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What 30 Years of *Chevron* Teach Us About the Rest of Statutory Interpretation

Abbe R. Gluck
Yale Law School

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WHAT 30 YEARS OF *CHEVRON* TEACH US ABOUT THE REST OF STATUTORY INTERPRETATION

Abbe R. Gluck*

Chevron, the most famous rule of administrative law, is also a central doctrine of statutory interpretation. But Chevron is understood and operates quite differently from most of the other statutory interpretation rules. This Essay explores six such divergences and how they illuminate some of the most important, unanswered questions of the statutory era.

First, thirty years of Chevron highlight the enduring puzzle over the legal status of statutory interpretation methodology in general. Chevron is a “precedent;” the remaining statutory interpretation doctrines do not even rise to the status of “law.” But second, Chevron’s own fate is inextricably tied to these other rules, because Chevron relies on them in its famous two-step test. Critics blame Chevron’s manipulability, but arguably the blame lies more with the legal indeterminacy of all of the other statutory interpretation rules upon which Chevron relies. Third, as the Chevron doctrine has evolved, it has become more attendant to the realities of how Congress drafts statutes—realities in which the Court seems wholly uninterested when it comes to the rest of statutory interpretation. Relatedly, the Court shows no shame in acknowledging Chevron’s source; the Court created the doctrine. The jurisprudential status of the other interpretive rules, however, remains ambiguous, with the federal courts loathe to admit that they have fashioned a common law of statutory interpretation. Fourth, Chevron, as further developed by Mead, is the one instance in which the Court has explicitly used interpretive doctrine to influence the procedures that Congress uses. Again in contrast, across the rest of the statutory landscape, the Court has refused to enter the sausage factory, continuing to reject the idea that courts should interfere in the lawmaking process, or that how a law is made should affect its interpretation. Fifth, Chevron’s evolution has blown a hole through conventional notions of statutory stare decisis, but at the same time the Court now seems afraid that it has given away too much. Today, agency statutory interpretations may displace judicial precedents but, when agencies are not in the picture, the Court hoards power: it gives its own statutory precedents “super” stare decisis effect; is stingy when it comes to interpreting congressional overrides; and won’t cede any control over interpretive rules to any other branch.

* Professor of Law, Yale Law School. Thanks to Peter Shane and Chris Walker for the invitation to participate and to Molly Alarcon, Carter Greenbaum, and Grace Heusner for excellent research assistance.

Finally—and this is a shared feature—both Chevron and the rest of the statutory interpretation rules rest on an outmoded, “Schoolhouse Rock!” understanding of Congress and agencies that is no more, if it ever was. Thirty years of Chevron thus reveal a statutory law–landscape in remarkable flux, and a Court making few connections between the closely linked administrative and statutory domains.

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INTRODUCTION

*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ is best known as a key rule of administrative law, but it is also a vital doctrine of statutory interpretation. Like most other interpretive doctrines, *Chevron* instructs courts how to resolve statutory ambiguity and, for that reason, *Chevron* rightfully occupies a central place in the legislation canon. At the same time, however, *Chevron* operates very differently from virtually all of the other statutory interpretation rules. Those differences, and what they tell us about the current state of the law of the statutory age, are the focus of this Essay.

Consider the following distinctions between *Chevron* and the rest of the statutory interpretation rules. *Chevron* is more of a “doctrine” than the other interpretive principles. It is more hinged to the realities of how Congress drafts. Its application also has forced the U.S. Supreme Court to grapple explicitly with hard questions about the role of judicial stare decisis in statutory cases and, more generally, about the role of courts in the modern regulatory era—questions that hover, still unanswered, over the remaining rules of construction. And yet, *Chevron* is inextricably—perhaps ill-fatedly—linked to these other rules, because *Chevron*’s own doctrinal test requires the courts to consider them in every *Chevron* inquiry.

These differences and connections—illuminated when one analyzes *Chevron* from a legislation, rather than from an administrative law, perspective—productively reveal some of the most important and unanswered questions of the statutory era. Specifically, this Essay focuses on six doctrinal and theoretical intersections:

First, *Chevron* is a “precedent,” whereas the other canons of statutory interpretation are not treated as precedent or “doctrine” of any kind. Instead their legal status remains entirely ambiguous. These other canons help to decide cases but are not treated as “law.” Instead, they often are referred to as mere “rules of thumb.”

Second, *Chevron* itself exposes the contingency of those other canons, in *Chevron*’s own reliance on them in its famous two-step test. Under *Chevron*, courts must use “traditional tools of statutory construction”² to determine if the statute is sufficiently clear to deprive agencies of interpretive leeway. Law reviews are clogged with criticisms of courts’ inconsistent approaches to this first-step inquiry, but the fault arguably lies with the wishy-washiness not of *Chevron*, but of those canons on which *Chevron* relies and whose fickle applications have been chronicled at least since Karl Llewellyn’s famous exposition.³

Third, *Chevron* embraces legislative realism and also has grappled with its own jurisprudential foundations in ways that other canons do not and

1. 467 U.S. 837 (1984).

2. *Id.* at 843 n.9.

3. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (chronicling that for every canon there is a counter-canon that contradicts it).

have not. Although the Court announced *Chevron* with a hodgepodge of justifications that ranged from congressional intent to agency expertise,⁴ the Court over the last decade, beginning in *United States v. Mead Corp.*,⁵ has explicitly re-grounded *Chevron* in congressional intent.⁶ Also in *Mead*, the Court embarked on a new effort to make delegation doctrine more “realistic,” that is, more linked to how Congress actually works and how Congress itself signals delegation.⁷ In contrast, outside of the administrative deference context, the Court has shown virtually no interest in linking how Congress really works to the rest of its interpretive doctrines and has been content to leave the jurisprudential bases of those doctrines imprecisely defined.

Fourth, *Chevron* is the one instance in which the Court has explicitly used interpretive doctrines to influence the *procedures* that Congress uses. In *Mead*, the Court effectively told Congress that if it wants *Chevron* deference for its agencies, it has to delegate with formal process, and that agencies must use those processes rather than announce administrative interpretations more informally.⁸ Again in contrast, across the rest of the statutory interpretation landscape, the Court has refused to enter the sausage factory, continuing to reject the idea of “due process of lawmaking”—i.e., that how a law is made should affect its legitimacy or how it is interpreted by courts.⁹

Fifth, *Chevron* has been at the center of a robust debate about statutory stare decisis. That debate has highlighted deep tensions in how the Court conceives of precedent more generally in the statutory context, and also evinces the Court still struggling to define its role in the modern statutory era. *Chevron*, of course, worked an enormous transfer of interpretive authority from courts to agencies. But the Court went even further in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*,¹⁰ a 2005 decision that effectively liberates agencies from stare decisis for their own interpretations in many cases and even allows agency interpretation of ambiguous statutes to displace judicial precedents on those same questions.¹¹ At the very same time, the Court has continued to use *other* doctrines of statutory precedent to enhance its power over other institutional actors, perhaps in reaction to all it has given away through the *Chevron* line of cases. For instance, the Court applies “super strong stare

4. *Chevron*, 467 U.S. at 864–65.

5. 533 U.S. 218 (2001).

6. *See id.* at 236–37.

7. *Id.* (narrowing *Chevron*’s availability to those situations in which Congress has signaled an intent to delegate and in so doing seeking to “tailor deference to [the] variety” of ways in which Congress delegates).

8. *Id.* at 226–27.

9. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 199 (1976); cf. SUSAN ROSE-ACKERMAN ET AL., “DUE PROCESS OF LAWMAKING”: UNITED STATES, SOUTHERN AFRICA, GERMANY, AND THE EUROPEAN UNION, (forthcoming 2014) (describing the lack of a “due process of lawmaking” doctrine in American statutory law).

