

City of Arlington v. FCC: Justice Scalia's Triumph

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The Court's opinion in *City of Arlington v. FCC*¹ may mark the most "avulsive"² change in administrative law in at least the last 13 years. But it is not the revolution that anyone, save its author, was expecting. While the Court may, from time to time, engage in misdirection to pull rabbits out of hats, this case was more like pulling a trout out of a pencil-case.

Yes, the Court did answer the question presented, holding that agencies are due deference under the two-step framework of *Chevron v. Natural Resources Defense Council* for reasonable statutory constructions resolving ambiguity concerning the scope of their jurisdiction.³ Had the Court come out the other way, that certainly would have been avulsive too, giving courts the opportunity in nearly every regulatory challenge to resolve statutory ambiguities *de novo*, taking no or little account of the administering agency's views. But that, at least, would have been predictable, because it was among the answers to the question before the Court.

Instead, *City of Arlington* could be the landmark that Justice Antonin Scalia has always maintained that *Chevron* was. His majority opinion announces a broad rule of judicial deference to agency statutory construction, when within the bounds of permissible interpretation. In this new formulation, gone is the "flabby" multi-factor inquiry that preceded application of *Chevron* deference. In its place is a simple, easily administrable rule of deference to agencies that reasonably and authoritatively

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¹ 133 S. Ct. 1863 (2013).

² See *infra* § I.B.

³ *City of Arlington*, 133 S. Ct. at 1874–75 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

interpret ambiguities in the statutes that they administer—the rule that Scalia has promoted for years, as often as not in dissent.

Scalia's majority opinion sets the stage for a heated debate with Chief Justice John Roberts, writing in dissent, on the role of the courts in policing the administrative state. Where Scalia is concerned about marking the boundary between the judicial branch and the political branches, the chief justice frets over Congress's unbounded delegations of authority to administrative agencies, which themselves are barely checked by the president or the courts. Just when it seems the chief justice is ready to breathe life into the non-delegation doctrine and put the lot of them on notice, he turns in a different direction, concluding that agencies are due no deference on their authority to interpret different provisions of the statutes they administer—a question substantially narrower than the one the Court agreed to hear.

What to make of it all? It may be that Scalia and Roberts share the same concern, each struggling for a way to assert control over an administrative state that does not fit the Constitution's separation of powers but is, at this late date, a fact of life. Scalia, ever the formalist, would keep the courts away from decisions that smack of policymaking, while using the heavy artillery of thoughtful statutory interpretation to limit the bounds of permissible agency action. Roberts, meanwhile, would have the courts take on more statutory questions themselves, strictly construing agencies' freedom of action and, ultimately, their authority. Each is a second-best solution, and neither is without its problems. Somewhat counterintuitively, Scalia's approach may be the more durable and, ultimately, the more effective at protecting individual liberty.

This article proceeds in four sections. The first presents a thumbnail sketch of the Court's approach to applying deference to agencies' statutory constructions. The second describes the *City of Arlington* litigation and the different parties' positions, which are essential to understanding the Court's resolution of the case. The third analyzes the justices' opinions. And the fourth concludes with several observations on the decision's impact

I. A Brief History of Deference

A. *The Chevron Revolution*

The only thing that has ever been clear about the "doctrine" enunciated in *Chevron* is that it is contained in the following paragraph, surely the most cited in administrative law:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁴

These things are "well-settled," the Court explained.⁵ But left unsettled and unanswered were at least a few minor points: Which types of "construction[s]" are entitled to such deference? How is a court to decide when the "intent of Congress is clear"? What is a "permissible construction of the statute"? And above all, what is *Chevron's* domain? That is, "[t]o what sorts of statutes and what sorts of agency interpretations should the mandatory deference doctrine of *Chevron* apply?"⁶ Thirty years into this project, *Chevron's* contours and substance remain uncertain.

That would be a strike against *Chevron* if the Court that decided it had intended it to work any great change in the law. It did not. The Court's focus at argument and conference was the precise question before it: whether the Environmental Protection Agency could allow states to treat all pollution-emitting devices within a plant-wide "bubble" as a single "stationary source" under the Clean Air Act's Prevention of Significant Deterioration preconstruction review program, thereby allowing sources more flexibility to "trade" emission increases and decreases among different emitting units within the "bubble."⁷ At conference, Justice John Paul Stevens, *Chevron's* author,

⁴ 467 U.S. at 842–43 (footnotes omitted).

