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Chevron's Generality Principles

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CHEVRON'S GENERALITY PRINCIPLES

*Emily Hammond**

Chevron *is surely one of the most influential doctrines of administrative law. Both in judicial opinions and the scholarly literature, its original insights and subsequent evolution have contributed much to our understanding of the roles of the "four" branches, especially as those roles relate to judicial review. But what does* Chevron *have to say about the many agency behaviors that are relatively insulated from review? The vast majority of agency policymaking decisions never reach court; for example, they might not be "final" or even "action," or they may pose standing or ripeness difficulties for would-be petitioners. This Essay argues that* Chevron*'s impact might reach even these rarely reviewed types of agency behavior. Descriptively, this claim is supported by an analysis of judicial opinions applying* Chevron *principles to assess agency actions that are* not *interpretations of organic statutes. Normatively, this claim challenges administrative law to turn its focus to agencies' unreviewable discretionary space, where a* Chevron *lens offers important insights about the extent to which agencies can construct their own legitimacy.*

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INTRODUCTION

Thirty years after the "quiet revolution"[1] that was *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[2] the doctrine bearing that decision's name is arguably the most cited of administrative law.[3] It stands at the heart of judicial review of administrative action, captivating scholars' imaginations and providing the seductive ease of a two-step formula for litigants and lower courts. But what does the doctrine have to say about the many agency behaviors that are relatively insulated from judicial review? I take up that question in this Essay.[4]

The governing paradigm is that judicial review is a necessary component of administrative legitimacy.[5] It acts as an ex ante check on agency behavior by incentivizing agencies to promote participation, engage in deliberation, and set forth their reasoning transparently in the first instance.[6] It promotes dialogue between the branches[7] and amongst agencies and their stakeholders.[8] And it acts as a backstop, guarding against arbitrariness[9] and—in denying petitions for review—putting the imprimatur of approval on various agency actions.[10]

These functions, of course, are not specific to *Chevron*. The *Chevron* context adds nuances. For example, Step One promotes judicial and administrative uniformity because it mandates adherence to a determination

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1. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 532 (6th ed. 2013).

2. 467 U.S. 837 (1984). *Chevron* provided a two-step means of reviewing agencies' interpretations of their statutory mandates. First, a court asks whether Congress addressed the precise question at issue; second, if the text is ambiguous, the court upholds the agency's construction if it is reasonable. *Id.* at 842–43.

3. EMILY HAMMOND ET AL., *The* Chevron *Doctrine*, *in* JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES (forthcoming 2015) (manuscript on file with author).

4. This Essay is part of a larger symposium entitled Chevron *at 30: Looking Back and Looking Forward*. For an overview of the symposium, see Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014). Two contributors to this symposium explore other aspects of the role of *Chevron* inside the regulatory state. *See* Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679 (2014) (exploring the President's role in the *Chevron* deference regime); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703 (2014) (exploring empirically *Chevron*'s effect on agency statutory interpretative practices).

5. *See* Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 315 (2013) (providing background and collecting sources). By "legitimacy," I mean both fidelity to statute and conformity with administrative law values such as participation, deliberation, and transparency. *See id.* at 316–17 n.18 (collecting sources).

6. *See id.* at 327; *see also* Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1691 (2004).

7. *See* Lisa Schultz Bressman, *Procedures As Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1805 (2007).

8. Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review As Translation of Agency Science*, 109 MICH. L. REV. 733, 778–89 (2011) [hereinafter Hammond].

9. *See generally* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

10. Hammond & Markell, *supra* note 5, at 322.

that statutory text is clear.[11] And at Step Two, the agency's explanation of its choice between permissible constructions is a special application of the reason-giving requirement underlying arbitrary and capricious review; thus, the administrative law norms set forth above are also furthered in the *Chevron* context.[12]

But there is more. *Chevron* stands for the proposition that judicial review is only part of the equation in the quest for administrative legitimacy. At the surface, this is true because courts are instructed not to engage in de novo analyses of ambiguous statutes, departing from the traditional role of saying "what the law is."[13] When courts review agencies less robustly, a fortiori they are making themselves less necessary to ensuring agency legitimacy than may previously have been thought. Indeed, the language of *Chevron* itself suggests that administrative expertise and superior political accountability—attributes arising within the executive branch—promote legitimacy and justify a correspondingly diminished role for the courts.[14]

More deeply, *Chevron* approves of agencies' flexibility to change their minds—even on questions of law.[15] In *Chevron* itself, Environmental Protection Agency (EPA) had revised its interpretation of "stationary source" following a change in administration.[16] The decision therefore stands for the proposition that there is nothing inherently illegitimate in an agency's revising its interpretation.[17]

The changes ushered in by *Chevron* therefore shift the legitimation emphasis away from courts and toward agencies. Suppose, however, that one looks even further beyond judicial review to the behavior of agencies themselves. Underlying the notion that courts ought to be deferential to agencies is a broader principle of agency flexibility within the zones of statutory discretion. Indeed, even if we remove judicial review from the landscape altogether, *Chevron* offers insights for agencies' ability to construct their own legitimacy.

In this Essay, I explore that hypothesis. First, it is helpful to clarify what I mean by an agency constructing its own legitimacy. I define legitimacy

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11. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 968–69 (2005) (holding that Step One decisions have preclusive effect); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118–29 (1987) (arguing that *Chevron*'s structure promotes Supreme Court correction of lower court mistakes more readily than would a multifactor inquiry).

12. *See* HAMMOND ET AL., *supra* note 3, at 28–29 (describing competing understandings and urging this particular Step Two approach).

13. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

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

15. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (noting that under *Chevron*, "the agency is free to give the statute whichever of several possible meanings it thinks most conducive to accomplishment of the statutory purpose").

16. *See Chevron*, 467 U.S. at 851.

17. *See id.* at 853–58; Scalia, *supra* note 15, at 518; *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–16 (2009) (holding that the arbitrary and capricious standard does not require heightened explanation when an agency departs from prior policy).

broadly, encompassing both statutory and democratic legitimacy. An important premise of this Essay is that administrative law values—participation, deliberation, transparency, and reason-giving—further both kinds of legitimacy.[18] In the absence of judicial review, however, it is exceedingly difficult to measure an agency's performance. Although one may be able to identify participation-enhancing procedures or reason-giving, there is no real baseline against which to assess the norm of "legitimacy."[19] Nor can one objectively determine that an agency's ultimate action best furthers a statute's policies because "best" is in the eye of the beholder.[20]

There are at least a few guiding principles, operating across a spectrum. At one end of the spectrum is the principle from *Whitman v. American Trucking Ass'ns*[21] that an agency cannot cure an unconstitutional delegation of power by adopting a limiting construction of its statutory mandate.[22] That is, an agency's "voluntary self-denial" of power cannot undo an unconstitutional delegation of that power by the legislature.[23] In such circumstances, courts are at the zenith of their power and agencies are wholly unable to impact their own legitimacy.

At the other end of the spectrum is the doctrine enunciated in *United States v. Mead Corp.*[24] One product of that decision is the difficult-to-apply principle that agencies can influence the level of deference they receive by choosing procedures that tend to "foster fairness and deliberation."[25] This link between agency choice of procedure and substantive legitimacy has important ramifications for judicial review.[26] But does it hold lessons for agencies' behavior more generally?