10. 545 U.S. 967 (2005).

11. *Id.* at 984–86.

decisis” to its *own* substantive statutory precedents,¹² making them more deeply entrenched than ordinary decisions. The Court also refuses to treat statutory interpretation principles as formal precedents, a choice that prevents Congress (or anyone else) from having any control over the canons of interpretation.¹³

Sixth—and this is a parallel more than a difference—for all that commends *Chevron*, it still is almost as outdated as the rest of statutory interpretation doctrine. *Chevron* is based on a “Schoolhouse Rock!” version of Congress that is no more, if it ever was. For example, *Chevron* assumes that Congress delegates to one federal agency at a time, when in fact Congress often delegates to multiple agencies simultaneously, not all of which are federal.¹⁴ *Chevron* also assumes that congressional drafters are focused on the Court’s own doctrines, when in fact the realities of the legislative process are now so complex that drafters are focused on a host of other factors—including agencies—that have little to do with courts (if they ever did in the first place).¹⁵

In the end, viewing statutory interpretation in light of thirty years of *Chevron* reveals the federal courts still finding their way, and still working out the nature of statutory law in the modern legal era. We do not yet know what kind of precedential weight statutory interpretation doctrines carry, or whether they will ever be more determinate. We do not yet have a clear set of foundations for the non-*Chevron* rules of construction themselves, but what we can say is that if they are supposed to reflect how Congress drafts, the Court is not making much of an effort toward that goal. And perhaps most fundamentally, we see the Court torn between giving more power to agencies and hoarding it for itself. Can we blame it? After all, the role of the federal courts would be dramatically diminished if the courts ceded control over the world of statutes.

Each of these *Chevron* differences could be the subject of its own study, and I have elaborated on aspects in other work.¹⁶ But considering them

12. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988); see, e.g., *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (adhering with “special force” to a longstanding interpretation of a Court of Federal Claims statute of limitations).

13. See generally Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013).

14. See generally Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011). For a detailed exposition of modern deviations from the textbook processes of both administrative law and statutory interpretation, see Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, U. PENN. L. REV. (forthcoming 2015).

15. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 767–69 (2014).

16. For work on the legal status of the canons, see Gluck, *supra* note 13; Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) [hereinafter Gluck, *States As Laboratories*]. For work on *Chevron*’s justifications and its legislative realism, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical*

together, albeit in more summary fashion, has the advantage of constructing a more holistic picture of the doctrines in flux, and what the next thirty years of *Chevron* and the statutory landscape have in store.

I. *CHEVRON* AS A STUDY IN THE LEGAL STATUS OF STATUTORY INTERPRETATION METHODOLOGY

Chevron is a legal framework used by courts to resolve questions of statutory ambiguity. Like all canons and presumptions of statutory interpretation, *Chevron* is a rule that tips the scales in favor of a particular result when a statute is unclear. In *Chevron*'s case, the scales are tipped toward the agency's preferred interpretation. So understood, it functions much like any other canon of statutory interpretation, such as the presumption that ambiguous statutes be construed as not preempting state law (the "presumption against preemption")¹⁷ or the presumption that ambiguous statutory provisions be construed so as not to render other statutory provisions redundant (the "rule against superfluities").¹⁸ Administrative law experts sometimes resist this description of *Chevron* as a "canon": they think of *Chevron* as hard-core "doctrine," indeed, their central doctrine, in ways that statutory interpretation canons are not often understood.¹⁹ But *Chevron*'s analogous role in resolving interpretive disputes is why legislation experts understand *Chevron* (properly in my view) as not only a central administrative law doctrine but also as another tool in the judicial bucket of interpretive aids.²⁰

This is not to say that *Chevron* is just any old interpretive tool. It is the most cited administrative law case in history and has been referenced in more than 7000 cases and more than 5000 law review articles.²¹ Congress increasingly delegates more work to agencies and, as a result, the validity of the "agenc[ies'] statutory interpretation"²² is the main issue in an enormous number of run-of-the-mill statutory interpretation cases.

Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 STAN. L. REV. 901 (2013); Bressman & Gluck, *supra* note 15. For work on *Chevron*'s outdated understanding of how Congress drafts and delegates, see Gluck, *supra* note 14; Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Gluck, O'Connell & Po, *supra* note 14.

17. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

18. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–703 (1995) (refusing to construe the statute in ways that would give two statutory terms duplicate meaning).

19. For statements to this effect from one of the leading administrative law textbooks, see PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS* 1021 (11th ed. 2011).

20. See Connor N. Raso & William N. Eskridge, Jr., *Chevron As a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

21. 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, 782 & n.6 (2010); see Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 & n.2 (2014).

22. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 524–26 (2005).

Chevron, however, has an entirely different legal status from the other interpretive principles. With the exception of *Chevron* and its progeny, the Court does not apply what I have called “methodological stare decisis”—the concept that judicial interpretive pronouncements (e.g., “We presume that Congress accords the same meaning to a term used multiple times within the same statute”) should be treated as precedential for the next statutory case. This difference—*Chevron*’s privileged status as real “doctrine”—lends jurisprudential clarity to *Chevron* that escapes the other interpretive rules. Moreover, in contrast to most of the other interpretive rules, there is widespread agreement about *Chevron*’s source: the Court created the doctrine. And so we know the nature of the power that underlies it, and who can change it.

A. Only *Chevron* and Its Progeny Get Stare Decisis Effect

As I have detailed elsewhere, there is a conspicuous absence of any kind of system of precedent for the entire non-administrative law-related landscape of statutory interpretation methodology.²³ For example, even when a majority of the U.S. Supreme Court agrees on an interpretive principle in a particular case (for example, “floor statements are not reliable legislative history” or the presumption that ambiguous bankruptcy statutes be construed in favor of the debtor, and so on),²⁴ that principle is not viewed as “law” for the next case, even when the same statute is being construed. The Justices either believe that they cannot bind other Justices’ (or future Justices’) methodological choices or have implicitly concluded that it would not be wise to do so.²⁵ Instead, courts and scholars routinely refer to these canons as “universal” principles, or “rules of thumb,”²⁶ a sharp divergence from the way in which they treat analogous decision-making principles in other contexts—including choice-of-law rules, rules of contract interpretation, and even constitutional law decision-making regimes such as the tiers of scrutiny.

All of the canons except *Chevron* and its progeny, that is. *Chevron* is routinely referred to as a “precedent” by courts and scholars alike,²⁷ and, as noted, it is one of the most cited cases in history.²⁸ Indeed, *Chevron* is a precedent that was modified by another precedent (i.e., *Mead*) that was

23. See Gluck, *States As Laboratories*, *supra* note 16.

24. See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY* app. B (4th ed. 2007) (cataloguing more than 100 canons and citing references).

25. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology As “Law” and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1910 (2011).

26. *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“[C]anons of construction are no more than rules of thumb . . .”); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *COLUM. L. REV.* 609, 662 (1990); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 *MINN. L. REV.* 199, 206 (1999). See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

27. See generally Raso & Eskridge, Jr., *supra* note 20.

28. *Id.* at 1730–31; Beermann, *supra* note 21, at 782 & n.6.

modified by yet another precedent (i.e., *Brand X*). The “*Chevron* doctrine” as we talk about it today (and as I shall refer to it here) encompasses all of these decisions, each building upon the other. Nothing like this exists with respect to the rest of the interpretive doctrines. The Court has not, for example, stated that the rule against superfluities applies only in a particular class of situations (say, short versus long statutes or to a particular statute), and then applied that precedent to the next case, much less built on it with another doctrine.²⁹

The Court has no ranking of these other canons and no other process that determines in what order they will be applied or when. As another example, the Court still has not decided—even though it has repeatedly debated the question—whether legislative history may be consulted to clarify a statute before applying a policy canon like the rule of lenity³⁰ or constitutional avoidance.³¹ Just this past Term, the Court divided again in two high profile cases over the question of what threshold level of ambiguity is necessary to trigger the application of two of the most common interpretive presumptions—the federalism canon, in *Bond v. United States*,³² and lenity, in *Abramski v. United States*.³³ We have seen these debates before,³⁴ and it is virtually assured we will see them again, because of the absence of methodological stare decisis.

