Interstitial Steps that makes up the *Chevron* staircase begins to emerge, as it becomes clear that a court, in respecting the express delegation and using it as a reason to defer to the agency, entertains an intervening consideration between Step 1 and Step 2. That step may seem almost imperceptible, but the Court's opinion in *Chevron* noted how "an express delegation of authority . . . to elucidate a specific provision of the statute" gives rise to an obligation, at what is now known as Step 2, to give the agency's interpretation "controlling weight."[49]

The Court further explained that such a delegation of interpretive authority could also sometimes be implied.[50] Any implied delegation, though, depends on more than the mere existence of statutory ambiguity. Step 2 deference requires that a court also find that the agency construing an ambiguous statutory provision has been "charged with responsibility for administering the provision."[51] Proceeding to Step 2 is thus conditional not only on a finding that the statute is ambiguous (Step 1), but also on a showing of an explicit or implicit congressional delegation that the court is bound to honor.[52] Had the Environmental Protection Agency ("EPA") never been "charged with responsibility for administering the provision" at issue in *Chevron*, the Court would surely not have viewed itself as being bound by that agency's reasonable interpretation of the provision.[53]

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49 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

50 *Id.*

51 *Id.* at 865; *see also id.* at 844–45 (describing as a "well-settled principle[]" that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *id.* at 863 (emphasizing the importance of the Environmental Protection Agency ("EPA") being "the agency primarily responsible for administering this important legislation").

52 *Id.* at 844–45.

53 The relative imperceptibility of the Interstitial Steps implicit in *Chevron* can sometimes suggest that the mere existence of statutory ambiguity gives rise to Step 2 deference. For example, in *Brand X*, Justice Thomas's majority opinion might seem to suggest that merely passing over Step 1 impels the judge to ascend to Step 2: "In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005). To the extent that passages like this one imply that Step 2 deference becomes automatic upon a finding of ambiguity, they are not a full and faithful reading of *Chevron*, which does not indicate that the mere existence of an ambiguity by itself

Chevron recognizes what even a cursory review of the U.S. Code makes plain: Congress does not always make explicit and specific its grant of gap-filling authority with respect to broad or ambiguous statutory terms. Many statutes contain ambiguous terms without containing accompanying provisions like the examples noted above in the Affordable Care Act and the Dodd-Frank Act, which expressly grant agencies authority to define specified terms. On occasion, legislation grants agencies more general definitional authority. For example, the Small Business Jobs Act[54] authorizes the Secretary of the Treasury to "issue such regulations and other guidance as the Secretary determines necessary or appropriate to implement this chapter including *to define terms*, to establish compliance and reporting requirements, and such other terms and conditions necessary to carry out the purposes of this chapter."[55] In another instance, the International Lending Supervision Act[56] provides that "[t]he appropriate Federal banking agencies are authorized *to interpret and define* the terms used in this chapter."[57]

On still more occasions, statutes fail even to give express authorization to agencies to define terms. Nevertheless, they do frequently empower agencies to issue regulations that are necessary to effectuate the statutes they have been charged with administering. Examples are legion, but just a few instances illustrate the type of general, "necessary-and-proper" authority that Congress routinely grants to agencies:

- "The [Securities and Exchange] Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section."[58]
- "[T]he Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including

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constitutes a delegation of gap-filling authority. If that were the case, the *Chevron* majority would have never needed to distinguish between explicit and implicit delegations; every ambiguity would have been inherently a delegation. Importantly, even the quoted passage from *Brand X* implies that more than just statutory ambiguity is needed, as it indicates that Step 2 deference hinges on both a finding of statutory ambiguity and agency "jurisdiction" to administer the statute containing the ambiguous language. *Id.* The logic of the majority opinion in *Chevron* is clear: the reason courts must defer to reasonable agency interpretations at Step 2 is because of the existence of some kind of express or implied delegation of authority—that is, the passage over an intervening step or steps.

54 Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (codified in scattered sections of the U.S.C.).

55 12 U.S.C. § 5709 (2012) (emphasis added).

56 International Lending Supervision Act of 1983, 12 U.S.C. §§ 3901–3911 (2012).

57 *Id.* § 3909(a)(1) (emphasis added).

58 15 U.S.C. § 78u-6(j) (2012).

all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[59]

- "The [Commodity Futures Trading] Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section."[60]
- "The Administrator [of the Environmental Protection Agency] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."[61]

Although the *Chevron* opinion did not refer explicitly to a general statutory delegation like one of these—the last of which is found in the Clean Air Act,[62] the statute at issue in *Chevron*—such language giving agencies general authority to make binding rules provides a sound basis for courts to imply a delegation to the agency to define ambiguous or general terms.[63] *Chevron* did, after all, emphasize the "responsibility" Congress had given to the EPA to administer the Clean Air Act.[64] *Chevron* also expressly indicated that courts should ask if they have before them just "such a case" of implied authority before giving controlling weight to the agency's reasonable interpretations of ambiguous statutory provisions.[65] Such conditional language demarcates the existence of at least one step on the staircase between Step 1 and Step 2.

In *United States v. Mead Corp.*,[66] the Supreme Court confronted an agency interpretation contained in informal ruling letters, and the Court's majority concluded that such letters provide an insufficient basis upon which to grant *Chevron* deference.[67] The majority emphasized *Chevron*'s intervening inquiry about an explicit or implicit delegation of authority to define ambiguous statutory terms with the "force of law."[68] As indicated in *Chevron*, grants of explicit authority to define general terms provide a plain justification for moving to Step

59 26 U.S.C. § 7805(a) (2012).

60 7 U.S.C. § 26(i) (2012).

61 42 U.S.C. § 7601(a)(1) (2012).

62 Clean Air Act, 42 U.S.C. §§ 7401–7671q (2012).

63 *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007) (treating a general statutory grant of authority "to prescribe necessary rules, regulations, and orders" as giving the agency "the power to fill . . . gaps" in "the scope and definition of statutory terms").

64 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 845–46 (1984) (quoting Train v. Nat. Res. Def. Council, Inc., 421 U.S. 60, 64 (1975)).

65 *See Chevron*, 467 U.S. at 843–44.

66 533 U.S. 218 (2001).

67 *Id.* at 234.

68 *See id.* at 226–31.

2, but *Mead* reminded courts that *Chevron* also acknowledged that Congress can implicitly delegate interpretive authority to agencies.[69] For the *Mead* majority, "*Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference."[70]

Given that an inquiry into the agency's administrative responsibility was baked into the *Chevron* Court's opinion itself, *Mead* can hardly be said to have made an "avulsive change" in the *Chevron* framework, as Justice Scalia claimed in his *Mead* dissent.[71] The *Mead* opinion may well have generated some "confusion"[72] for scholars and even judges, as Scalia predicted, but it is difficult to see how it was *Mead*, and not *Chevron*, that created what Scalia described as "a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so."[73] Contrary to Justice Scalia's criticism, the need for finding a statutory delegation followed from *Chevron* itself and its conditioning of the controlling weight of an agency's reasonable interpretation on the existence of an express or implied delegation to the agency—that is, on surmounting one or more steps between Step 1 and Step 2.[74]

Mead merely attempted to add some clarity to those Interstitial Steps. Whether it succeeded has been subject to debate. Still, the *Mead* Court did articulate formal indicia for the conditions that give rise to Step 2 deference, declaring that the express grant of either rulemaking authority or formal adjudication authority provides "a very good indicator of delegation meriting *Chevron* treatment."[75] *Mead* also generally required the agency to use its rulemaking or formal adjudication authority in order to make an interpretation of a statute that would qualify for *Chevron* deference.[76] All of this is actu-

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69 *Id.* at 227, 229, 237.

70 *Id.* at 237.

71 *See id.* at 239 (Scalia, J., dissenting).

72 *Id.* at 245; *see also* Bressman, *supra* note 24, at 1445, 1475 (claiming "*Mead* has muddled" the *Chevron* doctrine); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 355 (2003) (discussing the "confusion and error" created by *Mead*).

73 *Mead*, 533 U.S. at 240 (Scalia, J., dissenting).

74 *See* Alexander "Sasha" Volokh, *The Shadow Debate over Private Nondelegation in* DOT v. Association of American Railroads, 2014–2015 CATO SUP. CT. REV. 359, 381 n.111 ("Deference to agencies has always been rooted in concepts of implicit delegation—*Chevron* deference explicitly so." (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984))).

75 *Mead*, 533 U.S. at 229.

76 *Id.* at 226–27. *Mead*'s requirement that agencies actually use their rulemaking or adjudi-

ally quite clear, making *Mead* an advance in doctrinal illumination because it specifies conditions under which courts can properly imply a delegation of interpretive authority to the agency.[77] The less-than-clear aspect of *Mead* lay in its statement that "other statutory circumstances" might also justify implying a delegation of authority for "the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."[78] *Mead* gave little indication of what these other circumstances might be, with the Court making a point to recognize that they will likely vary because statutes themselves vary.[79] Despite the unresolved nature of what other circumstances would justify reaching Step 2, *Mead* did clarify that, absent an express delegation of term-defining authority, the judicial task before moving from Step 1 to Step 2 is to determine if such a delegation should be implied.[80]

Justice Scalia favored simplicity. In his dissent in *Mead*, he seemed to pine for earlier days when *Chevron* had just two steps (even though, as indicated above, it never really did). For Justice Scalia, if a statute proved ambiguous and incapable of resolving the question at hand, then a court would simply defer to the reasonable and authoritative interpretation an agency gives "to the statute it is charged with enforcing."[81] In other words, Justice Scalia favored what

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catory authority can be justified as the necessary effectuation or use of the authority that the courts look to in order to imply a broader gap-filling authority. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016). This requirement also seems to promote procedural regularity and circumspection, both of which are presumably desirable.

77 This does not mean *Mead* cannot be questioned for its seeming emphasis on procedural formality as a basis for implying delegation. Nevertheless, the decision does have an internal logic to it; namely, because courts must decide when to imply a delegation to an agency to construe or define binding statutory language, it presumably will be easiest to do so when Congress has given the agency the power to make binding general decisions and the agency is exercising that power. It will presumably be more difficult for a court to imply a delegation of interpretive authority in cases where agencies either have never been given authority to make binding decisions or are not relying on that authority to define or construe the ambiguous statute.

78 *Mead*, 533 U.S. at 229.

79 *See id.* at 236–37.

80 *See id.* at 229 (explaining that a court's obligation to defer to a reasonable agency interpretation of an ambiguous statutory provision depends on whether it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law"); *see also* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007) (stating that "the ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority").

81 *Mead*, 533 U.S. at 239–40 (Scalia, J., dissenting).

he described as a "general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce."[82] This sounds simple—and it is *simpler* than what the majority in *Mead* articulated—but, importantly, it too has embedded within it an interstitial step. Even for Justice Scalia, clearance of Step 1 did not automatically mean the agency should receive deference for its reasonable interpretation of the statute. On Justice Scalia's account, only a "general presumption" would favor getting from Step 1 to Step 2[83]—and a "presumption," by definition, can be overcome by some *other circumstances*. Much as with the majority in *Mead*, though, Justice Scalia failed to make clear what these other circumstances might be. In addition, even for Justice Scalia, judges first must ascertain whether the statute the agency is construing is one that the agency has been "authorized to enforce"—an intervening step that may seem altogether imperceptible because it will be satisfied in most cases, but nevertheless it does call for an inquiry that occupies a position between Step 1 and Step 2.[84] The existence of just such an intervening step becomes clearer in disputes involving transgovernmental statutes, such as the APA, Freedom of Information Act ("FOIA"),[85] and National Environmental Policy Act ("NEPA").[86] When the terms of these transgovernmental statutes fail to speak precisely and clearly to the question at hand, the existence of the intervening step inherent in Justice Scalia's precondition becomes apparent, and courts have refused to extend *Chevron* deference in these instances.[87]

The requirement that the agency must be charged with implementing the statute in question is among the several circumstances or "indicators" that inform courts' decisions about whether to ascend to

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82 *Id.* at 239.