The question has real-world implications. Agencies constantly face new circumstances in which their statutory mandates provide little guidance or even clear authority.[27] Topics such as sustainability, climate change, and energy policy lack comprehensive statutory schemes; agencies must rely on their inherent discretionary authority to tackle these issues. Consider, for example, an EPA guidance document issued in conjunction with a

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18. *See* Hammond & Markell, *supra* note 5, at 320–27 (drawing on administrative law and procedural justice literatures to consider how judicial review furthers administrative legitimacy).

19. My coauthor and I recently attempted to do this and found the issue of testability very challenging. *See id.* at 327–30 (developing metrics for legitimacy); *id.* at 362–63 (discussing limitations of those metrics).

20. *See id.* at 353 (providing example).

21. 531 U.S. 457 (2001).

22. *Id.* at 472–73.

23. *Id.* at 473.

24. 533 U.S. 218 (2001).

25. *Id.* at 230; *see also* Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 279–80 (2011) (describing the puzzles of this part of the *Mead* decision).

26. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (setting forth *Skidmore*-like factors for use in Step Zero analyses); Cass Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 213–19 (2006) (providing examples of how lower courts have connected choice of procedure to standard of review following *Mead* and *Barnhart*).

27. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. (forthcoming 2014), *available at* http://ssrn.com/abstract=2393033.

rulemaking that imposed stricter Clean Air Act (CAA) controls on emissions of air toxics from electricity generation. Section 112 of the CAA requires existing sources to meet the rule's standards within three years of the effective date of the rule.[28] The CAA also provides limited circumstances in which EPA may extend the time to comply with such standards.[29]

In the face of strong opposition from the coal-fired electricity industry, which argued that the new standards would diminish electricity reliability, President Obama directed EPA to issue a guidance memo that explained how it would address compliance with the standards in the coming years.[30] In this memo, EPA indicated its intent to use its enforcement discretion to liberally grant time extensions to electricity generators that made certain showings related to reliability.[31] But the CAA does not specifically address the reliability issue: EPA exercised its discretion, using an unreviewable approach,[32] to accommodate competing public interests in clean air and electricity reliability.

Can agencies construct their own *intrinsic* legitimacy in the absence of judicial review?[33] And if so, are there any limits on agencies' abilities to take such actions? This Essay posits that *Chevron*—while not directly imposing those limits—indeed influences our sense of what those limits are. Moreover, it informs the quest to look beyond judicial review for sources of agency legitimacy. In essence, *Chevron* stands for a variety of "generality" principles that extend broadly throughout administrative law. And in particular, my ultimate focus here is on "intrinsic" agency legitimacy, which is meant to capture the ideals of agency legitimacy in the absence of external oversight. *Chevron*'s generality principles, I argue, suggest metrics for assessing that legitimacy.

Part I of this Essay begins by elaborating the spectrum described in this Introduction. As already alluded to, *Chevron* interacts strongly with each doctrine on the spectrum. Next, Part I delves into what I call "second-order" *Chevron* decisions—that is, those opinions applying *Chevron* to agency interpretations of text not appearing in their statutory mandates.

28. Clean Air Act Amendments of 1990, Pub. L. No. 101-159, § 112(i)(3)(A), 69 Stat. 322 (codified as amended at 42 U.S.C. §§ 7401–7626).

29. *Id.* § 112(i)(3)(B), (4)–(6).

30. Memorandum from Cynthia Giles, Assistant Adm'r of the Office of Enforcement and Compliance Assurance, to Regional Administrators (EPA Regions I–X) et al. (Dec. 16, 2011), *available at* http://www.epa.gov/mats/pdfs/EnforcementResponsePolicyforCAA113.pdf.

31. *See id.* at 4.

32. The approach is doubly unreviewable. As a guidance document, it is difficult to challenge given various reviewability doctrines like finality and ripeness. *See* 5 U.S.C. § 704 (2012) (finality); Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (ripeness). And as an exercise of enforcement discretion, it is presumptively unreviewable in any event. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985).

33. I refer to "intrinsic" legitimacy synonymously with "inside-out" legitimacy, as coined by Professors Shapiro and Wright and as I have adopted the terms in my own work. Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 578 (2011); *cf.* Hammond & Markell, *supra* note 5, at 316 n.12.

This discussion reveals a comprehensive commitment to the underlying background principles upon which *Chevron* was initially based. Part I concludes by showing how those background principles inform our sense of legitimacy for agency actions generally, even in the absence of judicial review. Although this Essay acknowledges the difficulty of measuring agency legitimacy for activities not subject to judicial review, it suggests in Part II that *Chevron*'s background principles inform even this more elusive context. Part II suggests potential metrics for gauging intrinsic agency legitimacy, while acknowledging the difficulties attendant in operationalizing at least some of the metrics. After considering this and other potential objections to my approach, this Essay returns to the concept of *Chevron* as a generality principle, reinforcing how that doctrine informs the legitimacy of elusive agency behaviors.

I. THE SPECTRUM FOR CONSTRUCTING LEGITIMACY

As noted above, the U.S. Supreme Court has offered some guidance on agencies' ability to construct their own legitimacy. To illustrate, this section considers three such decisions with deeply relevant connections to *Chevron*: *Whitman v. American Trucking Ass'ns, Utility Air Regulatory Group v. EPA*,[34] and *United States v. Mead Corp.*[35]

A. Guideposts

1. *Whitman v. American Trucking Ass'ns*

Prior to any consideration of agency legitimacy is the constitutional legitimacy of the delegation in an agency's statutory mandate. Although the Court has not invalidated any statute on nondelegation grounds since the 1930s,[36] the nondelegation doctrine influences administrative law in important ways.

In *American Trucking*, various petitioners representing industry interests challenged EPA's National Ambient Air Quality Standards (NAAQS) for certain air pollutants.[37] The NAAQS were promulgated pursuant to the CAA, which instructed in relevant part that EPA was to set such standards based on criteria "requisite to protect the public health" with "an adequate margin of safety."[38] EPA's task wasn't easy: for nonthreshold pollutants, those for which there is no known exposure threshold below which there

34. 134 S. Ct. 2427 (2014).
35. To this list might be added *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), which held that *Chevron* applies to agencies' interpretations of the scope of their statutory jurisdiction.
36. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).
37. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 462–63 (2001).
38. *Id.* at 465; 42 U.S.C. § 7409(b)(1) (2012).

are no adverse impacts, crafting a numerical exposure standard meant making a policy judgment in light of scientific uncertainty.[39]

Although EPA developed a set of factors to explain its decision to set the standards at particular points, the D.C. Circuit concluded that those factors were too indeterminate; moreover, the statute itself did not provide EPA any guidance in deciding where to draw the line.[40] Thus, the court remanded the case to EPA to adopt an approach that would supply the missing determinacy.[41] The court's rationale was two-fold. First, if an agency creates binding standards for itself, it is less likely to act arbitrarily.[42] And second, if the agency created such standards, those would facilitate judicial review.[43] Although the court had acknowledged that this approach meant the agency, rather than Congress, would be making important policy decisions, it reasoned that EPA could use its expertise to "salvage" the statute.[44]

In an opinion authored by Justice Scalia, the Supreme Court rejected the possibility that an agency can cure an unconstitutional delegation of power: "an agency's voluntary self-denial" would itself be an exercise of "forbidden" power.[45] The Court offered little more guidance and did not engage the D.C. Circuit's rationale,[46] but the bottom line was clear: when confronted directly with nondelegation concerns, agencies may not construct their own legitimacy.