B. Why Chevron’s Status As “Real Law” Matters

It is a matter of highly contested opinion whether there *should* be methodological stare decisis for principles of statutory construction.³⁵ I

29. There may be some emerging exceptions. Most notably, the “extraterritoriality canon”—the presumption that U.S. laws do not apply abroad unless the statute explicitly so provides, see *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)—in recent years seems to have taken on the status of something closer to a precedential rule than a presumption of statutory interpretation. The rare progression from canon to precedent is worthy of separate examination, which I develop in a forthcoming work.

30. *Compare, e.g.*, *United States v. Hayes*, 555 U.S. 415, 429 (2009), *with id.* at 436–37 (Roberts, C.J., dissenting) (arguing that the statutory ambiguity required applying the rule of lenity, rather than “comb[ing] through obscure legislative history”).

31. *Compare, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001), *with id.* at 706–07 (Kennedy, J., dissenting) (debating the level of ambiguity required to trigger the canon of constitutional avoidance).

32. 134 S. Ct. 2077 (2014). *Compare id.* at 2090, *with id.* at 2094–97 (Scalia, J., concurring in judgment) (debating the level of ambiguity necessary to trigger the federalism canon).

33. 134 S. Ct. 2259 (2014). *Compare id.* at 2272 n.10, *with id.* at 2280–81 (Scalia, J., dissenting) (debating whether the rule of lenity should have been applied before resorting first to statutory purpose and history to clarify ambiguity).

34. *Compare* *Skilling v. United States*, 561 U.S. 358, 410–11 (2010), *with id.* at 423–34 (Scalia, J., concurring in part and concurring in judgment) (debating whether the rule of lenity and avoidance canons could narrow an unconstitutionally broad criminal statute). *See Hayes*, 555 U.S. at 429, 436–37 (summarized *supra* note 30).

35. *See* Gluck, *supra* note 13, at 778. Some view statutory interpretation as not a “science” but an “art,” and so as requiring a more creative judicial decision-making process than other areas of law. *Cf. generally* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1269 (1947) (comparing interpreting legislation to interpreting music and addressing “judges’ reluctance to admit their own

have argued elsewhere that some species of methodological stare decisis might ameliorate the lack of predictability associated with statutory interpretation.³⁶ At a minimum, and regardless of how the stare decisis question is resolved, canons must have *some* legal status. If they aren't precedent or "law," what are they? It is difficult to think of any other rules that do so much work in judicial opinions³⁷ whose legal status remains so ambiguous. Perhaps even more surprising, the Court does not seem at all interested in acknowledging this ambiguity, much less in resolving it.

One significant aspect of *Chevron's* clear legal status is that it dispels a common "impossibility thesis"—the argument that it is simply not possible to doctrinalize interpretive rules. (State courts across the country have in fact doctrinalized many of the canons, and state legislatures have even passed laws about them, two developments that further dispel this hypothesis.³⁸)

Another significance of the *Chevron* difference is that judges and scholars are not evasive about "where the rule comes from" as they indeed are with respect to the other canons. Administrative law scholars routinely argue that much of administrative law, with a particular focus on *Chevron*, is judge-made common law.³⁹ In contrast, when it comes to the other canons, courts suggest that they come from Blackstone,⁴⁰ from "common sense," or from reflections of how Congress legislates (but reflections observed or originated by whom, no one says).⁴¹ The federal courts generally do not acknowledge that *courts create at least some canons* in the same way that courts created *Chevron*. Yet, the presumption against preemption was announced in a New Deal-era case, *Rice v. Santa Fe Elevator Corp.*⁴² in 1947. The federalism canon was announced in 1991 in *Gregory v. Ashcroft*.⁴³ Similarly, policy canons like the rule that exemptions to the tax code are narrowly construed did not come down from

creativity"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947); Todd D. Rakoff, *Statutory Interpretation As a Multifarious Enterprise*, 104 N.W. U. L. REV. 1559, 1578 (2010). Many believe that judges must retain special interpretive flexibility in this context, and that belief may explain why most commentators seem content to rest with the nebulous nature of the canons' legal status. It is worth pointing out, however, that this romanticized vision of the judicial role in statutory interpretation is a vision that is somewhat at odds with the positivism embraced by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its doctrinal progeny; namely, the idea that law does not come from nowhere.

36. Gluck, *States As Laboratories*, *supra* note 16, at 1846–55.

37. At least in terms of justification; the canons' actual effect on judicial decision making is difficult to determine and contested.

38. *See generally* Gluck, *States As Laboratories*, *supra* note 16 (detailing these state developments).

39. *See, e.g.*, Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 2–3 (2011); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1295 (2012).

40. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997) (emphasizing the "sheer antiquity" of lenity as a fact that justifies its application).

41. *See* Gluck & Bressman, *supra* note 16, at 924–26.

42. 331 U.S. 218, 230 (1947).

43. 501 U.S. 452, 461 (1991).

the sky, either.⁴⁴ Aren't at least some of these canons as much "common law" as *Chevron*? To be sure, one might argue that they are *more* than common law: for example, that canons invoking constitutional principles like federalism are actually constitutional law, or constitutionally derived "constitutional common law."⁴⁵ The point is that, although we might divide over which category of "law" they are, they cannot really be "not law" at all.⁴⁶

In my view, the judicial resistance to acknowledging the common law status of these canons stems in large part from the consequences that would be attendant to such an acknowledgment. If the canons were understood as common law, they might bind other judges (meaning there would, indeed be, methodological *stare decisis*)—or, even worse (from the viewpoint of some judges), give Congress the power to legislate over them. In fact, scholars have so assumed that Congress could legislate some different version of *Chevron*.⁴⁷ When it comes to the non-*Chevron* canons, however, judges have vigorously resisted the idea that legislatures can dictate the rules of statutory interpretation⁴⁸—a position that almost certainly comes both from a judicial desire to retain control over these cases and also from a sense that these canons are somehow more "internal" or personal to the individual judge than ordinary decision-making rules.

One question to ask is why courts have so comfortably viewed *Chevron* as different. It may be that more formality is necessary in the *Chevron* context because the administrative deference doctrines explicitly regulate interbranch relationships. Or it may be that deference doctrines are a distinctly *modern* animal—created by modern courts to respond to the rise of the administrative state, whereas some (but certainly not all) of the other canons have applied to judicial decision making since Roman times, and many more were inherited from the English common law tradition. These older doctrines may be more poorly tailored to the modern statutory age state than is *Chevron*.

The distinction may also stem from the fact that *Chevron* functions slightly differently from the typical canon of statutory construction: it does not aim to construe language, which is, perhaps, an inherently indeterminate task that requires some interpretive flexibility. Rather, *Chevron* simply

44. See ESKRIDGE, FRICKEY & GARRETT, *supra* note 24, app. B at 41 (citing *United States v. Burke*, 504 U.S. 229 (1992) (Souter, J., concurring in judgment)); see also *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988).

45. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

46. Some of these canons, like the rule of lenity, may have constitutional bases but, as I detailed in Gluck, *supra* note 13, that argument certainly cannot be made for all of them.