⁵ *Id.* at 845.

⁶ Thomas W. Merrill & Kristin E. Hickman, *Chevron's* Domain, 89 Geo. L.J. 833, 835 (2001).

⁷ William N. Eskridge, Jr., & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083, 1086 (2008) (quoting Memorandum from Justice Sandra Day O'Connor to

had no firm opinion on that question and was sympathetic to the agency's exercise of discretion in an area fraught with competing legal and policy considerations: "When I am so confused, I go with the agency."⁸ And so he did.

And in so doing, *Chevron* seemingly supplanted the disparate approaches that the Court had, until then, applied to agencies' interpretations of their governing statutes. Judge Henry Friendly described the complicated state of the law in a 1976 opinion:

We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases supporting the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.⁹

Indeed, in the freewheeling spirit of the era, the Supreme Court routinely conducted open-ended "totality of the circumstances" inquiries before deciding to go with its own view of a statute's "most natural or logical" meaning,¹⁰ and the lower courts considered themselves empowered to order executive agencies to create new regulatory programs out of whole cloth.¹¹ No more, post-*Chevron*. Its "equa-

the Conference (June 14, 1984) (in Papers of Harry A. Blackmun, Library of Congress, Madison Building, Box 397, Folder 7); see generally Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Precedent*, in *Administrative Law Stories* 398 (Peter L. Strauss ed., 2006).

⁸ Eskridge & Baer, *supra* note 7, at 1086.

⁹ *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976), *aff'd*, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977); see also *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 767 (D.C. Cir. 1984) ("[T]he case law under the Administrative Procedure Act has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agency interpretations of law.").

¹⁰ See, e.g., *Securities and Exchange Commission v. Sloan*, 436 U.S. 103 (1978).

¹¹ See, e.g., *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd* by an equally divided court *sub nom.*, *Fri v. Sierra Club*, 412 U.S. 541 (1973) (ordering EPA to create the Prevention of Significant Deterioration

tion of gaps and ambiguities with express delegations turned the doctrine of mandatory deference . . . into a ubiquitous formula," effecting "a fundamental transformation in the relationship between courts and agencies under administrative law."¹²

But if *Chevron* marked a revolution, the Court didn't immediately recognize it, applying the two-step framework only inconsistently, at best, in subsequent terms.¹³ But the timing was right: *Chevron*'s rise reflected a sea change in the politics and policies of judging. The doctrine quickly gained currency on the U.S. Court of Appeals for the D.C. Circuit, particularly among Reagan appointees like then-judges Antonin Scalia and Kenneth Starr, who recognized it as a "landmark"¹⁴ and a "watershed," respectively, for deregulation.¹⁵ Under *Chevron*, no longer would courts impose artificial "obstacles" "when an agency that has been a classic regulator decides to go in the other direction" or when it "simply sits on its hands and does not choose to do additional things that could be done."¹⁶ Yet even Starr admitted that its "revolutionary effect is not apparent from a quick examination of the opinion itself. The opinion on its face signals no break with the past; it does not explicitly overrule or disapprove of a single case."¹⁷ It would be several more years before the lower courts' view of *Chevron* bubbled up to the high court, pushed along by the elevation of Justice Scalia in 1986. This delay was also a reflection, perhaps, of the Reagan and George H. W. Bush administrations' efforts to tread lightly for fear that the Supreme Court would undermine the gains it had made in the courts of appeals.¹⁸

Program based on a statutory purpose provision and some cherry-picked excerpts of legislative history). For background, see generally Jack L. Landau, *Alabama Power Co. v. Costle: An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality?*, 10 *Envtl. L.* 585, 589–92 (1980).

¹² Merrill & Hickman, *supra* note 6, at 834.

¹³ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *Yale L.J.* 969, 980–81 (1992) (presenting statistics).

¹⁴ Antonin Scalia, *The Role of the Judiciary in Deregulation*, 55 *Antitrust L.J.* 191, 193 (1986).

¹⁵ Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 *Yale J. On Reg.* 283 (1986).

¹⁶ Scalia, *supra* note 14, at 191.

¹⁷ Starr, *supra* note 15, at 284.