How does this principle relate to *Chevron*? As Professor Pierce has explained, *Chevron* helps enforce the nondelegation doctrine because it changes the incentives for Congress.[47] That is, rather than attempt the impossible task of delineating rules for Congress to follow in creating permissible delegations, the Court has signaled to Congress that it will consider ambiguous statutory terms as evidence that Congress intends the Executive to have primary policymaking authority.[48] If Congress wishes to avoid this result, it can enact statutes that are more detailed and hence, less open to agency interpretation.[49]

2. *Utility Air Regulatory Group v. EPA*

Chevron's relationship to the nondelegation doctrine helps explain another CAA decision, *Utility Air Regulatory Group* (*UARG*) *v. EPA*. As a

39. For further discussion, see *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034–37 (D.C. Cir. 1999), *rev'd*, 531 U.S. 457 (2001).

40. *Id.* at 1034.

41. *Id.* at 1038.

42. *Id.*

43. *Id.*

44. *Id.*

45. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001).

46. Instead, the Court proceeded to explain why the statute was sufficiently intelligible to fit within existing nondelegation jurisprudence. *Id.* at 473–76.

47. *See* Richard J. Pierce, Jr., *Reconciling* Chevron *and Stare Decisis*, 85 GEO. L.J. 2225, 2230–32 (1997).

48. *See id.* at 2231.

49. *See id.* at 2232.

result of earlier developments,[50] EPA promulgated regulations setting standards for greenhouse gas (GHG) emissions from new motor vehicles.[51] The Agency determined that regulating such emissions triggered an obligation to regulate GHG emissions from stationary sources under, among other things, the prevention of significant deterioration (PSD) provisions of the CAA.[52] This result followed because "air pollutant" was used in operative provisions of each title—and "air pollutant" included GHGs.[53]

When EPA issued the relevant rule, however, it explained a fundamental problem it faced: the PSD provisions of the statute explicitly apply to sources emitting 100 or 250 tons per year of "air pollutants."[54] But GHGs are emitted at much higher levels, and applying the statute literally would have significantly enlarged the number of sources subject to the program, placed enormous burdens on the permitting authorities, and, essentially, gone far beyond Congress's intent that only major sources should be subject to PSD requirements.[55] Nevertheless, EPA explained that the statute's use of "air pollutant" compelled its interpretation, so it issued the "Tailoring Rule," which set the applicable emissions limits at 75,000 or 100,000 tons per year, as a way of departing from the statutory text "no more than necessary to render the requirements administrable."[56]

When the Supreme Court confronted the Tailoring Rule, it applied the *Chevron* doctrine to EPA's interpretation of its statutory mandate.[57] But the Court rejected EPA's interpretation without even engaging the agency's explanation. First, the Court reasoned that the statute did not compel EPA's interpretation: "air pollutant" as used in the operative provisions of the statute did not necessarily carry the same meaning as the term when used broadly in the statute's general definitions.[58] Second, the Court explained that EPA's interpretation was unreasonable

> because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We

50. *E.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (holding CAA's term "air pollutant" encompasses greenhouse gas (GHG) emissions and holding EPA's rationale for failure to regulate GHG emissions from new motor vehicles arbitrary and capricious).
51. Util. Air Regulatory Grp. (UARG) v. EPA, 134 S. Ct. 2427, 2437 (2014).
52. *Id.*
53. *Id.*
54. *See id.* at 2442–43 (describing the statute and EPA's rule).
55. *Id.*
56. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,517 (proposed June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71).
57. *UARG*, 134 S. Ct. at 2439.
58. *Id.* at 2439–42.

> expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[59]

In other words, the precise language of the statute, if followed, would have so expanded EPA's jurisdiction that Congress simply could not have intended that result. It is perhaps curious that the Court announced this interpretation at Step Two, rather than Step One; after all, Step One is primarily directed at determining whether Congress intended to delegate interpretive authority to the agency with regard to the precise question at issue.[60]

But could EPA's Tailoring Rule save its interpretation? No, said the Court. Even though EPA had adopted a construction of the statute that *limited* its jurisdiction,[61] it had departed from the clear statutory text.[62] Although the CAA granted EPA broad power, the agency did not have the power to "revise clear statutory terms that turn out not to work in practice."[63]

UARG's result is unusual from a *Chevron* standpoint. The Court held that there was ambiguity in the term "air pollutant," but that EPA's interpretation was unreasonable because it would extend EPA's jurisdiction far beyond that intended by Congress. And EPA's attempt to limit its jurisdiction with the Tailoring Rule was impermissible because it contradicted the express language of the CAA. The result appears to be that EPA is foreclosed from regulating GHGs under the applicable stationary source provisions because there is no way to do so that would avoid the numerical limits Congress provided.[64]

Typically, EPA could try again on remand to adopt a permissible construction of the ambiguous term "air pollutant."[65] Here, however, the result is such that the Court's pronouncement is binding, having the same impact as if the Court held that the meaning of "air pollutant" is clear in foreclosing GHGs for the operative provisions of the statute. In other words, EPA is unable to adopt a limiting construction of the CAA to assuage concerns that its jurisdiction under the statute would otherwise extend too far. While not a nondelegation case, the Court's emphasis on the need for Congress to speak clearly if it wishes an agency to regulate "a significant portion of the American economy" does not seem too far

59. *Id.* at 2444 (quoting FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159–60 (2000)).

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

61. *See UARG*, 134 S. Ct. at 2454 (Breyer, J., concurring in part and dissenting in part) (noting that EPA's interpretation *exempts* sources from regulation).

62. *Id.* at 2445.

63. *Id.* at 2446.

64. EPA retains authority to regulate GHGs under other provisions of the CAA, however. *Id.* at 2448–49 (upholding EPA's permissible construction of statute for other types of sources of GHGs).

65. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–91 (2005) (applying *Chevron* framework to FCC decision).

removed from the logic of *American Trucking*.[66] Further, the case illustrates how *Chevron* might work as a nondelegation incentivizer. Congress set precise, numerical limits on EPA's authority, which easily obviated any concern that intelligible principles were lacking. The agency, in turn, was limited in the sense that, with respect to that precise issue, it had no flexibility to adopt a different interpretation. This case thus illustrates the nondelegation basis for *Chevron* while also providing a stark example of the potential power of statutory text. When such text is *extremely* precise, agencies may not depart from the statutory terms, regardless of broader statutory purposes or the administrative law values evident in the agencies' means of adopting their particular constructions.

3. *United States v. Mead Corp.*

The first two cases above illustrate how an agency may be completely barred from creating its legitimacy. The *Mead* decision, a direct descendant of *Chevron*, offers an important point of contrast. That case, of course, involved the U.S. Customs Service's decision classifying Mead planners as diaries for tariff purposes.[67] The Court concluded that the decision was not *Chevron*-eligible because it did not have the force of law, but that the lesser *Skidmore* deference standard applied.[68] The Court explained that congressional intent to delegate interpretive authority was the linchpin of *Chevron*, but it (perplexingly) stated that a good indication of such delegation would be when Congress provides for agency procedures that "tend[] to foster [] fairness and deliberation."[69] Although this phrase focuses on what procedures Congress has required, the opinion itself focuses on the procedures the agency actually used, notwithstanding that it is hard to see how an agency's choice of procedures has anything to do with congressional intent.[70]

Despite this awkward logic, *Mead* is important as a practical matter because it means an agency's procedural choices matter. Professor Bressman has explained one way this works: *Mead* furthers the courts' role in mediating the relationship between Congress and agencies because it calls for enhanced judicial oversight in situations where agency actions are

66. *See UARG*, 134 S. Ct. at 2444; Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (explaining that Congress must provide more guidance for standards "that affect the entire national economy").