83 *Id.*

84 *Id.* Justice Scalia has also indicated that the agency's interpretation must be "authoritative," whereby it "represent[s] the official position of the expert agency," interposing yet another intervening step. Christensen v. Harris Cty., 529 U.S. 576, 590–91, 590 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment).

85 Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012).

86 National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370m-12 (2012 & Supp. III 2015).

87 *See, e.g.*, Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (refusing to defer in a case involving the APA); Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1285 n.15 (1st Cir. 1996) (refusing to defer in a case involving NEPA); Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice, 816 F.2d 730, 734 (D.C. Cir. 1987) (refusing to defer in a case involving FOIA). As Justice Scalia elsewhere noted, *Chevron* deference can only apply "if the matter at issue is one for which the agency has responsibility"; it does not apply "to matters that are not committed to the agency's administration." Scalia, *supra* note 42, at 519.

the top of the *Chevron* staircase.[88] It is surely not the only other indicator, though, because, as already noted, the majority in *Mead* recognizes "that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it."[89]

The Court's recognition of "different reasons" for determining whether to apply *Chevron* deference helps explain yet another intervening step: the so-called "major question" or "extraordinary case" exception.[90] This step was evident in *King v. Burwell*,[91] where the Court faced the question of whether the Affordable Care Act's provision for tax credits for insurance sold on exchanges "established by the State" included exchanges created by the federal government.[92] The Internal Revenue Service ("IRS") said it did.[93] The Court agreed, but did so without giving *Chevron* deference to the IRS interpretation.[94] In fact, the *King* Court's treatment of *Chevron* was brief and far from stepwise.[95] The Court never addressed Step 1 directly, although it could not have resolved the case as it did at Step 1, for no credible claim could be made that exchanges "established by the State" unambiguously encompassed exchanges established by the federal government. The statute was, if anything, unambiguous in a direction *opposite* of the Court's conclusion.

Had the *King* Court openly grappled with Step 1, the best it would have been able to muster was to conclude that the statute was ambiguous, explaining why by reference to the same account it gave for its ultimate judgment that "established by the State" encompasses both state or federal governments.[96] Then the Court could have moved upward toward Step 2. If it had reached the top of the *Chevron* staircase, all it would have needed to do was find that the IRS interpretation was reasonable to reach the same resolution it ultimately reached, upholding the Obama Administration's implementation of

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88 *See Mead*, 533 U.S. at 231, 237.

89 *Id.* at 238.

90 See Sunstein, *supra* note 2, at 236–42, for background on the "major question" exception.

91 135 S. Ct. 2480 (2015).

92 *Id.* at 2487.

93 *Id.* at 2488.

94 *Id.* at 2488–90.

95 *See id.* at 2488–89.

96 For a discussion of why the Court could appropriately view such a statutory provision as ambiguous, see Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928333 (arguing that judges may be justified in demanding greater evidence of statutory clarity in high-stakes cases).

the Act. The Court's very explanation for its own reading of the statute would have provided ample basis for concluding that the IRS interpretation was at least a reasonable one.[97]

The *King* Court, however, did not invoke *Chevron* deference—that is, it did not reach the top of the staircase. Chief Justice Roberts's majority opinion did acknowledge *Chevron*'s two steps:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[98]

But the Chief Justice did not find any implicit gap-filling delegation in the Affordable Care Act with respect to the relevant statutory provision.[99] The reason had nothing to do with the lack of rulemaking authority or its exercise, as articulated in *Mead*. Rather, the Chief Justice pointed to *FDA v. Brown & Williamson Tobacco Corp.*,[100] where the Court stated that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[101] The Chief Justice in *King v. Burwell* continued:

> 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. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.[102]

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97 This was, incidentally, the approach taken by the Fourth Circuit in the case below. King v. Burwell, 759 F.3d 358, 375–76 (4th Cir. 2014).

98 *King*, 135 S. Ct. at 2488 (citations omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

99 *Id.* at 2488–89.

100 529 U.S. 120 (2000).

101 *King*, 135 S. Ct. at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).

102 *Id.* at 2489 (citation omitted).

The *King* Court concluded that "[t]his is not a case for the IRS. It is instead our task to determine the correct reading of [the statute]."[103] In this way, *King* made plain yet another Interstitial Step to be cleared to reach Step 2. The Court showed the existence of, to borrow *Mead*'s terms, one "other circumstance" that can make it implausible to think that Congress ever intended to leave a particular statutory provision's meaning up to an agency, even in the face of statutory ambiguity.[104]

What is it exactly about "extraordinary circumstances" of the kind in *King* that makes it so implausible to imply a delegation to the agency? The reasons given by Chief Justice Roberts are not entirely satisfying on their face. After all, courts assume responsibility when confronted with questions of law, not ones of economics or politics.[105] Questions of "deep 'economic and political significance'"[106] almost axiomatically would seem better addressed by an administrative agency with greater expertise and political accountability.[107] Even admitting that the IRS "has no expertise in crafting health insurance policy,"[108] as the *King* Court did, it is undoubtedly true that courts have no such expertise either. Why, then, was this case so clearly one for the court, and not the agency, to determine the meaning of the statute?

The answer almost certainly lies not in the criteria embedded in *Chevron*'s steps themselves, whether the terminal or intervening ones, but rather in what follows from ascending, or not ascending, the staircase. If all the steps are cleared and a court reaches Step 2, then the

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103 *Id.*

104 Some commentators have suggested that the majority in *King* simply bypassed *Chevron* altogether, invoking Step 0. *See, e.g.*, Leandra Lederman & Joseph C. Dugan, King v. Burwell*: What Does It Portend for* Chevron*'s Domain?*, 2015 PEPP. L. REV. 72, 75 (claiming that "in just a few sentences, the majority dispensed with *Chevron*"); Michael Dorf, *The Triumph of Chevron Step Zero?*, DORF ON LAW (July 27, 2015), http://www.dorfonlaw.org/2015/07/the-triumph-of-chevron-step-zero.html (arguing that the majority opinion in *King* "offers a classic *Chevron*-step-zero account"). Yet, as explained further in Part III, the Court could not properly bypass Step 1; no court can, ever. If a statute is unambiguous, neither a court nor an agency can lawfully disregard or bypass it. What the *King* Court bypassed was simply an explicit analysis labeled in Step 1 terms. The majority made it abundantly clear in its opinion that it rejected the view that exchanges "established by the State" in the statute unambiguously precluded exchanges established by the federal government. The Court concluded that the statute was ambiguous at Step 1 but that it could not reach Step 2 because of an Interstitial Step.

105 The Court has articulated a so-called political question doctrine that makes certain claims nonjusticiable. *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

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

107 Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1609–10 (2016).

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

agency's reasonable interpretation will control. Placing control with the agency also means, however, that the interpretation could change over time, such as in a later administration.[109] But when a court cannot clear a step on the way to the top of the *Chevron* staircase, and thus never reaches Step 2, the result is that the court is no longer duty-bound to follow the agency's reasonable interpretation. Instead, it can decide for itself what the statute means, based on its best, all-things-considered judgment. A court may still decide to take notice of the agency's interpretation, and it may even find itself persuaded by it—in accord with noncontrolling *Skidmore* deference[110]—but ultimately the court will make the final call, yielding an outcome that cannot be changed by a subsequent administration.[111]

In *King*, the immediate outcome in the case did not turn on whether the Court decided on its own or whether it accorded the agency deference under either *Skidmore* or *Chevron*. The *King* majority and the agency agreed on how the relevant statutory provision ought to have been construed.[112] But whether the Court decided itself or deferred to the agency mattered greatly in the longer term. When the Court fails to reach the top of the *Chevron* staircase and therefore decides for itself what a statute means,[113] the Court's interpretation will have a strong stare decisis effect, fixing the meaning of the statute unless or until Congress amends the legislation.[114] By contrast, whenever any court reaches the top of the *Chevron* staircase and decides the case at Step 2, the agency's reasonable decision is one that the *courts* must respect, but it need not control the *agency* in the future.

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109 *See, e.g.*, Scalia, *supra* note 42, at 518–19.

110 Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

111 Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) (contrasting instances where "the agency remains the authoritative interpreter"—i.e., Step 2—with those involving "agency interpretations to which *Chevron* [deference] is inapplicable," and explaining that only in the former cases does the agency have the authority to change its interpretation, within the bounds of reasonableness).

112 *See supra* notes 93–94 and accompanying text.

113 A court finds itself in this situation either when it determines that there is one clear meaning to the statute—of the kind that Step 1 asks it to search for using all the traditional statutory interpretation tools—or when the court gives a statute the best meaning it can because of the failure to pass one of the Interstitial Steps.

114 *See Brand X*, 545 U.S. at 984. *Brand X* does misleadingly state that a prior court's interpretation of a statute prevails over a later agency interpretation "*only* if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982 (emphasis added). If the prior court also fails to reach Step 2 because of one of *Chevron*'s Interstitial Steps, then its prior interpretation would also constrain the agency for the same reasons underlying the treatment the *Brand X* Court gives to judicial decisions resolved at Step 1: a court in such instances has no justification to defer to an agency's interpretation.

Rather than being fixed, the meaning an agency properly gives to a statutory provision will be susceptible to change, especially in any new administration. As *Chevron* made clear, "[a]n initial agency interpretation is not instantly carved in stone."[115]

The upshot is that, in *King*, had the Supreme Court not stopped in the middle of the staircase, and had it instead proceeded to Step 2 and awarded *Chevron* deference to the IRS, a new administration would only have had to reopen the matter and issue a new rule construing exchanges "established by the State" to mean just what those words say: only exchanges established by state governments.[116] Presumably that would have been a reasonable statutory interpretation, given its literal alignment with the statute's text.[117] The practical result, of course, would have been to undermine the larger purpose of the Affordable Care Act, imposing consequences of "deep economic and political significance"—a result that, once contemplated, made it extremely difficult to justify implying that Congress delegated to the agency to make (and potentially change) any such determination about the meaning of the pivotal language "established by the State."[118]

When an interpretive question raises extremely consequential stakes, like those implicated in *King*, it becomes untenable to conclude that Congress meant to delegate to the agency the authority to determine, and then possibly to change at a later date, the statute's meaning. Rather than casting doubt on *Chevron*, the *King* decision actually reaffirms *Chevron*'s core structure: Step 1, followed by Interstitial Steps needed to justify an implied delegation to the agency, followed by Step 2.

II. MAPPING *CHEVRON*'S INTERSTITIAL STEPS

From its very origins, the *Chevron* Court's reasoning anticipated the need for courts to encounter steps that lie between the finding of statutory ambiguity and the granting of controlling weight to an agency's reasonable interpretation of the statute.[119] The *Chevron*

115 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984).

116 *See* King v. Burwell, 135 S. Ct. 2480, 2490 (2015).

117 *See id.* at 2490.

118 *Id.* at 2488–89. Kristin Hickman helpfully indicates that the extraordinary stakes involved in *King* may also have led to the muting of any differences over how the Court handled *Chevron* in this case, and she suggests that *King* may well "fade into obscurity as doctrinally insignificant with respect to *Chevron*'s scope." Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 66.

119 *See Chevron*, 467 U.S. at 843–44.

Court did not fully explicate the express or implied delegation given to the EPA, presumably because the Interstitial Steps in that case were so effortless to ascend; however, the Court did repeatedly stress the delegated power that the EPA possessed:

- "[T]he listing of overlapping, illustrative terms [in the statute] was intended to enlarge, rather than to confine, the scope of the agency's power to regulate particular sources in order to effectuate the policies of the Act."[120]
- "[T]he agency [is] primarily responsible for administering this important legislation . . . ."[121]
- Deference is owed to "an agency to which Congress has delegated policymaking responsibilities."[122]

The Court's justification for holding itself duty-bound to follow the EPA's reasonable interpretation of "source" in the Clean Air Act centered squarely on a recognition of a legislative delegation of definitional authority.[123] That justification, by its very nature, necessitates the passage over some intervening steps between Step 1 and Step 2.