47. See generally Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637 (2003); cf. Kent Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 FORDHAM L. REV. 587 (2014) (detailing how Congress legislated *Skidmore*, rather than *Chevron*, deference for certain administrative preemption decisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 25b(b)(5)(A) (2012)).

48. See, e.g., SCALIA & GARNER, *supra* note 26, at 245 (disputing the constitutionality of legislated interpretive rules). See generally Gluck, *States As Laboratories*, *supra* note 16 (chronicling state court resistance to legislated interpretive rules).

dictates the decider. *Chevron's* kind of institutional allocation rule (very similar to how the *Erie* doctrine allocates decision-making authority between state and federal courts⁴⁹) may be more amenable to formalization than rules that go to the meaning of language.

One punch line of this exposition, then, is that it may not be the inherent *legal status* of the canons of interpretation that is the problem; rather, it may be their *substance*. What if, e.g., the presumption against preemption, instead of functioning as a principle of linguistic construction, functioned instead to shift the interpretation of an ambiguous statute to the states' discretion? The rule of lenity is an interesting example in this regard. Lenity *does* effectively shift the decision to the criminal defendant: the presumption is that ambiguous criminal laws are interpreted in favor of defendants. It may be no surprise then, in light of the foregoing discussion, that judges tend to describe lenity in more "lawlike" terms than they tend to describe the other canons of interpretation. Many scholars consider lenity closer to a "doctrine" (perhaps even a doctrine of constitutional law) than a "canon."⁵⁰ Justice Scalia has so defended its legitimacy on several occasions.⁵¹

II. CHEVRON AS A STUDY IN THE CONTINGENCY OF THE REST OF THE CANONS

But even as it differs from the other canons, *Chevron's* fate, in an important sense, rests on them: *Chevron* and the other canons of interpretation are inextricably linked through *Chevron's* own formulation. *Chevron's* famous two-step provides:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [n.9] If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁵²

As to the ascertainment of ambiguity, the opinion's also famous footnote 9 sets out how judges are to go about their task: "If a court, *employing*

49. See Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2610 (2006) ("*Chevron* is our *Erie*, and much of the time, it is emphatically the province and duty of the executive branch to say what the law is.")

50. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406 n.26 (2010) ("[Lenity] 'reflects not merely a convenient maxim of statutory construction,' but rather 'is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.'" (quoting *Dunn v. United States*, 442 U.S. 100, 112 (1979))).

51. See, e.g., SCALIA & GARNER, *supra* note 26, at 296–97.

52. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (footnotes omitted unless indicated).

traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”⁵³

Chevron tells courts to defer to reasonable agency statutory interpretations if the statute is ambiguous, but it *also* tells courts that they first should attempt to resolve any ambiguities themselves using the “traditional tools of statutory construction.” The problem, however—which relates directly to the absence of general methodological *stare decisis* described in the previous part—is that the Court never sets out what those “traditional tools” are, likely because it could not agree on them if it wanted to.

The result is that *Chevron* has become a punching bag for those who argue that courts are result-oriented in their approach to agency deference. William Eskridge and Connor Raso go so far as to challenge the idea that *Chevron* is a precedent in the first place because *Chevron* and its sister administrative deference doctrines are so inconsistently applied.⁵⁴ Nevertheless, the administrative law canons do have an effective “ranking”—we know, e.g., that *Curtiss-Wright* deference (on national security matters)⁵⁵ is stronger than *Chevron*, which is stronger than *Skidmore*,⁵⁶ and so on. On the other hand, we know little about whether the presumption against preemption is stronger than the presumption against implied repeals.

These uncertainties about the relationships among the non-*Chevron* canons play out in the *Chevron* cases themselves. The Court is divided about whether legislative history should be used to eliminate statutory ambiguity (and so preclude agency deference under *Chevron*), or whether policy-based canons like preemption might do so,⁵⁷ and so the federal courts are generally inconsistent in their use of such canons at Step One. These disputes give *Chevron* a bad name, but understanding the statutory interpretation landscape makes clear that the disputes are not really about *Chevron*. Rather, they reflect a lack of consensus on the Court about the *other* interpretive tools, even in the absence of an agency interpretation in the case.

The Court rests *Chevron*’s application on a finding of “ambiguity” but has directed jurists to make that ambiguity determination with reference to a

53. *Id.* at 843 n.9 (emphasis added).

54. See generally Raso & Eskridge, Jr., *supra* note 20.

55. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

56. *Skidmore*, which preceded *Chevron*, was not the same kind of power-transferring deference doctrine as *Chevron*. In *Skidmore*, the Court held that agency statutory interpretations should be given weight in accordance with their “power to persuade,” but the courts retained ultimate interpretive authority. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

57. See generally Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64 (2008). For example, if a statute is ambiguous with respect to preemption, the question is whether to defer to the agency’s view under *Chevron* or “clarify” the statute by applying the default no-preemption rule, thereby depriving the agency of discretion on that question.

category of legal tools—“traditional tools of statutory construction”—that is murky at best, because the Court cannot agree on what the traditional tools of construction are, or in what order they should be applied, and because the Court will not treat any decision on such matters as carrying any kind of stare decisis effect. Don’t blame *Chevron*. Blame the lack of methodological consensus in the federal courts when it comes to the rest of the interpretive principles.

III. CHEVRON AS A STUDY IN LEGISLATIVE REALISM AND JURISPRUDENTIAL FOUNDATIONS

Chevron and its progeny also radically differ from the other canons with respect to how very explicitly the Court has grappled with *Chevron*’s basis and goals in ways it has not for the other presumptions. This jurisprudential struggle has resulted in a *Chevron* approach that is now much more focused on how Congress actually works than is typical for the rest of the statutory interpretation rules.

A. *There Is No Coherent Jurisprudential Basis for the Canons of Interpretation Outside of the Chevron Line of Cases*

Outside of the *Chevron* context, judges have justified the application of the canons on numerous and often conflicting grounds, all generally grouped under the very large umbrella concept that courts should act as “faithful agents” of the legislature.⁵⁸ This has translated to arguments that the canons are legitimate because they (1) reflect how Congress drafts (e.g., the rule against superfluities); (2) help Congress draft better (e.g., the presumption against preemption); (3) are part of a shared set of background principles of which courts and Congress are each aware and mutually apply (e.g., clear statement rules); (4) impose beneficial, sometimes constitutional, policy norms on the legislative process (e.g., the rule of lenity); or (5) serve a “rule of law” function (in the sense that they advance values of coherence, predictability, and notice (e.g., the presumption that statutory terms are used consistently throughout the U.S. Code)).⁵⁹

Obviously not all of these functions are the same. The claim that interpretive doctrines should merely reflect how Congress drafts posits a very different role for the judiciary than a claim that interpretive doctrines should aim to change congressional behavior or even impose values (like consistency or federalism) on legislation that Congress itself does not. Nor has the Court disaggregated the individual canons and justified different canons on different grounds—for example, perhaps canons based on the Constitution do not require congressional awareness or use to be legitimate.