67. United States v. Mead Corp., 533 U.S. 218, 221 (2001).

68. *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

69. *Id.* at 230.

70. *See id.* at 233–34 (discussing why tariff classification was not *Chevron*-eligible); *see also* Seidenfeld, *supra* note 25, at 279–80 (making this point). This is not to say that there is always a tension between an agency's choice of procedures and congressional intent. For example, the two are aligned when agencies choose to exercise their rulemaking authority as authorized by Congress, according to notice-and-comment procedures. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013) (finding that *Chevron* was applicable to agency's construction of its own jurisdiction where Congress vested the agency with authority to administer a statute by rulemaking and adjudication, and when the agency exercised that authority).

insulated from legislative oversight.[71] In other words, if agencies fail to use procedures like notice-and-comment rulemaking that facilitate legislative oversight because of their transparency and reason-giving, courts will step in with the closer look afforded by the *Skidmore* standard.

Such actions are often shielded from stakeholder oversight as well. For example, scholars have criticized nonlegislative rules for being nonparticipatory, excluding stakeholders from notice-and-comment procedures and making it more difficult to monitor agency behavior.[72]

Courts considering whether to apply *Chevron* to agency actions that are not in the *Chevron*-presumptive categories of formal proceedings or notice-and-comment rulemaking have taken notice of the importance of procedures. Where courts have extended *Chevron* deference to such actions, the actions typically were within the agency's expertise, exhibited transparency through publication in the Federal Register, evidenced some type of participation through stakeholder input or a comment period, and revealed reasoned decisionmaking through written explanations.[73] In other words, although agencies have significant discretion in their choice of procedure,[74] and although courts may not impose procedures on agencies beyond those required by Congress or the Constitution,[75] agencies are rewarded with *Chevron* eligibility when they use procedures that enhance administrative law values.

Of course, these observations stem from examples involving judicial review. By linking legitimizing procedures to *Chevron* eligibility, however, the Court has offered important clues about the room within which agencies may construct their intrinsic legitimacy. With that in mind, this Essay turns next to the second-order *Chevron* decisions.

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71. *See* Bressman, *supra* note 7, at 1791–92.

72. *See, e.g.*, *id.* at 1793 ("Unless the position is authoritative, constituents do not know what to monitor."); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 440–41 (2007) (suggesting reforms for enhanced accountability with respect to guidance documents that ultimately rely on judicial review as a check); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 342–44 (2011) (describing the potential for agency abuse of guidance documents).

73. *See, e.g.*, Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257, 1273 (11th Cir. 2009) (applying *Chevron* to agency handbook that underwent the same procedures as official regulations); Kruse v. Wells Fargo Home Mortg., Inc., 383 F.3d 49, 60–61 (2d Cir. 2004) (applying *Chevron* to HUD policy statement that had been published in the Federal Register and met various other factors); Schuetz v. Banc One Mortg. Corp., 292 F.3d 1004, 1012 (9th Cir. 2002) (similar). Many scholars offer further discussion on this point. *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1488 (2005) (suggesting that courts look for "minimum indicia of lawmaking authority" meant to show "considered judgment and consistent application"); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 490 (2013) (describing lower courts' responses); *cf.* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (setting forth, in dicta, factors bearing on whether nonpresumptive *Chevron* actions are eligible for *Chevron* deference).

74. *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194 (1947).

75. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978).

B. Second-Order Chevron *Decisions*

This section considers judicial extensions of *Chevron* to agency actions in which agencies are not interpreting their statutory mandates. These second-order *Chevron* decisions provide a helpful contrast to run-of-the-mill *Chevron* cases because they invite scrutiny of the principles animating *Chevron*. Studying the reasoning of courts determining whether to extend *Chevron* in this way illuminates the doctrine's background principles for how agencies legitimate their behavior. Others have considered how courts ought approach the "Step Zero" question whether to apply *Chevron* to agencies' interpretations of their statutory mandates.[76] The difference for the analysis here is two-fold. First, those considerations are typically aimed at agencies' interpretations of their statutory mandates; here I am focused on second-order extensions. Second, those considerations are typically aimed at understanding the courts' role vis-à-vis the executive and legislative branches and the external oversight provided by the different branches; here I am focused on intrinsic legitimacy in the absence of external oversight.

To provide focus, consider whether agencies should receive *Chevron* deference for interpretations of contracts concerning their areas of expertise. First, it bears repeating that the concept of deference to agencies did not begin with *Chevron*—and that case itself stated as much.[77] This proposition is also supported by the 1960 Supreme Court decision *Texas Gas Transmission Corp. v. Shell Oil Co*.[78] There, the Court declined to defer to the Federal Power Commission's interpretation of a contract for the purchase of natural gas because the agency had relied on ordinary rules of contract interpretation rather than its special expertise.[79]

Rather than characterizing the matter as one purely of law, the Court looked specifically to *how* the agency had arrived at its interpretation.[80] Instead of revealing the agency's interpretation to have been "on the basis of specialized knowledge gained from experience in the regulation of the natural gas business, or upon the basis of any trade practice," the record disclosed that the agency applied ordinary principles of contract interpretation.[81] This approach exemplifies an early indication of agencies' ability to construct their own legitimacy, insofar as their choice of rationale and application of expertise may be relevant to the deference they ultimately receive.[82] Moreover, it foreshadows both *Chevron*'s reliance on

76. *See, e.g.*, Bressman, *supra* note 73; Sunstein, *supra* note 26.

77. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (citing Labor Bd. v. Hearst Pubs., 322 U.S. 111 (1944)).

78. 363 U.S. 263 (1960).

79. *Id.* at 268–69.

80. The Court cited the *Chenery I* principle that courts are to review agency decisions on the basis of the record at the time the decisions were made. *Id.* at 270 (citing SEC v. Chenery Corp., 318 U.S. 80, 87 (1943)).

81. *Id.* at 268.

82. A number of lower courts have explained *Texas Gas* as one favoring de novo review for questions of law, thereby limiting that decision's rationale more than warranted. *See, e.g.*, Muratore v. U.S. Office of Pers. Mgmt., 222 F.3d 918, 921–22 (11th Cir. 2000) (citing *Texas*

expertise as one of the reasons for deference and *Mead*'s indication that agency procedures matter.

Indeed, after *Chevron*, many courts, especially the D.C. Circuit, considered extending the doctrine to second-order contexts. Those that have done so have placed importance on the following factors: (1) delegation of some authority over the text; (2) actual or presumed agency expertise; (3) consideration of the agency procedures that were used; (4) the agency's need to promote national uniformity; and (5) the agency's consistency in its interpretation over time.[83]

In the 1987 decision *National Fuel Gas Supply v. FERC*,[84] for example, the D.C. Circuit rejected the argument that it should review a FERC-approved settlement agreement concerning natural gas rates de novo because the meaning of the agreement was a question of law.[85] The court reasoned that, although a settlement agreement was not written by Congress but by private parties, Congress nevertheless intended that FERC should be given deference because of the agency's broad powers of adjudication.[86] Indeed, Congress had required the agency to "take an active role in approving the agreement."[87]

With this statement, the court suggested that *Chevron*'s fictional intent requirement was satisfied. But the court explained that there were other reasons for affording deference. When FERC interprets settlement agreements, those interpretations are enhanced by the agency's technical knowledge: "Construction of a settlement agreement will be influenced by the agency's expertise in the technical language of that field and by its greater knowledge of industry conditions and practices, including its more comprehensive experience with the kinds of disputes and negotiations that generally produce such an agreement."[88] This explanation echoes the expertise rationale of *Chevron* and is not inconsistent with *Texas Gas*.