¹⁸ Eskridge & Baer, *supra* note 7, at 1087; see Peter H. Schuck and E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 *Duke L.J.*

B. *The Counterrevolution*

That fear was not misplaced, because there was resistance. In *Immigration and Naturalization Service v. Cardoza-Fonseca*, Justice Stevens wrote for the Court that agencies are due no special deference when they face “a pure question of statutory construction for the courts to decide,” rather than a “question of interpretation [in which] the agency is required to apply [a legal standard] to a particular set of facts.”¹⁹ Although this statement was arguably dicta, given that the Court had already held the agency’s interpretation to be flatly inconsistent with the statutory text, it provoked a fiery response from Justice Scalia, who recognized Justice Stevens’s attempt to realign his *Chevron* opinion with the less-deferential approaches that had preceded it.²⁰

Although this aspect of *Cardoza-Fonseca* was a dead end—in the Supreme Court, at least; it caused no little confusion in the lower courts—it was a prelude to the Court’s decision in *United States v. Mead Corporation*.²¹ Where *Chevron* expressed a presumption that statutory “gaps” indicate an implicit delegation of interpretative authority to the administering agency, *Mead* held that a “gap” alone was not enough and that delegation must be supported by an “indication of a . . . congressional intent,” basically flipping the presumption of congressional intent the other way:

Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.²²

Those circumstances “may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment

984, 1031 (1990) (discussing the federal government’s “win rate” in the lower courts post-*Chevron*); see Eskridge & Baer, *supra* note 7, at 1121–22 (discussing the Supreme Court).

¹⁹ 480 U.S. 421, 448 (1987).

²⁰ *Id.* at 453–55 (Scalia, J., concurring).

²¹ 533 U.S. 218 (2001).

²² *Id.* at 227, 229.

rulemaking, or by some other indication of a comparable congressional intent.”²³ Under this formula, even “express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings” would be only a “very good indicator of delegation meriting *Chevron* treatment.”²⁴ As to the agency construction at issue—a ruling letter by the Customs Headquarters Office concluding that Mead’s imported day planners were subject to the statutory tariff classification for “diaries”—the Court denied it *Chevron* deference based on a laundry list of factors, including the lack of notice-and-comment practice, the letter’s inapplicability to third parties, the many Customs offices issuing such letters, and so on.²⁵

But the agency was not necessarily out of luck. The Court exhumed the doctrine of *Skidmore v. Swift & Company*,²⁶ which some believed *Chevron* had interred. Under this approach, the weight accorded an administrative judgment in a particular case “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”²⁷ The Court described this fallback as necessary “to tailor deference to variety” in the spectrum of possible agency actions.²⁸

Justice Scalia, in lone dissent, explained that the *Mead* majority worked “an avulsive change” in administrative law, replacing *Chevron*’s presumption of agency delegation with “a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so.”²⁹ Compounding that dislocation was the Court’s “wonderfully imprecise” test for whether or not agency interpretations would be entitled to deference, made worse by a “virtually

²³ *Id.* at 227.

²⁴ *Id.* at 229. In this, the Court backed away from its statement of just a year earlier, in *Christensen v. Harris County*, 529 U.S. 576, 586–87 (2000), that *Chevron* held “that a court must give effect to an agency’s regulation containing a reasonable interpretation of an ambiguous statute”—and even that was a retreat from *Chevron*’s reference to “an agency’s construction of the statute which it administers,” without limitation as to the form the construction takes. See 467 U.S. at 842.

²⁵ 533 U.S. at 232–34.

²⁶ 323 U.S. 134 (1944).

²⁷ *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

²⁸ *Id.* at 236.

²⁹ *Id.* at 239–40 (Scalia, J., dissenting).

open-ended exception” meant to incorporate all of the Court’s prior case law.

Scalia had particularly harsh words for the majority’s embrace of *Skidmore* deference:

[I]n an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable, totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and then be included within today’s intentionally vague formulation of affirmative congressional intent to “delegate”) is irresponsible.³⁰

Chevron, Scalia argued, although “rooted in a legal presumption of congressional intent,” actually concerns the “division of powers between the Second and Third Branches”—that is the executive and the judicial.³¹ Rather than fixing the balance of power between Congress and the agencies it has authorized, *Mead* adopted a “background rule . . . that ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges.”³² But, as *Chevron* explained, administration of “a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”³³ Now judges, rather than agency administrators, would exercise that policy discretion in an increasing number of cases. This would cause “ossification of large portions of our statutory law” in cases where agency interpretations that would have been permissible under *Chevron* are denied that deference and the court fixes statutory meaning *de novo*.