Moreover, many of these justifications for the canons are based on *empirical* claims: the idea that canons reflect how Congress actually drafts and that the canons set out “clear statements” that Congress knows to use

58. Gluck & Bressman, *supra* note 16, at 913 (collecting sources).

59. For a more detailed discussion and examples from cases, see Gluck & Bressman, *supra* note 16, at 979–82.

are claims about the real world of legislative drafting, and yet the Court does not seem at all interested in verifying the accuracy of these assumptions. Justice Scalia and Bryan Garner recently published a 500-page treatise discussing more than seventy individual canons, including their bases in legislative drafting, without presenting any evidence of the actual federal statutory drafting process.⁶⁰

B. Contrast the Progression from Chevron to Mead, and the Move Toward Legislative Realism in the Deference Context

Enter *Chevron*. It is true that *Chevron*, like the rest of the statutory interpretation canons, initially rested on a variety of not necessarily consistent normative bases. The *Chevron* opinion itself set out a range of justifications for its new rule—justifications that extended from agencies' superior political accountability to the notion that Congress actually *intends* to delegate to agencies whenever statutes are ambiguous or silent.⁶¹ In the years after *Chevron*, the broad consensus was that *Chevron*'s intent-based presumption—that any statutory ambiguity or silence signals congressional intent to delegation—was a fiction, although, to some, a benign one.⁶²

Then came *Mead*, in which the Court expressly grappled with whether Congress *actually* intends to delegate whenever a statute is ambiguous or silent. The Court answered that question in the negative, and in the process significantly narrowed the *Chevron* presumption of delegation to apply only when Congress gives agencies formal lawmaking authority (and agencies use that authority).⁶³

One way to understand the march from *Chevron* to *Mead* is as an evolution from a broad and ambiguously justified approach to delegation to one focused on *one* particular justification—congressional intent to delegate—grounded in legislative reality. Justice Souter's majority opinion in *Mead* begins with a recital of the many different ways in which Congress includes agencies in federal statutes and the many different ways in which agencies exercise the power that Congress gives them. In Justice Souter's words, *Mead* is the Court's effort to "tailor deference to [the] variety" of ways in which Congress delegates.⁶⁴ So understood, *Mead* makes two critical moves: (1) it realistically acknowledges that Congress designs statutory roles for agencies in myriad ways that a single interpretive presumption cannot capture, and (2) it argues that courts should *try* to reflect congressional practice, even if it comes in this variety of forms. Then-professors Barron and Kagan described *Mead*'s holding as one that

60. See generally SCALIA & GARNER, *supra* note 26.

61. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

62. See generally Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009 (2011).

63. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law . . .").

64. *Id.* at 236.

firmly and exclusively grounds *Chevron* in congressional intent, calling it “the apotheosis of a developing trend in *Chevron* cases: the treatment of *Chevron* as a congressional choice, rather than either a constitutional mandate or a judicial doctrine.”⁶⁵

Return to the non-administrative law canons and consider how the *Chevron-to-Mead* doctrinal evolution exposes the flimsiness of their own jurisprudential bases. Judges have not told us which interpretive doctrines must be pegged to congressional intent to be legitimate, nor have they acknowledged the dizzying variety in how Congress drafts. As my recent empirical study of congressional drafting with Lisa Bressman details,⁶⁶ omnibus and non-omnibus statutes are very different animals (for example, legislative history and consistent-word usage play different roles in each). Statutes drafted by a single committee are different from statutes drafted by leadership or multiple committees acting together. Appropriations statutes are different from authorization statutes, and so on. Even the subject matter makes a difference, in the view of the drafting staff, with respect to what presumptions and drafting practices congressional drafters apply. It may not be possible, or desirable, to craft an interpretive regime that actually reflects the complexities of this real-world drafting process. But the point is that, in the *Chevron* context, *the Court has worn these questions on its sleeve*. The *Chevron-to-Mead* doctrinal evolution has occasioned a vigorous public debate in the Court (mostly between Justices Breyer and Souter on the one side and Justice Scalia on the other) about how much doctrine should or does reflect congressional practice; how much complexity the system will tolerate; and the costs and benefits of tailored or transsubstantive interpretive rules⁶⁷—questions that have long lurked far beneath the surface for the rest of statutory interpretation doctrine.

C. The Court Is Doing a Better Job Approximating How Congress Works with the Administrative Canons

It therefore may come as little surprise that the Court seems to be doing a better job approximating how Congress delegates than approximating how Congress drafts. The Gluck-Bressman study surveyed 137 congressional counsels on their familiarity with the judicial doctrines of interpretation and delegation and on whether the doctrines (regardless of staffer familiarity with them) substantially reflected the realities of the legislative drafting process.⁶⁸ As we detailed, congressional staffers knew few of the non-administrative law canons of statutory interpretation and rejected several

65. David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212.

66. See Gluck & Bressman, *supra* note 16, at 979–82; Bressman & Gluck, *supra* note 15, at 758–61.

67. See, e.g., *Mead*, 533 U.S. at 236 (“If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. . . . Justice Scalia’s first priority over the years has been to limit and simplify. The Court’s choice has been to tailor deference to variety.”).

68. See Bressman & Gluck, *supra* note 15; Gluck & Bressman, *supra* note 16.

that they did know (such as presumptions of consistent-term usage) as unrealistic assumptions about congressional drafting.⁶⁹

The administrative law canons, however, fared better. For example, the rule announced in *Mead*, although the case was virtually unknown by name or as a doctrine that courts employ, was overwhelmingly validated as a good signal on which to rest assumptions about congressional delegation. *Chevron* was the most known of *all* the canons by name, and the majority of respondents said they understood *Chevron*'s consequences when drafting. Even some of the less generally known and hotly contested administrative law doctrines, such as the major questions rule (i.e., do not presume from mere ambiguity that Congress delegates major economic, policy, or political statements to agencies⁷⁰), were validated by our respondents as realistic assumptions about delegation.⁷¹

Why the Court seems to have done a better job in the administrative law context is a difficult question about which one can only hypothesize. The current Court is packed with administrative law scholars, former D.C. Circuit judges, and former executive branch officials. Only Justice Breyer has worked in the legislative branch, and there has not been a Justice on the Court who served in Congress since Justice Black retired in 1971. As noted in Part I, it also seems relevant that the administrative law doctrines have been developed hand in hand with the regulatory state itself, in contrast to the ancient, "cookie-cutter" rules of general interpretation.

Regardless of the reason, *Mead*'s apparently successful attempt to incorporate some realistic legislative signaling into interpretive doctrine challenges the Court either to do better when it comes to the rest of the canons, or to justify why it chooses not to do so. One can see why the Court likes to say that all of its canons aim to reflect congressional practice: such an approach has obvious democratic legitimacy and legislative supremacy attractions. What is more, to say that the canons merely reflect what Congress does is to say that the Court *does not make them up*—and I detailed in Part I the Court's strong resistance to acknowledging that the canons are judicially derived.

But if the canons do not actually reflect congressional practice, then the Court needs to acknowledge where they are coming from (the *Court*?) and what they are doing. There are good arguments to be made, for example, that federal courts should interpret statutes to be internally consistent even if Congress did not so intend—such an approach to statutory interpretation would rest on the importance of public notice or on the federal courts' role in cohering the corpus juris.⁷² Likewise, there are arguments to be made in

69. See Gluck & Bressman, *supra* note 16, at 906, 924–64.

70. See *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).

71. See Bressman & Gluck, *supra* note 15, at 990–1014; cf. Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 715–21 (2014) (finding similar understandings among agency personnel surveyed on many of the same questions utilized by Gluck and Bressman).

72. See *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 744 (2013) (“Consistency of interpretation of related state and federal laws is a virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and for nonlawyers alike.”);

support of courts interpreting statutes against the backdrop of constitutionally derived values, like federalism and lenity, that Congress might not have sufficiently considered. The point is not to criticize these alternate approaches, but rather to press the Court to be clear about what should justify modern interpretive practice, as the Court has tried to do in the context of delegation.