Uniformity principles also informed the court's analysis. In deciding whether the agreement met the statute's just and reasonable standard, the court reasoned that FERC may have understood the terms to hold particular meaning; a contrary judicial interpretation could undermine that conclusion.[89]

Gas as having been modified by *Chevron*); Nat'l Fuel Gas Supply v. FERC, 811 F.2d 1563, 1570 (D.C. Cir. 1987) (same); *see also* Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1549 (D.C. Cir. 1993) ("[T]he *Texas Gas* rule does not survive the Supreme Court's *Chevron* decision."); *cf.* Bos. Edison Co. v. FERC, 856 F.2d 361, 363 (1st Cir. 1987) (stating both that agencies are entitled to some deference regarding interpretations rooted in expertise *and* that "agency decision[s] based on pure questions of law may be reviewed de novo" (citing *Texas Gas*, 363 U.S. at 268–70).

83. As noted *infra* note 122, these factors look very similar to those of *Skidmore* as well as *Barnhart v. Walton*, 535 U.S. 212 (2002).

84. 811 F.2d 1563 (D.C. Cir. 1987).

85. *Id.* at 1563.

86. *Id.* at 1569–70 & 1570 n.3.

87. *Id.* at 1571.

88. *Id.* at 1570.

89. *Id.* at 1571.

Although *National Fuel Gas Supply* involved a settlement of an adjudication before FERC, the D.C. Circuit quickly extended its *Chevron* approach to FERC's interpretations of contracts that the agency approved.[90] And indeed, the D.C. Circuit later held FERC's contract interpretations are *Chevron*-eligible even where the contract did not need agency approval to take effect.[91]

A more recent decision, *Entergy Services, Inc. v. FERC*,[92] highlights the applicable standard of review and provides further insights into *Chevron*'s generality principles.[93] The case is instructive because it reveals the distance between second-order interpretations and agencies' interpretations of their statutory mandates. *Entergy* involved a 1977 contract for delivery of electricity on the wholesale market.[94] The parties jointly owned several power generating facilities, but only the seller, an electric services company, had control over scheduling and dispatch.[95] The parties' contract included two different pricing schemes, which varied according to whether the jointly-owned generation could supply all or some of the buyer's demand.[96] For example, when the generation could not meet demand, the buyer would pay a higher amount to the seller because according to the contract, the buyer did not have "sufficient resources available."[97]

Increasingly, however, the generation was physically capable of meeting demand, but transmission system constraints made it impossible for the seller to actually use that generation.[98] The seller attempted to charge the buyer the higher price, arguing that the terms "sufficient" and "available" meant not just physical generation but also the seller's ability to use that generation.[99] The buyer filed a complaint with FERC, arguing that the higher price did not apply because its generation was both sufficient and available.[100]

FERC agreed with the buyer. In its order on the dispute, FERC reasoned that the contract language was ambiguous because it was capable of holding at least two meanings.[101] The agency used canons of contract interpretation,[102] analysis of other contract terms,[103] and extrinsic evidence of the parties' conduct to determine that the higher price did not apply.[104]

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90. *See* Vt. Dep't of Pub. Serv. v. FERC, 817 F.2d 127, 134–35 (D.C. Cir. 1987) (involving FERC-approved contract between a utility and state utilities commission for electric power delivery).

91. Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1549–51 (D.C. Cir. 1993).

92. 568 F.3d 978 (D.C. Cir. 2009).

93. *Id.* at 981.

94. *Id.* at 979.

95. *Id.*

96. *Id.* at 980.

97. *Id.* at 979.

98. *Id.* at 980.

99. *Id.* at 983.

100. *Id.* at 981.

101. Ark. Elec. Coop. Corp. v. Entergy Ark., Inc., No. EL05-15-001, 2006 WL 3030149, at *13–14 (FERC Oct. 25, 2006) (Order on Initial Decision).

102. *Id.* at *11 n.47.

103. *Id.* at *10–13.

104. *Id.* at *18–19.

On petition for review, the D.C. Circuit explained:

> We review claims that the Commission acted arbitrarily and capriciously in interpreting contracts within its jurisdiction by employing the familiar principles of *Chevron* . . . . We evaluate de novo the Commission's determination that a contract is ambiguous, but we give *Chevron*-like deference to its reasonable interpretation of ambiguous contract language.[105]

The court agreed that the contract was ambiguous, and it adopted the reasoning set forth in FERC's initial order.[106] In determining that FERC's interpretation was reasonable, the court followed FERC's approach of considering canons of interpretation, other terms in the contract, and the parties' course of dealing.[107] Finally, in response to the petitioner's argument that FERC should have awarded extra compensation as a matter of fairness, the court stated:

> [T]he question before us is not whether the *contract* was reasonable, a technical issue as to which courts have little expertise, but rather whether FERC's *construction* of that contract was reasonable—the kind of legal dispute that this court resolves every day. And as to the latter, we have no doubt.[108]

FERC's detailed initial order and order on petition for rehearing reveal analyses far more deeply grounded in an understanding of the industry than the D.C. Circuit's opinion.[109] The agency's superior expertise is evident, as is its reasoned decisionmaking and transparent explanation of its decision. Relatedly, the contract interpretation took place in the context of a formal adjudication authorized by Congress, which provided the procedural safeguards found in §§ 556 and 557 of the Administrative Procedure Act.[110] Although the context is not an interpretation of a statutory mandate, therefore, *Chevron* principles can be used to justify the court's approach on review.[111]

It is tempting to wonder if the FERC example is agency-specific precedent, with little persuasive force outside of cases involving that agency.[112] Or perhaps it is specific to the D.C. Circuit. The approach,

105. Entergy Servs., Inc. v. FERC, 568 F.3d 978, 981–82 (D.C. Cir. 2009) (citations omitted). The court further explained that the background of negotiations and the parties' course of dealing were relevant considerations for interpreting ambiguous contracts. *Id.* at 982.

106. *See id.* at 983.

107. *Id.* at 983–85.

108. *Id.* at 985.

109. *See generally* Ark. Elec. Coop. Corp. v. Entergy Ark., Inc., No. EL05-15-001, 2007 WL 1814451 (FERC June 25, 2007) (Order on Rehearing); *Ark. Elec. Coop. Corp.*, 2006 WL 3030149.

110. 5 U.S.C. §§ 556–557 (1990).

111. *See also* Braintree Elec. Light Dep't v. FERC, 667 F.3d 1284, 1288 (D.C. Cir. 2012) (applying *Chevron* deference to FERC interpretation of settlement agreement involving electric reliability).