As we have seen, post-*Chevron* decisions, including *Mead* and *King*, have marked out these intervening steps more distinctly.[124] It is now possible to summarize a series of key questions that courts need to confront before concluding they are duty-bound to defer to the agency's reasonable definition of an ambiguous statute: Does the legislation contain an express delegation of gap-filling authority? Does the legislation implicitly delegate gap-filling authority, such as by authorizing the agency to engage in rulemaking or formal adjudication? If so, has the agency used that rulemaking or adjudication authority in pronouncing its interpretation of the statute? Do other circumstances indicate that Congress did or did not intend the agency to have gap-filling authority? For example, does the statute apply across the federal government or is it one for which the agency making an interpretation has been specifically charged with the responsibility for implementing? Do extraordinary economic or political implications follow from the resolution of the statutory ambiguity, such that it is implausible to conclude that Congress intended the agency to resolve the issue?

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120 *Id.* at 862.

121 *Id.* at 863.

122 *Id.* at 865–66.

123 *See id.* at 860–62.

124 *See supra* Part I.

These questions represent additional but necessary conditions that must be satisfied for a court to determine that Congress explicitly or implicitly delegated the agency primary authority to define ambiguous statutory terms, and thus for a court to award deference at Step 2. These additional conditions constitute *Chevron*'s Interstitial Steps, ordered in the following decision-tree fashion to reveal the coherent structure reflected in *Chevron* jurisprudence:

Step 1: Are the pertinent statutory provisions clear?[125]

Yes: The court must apply, and the agency must conform to, the meaning of the statute. Analysis concludes and stare decisis adheres.

No: Move to next step.

Step 1.1: Did Congress expressly delegate gap-filling authority to the agency?[126]

Yes: Proceed directly to Step 2.

No: Move to next step.

Step 1.2: Is the ambiguous statutory provision at issue so vital to major economic or political issues, or does it present other extraordinary circumstances, such that it is implausible that Congress would have wanted an agency to determine (and thus also potentially to change) the meaning of the provision?[127]

Yes: The court decides. Skidmore deference may still be afforded. Analysis concludes and stare decisis adheres.

No: Move to next step.

Step 1.3: Has Congress given the agency authority to engage in rulemaking or formal adjudication?[128]

Yes: Move to next step.

No: Proceed directly to Step 1.5.

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125 *See supra* notes 25–26 and accompanying text. Daniel Hemel and Aaron Nielson call attention to D.C. Circuit Court decisions that purport to require agencies to have expressly asserted that the answer to this question is "no" in order to advance toward Step 2. Hemel & Nielson, *supra* note 21, at 760. Although such an additional step is not compelled by *Chevron*, I acknowledge the possibility of the Supreme Court in the future accepting an additional step or steps to the structure presented here. I limit this structure to salient questions presented to date by the Court.

126 *See supra* notes 42–43, 49–52 and accompanying text. This step only asks about an express delegation of interpretive authority to an agency because Steps 1.2 to 1.6 provide the framework for a court to determine whether it would be justified in implying such a delegation.

127 *See supra* notes 100–03 and accompanying text.

128 *See supra* note 75 and accompanying text.

Step 1.4: Did the agency's interpretation stem from its proper use of its authority to engage in rulemaking or formal adjudication?[129]

Yes: Proceed directly to Step 1.6.

No: Move to next step.

Step 1.5: Do other circumstances indicate that Congress intended the agency to fill gaps in ambiguous statutory provisions?[130]

Yes: Proceed directly to Step 2.

No: The court decides. *Skidmore* deference may still be afforded. Analysis concludes and stare decisis adheres.

Step 1.6: Do other circumstances indicate that Congress intended for the courts rather than the agency to fill gaps in ambiguous statutory provisions (such as with transgovernmental statutes)?[131]

Yes: The court decides. *Skidmore* deference may still be afforded. Analysis concludes and stare decisis adheres.

No: Move to next step.

Step 2: Is the agency's interpretation reasonable?[132]

Yes: The court must uphold the agency's interpretation, even if it is not the same as the interpretation the court would have made. The agency is free to change its interpretation later to another reasonable interpretation.

No: The court remands to the agency. The agency may seek to make another interpretation that falls within the zone of reasonableness.

Figure 1 graphically represents these various steps.

For some lawyers, judges, and scholars, enumerating *Chevron*'s Interstitial Steps in such a comprehensive fashion may well serve to increase their overall anxiety about the *Chevron* framework, perhaps even making some critics even more resolved to abandon it. Such reactions would be understandable if television-commercial-style claims that *Chevron* could resolve all questions of administrative law in "just two easy steps" could be believed.[133] Yet, *Chevron* could no more do that than most kitchen gadgets hawked on television can make gourmet cooking easy. Statutory interpretation can be just plain difficult.

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129 *See supra* note 76 and accompanying text.

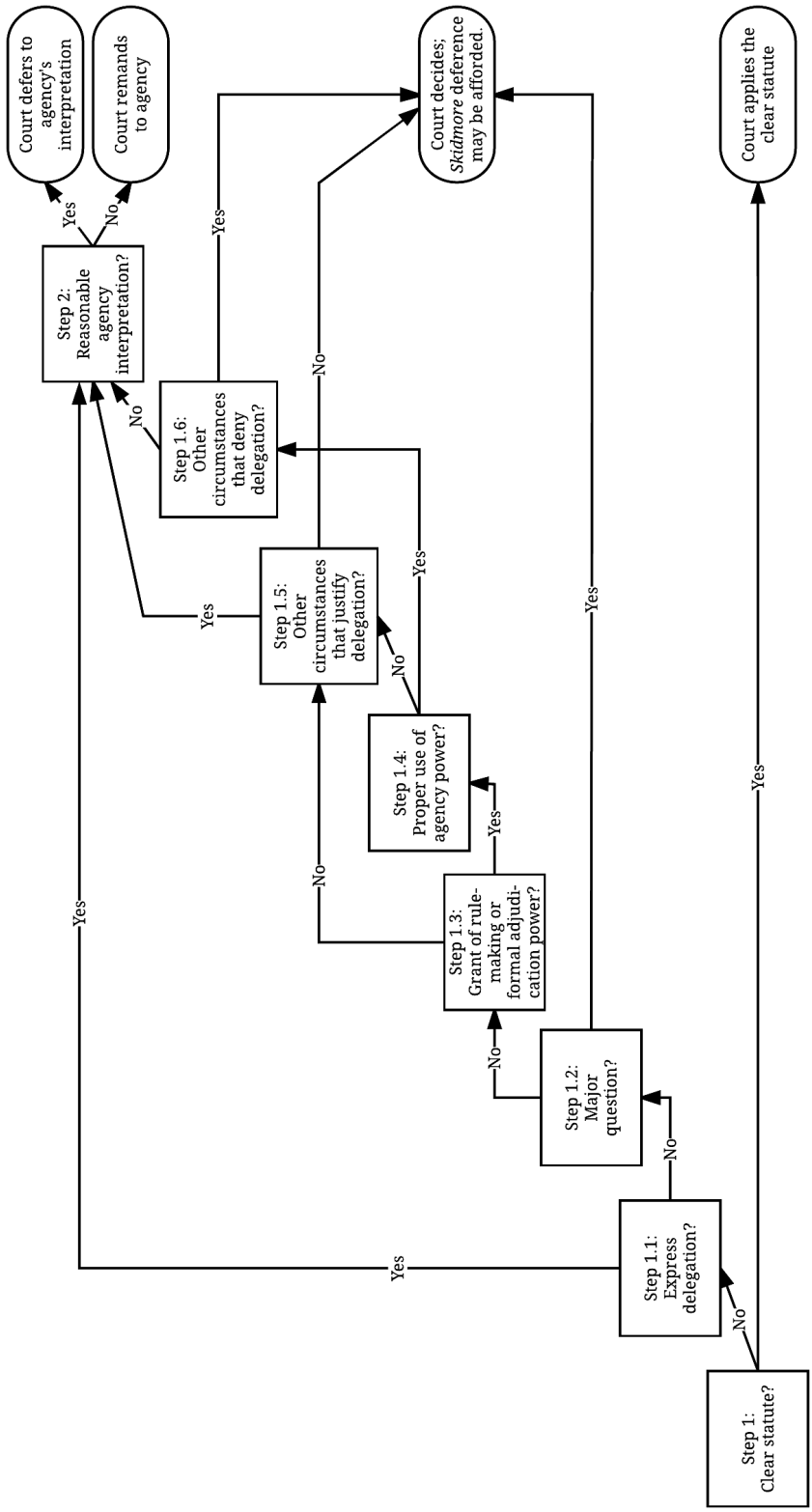
130 *See supra* notes 78–79 and accompanying text.

131 *See* SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 35–36 (2d ed. 2013) (suggesting possible circumstances weighing against *Chevron* deference). Presumably the "major question" or "extraordinary circumstance" test, situated at Step 1.2, could be characterized as one of these "other circumstances."

132 *See supra* notes 29–32 and accompanying text.

133 *See supra* text accompanying note 7.

FIGURE 1: THE *CHEVRON* STAIRCASE



Rather than offering any persuasive reason for abandoning *Chevron*, explicating its Interstitial Steps in a decision-tree format only brings greater clarity to the legal analysis. Whereas others have sometimes accused *Chevron*'s progeny of creating a muddled mess,[134] the decision tree shows that it is possible to see more clearly the structure in the doctrine, however complex it might appear. Articulated complexity is, after all, better than muddled simplicity.

Not only is any increase in complexity more than made up for by doctrinal clarity, but it can be readily accepted for at least two other reasons. First, a mapping of Interstitial Steps merely shows the full range of legal questions that confront courts before they can reach Step 2; it does not imply that courts do, or necessarily should, run through the entire list of Interstitial Steps when they grapple with an agency's statutory construction. Some steps may be quickly passed over. In many instances, certain steps can be easily ignored in a given court's written opinion, as they could be in *Chevron* itself. Steps 1.1 and 1.2, for example, may be easily skipped in the typical case involving neither an express delegation of authority, akin to the Affordable Care Act's "essential health benefits" provisions,[135] nor a major question of the kind involved in *King*.[136] In most cases, Steps 1.5 and 1.6 will also not be implicated. The bulk of the cases will, presumably, involve the well-recognized *Mead* steps (Steps 1.3 and 1.4) concerning the agency's use of rulemaking or formal adjudication.[137] Both the Supreme Court and the lower courts seem able to work through these steps in a rather practiced, even at times "rote," fashion.[138]

Second, as noted at the outset of this Foreword, even *Chevron*'s original two steps were nothing if not complicated. Neither could be easily or meaningfully captured in a stepwise fashion. But assuming they could, each would surely amount to more than a single step. Inside Step 1, for example, are nested many subsidiary steps, each to reflect the major theories of statutory interpretation (i.e., textualism, intentionalism, and purposivism) and varied uses for the "traditional tools of statutory construction" that courts are supposed to rely on at that first step.[139] Producing just a list of major sources of legislative

134 *See, e.g.*, Bressman, *supra* note 24.

135 *See* 42 U.S.C. § 18022 (2012).

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

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

138 *See* Hickman, *supra* note 21, at 539, 549; *see also* Sunstein, *supra* note 2, at 193 ("When agency decisions have the force of law or follow a formal procedure, *Chevron* continues to supply a simple rule . . . .").

139 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

history and their corresponding probative value would be quite a feat. If simplicity is what one seeks, it might be best to steer clear of statutory interpretation altogether. The upshot for *Chevron* is that, by comparison to the complexity built into just Step 1, the marginal complexity added by recognizing the Interstitial Steps seems hardly great at all, and it does bring conceptual clarity to the justification for Step 2 deference.