IV. CHEVRON AS A STUDY IN “DUE PROCESS OF LAWMAKING” (AND AS AN END RUN AROUND *VERMONT YANKEE*)

Ever since 1892, when the Court held in *Field v. Clark*⁷³ that, “an enrolled act, thus authenticated, is sufficient evidence of itself . . . that it passed Congress,”⁷⁴ federal courts have refused to enter the sausage factory. That is, they have refused to consider whether Congress engages in “due process of lawmaking”—for example, whether Congress was sufficiently deliberate or transparent in the enactment of legislation—in evaluating a statute’s legitimacy or its meaning.⁷⁵ This position has arguably taken on greater significance in recent years, as extreme congressional gridlock has occasioned a rise of what political scientist Barbara Sinclair calls “unorthodox lawmaking”—the increased use of legislative maneuvers such as closed-door summits and omnibus (bundled) legislation that make the legislative process less transparent and result in statutes that can be quite messy even as they increase in complexity.⁷⁶

A. *Mead*, However, Is a Due Process of Lawmaking Decision

But here, again, *Chevron* provides an exception. *Mead*, although not commonly conceptualized in this fashion, is a “due process of lawmaking” decision when considered from the perspective of statutory interpretation doctrine. In *Mead*, the Court effectively told Congress that if it wants deference for an agency delegate, the agency must be given the power to make law through the transparent and deliberative notice-and-comment

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in judgment) (“The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated”); SCALIA & GARNER, *supra* note 26, at 252 (“[T]he body of the law should make sense, and . . . it is the responsibility of the courts, within the permissible meanings of the text, to make it so.”); Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES LEGAL SCHOLARSHIP, art. 1, 2002, at 7, available at <http://www.bepress.com/ils/iss3/art1> (subscription required). See generally William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000) (elaborating on Justice Scalia’s views of the judicial obligation to impose coherence on the U.S. Code).

73. 143 U.S. 649 (1892).

74. *Id.* at 672.

75. See generally Linde, *supra* note 9.

76. See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 2012); Gluck, O’Connell & Po, *supra* note 14.

process provided by the Administrative Procedure Act.⁷⁷ And the agency has to *use* it. As Justice Scalia commented in his *Mead* dissent, if the Court were concerned only with finding a clear signal of congressional intent to delegate, then looking for the delegation of lawmaking power from Congress would have been enough.⁷⁸ Requiring the agency to *use* that power adds something more to the *Mead* opinion.

The Court in *Mead* was adding something that it had not felt comfortable doing as a matter of constitutional law in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁷⁹ In *Vermont Yankee*, the Court held that it was beyond the power of the federal courts to add procedural requirements to agency statutory implementation beyond the requirements set forth in the Administrative Procedure Act.⁸⁰ *Mead*, however, accomplishes close to the same result in a more indirect fashion, encouraging agencies to use formal procedures if they want their interpretations to get deference. The question is why, here too, the Court seems more willing to grapple with the same ideas in the *Chevron* context—in this case, ideas about which policymaking procedures produce more legitimate outcomes—that it continues to avoid when it comes to the rest of the canons.

B. *Mead* (Like Some Other Canons) As “Backdoor” Constitutional Law

We also see in *Mead* the Court trying to affect congressional behavior through the “softer” mode of regulatory law in ways that it does not feel comfortable doing through the sharper edge of constitutional doctrine. Thus conceptualized, *Mead* bears resemblance to how some scholars have described the Court’s use of certain other interpretive rules, most prominently, the statutory interpretation “clear statement rules.” Clear statement rules require from Congress what are essentially magic words before courts will interpret statutes to tread on constitutional values—for example, the requirement that Congress must be explicit when it wishes to abrogate sovereign immunity or intrude on traditional state functions.⁸¹ As William Eskridge and Philip Frickey have put it, the Court has used these rules to make “backdoor” constitutional law in precisely those areas in which the Court has decided, as a constitutional matter, it should not intervene.⁸²

This comparison to clear statement rules makes even clearer that *Mead* is an end run around *Vermont Yankee*. The Court accomplished through interpretive doctrine what it could not accomplish through constitutional

77. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *see also* Administrative Procedure Act, 5 U.S.C. § 553 (2012) (describing the notice and public comment procedures required for federal rulemaking).

78. *Mead*, 533 U.S. at 246 (Scalia, J., dissenting).

79. 435 U.S. 519 (1978).

80. *Id.* at 543.

81. *See* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

82. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

law, much in the same way that the Court's creation of a new "federalism" clear statement rule in *Gregory v. Ashcroft*⁸³ offered the states the protection from congressional intrusion that the Court had held, just six years earlier, the Constitution could not offer.⁸⁴

And, in return, *Mead* highlights the due-process-of-lawmaking features of the other canons of interpretation. Consider again the clear statement rules, which generally have not been conceptualized as a due-process-of-lawmaking regime. A Court concerned that Congress is not sufficiently deliberative when it comes to, e.g., decisions of federal-state relations, might address that concern by creating an extra legislative hurdle—a requirement of a clear statutory statement for any statutory change to the federalism status quo—to make Congress pause or encourage explicit debate on the subject. Like *Mead*, and in light of *Mead*, such presumptions look much more like judicial attempts to affect the lawmaking process, despite the Court's stated resistance to doing anything of the sort.

V. CHEVRON AS A STUDY IN SUBSTANTIVE STATUTORY PRECEDENTS— AND THE ROLE OF FEDERAL COURTS IN THE STATUTORY ERA

Chevron also has a lot to tell us about how the Court sees its role—and how that role is changing—in the modern statutory state. One way to see this is to look at the next major administrative deference case after *Mead*: *Brand X*—a 2005 decision with enormous repercussions for the allocation of power between courts and agencies.

A. *Is the Court Really Ready to Give Away All of This Power?*

In *Brand X*, the Supreme Court held that agency statutory interpretations of ambiguous statutes sometimes could, and indeed *should*, displace judicial precedents on what those statutes mean—perhaps even U.S. Supreme Court precedents.⁸⁵ This is a "WOW" moment. *Brand X* is arguably the capstone of the Court's *Chevron* evolution: it works a wholesale transfer of statutory interpretation authority from federal courts to agencies. Not since the famous *Erie Railroad Co. v. Tompkins*⁸⁶ case have we seen the Court giving away so much of its power to a different institutional legal actor.

Well before *Brand X*, Cass Sunstein already had called *Chevron* our generation's *Erie* doctrine.⁸⁷ When *Erie* was decided, at the dawn of the

83. 501 U.S. 452, 459–60 (1991).

84. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985).

85. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference 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.").

86. 304 U.S. 64 (1938).

87. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 206 (2006) ("*Chevron* can be seen in this light as a close analogue to *Erie Railroad Co. v. Tompkins*—as a suggestion that law and interpretation often involve no 'brooding omnipresence in the sky' but instead discretionary judgments to be made by appropriate institutions." (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting))).

New Deal era, it was state courts that received the transfer of law-deciding power; in the modern era of the regulatory state, it is federal agencies. *Brand X*, however, makes the *Erie* link even more explicit than *Chevron* alone. As Kenneth Bamberger and Peter Strauss each have noted, just as *Erie* held that state, not federal, courts have the final word on interpretations of state law, the doctrine announced in *Brand X* effectively turns many judicial statutory interpretations into “provisional precedents”: judicial interpretations sit provisionally in place until an agency interpretation displaces them.⁸⁸

The big-picture question is whether, when it comes to statutory cases, the Court is really comfortable giving away so much of the store. *Erie* took away from courts similar swaths of power: most of the common law landscape comes from the state-law doctrines that *Erie* told federal courts to stop making themselves. But coming at the same time as the New Deal, *Erie* simply cleared the federal courts’ plate for an arguably even bigger meal: the major statutes of the modern regulatory state. Today, by contrast, no new area of federal law waits in the wings to fill the void left by the transfer of federal statutory interpretation to agencies.