112. *See generally* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011). Others have discussed the FERC context. *See, e.g.*, Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y

however, shows up in other contexts and in other courts. The District Court for the District of Columbia, for example, cited *National Fuel Gas Supply* in extending deference to the Interior Board of Land Appeals' construction of a land patent's ambiguous language involving the status of a right-of-way in *Bolack Minerals Co. v. Norton*.[113] The court emphasized the importance of delegation,[114] expertise,[115] and uniformity[116] in so doing. Similar themes are echoed in decisions of other courts.[117]

On the matter of expertise, the Tenth Circuit has explained that "under the principles of *Chevron* . . . an agency's interpretation of a contract is reviewed under the arbitrary and capricious standard when the subject matter of the contract involves the agency's specialized expertise."[118] Yet the court determined that such deference was not warranted when the Department of Health and Human Services (HHS) interpreted a sentencing agreement because the agreement was not within HHS's expertise.[119] The court reasoned that the agreement did not deal with "arcane subject matter" or contain technical terms; HHS did not routinely interpret such agreements; and reviewing such agreements had not been delegated to HHS by Congress.[120] As a result, the court interpreted the agreement de novo.[121]

The final factor—delegation by Congress—makes this case distinguishable from *National Fuel Gas Supply* because in the latter instance, FERC had authority to adjudicate the relevant contracts. But also of interest, the first two considerations on which the Tenth Circuit relied—agency expertise and experience—represent a functional approach to determining *whether* deference ought to be afforded.[122]

203, 213 n.27 (2004) ("[FERC] appears consistently to receive judicial deference to its interpretations of the terms of contracts between parties who are subject to its regulatory jurisdiction."); Jerome Nelson, *The* Chevron *Deference Rule and Judicial Review of FERC Orders*, 9 ENERGY L.J. 59, 65–82 (1988) (providing a summary of *Chevron*'s FERC context).

113. 370 F. Supp. 2d 161, 175 (D.D.C. 2005).

114. *Id.* at 175–76.

115. *Id.* at 176.

116. *Id.*

117. *See, e.g.*, Muratore v. U.S. Office of Pers. Mgmt., 222 F.3d 918, 923 (11th Cir. 2000) (extending *Chevron* to an Office of Personnel Management's (OPM) interpretation of a federal employee's health insurance contract; factors included delegation, expertise, and uniformity).

118. Sternberg v. Dep't of Health & Human Servs., 299 F.3d 1201, 1205 (10th Cir. 2002) (internal citation omitted). The Tenth Circuit's approach is traceable to *National Gas Fuel Supply*. *See* Nw. Pipeline Corp. v. FERC, 61 F.3d 1479, 1486–87 (10th Cir. 1995) (applying *National Fuel Gas Supply* rationale to FERC's interpretation of natural gas pipeline tariff).

119. *Sternberg*, 299 F.3d at 1205.

120. *Id.*

121. *Id.* at 1205–06.

122. This approach is not altogether different from that suggested in Justice Breyer's *Barnhart* dictum. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (citing "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" as reasons for *Chevron* deference). Indeed, even courts that reject a categorical second-order *Chevron* approach have recognized the functional approach of *Texas Gas*. *See* Amoco Prod. Co. v. FERC, 765 F.2d 686, 690 (7th Cir. 1985); *see also* Bos. Edison, Co. v. FERC, 233 F.3d 60, 66 (1st Cir. 2000) ("FERC is entitled to some deference in construing contracts

Relatedly, the D.C. Circuit has applied a functional approach in stating that agency interpretations may not warrant *Chevron* deference when the agency has vacillated in its position over time.[123] In *Idaho Power v. FERC*,[124] the court rejected FERC's interpretation of a right-of-first-refusal provision in a filed contract to provide electric transmission service both because the agency's interpretation had changed over time and because it was "nonsensical."[125] At issue was FERC's pro forma, required right-of-first-refusal term for Open-Access Transmission Tariffs (OATTs) developed pursuant to FERC Order 888.[126] Under this term, the transmission company was required to give a right of first refusal to incumbent customers provided that they accepted contract terms "at least equal to" those offered by new, competing customers.[127] FERC interpreted that language to mean that the competing customers' terms had to be "substantially the same in all respects" to trigger the tariff's requirements.[128] The court reasoned, first, that FERC's interpretation was nonsensical and in conflict with other terms in the tariff because the interpretation would preclude new customers from making better offers.[129] Additionally, the interpretation conflicted with Order 888, among others,

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where the sales are subject to FERC regulation."); City of Kaukauna v. FERC, 214 F.3d 888, 894–95 (7th Cir. 2000); Wash. Urban League v. FERC, 886 F.2d 1381, 1386 (3d Cir. 1989) ("We generally defer to an agency's interpretation of agreements within the scope of the agency's expertise, and the case for deference is particularly strong when the agency has interpreted regulatory terms regarding which it must often apply its expertise." (citation omitted)). The Fifth Circuit also reviews agencies' contract interpretations de novo, though it does not appear to have considered directly whether *Chevron* counsels a different approach. *See* Davidson v. Glickman, 169 F.3d 996, 1000 (5th Cir. 1999) (applying de novo standard to review of agency's interpretation of crop insurance contract); *see also* Burgin v. Office of Pers. Mgmt., 120 F.3d 494, 497–98 (4th Cir. 1997) (similar). *But see* Campbell v. U.S. Office of Pers. Mgmt., 384 F. Supp. 2d 951, 955 (W.D. Va. 2004) (distinguishing *Burgin* and citing *Chevron*, reasoning that a full understanding of contract terms depended on agency's expertise). For more on whether courts should grant deference to agencies' common law interpretations, see Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799 (2010). *See also* Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009) (all members of the Court deemed *Chevron* applicable, but the Justices disagreed how it should apply).

123. *See* Nat'l Fuel Gas Supply v. FERC, 811 F.2d 1563, 1571 (D.C. Cir. 1987); *cf.* Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1550–51 (D.C. Cir. 1993) (declining to adopt vacillation rationale and applying *Chevron* where agency had adopted different interpretation on rehearing). There is of course some tension between an agency developing consistent national policy yet changing its position over time. *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (holding that only a prior judicial determination of a statute's unambiguous meaning precludes an agency from later changing its interpretation).

124. 312 F.3d 454 (D.C. Cir. 2002).

125. *Id.* at 462.

126. In Order No. 888, FERC required utilities to separate their transmission functions from their wholesale merchant functions. *See generally* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (Apr. 24, 1996) (codified at 18 C.F.R. pts. 35 & 385) [hereinafter *Order No. 888*].

127. *Idaho Power*, 312 F.3d at 457.

128. *Id.* at 462.