The six Interstitial Steps presented above also have more flexibility than it might seem. They are not rigid in the sense that they can be ascended in more than just the order presented here. Although it might generate some additional or unnecessary effort, a court could, for example, take up the *Mead* steps (1.3 and 1.4) before the *King* step (1.2). In addition, all six steps could be collapsed synthetically into a single intervening step: *Did Congress explicitly or implicitly delegate clarifying or gap-filling authority to the agency?* The answer to this question determines whether a court should even contemplate giving an agency's interpretation controlling weight by moving from Step 1 to Step 2. Distilled into this single question, the six Interstitial Steps collectively form the middle of a three-part doctrinal structure: Step 1, the Interstitial Steps, and Step 2.

It is undeniable that there are other ways to order the analysis reflected in the Interstitial Steps, beyond the structure shown in Figure 1. For example, assuming a relevant statutory provision is ambiguous, a court could find that Congress delegated clarifying or gap-filling authority to the agency if either one of the following two conditions hold:

1. If the statute expressly delegates definitional or interpretive authority to the agency; or
2. If either of the following conditions holds:
    a. Both (i) the agency has been generally delegated the authority to make binding law and is exercising that authority, and (ii) the statutory issue presents no "major question" nor other circumstances supporting the inference that Congress meant for the courts, rather than the agency, to decide the question; or
    b. Notwithstanding 2(a), other circumstances support an implied delegation of interpretive authority to the agency.

An agency operating under these conditions could be said to possess an express or an implied delegation of interpretive authority, and

courts should therefore defer to its reasonable interpretations at Step 2.[140]

The existence of other ways of organizing the Interstitial Steps does not deny the essential point that, in some fashion or another, a court confronting an agency interpretation of an ambiguous statute must consider a series of factors the Supreme Court has identified for treating the agency as having exercised delegated authority and thus becoming entitled to *Chevron* deference. Although perhaps never quite articulated in a stepwise fashion as in this Foreword, *Chevron*'s Interstitial Steps have long been a core part of the Court's framework, as even *Chevron* itself anticipated.[141] Recognition of the doctrinal place for the Interstitial Steps, however ordered, would go some distance toward removing the confusion that judges and scholarly observers have claimed follows from *Mead* and *King*.[142] As will be indicated in Part V, the Interstitial Steps approach also provides a response to those who assert that *Chevron* analysis amounts to an abdication of judicial responsibility.

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140 It is possible to describe these conditions in still other ways as well. For example, one might well ask a single question: Did Congress intend to leave the resolution of relevant statutory meaning to the agency? Then, answering that question might follow roughly along these lines: "No" if (1) the statute is clear on its own, based on all the traditional tools of statutory construction; (2) the statute is not clear but the resolution of statutory meaning is so vital that Congress would not have wanted it to be left to the agency and hence changeable from administration to administration; or (3) Congress had never given the agency any authority to make binding decisions. "Yes" at all other times, as long as the agency's interpretation of the statute (1) follows from the exercise of the agency's authority to make binding decisions and (2) is reasonable.

141 *See supra* notes 49–52, 68–73 and accompanying text.

142 To be clear, the claim here is simply that *Chevron* and its progeny provide a much clearer conceptual ordering than has been generally thought, not that the Supreme Court or all other federal courts have always consistently or coherently handled cases involving statutory interpretation in the agency context. The conceptual ordering presented in this Foreword still leaves much room for judicial discretion; the tests articulated at many of the steps in this structure are certainly not self-executing. As noted in the text, the ordering does not erase all the difficulties inherent in statutory interpretation. Even with the ordering suggested by the *Chevron* staircase, with its Interstitial Steps sandwiched between Steps 1 and 2, there remain genuine questions for any court to confront, such as whether a particular statutory provision is ambiguous, whether a statutory question is sufficiently central to raise a major question, or whether other circumstances exist to support or reject an implied delegation to an agency. No claim of complete doctrinal determinacy or total interpretive ease should be implied from the stepwise mapping provided in this Part. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring in part and concurring in the judgment) (acknowledging that statutory interpretation under *Chevron* "is not always an easy matter"); *see also supra* notes 10–12 and accompanying text.

III. WHY "STEP 0" IS MISPLACED

To many readers, the Interstitial Steps mapped out in Part II will share an important resemblance to another prevailing doctrinal framework that also breaks *Chevron* analysis into three parts by inserting a Step 0 before Steps 1 and 2.[143] Without question, *Chevron*'s Interstitial Steps do bear an affinity with, and even could be said to overlap with, what other scholars have characterized as Step 0. But the Interstitial Steps are placed *interstitially* between Steps 1 and 2 rather than before them. In many cases, it will be possible to reach identical results regardless of where the additional analysis is situated in a court's analysis. Yet, the notion of a Step 0 that precedes Step 1 is ordinally and conceptually erroneous.

Those administrative law scholars who have articulated the notion of a Step 0 admittedly have provided much valuable insight about factors courts should consider in deciding whether to imply a delegation of interpretive authority—and, in the main, their analysis is compatible with the argument presented here about questions a court should ask before finding a delegation to an agency that would justify the kind of obligatory deference called for at Step 2. Unfortunately, the placement of these factors within a step that precedes Step 1 has proven to be a source of confusion and a missed opportunity to recognize the substantial role that *Chevron* has left for courts in resolving questions of law in disputes that involve administrative agencies.

Scholarly articulation of a Step 0 predates the Supreme Court's decision in *Mead*. Grappling with earlier decisions such as *Christensen v. Harris County*,[144] Thomas Merrill and Kristin Hickman offered a prescient and influential article articulating a set of operating principles which amount, in their words, to a "step zero," or "the inquiry that courts should undertake *before moving on to step one of Chevron*."[145] The principles they articulated bear a close affinity with what emerged from *Mead* and with what I have characterized in this Foreword as *Chevron*'s Interstitial Steps.[146] Although Step 0 principles by definition precede Step 1, Merrill and Hickman acknowledge that the need for these principles actually derives from the need to justify *Chevron*'s "mandatory deference" at Step 2.[147] Merrill and Hickman argue that the best justification for Step 2 deference could be found in

143 *See, e.g.*, Merrill & Hickman, *supra* note 13, at 836; *supra* text accompanying note 13.

144 529 U.S. 576 (2000).

145 Merrill & Hickman, *supra* note 13, at 845–48, 873 (emphasis added).

146 *See id.* at 873–74.

147 *Id.* at 873.

the notion of "presumed congressional intent" to have courts defer based on an "implied delegation of interpretational authority."[148] That implied delegation should come, they argue, from finding at Step 0 that a statute "charges an agency with taking action that binds persons outside the agency with the force of law."[149] What they do not explain adequately, though, is why a determination that they recognize is needed to justify deference under Step 2 should precede Step 1.

Cass Sunstein has written a highly influential and insightful article critiquing the complexity that he claims has come to constitute Step 0.[150] Writing after *Mead* and *Barnhart v. Walton*,[151] Sunstein put forward the claim that these decisions created a "Step Zero inquiry,"[152] one that, as in Merrill and Hickman's articulation, constitutes "the initial inquiry into whether the *Chevron* framework applies at all."[153] Sunstein argues that this inquiry has become so complicated that it "serves no useful purpose,"[154] and he offers arguments for simplifying that inquiry—arguments that presumably he might also make against the six Interstitial Steps.[155] But as a merely descriptive, doctrinal matter, Sunstein never explains why the "inquiry" he critiqued belongs before Step 1, even though he, like Merrill and Hickman, rightly considers this inquiry's main purpose to be one of justifying the *Chevron* deference afforded at Step 2.[156]

Doctrinal clarity dictates placing *between* Steps 1 and 2 the kind of inquiry that travels under the banner of Step 0, because it is precisely—and only—at that point in a court's analysis that the need for such an inquiry arises. Step 1 certainly does not demand any preliminary inquiry along the lines of Step 0. Only Step 2 does, which is why such a preliminary inquiry occurs as a series of Interstitial Steps, not as a Step 0.

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148 *Id.* at 888; *see also id.* at 873 (treating *Chevron*'s "doctrine of mandatory deference [as] based on an implied delegation of interpretational power from Congress").

149 *Id.* at 920. Merrill and Hickman properly reject the notion that the basis for implying a delegation of interpretive authority to an agency arises merely from the existence of an ambiguity or a gap in a statute. *Id.* After all, they reason, virtually every statute will "contain gaps and ambiguities." *Id.* For a court to decide that an agency's interpretation merits *Chevron*'s "controlling weight," something more is needed.

150 *See* Sunstein, *supra* note 2.

151 535 U.S. 212 (2002).

152 Sunstein, *supra* note 2, at 248.

153 *Id.* at 191.

154 *Id.* at 249.

155 *Id.* at 248–49.

156 *See id.* at 194, 247–48.

Rejecting Step 0 but accepting the existence of Interstitial Steps holds several meaningful advantages. First and foremost, disavowing the placement of a Step 0 in favor of Interstitial Steps gives primacy to the rule of law and to judges' and agencies' responsibility to uphold and follow clearly articulated law.[157] It is remarkably dissonant that lawyers, judges, and legal scholars should ever even suggest that some step or test precedes the requirement to respect clear, duly applicable statutory provisions. Step 1 is, if nothing else, the epitome of what the rule of law demands: courts and agencies must adhere to what statutes say. Inserting a step prior to Step 1 unsettles this notion, however unintentionally, by suggesting that Step 1's expression of a duty to observe clear rules might not always apply. This disquieting feature of Step 0 persists even when it is understood, intellectually, that the alternative—if Step 1 were never to be reached—would remain the enforcement of a court's best interpretation of the statute. Still, from the standpoint of reinforcing the primacy of the rule of law, surely it would be better never even to hint that Step 1 might not apply or to suggest that courts and agencies might not need to honor a statute's clear provisions.[158] It would be better, in other words, to place the so-called Step 0 inquiry about implied delegation where it belongs: after Step 1 and before Step 2.

Second, for anyone truly concerned about the doctrinal complexity that *Mead* and other recent cases are said to have added to *Chevron*'s two-step framework, abandoning Step 0 in favor of Interstitial Steps will simplify judges' analytic tasks in many instances simply by sparing judges the need to engage in so-called Step 0 analysis. Under a doctrinal model with Step 0, the analysis of whether a delegation to the agency should be implied—a parallel analysis to the inquiry called for by Steps 1.1 or 1.6—must be undertaken in *all* cases. But if the statute is clear and affords only one meaning, then the matter should be settled at Step 1, period. Adding a Step 0 implies that its additional analysis is needed in all cases involving agency interpretations of statutes, even those where deference at Step 2 is never implicated. For

157 *Cf.* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 572 (1965) (noting that "where the *judges* are themselves *convinced* that certain reading, or application, of the statute is the *correct*—or the only *faithful*—reading or application, they should intervene and so declare").

158 How rules are framed and presented can affect the legitimacy of the legal system. *See, e.g.*, Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1909 (2016) (providing empirical evidence showing "how specific types of doctrinal formulations affect public perceptions of legitimacy").

example, if cases such as *MCI Telecommunications Corp. v. AT&T Co.*[159] and *Brown & Williamson*[160] are indeed better viewed as Step 1 cases, as Cass Sunstein has argued, then rejecting the Step 0 construct in favor of Interstitial Steps would advance the goal that Sunstein has advocated: downplaying an "unnecessary emphasis" on trying to figure out whether Congress intended to delegate definitional authority to the agency.[161] Moving the implied delegation inquiry from the pivotal position at the very beginning of a judge's analysis (Step 0) in these cases to an intermediate position (Steps 1.1 to 1.6) serves to downplay it.