Unsurprisingly, the Court thus seems conflicted about the current state of affairs—about its place, its powers, and the role of the federal courts in the modern statutory world. The Court seems to be grappling with questions about its own status and the status of the law that it makes in today’s regulatory state, and there is a tension between how much power the Justices desire to give to agencies and how much they want to keep.

These tensions are on display when we look at the rest of the doctrinal landscape of precedent in the statutory interpretation context. In a series of opinions, the Court has emphasized that statutory interpretation opinions get “super strong stare decisis”—a higher level of stare decisis than the usual mode.⁸⁹ The justification has generally rested on separation of powers: once a court speaks on a statutory matter, it is up to Congress, in the interest of legislative supremacy, to decide how to react.⁹⁰ Some cases also have emphasized reliance interests in support of super strong stare decisis for statutory precedents, particularly when it comes to statutes governing business, markets, or property.⁹¹ But, as *Brand X* illustrates,

88. See Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1310–11 (2002) (presaging *Brand X*); Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143, 1169 (2012).

89. See, e.g., *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (“[S]tare decisis in respect to statutory interpretation has ‘special force’” (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989))); *Flood v. Kuhn*, 407 U.S. 258, 280–82 (1972) (refusing to overrule several earlier cases involving baseball’s exemption from federal antitrust laws); Gluck, *supra* note 25, at 1917–18.

90. See, e.g., Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327 (2005).

91. *Sand & Gravel Co.*, 552 U.S. at 139 (reasoning in a statutory interpretation case that “even if the Government cannot show detrimental reliance on our earlier cases, our reexamination of well-settled precedent could nevertheless prove harmful” because “[t]o overturn a decision settling one such matter simply because we might believe that decision is

when agencies are involved, the Court takes a completely different tack. *Brand X* thus bifurcates the world of substantive statutory precedents: agencies can change their minds and even effectively change some judge-made precedents whereas, for courts, their statutory precedents are ossified.

But the Court has not been able to go all the way. Many court watchers read *Brand X* in shock. Would the United States Supreme Court really allow a *federal agency* to overrule one of its own opinions? Justice Stevens concurred specially (but alone) in *Brand X* to carve out an exception for the Court's own precedents.⁹² Perhaps not surprisingly, when confronted directly with that question in the next major case, *United States v. Home Concrete & Supply*,⁹³ the Court punted and so lived to fight another day.

B. Other Statutory Precedent Doctrines That Hoard Power for the Court

The Court has also engaged in more subtle attempts to retain interpretive power. Many of the ways in which the Court deploys its own doctrines of precedent in the statutory interpretation context, agencies aside, seem to be attempts to retain a central role for courts. Consider in this regard the lack of methodological *stare decisis* discussed in Part I; or the Court's stingy treatment of congressional overrides of statutory decisions, which Deborah Widiss has documented;⁹⁴ or its retention of emphasis on the common law (which of course is made by *judges*). Refusing to treat interpretive methodology as law, for example, means that Congress can't overrule it. Giving congressional overrides their narrowest construction retains as much as possible of the previous judicial decision. Retaining a series of outdated default presumptions that statutes are to be interpreted against the backdrop of the common law and that when statutes are ambiguous the common law principle controls is a last grasp at judicial power, as Justice Scalia and Judge Posner each have charged.⁹⁵

no longer 'right' . . . could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability").

92. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005) (Stevens, J., concurring) ("While I join the Court's opinion in full, I add this caveat concerning Part III-B, which correctly explains why a court of appeals' interpretation of an ambiguous provision in a regulatory statute does not foreclose a contrary reading by the agency. That explanation would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.").

93. 132 S. Ct. 1836 (2012). *Home Concrete* involved a pre-*Chevron* interpretation of a tax statute by the Court that was later interpreted, post-*Chevron*, differently by the IRS. The Court punted the question by holding that since the earlier case was pre-*Chevron*, the Court's descriptions of the statutory ambiguity should not be taken in the official *Chevron* sense. Instead, the Court held that had the earlier case come to the Court post-*Chevron*, the Court would have held that the statute was not ambiguous, thereby leaving no room for the alternate agency interpretation even if *Brand X* applied to the Supreme Court. *See id.* at 1843–44.

94. Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 518–28 (2009).

95. *See* SCALIA & GARNER, *supra* note 26, at 318 (calling this canon "a relic of the courts' historical hostility to the emergence of statutory law"); SCALIA, *supra* note 40, at 29 (calling this canon a "sheer judicial power-grab"). Judge Posner also recently called the

Brand X of course tugs in the opposite direction, and we see the Court struggling with the decision. Chief Justice Roberts's dissent in *City of Arlington v. FCC*⁹⁶—perhaps not un-coincidentally the first major administrative deference case after *Home Concrete*—is one of the more explicit statements of concern that the Court has been overly generous: “It would be a bit much to describe the result [of *Chevron*] as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”⁹⁷

VI. *CHEVRON* AS A STUDY IN THE END OF “SCHOOLHOUSE ROCK!”
(OR, *CHEVRON*: THE NEXT THIRTY YEARS)

One thing *Chevron* does share with most other statutory interpretation doctrines is “Schoolhouse Rock!” *Mead* is an important exception—a recognition that Congress delegates in a variety of complex and diverging ways. But most other aspects of *Chevron-Mead* share with the non-administrative interpretive doctrines the outdated assumption of a textbook legislative process that rarely exists today, if it ever did. The doctrines generally assume that statutes are drafted by a single or cohesive group of people; that when there is a delegation it is to one, federal, agency; and that statutes progress from committee, to floor, to vote, to conference just as the cartoon taught us.

It's time to bid adieu to this old familiar tale—and that is a project not only for *Chevron*'s next thirty years but for the broader statutory context as well. Sinclair has documented the rise of “unorthodox lawmaking”⁹⁸—pervasive deviations of the legislative process from the “Schoolhouse Rock!” model to, e.g., omnibus deals involving multiple congressional committees; bills that sometimes bypass committee altogether in favor of off-the-record summits between party leaders and the executive branch; and countless other process deviations that I have further developed elsewhere, with Anne Joseph O'Connell and Rosa Po.⁹⁹ The Gluck-Bressman empirical study also confirms that congressional staff are acutely aware of these changes and view them as having a significant impact both on how statutes are drafted and on the tools that courts should use to interpret them. For instance, common interpretive tools, like legislative history or presumptions that statutes are drafted with internal coherence and consistency of language, have more relevance in statutes with a linear

canon a “fossil remnant of the traditional hostility of English judges to legislation.” Liu v. Mund, 686 F.3d 418, 421 (7th Cir. 2012); see also Gluck, *supra* note 13, at 811.

96. 133 S. Ct. 1863 (2013).

97. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (quoting The FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961)). *Arlington* held that *Chevron* deference was available to agencies' interpretations of their own jurisdiction—a question that the Court had hinted in earlier cases was one of those “major questions” that agencies should not be presumed to be delegated. *Id.* at 1868.

98. SINCLAIR, *supra* note 76.

99. See Gluck, O'Connell & Po, *supra* note 14 (introducing six categories of unorthodox lawmaking and analogous unorthodox administrative processes).

process than in omnibus bills.¹⁰⁰ But this real-world description has no legs when it comes to the doctrines actually in play.