129. *Id.*

and was a departure from FERC's longstanding interpretation of the same term in other pro forma tariffs.[130]

One final example of a second-order *Chevron* case is *Arkansas v. Oklahoma*,[131] which involved a federal agency's interpretation of state law.[132] There, EPA had issued a National Pollutant Discharge Elimination System (NPDES) permit to a discharger in Arkansas, upstream of Oklahoma.[133] The operative provisions of the Clean Water Act[134] require that any permit be consistent with both states' water quality criteria.[135] Oklahoma challenged the permit, arguing that its waters would be degraded by the discharge and thus, that the permit should not have been granted.[136] Interpreting that state's standards, EPA determined that the permit could be issued provided that there was no detectable violation of Oklahoma's water quality standards.[137] Finding no violation, the agency issued the permit.[138] The Tenth Circuit, however, held that even an undetectable contribution to the degradation of Oklahoma's waters was impermissible.[139]

The Supreme Court reversed. With respect to the degradation issue, it cited *Chevron* and held that the Court of Appeals erred in failing to give deference to EPA's interpretation of the Oklahoma standard.[140] This conclusion was based on several considerations. First, the state water quality standards (which were established by the state with guidance from EPA and approved by EPA) took on the character of federal law by virtue of their incorporation into the federal NPDES permitting scheme.[141] Second, intrastate water pollution is a matter of federal law.[142] And third, "treating state standards in interstate controversies as federal law accords with the Act's purpose of authorizing the EPA to create and manage a uniform system of interstate water pollution regulation."[143] With the Oklahoma standards having the character of federal law, the Court held that "EPA's reasonable, consistently held interpretation" was entitled to deference.[144]

Admittedly, the Court did not go to great lengths to outline the parameters of *Chevron*'s applicability. But its rationale is consistent with that evidenced in the lower courts' contract decisions: the authority being interpreted had a federal character; the goal of developing uniform national

130. *Id.* at 464.
131. 503 U.S. 91 (1992).
132. *Id.* at 110.
133. *Id.* at 94.
134. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.).
135. *Oklahoma*, 503 U.S. at 110.
136. *Id.* at 95.
137. *Id.* at 97.
138. *Id.*
139. *Id.* at 98.
140. *Id.* at 110.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

policy over time mattered; and the agency's consistency of interpretation supported deference.[145] Summed up, the second-order *Chevron* cases rely most clearly on a series of general principles related to the following: grants of authority (that is, delegation); expertise; uniformity; and procedural detail.

C. Developing Generality Principles

Taken together, the three spectrum cases delineate the bounds within which agencies may create their own legitimacy, while the second-order decisions offer guidance on how to do that. *American Trucking*, *UARG*, and *Mead* reveal much about *Chevron*'s role beyond the specific contexts in which they arose.[146] The doctrine sits at the confluence of separation of powers concerns, the nondelegation doctrine, and the relationship between procedural and substantive legitimacy. By preserving the courts' interpretive power for nondelegation concerns, *American Trucking* creates a space outside of which agencies may not have a say in constructing their own legitimacy.[147] By reinforcing the precise language of a statute in the face of lurking nondelegation concerns, *UARG* cautions that agencies may be rigidly confined even under *Chevron* in the name of fidelity to statute.[148] But by linking democratically legitimizing procedures to *Chevron* eligibility, *Mead* recognizes that there is room for agencies to construct their own legitimacy within the (vast) discretionary space that is left over.[149]

The second-order decisions provide new examples of what agencies may do in that space to enhance their legitimacy.[150] Provided they are operating under a proper delegation of authority, they can choose procedures that reinforce administrative law values and demonstrate that they have applied their expertise.[151] National uniformity and consistency over time matter as well.[152] But noting these generality principles' existence is only the starting point. If they are to be used for assessing intrinsic legitimacy, they must be converted to metrics.

II. DERIVING METRICS FOR AGENCY BEHAVIOR

An enduring challenge for administrative law is finding ways to legitimize agency behavior that is either unreviewable or rarely reviewed. As described in the Introduction, judicial review is the prevailing answer to

145. The context raises important questions about the authority of both federal agencies and federal courts. Suppose the Court and EPA had agreed that the Oklahoma statute unambiguously permitted the discharge. In the usual *Brand X* situation, that holding would have preclusive effect. But what about the *Erie* doctrine? Surely neither Oklahoma courts nor agencies would be bound to that interpretation.

146. *See generally supra* Part I.A.

147. *See generally supra* Part I.A.1.

148. *See generally supra* Part I.A.2.

149. *See generally supra* Part I.A.3.

150. *See generally supra* Part I.B.

151. *See supra* notes 78–88, 118–21 and accompanying text.

152. *See supra* notes 123–45 and accompanying text.

issues of legitimacy because it acts both as an ex ante and ex post check on agency behavior.[153] At the same time, *Mead* instructs that at least sometimes, agencies can construct their own legitimacy.[154] And the second-order *Chevron* cases underscore the importance of *Chevron*'s generality principles in achieving that result.[155]

Others have offered explorations of *Chevron*'s foundational principles; Professor Seidenfeld's collection of these, and elaboration of his own Article III foundation, provides an excellent example.[156] In some ways, my analysis here overlaps with these other works. But my aim is different; rather than articulating a justification for *Chevron*, I accept its existence and consider what it tells us more broadly about how to assess agency actions. Along the way, my analysis provides possible insights into some of *Chevron*'s puzzles. But the more modest focus is to move forward the conversation about deriving metrics for agency behavior.

In this vein, it is notable that many of the second-order cases rely on *Skidmore*-like factors in deciding whether *Chevron* deference is appropriate.[157] Perhaps this sheds light on the Scalia/Breyer debate about *Chevron*'s bright-line versus case-by-case applicability.[158] My conclusion that *Chevron* provides generality principles is consistent with Justice Scalia's preference of giving *Chevron* deference to any authoritative agency position.[159] But my argument that metrics themselves must consider a variety of factors and be tailored to the specific agency action is better aligned with Justice Breyer's approach. The key difference is that for both Justices, the debate concerns the appropriate *judicial* role. My focus on actions that are insulated from review removes much of the force of Justice Scalia's approach. This should not be surprising. What is potentially helpful is that removing the emphasis on judicial review can help pinpoint just what it is courts provide when they undertake review. When such review is lacking, we seek other ways to ensure that agencies maintain their legitimacy.

A. The Scope of Agency Authority

All of the second-order *Chevron* cases rely to some extent on congressional authorization for the relevant federal agency to make the interpretations necessary to fulfill its statutory mandate. Indeed, Professors Merrill and Hickman explain the tariff and settlement cases as examples of Congress delegating authority to FERC to issue binding orders interpreting such contracts.[160] This straightforward approach helps distinguish

153. *See supra* notes 5–10 and accompanying text.
154. *See generally supra* Part I.A.3.
155. *See generally supra* Part I.B.
156. *See* Seidenfeld, *supra* note 25.
157. *See supra* note 122 (providing background).
158. *See* Sunstein, *supra* note 26, at 198–206 (framing the debate).
159. *See generally* Scalia, *supra* note 15.
160. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 897 (2001). Congress has expressly authorized FERC to adjudicate disputes involving filed rates. 15 U.S.C. § 717c(e) (2012).

examples like *Litton Financial Printing Division v. NLRB*,[161] where the Supreme Court held that the NLRB's interpretations of collective bargaining agreements are not reviewable under *Chevron* because the applicable statute delegates enforcement of those agreements to the courts rather than the agency.[162]

Notice that these examples raise no *American Trucking* problems. In fact, in the examples provided the agencies are not even making interpretations bearing on the scope of their jurisdiction because they are not interpreting their statutory mandates. This context obviates a puzzle created by *City of Arlington v. FCC*.[163] There, the Court held that *Chevron* applies regardless of whether the agency interpretation can be said to impact the scope of its jurisdiction.[164] But the interplay of that holding with *American Trucking* is perplexing. How can an agency receive *Chevron* deference when it interprets the scope of its jurisdiction yet receive no opportunity at all to save an impermissible delegation with a limiting construction?