Finally, abandoning Step 0 and recognizing the Interstitial Steps should help reduce overall doctrinal confusion. Step 0 introduces confusion simply from the inherent lack of clarity about what "0" really means as a step.[162] More significantly, Step 0 mistakenly implies that judges need to clear that step before reaching Step 1, adding jarring ordinal distance and conceptual misplacement that invites confusion. After all, it is Step 2, not Step 1, that depends on the type of inquiry involved at what others have called Step 0.

Given what a Step 0 implies in terms of ordering, it is hardly surprising that scholars and judges have at times confusingly treated both steps of *Chevron*, rather than just Step 2, as depending on the resolution of Step 0 analysis. As already noted, Sunstein has equated *Chevron* deference (Step 2) with the entire *Chevron* framework (Steps 1 and 2) when he described Step 0 as "the initial inquiry into whether the *Chevron* framework applies at all."[163] Another scholar has noted that "[i]n *Chevron* step zero, the court asks whether the *Chevron* framework applies at all."[164] Still another has stated that "*Mead* lays out legal preconditions for the *Chevron* framework to apply at all."[165]

Judges sometimes seem to find themselves tripped up by Step 0 as well, also equating *Chevron* deference (Step 2) with the entire *Chevron* framework (Steps 1 and 2). A recent panel of the U.S. Court of Appeals for the Ninth Circuit viewed its initial task as one of deter-

159 512 U.S. 218 (1994).

160 529 U.S. 120 (2000).

161 Sunstein, *supra* note 2, at 248–49.

162 Such confusion is akin to what a hotel guest experiences on first encounter with an elevator with a button for a floor designated "0." Does that button refer to the ground floor or to a basement?

163 Sunstein, *supra* note 2, at 191.

164 Dorf, *supra* note 104.

165 ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 202 (2016).

mining whether the agency had satisfied *Mead*'s "preconditions to application of the *Chevron* framework."[166] Another panel of the same court noted that, "[a]t *Chevron* step zero," the question becomes "whether the *Chevron* framework applies at all."[167] In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[168] only after the majority of the Supreme Court found that the *Mead* factors were satisfied did the Court conclude that it must "apply the *Chevron* framework to the Commission's interpretation of the Communications Act."[169]

These examples of judges and scholars confusing the entire *Chevron* "framework" with *Chevron* "deference" may, of course, merely reflect lawyerly shorthand or unintended imprecision, rather than genuine confusion on the part of those judges and scholars who write as if the entire *Chevron* edifice, instead of just its deference, depends on Step 0. It is also admittedly the case that if a court does proceed first with the Step 0 inquiry and finds *Chevron* deference unjustified, then it would never need to answer the question about statutory ambiguity embedded in Step 1. A court could then simply identify its best interpretation of the statute, regardless of whether that interpretation is the only possible one. Although that implication does follow, it also is true that if a court does complete Step 0 and finds *Chevron* deference justified, it still may never reach Step 2 nor award deference to the agency's interpretation. A court still could find that the statute clearly resolves the question at Step 1.

Step 0 cannot be defended by saying that answering it one way would obviate the need for Steps 1 and 2. After all, that same logic could be offered in defense of a still earlier step—perhaps it might be called Step -1 (that is, negative one)—which could move to the forefront a variant of the Step 2 question and ask whether an agency's interpretation is *un*reasonable.[170] If the agency's interpretation were unreasonable, then the court need never ask or answer Steps 0 or 1 (or Step 1 and the Interstitial Steps). But the mere fact that an answer to one question might rule out other questions does not justify placing

166 Sharemaster v. SEC, 847 F.3d 1059, 1066 n.5 (9th Cir. 2017).

167 Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016).

168 545 U.S. 967 (2005).

169 *Id.* at 980–81.

170 I am not the first to suggest the possibility of a Step -1. Michael Dorf labels as "a kind of *Chevron-step-negative-one* ruling" an altogether different approach, where the court would look directly at whether the type of claim at issue was authorized by the statute, without regard to whether *Chevron* applied to the agency's interpretation. Dorf, *supra* note 104.

that question first in the analytic line, prior to what the Supreme Court has treated as *Chevron*'s first step.

The strongest justification for placing Step 1 first stems from fidelity to law and the primacy of statutes. If a statute's meaning is clear, then it controls and there exists no possible question about whether Congress implicitly delegated resolution of a statutory ambiguity to the agency—because no such ambiguity exists. At least until the Court or Congress overturns *Chevron* or repudiates its overall framework, doctrine in this area will remain more faithful to law and less confusing if it does not imply that the entire framework of *Chevron*, including Step 1, depends on the resolution of some other precedent analysis.

Even Chief Justice Roberts's opinion in *King v. Burwell*, which has too commonly been viewed as having brushed the *Chevron* framework aside, remained faithful to *Chevron*'s first step. *King* nowhere denied Step 1's requirement that courts "must give effect to the unambiguously expressed intent of Congress."[171] On the contrary, the Court's opinion in *King* proceeded to defend its own best interpretation of the relevant part of the statute only after concluding that "the meaning of the phrase 'established by the State' is not so clear."[172] Although not explicitly using the label of Step 1, the Court did anything but bypass this step or repudiate the entire *Chevron* framework. It expressly acknowledged statutory ambiguity before proceeding with its search for the statute's best meaning:

> The upshot of all this is that the phrase "an Exchange established by the State under [42 U.S.C. § 18031]" is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits. . . .
>
> The conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and Federal Exchanges. . . .
>
> . . . .
>
> . . . After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.[173]

171 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

172 King v. Burwell, 135 S. Ct. 2480, 2490 (2015).

173 *Id.* at 2491–92 (alterations besides ellipses in original).

Given the attention the *King* Court paid to statutory ambiguity *before* proceeding to offer its own best interpretation, it is difficult to see how, as one commentator has argued, "[a]fter *King v. Burwell*, the 'major questions' doctrine is emphatically a *Chevron* Step Zero question," to be analyzed "[b]efore even beginning to apply *Chevron*'s two-step approach."[174]

To be fair, Chief Justice Roberts's opinion did, admittedly, take up its brief discussion of *Chevron* and its treatment of the "extraordinary cases" step (Step 1.2) in a prefatory section that preceded a more extended account of the statute's ambiguity.[175] In this respect, the *King* opinion is no different than other Supreme Court opinions that have presented the *Chevron* steps selectively or with some variation in their ordering.[176] Yet the majority opinion in *King* still demonstrates that even when the Court rejects an implied delegation to the agency to resolve statutory ambiguities, that rejection of agency interpretive authority does not make the entire *Chevron* framework inapplicable. Unlike what is suggested by those who advocate for a Step 0, *Chevron*'s Step 1 still applies; a court still needs to follow the unambiguous meaning of the statute—if one exists.

King also shows that a court will always confront the need to enforce the unambiguous meaning of a statute, if the statute affords but one possible meaning—or, if it does not, the need to find another way to resolve a dispute over alternative meanings. *Chevron* Step 1 speaks to how a court should address the first of these needs, and the Interstitial Steps provide the conceptual structure for resolving the second by focusing on whether a court should decide on its own or should defer to the agency. In some circumstances, where a court finds that Congress has explicitly or implicitly delegated authority to the agency, the

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174 Adam White, *Symposium: Defining Deference Down*, SCOTUSBLOG (June 25, 2015, 11:27 PM), http://www.scotusblog.com/2015/06/symposium-defining-deference-down/.

175 *King*, 135 S. Ct. at 2488–89.

176 For an extreme example of a formulation of the *Chevron* test that departs from the traditional multistep framework, see Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 (2009), noting that the agency's "view governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." Although the Court's presentation of *Chevron* may not always follow the stepwise order presented in this Foreword, what matters is the conceptual ordering which remains reflected in the Court's reasoning in most cases, even if that ordering is also flexible enough to be presented in different ways. *See supra* text accompanying notes 135–38. Furthermore, because some steps may be easy to surmount and others difficult, the Court might well gloss over the easy ones. If the Step 1 ambiguity seems glaring to the Court in a particular case, it might well proceed rather speedily to further steps—but that does not mean Step 1 does not exist.

Interstitial Steps will lead the court toward the top of the *Chevron* staircase, where it must defer at Step 2 to a reasonable interpretation provided by the agency. In the remaining circumstances, where an implied delegation to the agency cannot be sustained, the interstitial *Chevron* analysis will, as in *King*, lead the court to resolve the dispute based on its own best interpretation, perhaps treating the agency's interpretation as helpful or persuasive guidance in accord with *Skidmore*.

In an area of the law that already has prompted jurists to worry about the introduction of "protracted confusion,"[177] perpetuating an antecedent Step 0 only continues to invite unnecessary confusion, leading scholars and judges sometimes to suggest that somehow Step 1—fidelity to a statute's clear meaning—might potentially not apply. But Step 1 always applies; *Chevron* deference centers on Step 2. For this reason, it is better to recognize *Chevron*'s multistep framework for what it is: Step 1, Interstitial Steps, and Step 2.

IV. On the Value of Distinct Steps 1 and 2

Other scholars have moved in the opposite direction, away from a multistep framework, seeking to simplify matters by urging that *Chevron*'s analysis be collapsed into just a single step.[178] If this view were correct, then *Chevron* would no longer comprise two steps between which additional steps could be situated. It is thus important to consider the case for collapsing *Chevron* to a single step. Doing so shows that a single-step approach falters. Such an approach fundamentally misses the distinct roles served by Steps 1 and 2, including what they mean for justifying deference and for allowing agencies to adapt their implementation of statutes over time.

Matthew Stephenson and Adrian Vermeule have made the most forceful case for collapsing *Chevron*'s two steps into "a single inquiry into the reasonableness of the agency's statutory interpretation."[179] Bracketing consideration of so-called Step 0 concerns,[180] Stephenson and Vermeule argue that Step 1 and Step 2 each ask the same basic

177 United States v. Mead Corp., 533 U.S. 218, 245 (2001) (Scalia, J., dissenting).

178 *See supra* note 14.

179 Stephenson & Vermeule, *supra* note 14, at 597–98. David Zaring has also argued that the courts in effect apply a single "reasonable agency standard" in *Chevron* cases. Zaring, *supra* note 14, at 195. Zaring takes more of a descriptive approach, highlighting what decisions courts actually make, but in a more normative vein he considers Stephenson and Vermeule's position to be "probably correct," while also "noting that their argument is an unconventional one." *Id.* at 157.

180 Stephenson & Vermeule, *supra* note 14, at 598 n.4.

question: whether an agency's interpretation is "permissible as a matter of statutory interpretation."[181] As such, they claim that decisions at Steps 1 and 2 "are always mutually convertible."[182] Any conclusion that an agency's interpretation contravenes the clear meaning of the statute at Step 1 means that the same interpretation is unreasonable at Step 2; correspondingly, any judicial decision reached at Step 2 could be "rewritten" in Step 1 terms.[183]

Stephenson and Vermeule's account helpfully illuminates an unassailable relationship between Steps 1 and 2. It is obviously correct that an agency interpretation that contravenes the clear meaning of a statute at Step 1 would also be unreasonable.[184] It is also correct that a finding of unreasonableness at Step 2 necessarily implies that the statute's meaning clearly does *not* accommodate the agency's interpretation.[185] Yet their argument that Steps 1 and 2 are essentially indistinguishable ultimately fails to convince for several reasons. *Chevron* does have two main steps, and thus courts need to consider the steps between them as well.

Part of what weakens Stephenson and Vermeule's position is its failure to live up to their own billing. They claim, for instance, that "a unitary logic"[186] underlies Steps 1 and 2, such that both steps can be said to be "analytically equivalent."[187] Yet they acknowledge that any such unity in the two steps depends entirely on reframing the questions that courts are supposed to answer at each step.[188] The purported equivalence of Step 1 and Step 2 findings appears only conceivable if the Step 1 "question is framed not as 'What does this statute mean?' but rather 'Is the agency's interpretation within the permissible range of readings?'"[189] Yet analytical equivalence should presumably hinge on more than just a stipulated reframing. Asking whether an agency's interpretation falls within a permissible range of interpretations may

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181 *Id.* at 599.