Scalia’s warnings proved prescient. *Mead* did cause confusion in the lower courts, which adopted a variety of inconsistent approaches to when an agency’s interpretative positions are entitled

³⁰ *Id.* at 250.

³¹ *Id.* at 241.

³² *Id.* at 243.

³³ *Id.* at 256 (quoting *Chevron*, 467 U.S. at 843).

to deference.³⁴ In some cases, reasonable agency resolutions of statutory ambiguities prevail; in others, courts “read *Mead* as a sort of abstract instruction . . . to decide, on an all-things-considered basis, and without affording any deference to agency views at all, whether Congress expressly delegated to the agency the power to take the very action it did take.”³⁵ That dissonance—between substantial deference in one class of cases and open-ended inquiries up to and including outright judicial policymaking in another, with no clear line between the two—has largely prevailed in the post-*Mead* world, despite the Court’s several attempts to clarify and backfill the “*Mead* doctrine.”³⁶ As Adrian Vermeule observed early on, “*Mead*’s compromise position, suspended uneasily between *Chevron*’s relatively clear global presumption and a genuine totality-of-the-circumstances test, is intrinsically unstable.”³⁷

³⁴ See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 Vand. L. Rev. 1443, 1445 (2005) (“Years have passed since *Mead* was decided, and we still lack a clear answer to the question when an agency is entitled to *Chevron* deference for procedures other than notice-and-comment rulemaking or formal adjudication.”).

³⁵ Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 Geo. Wash. L. Rev. 347, 352 (2003).

³⁶ See, e.g., *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that a prior judicial interpretation of a statute is necessarily binding on an agency “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”); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007) (explaining that Congress would have expected deference “[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable”); *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002) (deferring to an agency interpretation, despite that it had not been promulgated through rulemaking, due to “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”). On the other hand, some decisions have only added to the confusion. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 258–68 (2006) (denying *Chevron* deference for reasons that are basically impossible to summarize in a squib).

³⁷ Vermeule, *supra* note 35, at 353.

C. *Chevron* and Agency Jurisdiction

As Justice Scalia's *Mead* dissent intimates, one consequence of *Chevron*'s accidental landmark status is that its theoretical basis is unclear. The decision itself pays lip service to notions of democratic accountability and agency competence.³⁸ Later decisions like *Mead* have stated that *Chevron* rests (principally? entirely?) on legislative intent.³⁹ (Its plain incompatibility with the Administrative Procedures Act notwithstanding.⁴⁰) Others, like Scalia, imply that *Chevron* stems from Article III and is a limitation of the judicial power and on the role of judges in deciding matters that are not properly justiciable or are committed to the political branches. The lack of any firm theoretical grounding for the *Chevron* framework makes answering questions about its proper application difficult.

In particular, there has been uncertainty from nearly the beginning about whether *Chevron* applies to agencies' constructions regarding their own jurisdiction. When the issue was first broached in *Mississippi Power & Light Co. v. Mississippi* in 1988, the Court ducked it, holding that a prior case resolved that the jurisdiction of the Federal Energy Regulatory Commission extended to power allocations among utilities that affect wholesale rates, such that states are preempted from barring regulated utilities from passing through to retail consumers wholesale rates resulting from FERC-mandated power allocations.⁴¹ The majority opinion does not mention *Chevron* or the concept of deference.

But in concurrence, Justice Scalia addressed the issue head-on. The question, as he framed it, was "whether FERC has jurisdiction to determine the prudence of a particular utility's participation in [a pooling arrangement with other utilities]."⁴² This, in turn, required application of the *Chevron* framework to FERC's interpretation of its "statutory authority or jurisdiction" under the Federal Power Act—this was, Scalia

³⁸ *Chevron*, 467 U.S. at 866 ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.").

³⁹ *Mead*, 533 U.S. at 230 n.11 & accompanying text.

⁴⁰ See 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law . . ."); Mark Seidenfeld, *Chevron's* Foundation, 86 *Notre Dame L. Rev.* 273, 278–79 (2011).

⁴¹ 487 U.S. 354, 370–74 (1988). Notably, Justice Stevens, who also authored *Chevron*, wrote for the majority.