One answer is that the two issues are simply different: one involves the scope of congressional authority; the other is directed at the scope of agency authority. But consider Professor Pierce's view that *Chevron* helps enforce the nondelegation doctrine because it changes the incentives for Congress.[165] Coupled with *UARG*'s outcome, we can reach the straightforward result that express terms of statutory mandates must always prevail.

While the second-order *Chevron* cases did not present nondelegation or jurisdictional issues, they might have: a party to an adjudication might have challenged an agency's statutory mandate or an interpretation of the agency's jurisdiction had it been raised in the case. The main point remains the importance of fidelity to statute for agency legitimacy. Indeed, agency actions that are rarely or never reviewable must still draw legitimacy from fidelity to statute. Metrics assessing such fidelity are difficult to define in the absence of precise instructions from Congress.[166] But if such agency actions are coupled with procedural protections—like reasoned decision making and transparency—they signal to stakeholders and Congress the potential need for more precise instructions. In this way, Congress is again incentivized to avoid nondelegation problems with precise mandates, which promotes clearer metrics to judge agencies' fidelity to statute.

B. Agency Expertise, Uniformity, and Procedural Detail

Expertise is frequently cited as a justification for deference to agencies,[167] but it remains under-theorized from the standpoint of

161. 501 U.S. 190 (1991).
162. *Id.* at 201–03; Merrill & Hickman, *supra* note 160, at 898–99.
163. 133 S. Ct. 1863 (2013).
164. *Id.* at 1870–71.
165. Pierce, *supra* note 47, at 2230–32.
166. *See* Hammond & Markell, *supra* note 5, at 362–63.
167. *See* Hammond, *supra* note 8.

determining exactly what it is and when an agency has applied it. The second-order *Chevron* cases seem either to take its presence for granted, or to make only a very rudimentary distinction between agencies applying common law principles like interpretive canons for contracts (which do not relate to expertise), and agencies interpreting terms of art like "just and reasonable," which require agencies to apply their specialized knowledge and experience. Nevertheless, there is no doubt that agencies are generally the superior institutions to make the scientific and technical judgments necessary to inform policymaking.[168]

When courts review agency expertise, their own opinions provide translations that enable oversight and promote court-agency dialogue.[169] But what about unreviewable agency actions? "Expertise" is hardly a metric. The second-order decisions (and *Chevron* itself) make mention of expertise, but they often simply presume its existence rather than independently analyze it.[170] A few courts taking the functional approach have determined that agencies do not apply expertise when they engage in common law contract interpretation,[171] but that approach likewise begs the question: How do we know an agency has applied its expertise? The answer seems to be that at this point, we don't. The matter is under-theorized in the legal scholarship, though progress is underway.[172] For now, there seems to be an intuitive consensus that expertise provides some legitimacy. How to develop and operationalize this factor is an area ripe for further research.

Numerous scholars also have noted *Chevron*'s ability to promote uniformity.[173] Uniformity can have two meanings. It could reflect nationally consistent policy, such as that FERC would develop in deciding whether a contract includes just and reasonable rates. Or it might reflect consistency over time, such as was lacking in FERC's interpretation of its OATT provisions. For agency actions that are not reviewable, uniformity ought to be easier to test than expertise because it is capable of objective proof.

Finally, procedural detail is the recurring theme for agency legitimacy. It is in choice of procedures that *Mead* grounds agencies' abilities to construct their legitimacy. Further, scholars have demonstrated how procedures are tied to legitimacy, both in furthering administrative law values and in

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168. *See generally id.*

169. *See id. See generally* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011).

170. *E.g.*, Nat'l Fuel Gas Supply v. Texas, 811 F.2d 1563, 1570 (D.C. Cir. 1987) (presuming expertise without analyzing it).

171. *E.g.*, Nw. Pipeline Corp. v. FERC, 61 F.3d 1479, 1486–87 (10th Cir. 1995) (applying *National Fuel Gas Supply* rationale to FERC's interpretation of natural gas pipeline tariff).

172. Importantly, in relying on expertise, it is crucial not to incentivize agencies to "pile on" the science, cloaking policy decisions in impenetrable scientific and technical records. Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

173. *See* Strauss, *supra* note 11, at 1118–29; *see also* Merrill & Hickman, *supra* note 160, at 861–62.

promoting procedural justice.[174] Like uniformity, procedural detail is not particularly difficult to operationalize as a metric because it can be objectively observed. That is (provided the agency is transparent), stakeholders can determine without too much difficulty whether an agency provided notice of its activities, invited participation, and responded to input, and the like.

C. Possible Objections

Many *Chevron* aficionados may well wonder about the place for political accountability in this framework. After all, *Chevron* itself is grounded in presidential accountability.[175] By omitting this theory as a factor for measuring legitimacy, I do not mean to suggest that it does not matter. But it is interesting that the factor plays little to no role in the second-order *Chevron* decisions. As a descriptive matter,[176] this omission invites rethinking about the place of presidential control in administrative law doctrine. On the other hand, the example in the Introduction involving EPA and electricity reliability shows that the President may be directly involved in formulating agency policies that are nevertheless unreviewable. Perhaps it may be said that the metrics I suggest here are best used for situations in which neither the executive nor the courts are involved in reviewing agency behavior. These agency actions are all the more insulated from scrutiny, and all the more in need of indicia of legitimacy.

Another concern relates to operationalizing these metrics: all rely on agency transparency. One cannot assess any of them without some sort of reviewable record. On the other hand, agencies need to get their work done without creating massive records like they would if they were expecting judicial review. In other words, ossification might be a concern. My own experience with a first attempt at assessing agency behavior in the absence of judicial review provides at least anecdotal evidence that transparency does not lead inexorably to ossification.[177] Agencies' letters, emails, and other informal memoranda are often available under the Freedom of Information Act[178] (FOIA).[179] That said, relying on FOIA is unsatisfactory because it is time-consuming, and for some requesters, expensive. Most problematic, it is likely to produce records after the fact, when decisions have already been made and it is too late for meaningful participation. Publishing more information online and in the Federal Register would

174. *See* Hammond & Markell, *supra* note 5, at 320–30 (making this demonstration and collecting other sources).

175. *See* Bressman, *supra* note 7, at 1763–65.

176. Indeed, in his contribution to the symposium, Peter Shane makes the rule of law and legitimacy argument that congressional delegation—not political accountability—should be the primary theoretical underpinning for *Chevron*, such that courts should respect congressional decisions to delegate decision-making authority in agency officials other than the President. *See* Shane, *supra* note 4, at 680, 685.

177. *See* Hammond & Markell, *supra* note 5, at 333–34 (describing study design).

178. 5 U.S.C. § 552 (2012).

179. *See* Hammond & Markell, *supra* note 5, at 333–34.

create transparency in many cases, and it would promote the ability to assess agency behavior.

CONCLUSION

Thirty years later, *Chevron* might be understood as providing a set of generality principles. It represents an intuitive approach to administrative law that derives agency legitimacy not from any single source, but from a set of principles. The courts' use of these principles in second-order decisions—those in which agencies have not interpreted their statutory mandates—helps justify applying the principles more generally. The possibility of transforming those principles into metrics for assessing unreviewable agency behavior is enticing.

This Essay identifies those principles—fidelity to statute, expertise, uniformity, and procedural detail—and suggests a few considerations for operationalizing them as metrics. Although the real work of actual operationalization still needs to be done, I hope that this Essay is useful for highlighting both the need for further work and the enduring generality of *Chevron*.