182 *Id.* at 600.

183 *Id.* at 599–600.

184 As Justice Scalia has written, "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 n.4 (2009). Zaring similarly notes that "there are no cases that would fail step one and not also fail step two." Zaring, *supra* note 14, at 156.

185 *See supra* text accompanying note 170; *see also supra* note 140 and accompanying text.

186 Stephenson & Vermeule, *supra* note 14, at 600.

187 *Id.*

188 *See id.*

189 *Id.*

be related to the question posed at Step 1, but it is different. It is actually the question of Step 2.[190]

Consider the Clean Air Act, the statute at issue in *Chevron*. Step 1 asks whether the term "source" in the Act possesses a clear statutory meaning with respect to the issue under dispute. That issue was essentially whether a "source" of air pollution meant just the individual smokestacks and pipes at a regulated facility, as opposed to the facility overall. Using traditional tools of statutory construction, the *Chevron* Court held that "source" had no clear meaning in the statute.[191] However, the Court's search for a clear meaning under Step 1 was different than asking whether, in the face of statutory ambiguity, it would nevertheless be reasonable for an agency to define "source" in a particular way. It was reasonable for the EPA to construe "source" either as individual smokestacks and pipes or as an entire facility, with its multiple smokestacks and pipes. But had the EPA defined "source" to include third-party suppliers of the raw materials that result in the air pollution emitted through the facility's smokestacks and pipes, that may well not have been a reasonable interpretation. The question at Step 2 is not about the precision of the meaning of "source" in the statute, as it is at Step 1, but about the whether a particular agency interpretation falls within the range of reasonable meanings. A court could well conclude that it does not, but this is indeed different than determining whether there exists only one reasonable interpretation.[192]

Perhaps a more telling internal weakness in Stephenson and Vermeule's argument stems from the fact that their purported single-step approach to *Chevron* implicitly contains multiple steps. Notwith-

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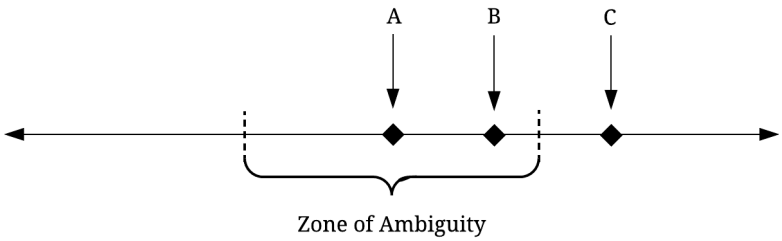
190 *See* Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 IND. L.J. 605, 612 (2014) ("The one-step version of *Chevron* that Stephenson and Vermeule propose is essentially the same verbal formulation as step two."). Re incisively elaborates the internal limitations of Stephenson and Vermeule's argument for a single-step approach. *See id.* at 610–13.

191 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 862 (1984) (finding the statutory language "not dispositive" and the legislative history "unilluminating").

192 Instead of a "unitary logic," what appears to unite *Chevron*'s two questions is a search for a common quality: clarity. A statute may have a *clear* meaning with respect to the particular issue under dispute (Step 1); if the statute lacks clear meaning, an agency's statutory interpretation may still *clearly* fall outside a zone of reasonableness (Step 2). This allows Stephenson and Vermeule and others to point out, correctly, that an unreasonable interpretation of a statute is one that is clearly contrary to the statute. But that is still different than saying that the statute has a clear meaning which affords no room for interpretation. Steps 1 and 2 do call for different inquiries, linked simply with a judicial quest for clarity with respect to each.

FIGURE 2: SPATIAL MODEL OF STATUTORY INTERPRETATION[193]



standing their claim to "simplify matters,"[194] the way their approach actually involves multiple steps becomes apparent from their otherwise helpful spatial representation of statutory meaning, reproduced here as Figure 2. One point on the line, labeled "A," represents a court's best interpretation of the relevant provision of a statute, around which appears a penumbra they call a "zone of ambiguity."[195] They posit two different agency interpretations of the same statutory provision: one they label "B," that lies inside the zone of ambiguity, and another they label "C," that lies outside.[196] Given Stephenson and Vermeule's emphasis on a single analytical step—their "unitary logic that requires only one step"[197]—we might well expect that something like their illuminating spatial model appears to judges fully formed, in a single instant, much like it appears as Figure 2 here. But the features represented in the figure cannot be instantaneously perceived—nor should they be, consistent with *Chevron*.

To see how Stephenson and Vermeule's account demands that judges make multiple determinations, consider how they describe the interpretive process in reference to their spatial diagram. They write that "[t]he statutory language, read in light of the traditional tools of statutory construction, will suggest to the reviewing court"[198] each of the following:

i. "a 'best' interpretation of the statute (interpretation 'A' in the diagram)";[199]

193 This Figure is a slightly modified version of the one appearing in Stephenson & Vermeule, *supra* note 14, at 601.

194 *Id.* at 609.

195 *See id.* at 601.

196 *Id.*

197 *Id.* at 600.

198 *Id.* at 601.

199 *Id.* It is not entirely evident from Stephenson and Vermeule's account—with their quotation marks around "best" and their use of the verb "suggest"—whether such a best interpretation by the court must be definitive at this stage, or merely provisional. But either way, it would

ii. "a range of interpretations that are sufficiently plausible that the court would view them as reasonable, though not ideal"[200]—a decision which they claim calls for more than just traditional statutory tools but "may depend in part on other factors, such as the court's confidence in the agency's expertise, its sympathy for the agency's policy goals, or its assessment of the importance of the interpretive issue";[201] and

iii. a determination whether the agency's interpretation (interpretation "B" or "C") lies within the zone of ambiguity.[202]

Rather than collapsing analysis to a single step, Stephenson and Vermeule's explanation reveals, in much the same fashion as *Chevron* does, the several determinations that a court must make and consider when deciding whether to uphold an agency's interpretation of a statute. Stephenson and Vermeule may very well resist calling these determinations "steps"—but it is hard not to see *Chevron*'s two main steps, or something close to them, implicit in their model.[203] Is the best interpretation so clear that the range of reasonable interpretations (zone of ambiguity) only affords one reading of the statute (Step 1)? If not, is the agency's interpretation within the range of reasonable interpretations (Step 2)?

Ultimately, Stephenson and Vermeule's argument for a single-step approach to *Chevron* fails for even more important reasons than its internal weaknesses. The thrust of their argument is that two steps are useless.[204] They assert that there exists "no good reason why we should decide whether the statute has only one possible reading [Step

represent a distinct step; without it, no point "A" could be identified around which a "zone of ambiguity" could be built.

200 *Id.*

201 *Id.* at 601 n.19.

202 *Id.* at 601.

203 Stephenson and Vermeule's spatial diagram, to the extent it illustrates how judges should approach statutory questions, would appear to call for judges to do potentially more work than *Chevron* demands, at least in some cases. *Chevron*'s two main steps, after all, do not require judges always to identify the "best" interpretation, but to do so only in cases where, at Step 1, the statute clearly permits only a single interpretation. *Chevron* also does not require fully marking out a zone of ambiguity, but rather it requires just a determination of whether that zone is wider than a single point (Step 1) and whether it extends at least as far as the agency's interpretation (Step 2). Granted, Stephenson and Vermeule's spatial diagram is merely a model or illustration, and it is an admirable one at that. Nevertheless, what it illustrates is less than supportive of an argument for a single step to *Chevron*.

204 Stephenson & Vermeule, *supra* note 14, at 601–02 (arguing that distinguishing the two steps serves "no useful purpose").

1] before deciding simply whether the agency's interpretation falls into the range of permissible interpretations [Step 2]."[205] They suggest that "nothing of consequence turns on whether the set of permissible interpretations has one element or more than one element."[206] In their defense, the futility of the two steps might seem to follow naturally from a belief that courts virtually never reject an agency interpretation at Step 2.[207] In such a world, case outcomes under *Chevron*'s two-step approach in practice would be indistinguishable from those under a one-step approach, according to which judges would always defer to the agency's interpretation unless it is clearly contrary to the statute. In reality, although it can be difficult to find examples of the Supreme Court setting aside agency interpretations at Step 2, lower courts apparently do so in at least a small percentage of cases.[208] For present purposes, however, empirical evidence, one way or the other, is largely beside the point. It may well be the case that, once the court reaches the top of the *Chevron* staircase, the agency almost always wins. Judicial resolution at Step 2 might constitute a relatively trivial step in most cases, especially if agencies generally make reasonable interpretive choices. But for purposes of assessing the legal significance of distinguishing *Chevron*'s two steps, just focusing on agency wins and losses risks missing the importance of a *Chevron* analysis with two distinct main steps.

Steps 1 and 2, each in their way, help courts and agencies, and even Congress, by clarifying whether agencies have flexibility to adapt statutory understandings over time. A court decision that simply upholds an agency interpretation as permissible does not inform the agency whether it might be able to adopt a different, but still potentially permissible or reasonable, interpretation in the future. By way of illustration, consider Michael Herz's hypothetical of an agency that defines the Clean Water Act's jurisdictional terms—"waters of the United States"—to include "the sands of the Arizona desert."[209] Herz

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205 *Id.* at 602.

206 *Id.*

207 *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 319 (8th ed. 2017) (asserting that "it is rare for a court to set aside an agency interpretation in step two").

208 *See* Barnett & Walker, *supra* note 28, at 34 (finding that, in circuit court decisions from 2003 to 2013 that were resolved at Step 2, agency interpretations were rejected in 6.2% of cases); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 47 (1998) (finding that, in circuit court decisions from the years 1995 and 1996 that were resolved at Step 2, agency interpretations were rejected in 11% of cases).

209 Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking*

argues that a court might strike down such an agency interpretation on either Step 1 or Step 2 grounds, and that either way "the point is the same."[210] It is true that either way the agency would lose. But the options for the agency in the future will be quite different depending on the step upon which the court relies. If the court were to strike down the interpretation under Step 1 because it concludes that "waters of the United States," properly understood using the traditional tools of statutory construction, clearly means permanent waterways—that is, surface rivers and lakes—then the agency will be limited in its ability to adapt the definition over time to include wetlands or even underground water flows beneath desert sands. On the other hand, the agency would retain such flexibility if the court concluded that "waters of the United States" contains considerable ambiguity (as in reality it does). An agency could reasonably define "waters" at a later time to include not just permanent surface waterways but also wetlands, intermittent streams, and even underground flows.[211] That flexibility would remain even if a court should strike down an agency's desert sands interpretation at Step 2, concluding that whatever "waters" means it does not encompass solids such as sand.

Distinguishing Steps 1 and 2 thus holds important implications for future actions by agencies. Given that ideas about how to implement statutes can change over time, whether in the face of changing conditions in the world or in the political control of government, agencies not infrequently confront the need to decide whether or how to change the way they carry out their statutory missions.[212] It may be no accident that some of the most significant agency statutory interpreta-

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Under Chevron, 6 ADMIN. L.J. AM. U. 187, 220–21 (1992). The phrase "waters of the United States" can be found in 33 U.S.C. § 1362(7) (2012); it is the notion of an agency construing these words to encompass sands in a desert that is hypothetical.

210 Herz, *supra* note 209, at 221.

211 *See id.* at 218 n.143; *see also* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 616 (2009) (noting that "a judicial determination that an agency interpretation embodies one option within the zone of indeterminacy makes it possible for the agency to put forth a different interpretation at a later time").