⁴² *Id.* at 378 (Scalia, J., concurring).

wrote, “settled law.”⁴³ In this, Justice Scalia laid down a marker, characterizing *Mississippi Power* and a swath of the Court’s prior cases for a proposition that had never quite been addressed.⁴⁴ *Commodity Futures Trading Commission v. Schor*, for example, had held that the CFTC was due deference for its choice to exercise jurisdiction over counterclaims arising out of the same transaction as disputes over which the agency had been expressly conferred jurisdiction.⁴⁵ And *City of New York v. FCC* upheld the Federal Communications Commission’s view that it could preempt state and local authorities from imposing stricter technical standards governing the quality of cable television signals than those imposed by the FCC.⁴⁶ But like the majority opinion in *Mississippi Power*, neither case devoted a word to addressing the appropriate degree of deference, if any, due an agency’s interpretation of its statutory jurisdiction. The most that could be said is that the Court simply assumed that deference would apply to such determinations.

Scalia identified two justifications for granting deference. The first was pragmatic:

[T]here is no discernible line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the “authority.”⁴⁷

The second was doctrinal: “Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.”⁴⁸ In other words, deference to jurisdictional determinations rests on the same basis as any other application of the *Chevron* framework: the legal presumption that Congress would expect agencies, not the courts, to exercise policymaking discretion in choosing among permissible interpretations of statutory authority.

⁴³ *Id.* at 381.

⁴⁴ *Id.* at 381–83.

⁴⁵ 478 U.S. 833, 845–46 (1986).

⁴⁶ 486 U.S. 57, 64 (1988).

⁴⁷ 487 U.S. at 381 (Scalia, J., concurring).

⁴⁸ *Id.* at 381–82.

Justice William Brennan took issue with those points in a forceful dissent. To begin with, jurisdictional issues “do not reflect conflicts between policies that have been committed to the agency’s care, but rather reflect policies in favor of limiting the agency’s jurisdiction that, by definition, have not been entrusted to the agency.”⁴⁹ For that reason, “agencies can claim no special expertise in interpreting a statute confining its jurisdiction.”⁵⁰ Accordingly, there was no basis to presume that Congress intended agencies to fill gaps in a jurisdictional statute, “since by its nature such a statute manifests an unwillingness to give the agency the freedom to define the scope of its own power.”⁵¹

There the issue stood for the next 15 years, as the Supreme Court continued its habit of unmentioned “drive-by” deference to agency jurisdiction determinations.⁵² The lower courts, meanwhile, were divided, sometimes even among panels within the same circuit.⁵³

II. A Tempest over Transmission Towers

A. *Municipalities Challenge FCC’s Authority to Regulate the Timing for Antenna Zoning Decision*

City of Arlington arose under the Communications Act of 1934, which in a 1996 amendment sought to address the problem of undue interference by state and local government in the placement and construction of wireless communications facilities like the antennae used for cellular phone and wireless data services.⁵⁴

⁴⁹ *Id.* at 387 (Brennan, J., dissenting).

⁵⁰ *Id.*

⁵¹ *Id.* In support of this last point, Brennan cites *Schor*’s discussion of the CFTC’s governing statute, ignoring that *Schor* was undertaking a *Chevron* step one inquiry. 478 U.S. at 844–45.

⁵² E.g., *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *MCI Telecomm. Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 224, 229, 231 (1994); *Reiter v. Cooper*, 507 U.S. 258, 269 (1993).

⁵³ See Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. Ill. L. Rev. 1497, 1518 (2009) (citing cases among the circuits and noting that the “D.C. and Eighth Circuit appear to have resolved the issue both ways.”).

⁵⁴ Telecomm. Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 332.

The provision at issue, Section 332(c)(7), contains three relevant subparagraphs. The first, a savings clause, generally preserves local zoning authority, except for the few exceptions that follow.⁵⁵ The second, which contains one of the exceptions, requires that a state or locality must act on any request for authorization to site wireless facilities “within a reasonable period of time after the request is duly filed.”⁵⁶ And the third provides that persons adversely affected by such an unreasonable delay may file suit in federal court within 30 days. Through this scheme, Congress sought to reconcile two competing interests: the “desire to preserve the traditional role of state and local governments in regulating land use and zoning and Congress’s interest in encouraging the rapid development of new telecommunications technologies by removing the ability of state and local governments to impede the construction and modification of wireless communications facilities through delay or irrational decisionmaking.”⁵⁷

As is often the case, Congress’s handiwork was not entirely successful at achieving its intended ends. In 2008, CTIA—The Wireless Association⁵⁸ filed a petition with the FCC complaining that the local zoning process for siting wireless facilities remained “extremely time-consuming,” frustrating operators’ ability to deploy wireless systems.⁵⁹ It proposed that the agency clarify the meaning of Section 332(c)(7)(b)(ii)’s requirement that zoning authorities act on siting requests “within a reasonable amount of time” by setting a presumptively reasonable time limit of 45 days for the addition of an antenna to an existing facility (known as “collocation”) and 75 days for a new facility.⁶⁰

In November 2009, the commission issued a declaratory ruling granting, in part, the CTIA petition.⁶¹ Its legal discussion proceeded in two steps. First, it addressed the FCC’s authority to interpret Section 332(c)(7), which had been challenged in comments submitted

⁵⁵ 42 U.S.C. § 332(c)(7)(A).