On the agency side, unorthodox lawmaking leads to what my coauthors and I have called “unorthodox delegations” and “unorthodox rulemaking.”¹⁰¹ Statutes drafted by multiple committees often delegate, in overlapping fashion, to multiple agencies precisely because each committee wants its own agency in the game.¹⁰² Statutes that address particularly controversial issues often punt difficult policy questions not only to federal agencies but outside of the federal government entirely—to state administrators and even private actors—thereby allowing the feds to deflect some accountability.¹⁰³ But there is no *Chevron* analogue for multiple federal implementers,¹⁰⁴ or for any implementers that are not federal agencies,¹⁰⁵ even though there is now some empirical evidence that Congress sometimes intends to delegate to multiple implementers simultaneously and even to outside entities like states.¹⁰⁶ Nor have the *Chevron* cases begun to consider how the rise of unorthodox rulemaking—agencies’ use of atypical and non-APA-derived policymaking practices—should affect questions of administrative deference.¹⁰⁷

Here, the *Chevron* context is simply one instance of the broader phenomenon. As I have detailed elsewhere, for example, statutory interpretation doctrine shares *Chevron*’s federal-law myopia—the persistent and incorrect assumption that the only actors who create and interpret federal law are federal actors.¹⁰⁸ But a challenge for the next thirty years of *Chevron* (and the rest) is to find a way to capture—or to justify ignoring—the overlapping complexity of the modern administrative state. For example, in addition to the need for deference rules that take into account multiple, nonfederal implementers (even if those rules ultimately reject deference), one wonders how these other nuances of unorthodox lawmaking

100. Bressman & Gluck, *supra* note 15, at 758–63 (discussing the unorthodox lawmaking procedures in legislation); Gluck & Bressman, *supra* note 16, at 936–37, 979–81 (detailing unorthodox lawmaking’s relevance).

101. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014) (detailing how the textbook story of administrative law is no more); Gluck, O’Connell & Po, *supra* note 14; Rosa Po, *Unorthodox Rulemaking* (unpublished note) (on file with author) (analogizing between rulemaking and Barbara Sinclair’s work on legislation).

102. See generally ROBERT KAISER, *ACT OF CONGRESS: HOW AMERICA’S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN’T* (2013) (describing how this phenomenon in the context of Dodd-Frank financial reform legislation led to overlapping delegations between the Commodity Futures Trading Commission and the Securities and Exchange Commission). On the pervasiveness of overlapping federal delegations, see generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

103. Gluck, *supra* note 14, at 602–03.

104. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 207.

105. See generally Gluck, *supra* note 14.

106. Gluck & Bressman, *supra* note 16, at 1006–11 (describing respondents’ understanding of delegation to multiple agencies and/or state implementers).

107. See Gluck, O’Connell & Po, *supra* note 14.

108. Gluck, *supra* note 14, at 537–38, 551–64.

affect delegation. For instance: Are agencies more attentive to differences across statutes than are courts? Do agencies discount legislative history in omnibus vehicles, as the Gluck-Bressman drafters suggested interpreters should? (If so, where do agencies get their directives for such statutes, since many agency directives currently appear in committee reports?) Does the fact that many major statutes are now managed by leadership, rather than by committee, reduce or increase the agency's role in the drafting process and the delegation it ultimately receives?

It also is evident that those statutes that go through an unorthodox legislative process (for example, the increasing tendency to skip the conference committee stage, where statutes are cleaned up) are less consistent textually, because they often bundle together multiple acts and also may be more likely to contain mistakes. Those features may trigger *Chevron* ambiguity in ways that Congress never expected or intended. Should agencies be given more latitude to correct mistakes when statutes go through exceedingly unorthodox processes?

Consider *Chevron* itself and the assumptions that it makes about the Congress-court-agency relationship. Right now, *Chevron* is a very court-centered doctrine precisely because of its link to statutory interpretation. *Chevron* deference depends on ambiguity, but *Chevron* ambiguity depends in large part on the application of the *court-created* presumptions of interpretation. *Chevron* assumes that Congress is talking the language of courts, and talking to courts, when it signals delegation. But what if Congress is actually talking to agencies? The Gluck-Bressman findings substantiate the intuition that most scholars of the modern administrative state will have: in today's regulatory environment, Congress is focused primarily on agencies, not on courts. Agencies are Congress's immediate, frequent, and ongoing statutory interpreters. Because courts are involved, if at all, much more rarely and usually further down the line, they are not on typically on Congress radar to the extent that courts seem to expect.

But if congressional drafters themselves do not know the canons and if many of those doctrines do not reflect actual drafting practice, how can *Chevron*'s canon-based test really effectuate congressional intent to delegate? The Gluck-Bressman drafters told us that they use different signals to communicate with agencies—for instance, directives in legislative history or linguistic signaling conventions (“X in consultation with Y,” e.g., to indicate which agency takes the lead)—that courts generally do not consider. Indeed, these signals of delegation may be present even when statutory text is “clear” (and thus even when the *Chevron* test, as the courts utilize it, would not find delegation). Wouldn't a truly modern *Chevron* doctrine follow further down the path of *Mead* and look to signals of how Congress talks to agencies rather than hinge on doctrinal guideposts used by courts?

Finally—and this is a big one—consider in this light the link between how Congress and agencies talk to one another and the *Brand X* case

discussed in Part V. If Professors Bamberger and Strauss are correct¹⁰⁹ (and I think they are) that *Brand X* turns judicial interpretations into *Erie*-like provisional precedents awaiting agency interpretation of the statute, why shouldn't the courts approach statutory interpretation in those circumstances *as agencies would*? In other words, if *Erie* requires federal courts interpreting state statutes to use the relevant state's interpretive methodologies (as I think it does),¹¹⁰ why shouldn't federal courts, interpreting federal statutes before an agency interpretation arises apply them as agencies would?

Numerous scholars have documented how "agency statutory interpretation" is far more purposive, expert, aggressive, and political than judicial interpretation.¹¹¹ But no one has yet suggested that federal courts take that same approach when they are standing in for federal agencies under *Brand X*: that is, to decide statutory questions with the same political, expert, and/or interpretive mindset that we expect from "agency statutory interpretation."¹¹² That would be another "WOW" moment. (Would textualist judges use legislative history because an agency would? Would left-wing judges pick a right-wing interpretation because the President espouses that view?) But arguably it follows from the *Brand X* rule, if that rule survives the next thirty years. At a minimum, the question deserves some engagement.

CONCLUSION

Chevron is the doctrinal apotheosis of the modern legal era. It signals a resounding shift of the center of the law's gravity away from judge-made law toward statutes and their primary administrators. It therefore should come as no surprise that thirty years of *Chevron* have lessons beyond the administrative law context—specifically, lessons about the evolving and uncertain role of the federal courts in the modern statutory landscape.

It seems as though the statutory era has suddenly caught up with the federal courts. The courts may not have needed determinate statutory interpretation doctrines, or doctrines whose legal bases and sources were thoroughly understood, when statutory cases were the exception. Understanding legislative behavior was perhaps not as important, and certainly Congress itself operated with less complexity. Similarly, while in the abstract it may make sense for democratically-accountable and expertise-driven agencies to be able to change their minds as politics and policy change, when laid next to more our general notion of precedent—

109. See generally Bamberger, *supra* note 88; Strauss, *supra* note 88.

110. Gluck, *supra* note 25, at 1926.

111. Mashaw, *supra* note 22, at 516–21 (detailing the prudential differences between judicial and agency interpretation); see Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 382–83 (2012) (arguing that a purposive interpretation of agency interpretation more accurately reflects the reality of regulations); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322–29 (1990) (explaining how agency and judicial readers differ in their interpretation).

112. Mashaw, *supra* note 22, at 504, 507–08.

which is perhaps the central institutional feature of a common law judicial system—the implications of the abrogation of statutory stare decisis are potentially earth-shattering. How the federal courts will resolve these challenges for the law of legislation remains to be seen; the courts are still finding their way. But thirty years of *Chevron* put many of the challenges in a new light.