212 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (noting that "everyday realities" and "the incumbent administration's views of wise policy to inform its judgments" can be proper bases for agency decisions). This possibility of administrative policy change in the face of changing realities or new political control helps explain why what agencies do when they interpret statutes is an executive rather than judicial function. Judicial interpretation seeks the best interpretation of the statute—often described as determining what Congress intended in passing the statute—which is generally treated as fixed and subsequently secured through stare decisis. By contrast, a delegation to an agency almost always entails some authority to adapt over time in response to changing conditions, additional knowledge, or new governing priorities.

tion cases—*Chevron*,[213] *Mead*,[214] and *Brown & Williamson*,[215] among them—have arisen from agency reversals of preexisting interpretive positions, sometimes longstanding ones.[216]

Attentiveness to such statutory dynamism openly emerged during oral arguments in *King v. Burwell*, where Chief Justice Roberts's only substantive question centered on how a possible Court decision at Step 2 would affect the agency's ability to change course. Responding to the government's argument for deference, Roberts asked the government's lawyers: "[I]f you're right about *Chevron*, that would indicate that a subsequent administration could change that interpretation?"[217] With statutory change on Roberts's mind, no one should be surprised that he authored a majority opinion that stopped short of *Chevron* Step 2, because a decision upholding federal exchanges at that step would have allowed a subsequent administration to reinterpret the Affordable Care Act to preclude federal exchanges.[218] Had the Court followed a single-step *Chevron* approach, holding merely that the government's interpretation had been permissible or reasonable, the circumstance would have been little different. A future administration would not know whether an alternative interpretation might also be reasonable—and it might well conclude that the leading alternative would indeed be reasonable.[219] But the *King* Court did not take a single-step approach, which would have merely declared the agency's interpretation permissible. Rather, the Court's opinion makes plain that the agency's interpretation prevailed not because of deference but because it happened to be the same as the

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213 *Id.* at 863 (noting "[t]he fact that the agency has from time to time changed its interpretation of the term 'source'").

214 United States v. Mead Corp., 533 U.S. 218, 225 (2001) (noting that, in its interpretation of the relevant statutory provision, "Customs changed its position").

215 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (noting that "[i]n 1996, the Food and Drug Administration (FDA), after having expressly disavowed any such authority since its inception, asserted jurisdiction to regulate tobacco products").

216 As the *Chevron* Court noted, the fact that an agency has modified its interpretation over time does not diminish the deference that the agency's interpretation is due. *See Chevron*, 467 U.S. at 863. That deference, as explained in Part I, derives from an express or implied delegation from Congress to the agency.

217 Transcript of Oral Argument at 76, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

218 *See supra* notes 96–103 and accompanying text.

219 It is difficult to see how an interpretation limited to state exchanges would fail a decision rule calling for "courts to defer to the agency's views unless clear and specific language, in the provision immediately at issue, bars the agency interpretation." ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 229 (2006). As discussed in Part I, a states-only interpretation would not have been clearly barred by the Affordable Care Act's language referring to exchanges "established by the State."

Court's best interpretation of the statute, under circumstances in which it was improper to imply a delegation of interpretive resolution authority to the agency, owing to the failure to satisfy one of the Interstitial Steps (namely, Step 1.2).

For these reasons, when courts distinguish Steps 1 and 2, as *Chevron* calls on them to do, they can resolve disputes in a manner that informs agencies about the possibility of future interpretive latitude available to them. Agency officials that lose a case at Step 1, or after a court fails to make it up the Interstitial Steps, know that they need not waste time proposing an alternative administrative interpretation. In such situations, members of Congress also know that, if they want to see the agency take a different approach, the onus is on the legislature to amend the statute.[220] Correspondingly, under *Chevron*'s two-step approach, a decision at Step 2 informs agency officials that they have an option to change course in the future.[221]

Beyond what follows from *Chevron*'s distinct steps for future agency interpretations, the need to distinguish between the two steps is also vital for justifying *Chevron*'s mandatory deference in the first place. That deference demands legal justification because it marks a departure from the courts' normal approach to resolving questions of statutory meaning. The principal reason for distinguishing Steps 1 and 2, then, derives from the need to justify this shift through a delegation to the agency.[222] Determining whether the permissible range of statutory meaning comprises just one interpretation or more than one reasonable interpretation is essential for that justification. If the statute's meaning is clear, affording the agency no room for interpretation, then the court cannot justify implying any delegation to the agency. Finding ambiguity at Step 1 is thus a necessary, even though not sufficient, condition for a court to find a delegation of definitional or interpretive authority. If ambiguity does exist—meaning the statute's zone of ambiguity is wide enough to accommodate more than one reasona-

220 Congress eventually did exactly that following *Brown & Williamson* with respect to the Food and Drug Administration's authority to regulate tobacco. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101(b)(3), 123 Stat. 1776, 1786–87 (2009); *see also* 21 U.S.C. § 387a (2012).

221 The varying precedential effects of decisions based on Step 1 and Step 2 are articulated in Justice Thomas's majority opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). For a compatible account, see Re, *supra* note 190, at 614–17.

222 Although a case for such deference might be made on policy or institutional grounds, the formal legal justification hinges on an express or implied delegation of authority to the agency by statute and on courts' consequent obligation to respect that delegation. *See supra* Part I.

ble interpretation—a court may then proceed up the staircase toward Step 2. A court that successfully ascends the Interstitial Steps has determined that the agency holds delegated interpretive authority and then the court must respect that delegation by letting the agency's interpretation stand, provided it falls within the confines of interpretive reasonableness.[223]

In the end, Stephenson and Vermeule's case for a single-step approach to *Chevron* fails for a variety of reasons: it does not live up to the unifying and simplifying claims made for it; it overlooks the key implication for statutory adaptation that follows from distinguishing Steps 1 and 2; and, most importantly, it misses how these distinctions provide courts the basis for justifying deference to agency interpretations. The *Chevron* staircase—with its distinct bottom and top steps, as well as its Interstitial Steps—does not collapse to a single step.

Before turning in the final part of this Foreword to a discussion of broader implications of the Interstitial Steps for *Chevron*'s future, one remaining issue merits mention: the meaning of "reasonableness" at Step 2. Although the conceptual scaffolding of the *Chevron* staircase does not depend on exactly what makes an agency interpretation reasonable, one prevailing view holds that the reasonableness inquiry at Step 2 calls for nothing more than the application of the arbitrary and capricious standard under the APA.[224] Stephenson and Vermeule, in arguing that Steps 1 and 2 are "redundant," correctly point out that treating Step 2 as nothing more than arbitrary and capricious review also effectively collapses doctrinal steps.[225] That approach replaces Step 2's test for interpretive reasonableness with a separate analysis of the kind called for under the APA, as articulated by the Supreme Court in *Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Insurance Co.*[226] Although replacing Step 2 with *State Farm* does not collapse *Chevron*'s two-step edifice, it might be seen effectively to concede Stephenson and Vermeule's point that

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223 Step 2's insistence on interpretive reasonableness "can and should be a meaningful limitation on the ability of administrative agencies to exploit statutory ambiguities, assert farfetched interpretations, and usurp undelegated policymaking discretion." Global Tel*Link v. FCC, 866 F.3d 397, 418 (D.C. Cir. 2017) (Silberman, J., concurring).

224 Ronald Levin has offered the most articulate and forceful argument that the test for reasonableness at Step 2 is essentially the same as the arbitrary and capricious test. *See* Levin, *supra* note 7, at 1263–65. It has won broader acceptance. *See* Emily Hammond et al., *Judicial Review of Statutory Issues Under the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 65, 94–98 (Michael E. Herz et al. eds., 2d ed. 2015).

225 Stephenson & Vermeule, *supra* note 14, at 602–03.

226 463 U.S. 29 (1983); Stephenson & Vermeule, *supra* note 14, at 603 (citing the "arbitrary and capricious" standard prescribed in *State Farm*, 463 U.S. at 42–44).

Chevron's two steps are doing no separate work, as one of them can be replaced with another test altogether.[227]

But Step 2, properly conceived, does call for inquiry distinct from arbitrary and capricious review, even though both focus on reasonableness. Together, *Chevron* and *State Farm* demand judicial inquiry about three conditions: statutory clarity or precision (*Chevron* Step 1); interpretive reasonableness by the agency (*Chevron* Step 2); and reasoned decisionmaking by the agency (arbitrary and capricious review). Under *State Farm*, the courts are supposed to use arbitrary and capricious review to look for sound policy judgment, explanations that are consistent with evidence, and the consideration of significant alternatives.[228] Step 2, by contrast, calls for a reasonableness of linguistic and interpretive meaning: whether the agency's interpretation of the statute falls within the zone of ambiguity. To be sure, Step 2 also demands sound judgment and cogent reasoning, but its reasonableness is an interpretive reasonableness—necessitated by the express or implied delegation to the agency of the authority to select the meaning of ambiguous statutory provisions.[229] Congress could repeal section 706(2)(A) of the APA upon which arbitrary and capricious review is based and yet *Chevron* Step 2 would be unaffected. The inquiry at Step 2 is focused on the statute the agency is charged with implementing—on its meaning—with the aim of determining whether that statute can accommodate the agency's interpretation.[230]

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227 Stephenson and Vermeule memorably characterize the predicament as a doctrinal game of musical chairs, in which three doctrines compete for space on two chairs. Stephenson & Vermeule, *supra* note 14, at 604. Another metaphor might be of three electrical plugs that need to fit into only two receptacles. Treating Step 2 as the same as arbitrary and capricious review is like deciding only to plug in Step 1 and *State Farm*. Stephenson and Vermeule, by contrast, advocate for keeping *State Farm* plugged in but might be said to favor a two-plug adaptor to combine Steps 1 and 2, plugging them in together into the other receptacle.

228 *See State Farm*, 463 U.S. at 42–44.

229 In this sense, the requirement of interpretive reasonableness at Step 2 combines with the language of the statute itself to operate much as any "intelligible principle" does with respect to ordinary delegations of authority, by cabining an agency's exercise of its delegated authority. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (explaining that delegated power must be "canalized within banks that keep it from overflowing"). For example, even though statutory ambiguity and the Interstitial Steps justified the *Chevron* Court in implying a delegation of authority to the EPA to construe the Clean Air Act, that delegation cannot be unbounded such that the agency could construe the statute in any way it might like. Despite the ambiguity in certain Clean Air Act provisions, they certainly could not lawfully be construed by the EPA to impose new capital adequacy requirements on banks or to change standards for criminal racketeering. *Cf.* Michigan v. EPA, 135 S. Ct. 2699, 2708 (2015) ("*Chevron* . . . does not license interpretive gerrymanders . . . .").

230 *See* SECTION OF ADMIN. LAW & REGULATORY PRACTICE, AM. BAR ASS'N, *supra* note

To illustrate the difference between Step 2 and arbitrary and capricious review, consider the familiar example of a statute that declares, "No vehicles in the park."[231] "Vehicles" is ambiguous.[232] An agency charged with implementing such a statute could reasonably consider automobiles and motorcycles to be vehicles, and thus prohibit them from the park. Bicycles, roller skates, and scooters might present closer calls. But consider a further possibility: the agency charged with implementing the statute confronts a serious problem of persistent litter in the park discarded by picnickers, and the trash has also started to attract bears and create a safety risk for visitors. Imagine that the park agency carefully studies the problem, assesses all the relevant evidence on trash levels and bear sightings, considers a broad range of alternative solutions, prepares a model benefit-cost analysis, and, in the end, provides cogent reasons for its decision to construe the "no vehicles in the park" provision to ban picnicking in the park. The agency could have fully met even the most rigorous demands of hard look review under the arbitrary and capricious standard, but it would still be precluded from interpreting "vehicles" to mean eating.[233] Construing "no vehicles" as "no picnicking" would prove unreasonable on *interpretive* grounds—no matter how reasonable and well-reasoned such a prohibition might be on the kind of *policy* grounds addressed by the arbitrary and capricious standard.

For the same reason, an interpretation that is interpretively reasonable under Step 2 might not be justified under the arbitrary and

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131, at 34 (articulating a test of "whether the statute, even if subject to more than one interpretation, can support the particular interpretation adopted by the agency").

231 *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958) (using the example to illustrate how words can have a "core of settled meaning" as well as "a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out").

232 It is of course conceivable that, under some versions of such a statute and for some purposes, were a court to use all the tools of interpretation, what constitutes a "vehicle" might well be sufficiently clear at Step 1. The point here is illustrative, with the example of a generally ambiguous term used to contrast Step 2 and arbitrary and capricious review. Other examples could work for this same illustrative purpose. *See, e.g.*, John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 29 (2014) ("If a statute crisply states 'no handguns in the National Parks,' that wording seems to convey relatively little discretion. If the statute instead says 'no dangerous weapons,' that signal makes the exercise of broad discretion inevitable.").

233 This is to put to the side the possibility that, as a behavioral matter, a mere prohibition on vehicles in the park could in fact diminish the number of picnickers too. *See* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1134 (2008) ("[I]t is important that we not forget about the driver of a pickup truck, with family and picnic preparations in tow, who sees the "No Vehicles in the Park" sign at the entrance to the park and simply turns around.").

capricious standard. An interpretation to construe the "no vehicles" statute to include electric wheelchairs might well be reasonable on interpretive grounds—the relevant statutory provision could support it—but the agency might make its decision hastily without undertaking any study and without considering evidence or alternative options advanced in public comments, such as information showing that electric wheelchairs result in no injuries, create virtually no noise or air pollution, and help people enjoy the park, and that any problems associated with their use could be addressed by other policies.[234]

The key lesson is that Step 2's reasonableness criterion calls for an inquiry into interpretive reasonableness, which is different than policy reasonableness or reasoned decisionmaking under the APA's arbitrary and capricious standard. Step 2 creates no redundancy with either *State Farm* or Step 1. *Chevron* does have two distinct main steps—with steps in between.

V. Implications for *Chevron*'s Future

When *Chevron* is properly conceived in terms of a Step 1 and a Step 2 as the bottom and top steps of a larger staircase, the logic behind *Chevron* deference fares better as both a doctrinal and normative matter. Given the current controversy surrounding the *Chevron* doctrine's future, at the very least the doctrine and its rationale should be better understood. The Interstitial Steps aim to ensure that judicial deference under Step 2 does not, as a doctrinal matter, automatically follow from a mere finding of statutory ambiguity under Step 1. *Chevron* analysis calls for additional judicial work to clear one or more hurdles designed to ensure that courts make sensible imputations of gap-filling delegations to agencies. These additional determinations demand a robust and traditional role for the courts, one not unlike those in which judges are routinely called upon in deciding all other kinds of cases for which they must make legal determinations. The

234 For a more realistic example, consider a scenario like that in *Chevron*, but where the EPA overlooks important comments, ignores pivotal evidence, or fails to offer reasons for its action. A finding that the EPA acted in an arbitrary and capricious manner would not necessarily make the agency's construction of the statute any less reasonable as a *matter of interpretation*. What it would do instead is undermine the validity of the EPA's underlying rulemaking in which the interpretation can be found, which would prevent the Court from even reaching Step 2. As both *Mead* and Step 1.4 of the framework in Part II of this Foreword indicate, an agency must properly use its rulemaking authority to receive the deference afforded an agency at Step 2. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (holding that an agency's failure to explain its interpretation is arbitrary and capricious and thus prevents a court from providing *Chevron* deference).

legal determinations that judges must make in confronting *Chevron*'s Interstitial Steps aim to ensure independent judicial judgment and adherence to the rule of law, including appropriate respect for legislative delegations of authority to administrative agencies.

As noted at the outset of this Foreword, *Chevron* has come under attack lately by certain scholars, legislators, and judges who charge that it gives too much power to agencies and essentially abdicates judicial responsibility.[235] To its critics, *Chevron* runs counter to section 706 of the APA, which states that "the reviewing court"—not the agency—"shall decide all relevant questions of law [and] interpret . . . statutory provisions."[236] It implies to them that whenever a statutory ambiguity exists, the agency effectively gets to decide what the statute means.[237]

Recognizing the role played by the Interstitial Steps blunts these concerns and bolsters *Chevron*'s defensibility. The Interstitial Steps call for judges to decide a series of relevant questions of law and, in so doing, to interpret statutory provisions. Judges confront questions they must answer at every turn. Step 1 asks a clearly relevant question of law, as do each of the Interstitial Steps and Step 2. Each step in the conceptual framework mapped out in Part II demands that judges engage in statutory interpretation. Not only does Step 1 call for judges to apply all the traditional tools of statutory interpretation, but the Interstitial Steps require courts to decide whether (1) the statute presents a major question, (2) the agency possesses authority to make binding law, and (3) the totality of circumstances weigh for or against implying a delegation. If the judge traverses up the Interstitial Steps to the top, then Step 2 presents another relevant question of law—one that cannot be decided without judges engaging in statutory interpretation—namely: Is the agency's interpretation of a statute reasonable? The only action that judges do not take at Step 2 is to substitute their own best interpretation for the agency's—but they may still hold the agency's interpretation unlawful if it does not fall within the realm of interpretive reasonableness.

When judges follow the Interstitial Steps and reach the legal conclusion that Congress meant for the agency to have the discretion and

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235 *See, e.g.*, Beermann, *supra* note 5, at 788.

236 5 U.S.C. § 706 (2012).

237 Justice Thomas, for example, argues against courts "blithely" deferring to agencies on matters of statutory interpretation, objecting that under *Chevron*, "[s]tatutory ambiguity thus becomes an implicit delegation of rule-making authority." Michigan v. EPA, 135 S. Ct. 2699, 2713–14 (2015) (Thomas, J., concurring).

authority to decide, within reason, what ambiguous language means, they fulfill their responsibility—not only by engaging in legal analysis but also by respecting the delegation that they conclude Congress intended to make to the agency.[238] When judges ask, "How much authority has validly been allocated to this agency?" they ask, as Peter Strauss has explained, a relevant legal question, the answer to which "is an element of the law the court is ultimately responsible to find *and obey*."[239] Chief Justice Roberts has elaborated that judges do not abandon their duty to interpret the law "when [they] afford an agency's statutory interpretation *Chevron* deference; [they] respect it. [They] give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities 'with the force of law.'"[240]

Underneath much criticism of *Chevron* appears a certain understandable unease about its perceived automaticity—that is, the notion that ambiguity seems to lead immediately and mechanistically to agency deference. When he was a judge on the Tenth Circuit, Justice Neil Gorsuch openly worried about what he characterized as "*Chevron*'s claim that legislative ambiguity represents a license to executive agencies to render authoritative judgments about what a statute means."[241] He argued that "*Chevron* suggests we should infer an intent to delegate not because Congress has anywhere expressed any such wish, not because anyone anywhere in any legislative history even hinted at that possibility, but because the legislation in question is *silent* (ambiguous) on the subject."[242]

Such unease derives, no doubt, from the way judges and scholars too often write about *Chevron*, making it seem as if courts must act

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238 *See* John F. Manning, Chevron *and the Reasonable Legislator*, 128 HARV. L. REV. 457, 459 (2014) (noting that, although the APA calls upon courts to make legal determinations, "judges nonetheless properly defer to" the agency under *Chevron*, and "the reviewing court fulfills its duty to 'interpret' the statute by determining whether the agency has stayed within the bounds of its assigned discretion—that is, whether the agency has construed its organic act reasonably").

239 Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012); *see also* Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21 (1985) (noting that "a court's refusal to use independent judgment actually fulfills Congress' intent" where "the most faithful reading of a statute" indicates Congress intended to give the agency authority to fill in gaps or clarify ambiguities).

240 City of Arlington v. FCC, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

241 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

242 *Id.* at 1153.

reflexively and approve any reasonable agency interpretation upon the mere showing of some statutory ambiguity.[243] *King* provides one of numerous examples. In that case, the majority declared that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[244] But does ambiguity truly "constitute" a delegation? Hardly. Ambiguity merely creates the space within which an agency might be allowed to decide how to choose among different reasonable meanings. The existence of such space only constitutes a necessary—not a sufficient—condition to support a judicial finding of delegation to the agency. Cass Sunstein had it exactly right when he wrote that "it would be a major error to treat all ambiguities as delegations."[245] The Supreme Court in *Gonzales v. Oregon*[246] was correct too in explaining that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved."[247] More must be shown. That "more" comes from the Interstitial Steps.

Chevron's Interstitial Steps offer a response to the not unreasonable concern that courts may approach deference in much too cavalier a fashion. That was the concern Chief Justice Roberts expressed in his dissent in *City of Arlington v. FCC*[248]:

> A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.
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> . . . [B]efore 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

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243 *See, e.g.*, Bamberger & Strauss, *supra* note 211, at 611 (stating that *Chevron* deference "rests squarely on the question of statutory ambiguity"); *see also supra* note 53.

244 King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

245 Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2090 (1990).

246 546 U.S. 243 (2006).

247 *Id.* at 258.

248 133 S. Ct. 1863 (2013).

> issue. . . . Whether Congress has conferred such power is the "relevant question[] of law" that must be answered before affording *Chevron* deference.[249]

Chief Justice Roberts described well the rationale supporting the Interstitial Steps that the Court has explained judges must traverse before they reach *Chevron* Step 2. He may well have lost the better of the argument to Justice Scalia on the more legally salient issues raised in *City of Arlington*, but his account of courts' responsibility to make an independent judgment about deference's justification provides an excellent account of the rationale for *Chevron*'s Interstitial Steps. Perhaps if the Court and the Congress—and the scholarly community—more openly recognized these Interstitial Steps, critics would be less quick to treat *Chevron* as a doctrine in need of retirement.

Conclusion

This Foreword has brought into sharper focus the Interstitial Steps that lie between *Chevron*'s Step 1 and Step 2. Recognizing these steps mitigates the concern that *Chevron* automatically substitutes agency interpretation for judicial judgment whenever a statute governing that agency is ambiguous. A mere finding of statutory ambiguity does not ineluctably justify deference to an agency's reasonable interpretation. The Interstitial Steps provide the legal framework for determining when deference is justified: only when Congress has explicitly or implicitly delegated interpretive authority to the agency.

Rather than seeing *Chevron* as directing courts to retreat from deciding the relevant legal questions, the Interstitial Steps reveal what those relevant questions are, and they show the work that judges must undertake in cases involving agency interpretations of statutes. If the judicial analysis of the Interstitial Steps supports an implied delegation of authority to an agency, courts respect the law not by rejecting *Chevron* deference but by deferring to the agency's reasonable interpretation. If a court's analysis of those steps does not support implying a delegation, then the court must provide its own best interpretation of the disputed statutory provision. Either way, judges are involved throughout the entire conceptual process and can hardly be said to have abdicated their role to decide legal questions and to uphold the rule of law.

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249 *Id.* at 1877–80 (Roberts, C.J., dissenting) (last alteration in original) (quoting 5 U.S.C. § 706).

Alternative accounts of *Chevron* that collapse its steps or that insert an antecedent step before Step 1 only foster confusion about the meaning and value of *Chevron*'s multistep framework. Step 1 should not be overlooked, pushed aside, or even hinted to be optional, for it is essential under any conception of the rule of law. After Step 1, the Interstitial Steps provide the legal basis for concluding that Congress has delegated to an agency the administrative authority to define and interpret statutory terms. Step 2 instructs courts to respect that delegation of authority but also to ensure that it remains cabined by a principle of interpretive reasonableness. Although the framework presented here—Step 1, Interstitial Steps, Step 2—departs from how those who study administrative law have tended to conceive the *Chevron* framework in the past, it not only captures better the internal logic of *Chevron* and its progeny but it offers a more defensible foundation for preserving a decision central to American administrative law.