⁵⁶ 42 U.S.C. § 332(c)(7)(B)(ii).

⁵⁷ *City of Arlington, Texas v. FCC*, 668 F.3d 229, 234 (5th Cir. 2012).

⁵⁸ See *City of Arlington*, 133 S. Ct. 1863 at 1867 n.1 (“This is not a typographical error.”).

⁵⁹ 24 FCC Rcd. 13994, 13996 (2009).

⁶⁰ *Id.* at 13997.

⁶¹ *Id.* at 13996.

by state and local governments as inconsistent with congressional intent to deny the FCC such authority.⁶² Predictably, the agency disagreed. Section 1 of the Communications Act, it explained, directs the commission to “execute and enforce the provisions of this Act” in order to regulate and promote communication “by wire and radio” on a nationwide basis, and its authority was supported by various provisions like Section 203(b) conferring rulemaking and adjudicatory power as may be necessary to carry out the act.⁶³ In its second step, the agency declared its interpretation of Section 332(c)(7)(b)(ii): a reasonable time presumptively would be 90 days for applications regarding collocated antennae and 150 days for all other applications, with the exceptions that (1) the wireless provider and locality could agree to extend the time frame and (2) the locality could, in court, seek to rebut the presumption of unreasonableness.⁶⁴

The City of Arlington, Texas, filed a petition for review of the FCC’s declaratory ruling in the U.S. Court of Appeals for the Fifth Circuit challenging, among other things, the FCC’s statutory authority to adopt the presumptive time limits.⁶⁵ The court held, applying circuit precedent, that the *Chevron* framework applied to the agency’s determination of its own statutory jurisdiction and that, under *Chevron*, the statute was ambiguous with respect to the FCC’s authority to establish presumptively reasonable time limits and the agency’s claim to possess such authority was a permissible interpretation of the statute.⁶⁶ It proceeded, also applying the *Chevron* framework, to uphold the time limits themselves as reasonable resolutions of a statutory ambiguity.⁶⁷

The City of Arlington asked the Supreme Court to consider both the appropriate degree of deference and the FCC’s authority in this instance, but the Court accepted only the first question: “Whether . . . a court should apply *Chevron* to review an agency’s determination of its own jurisdiction.”⁶⁸

⁶² *Id.* at 14000.

⁶³ *Id.* at 14001.

⁶⁴ *Id.* at 14003–05.

⁶⁵ *City of Arlington*, 668 F.3d at 236.

⁶⁶ *Id.* at 254.

⁶⁷ *Id.* at 255–60.

⁶⁸ *City of Arlington v. FCC*, 133 S. Ct. 524 (2012).

B. *The Confusion Begins*

Presumably for strategic reasons, the City of Arlington chose, in its merit briefing, to address a potentially narrower issue: the deference due to the FCC's determination that it possessed "interpretive authority" over Section 332(c)(7).⁶⁹ Because agencies possess only that power which Congress has conferred upon them, it argued, "the scope of an agency's legal authority is for a court to determine."⁷⁰ Leaning heavily on *Mead*, Arlington argued that courts must conduct a threshold "*Chevron* Step 0" inquiry, without affording any deference to the agency, to "determin[e] whether Congress intended to assign the agency authoritative interpretative power over the statute."⁷¹ This inquiry, proceeding on a provision-by-provision basis, would assess "factors such as whether Congress empowered the agency to make rules with the force of law, whether the agency's expressed views are authoritative, and whether the agency's position is well-reasoned, to name a few."⁷² In support of this proposition, Arlington cited a number of cases carrying out *Mead*'s threshold inquiry into congressional intent.⁷³ *Forget about the broad question that we asked you to consider*, the brief seems to say, *this is just a straightforward application of Mead*. Indeed, apparently playing for Justice Scalia's vote, Arlington actually *distinguishes* its "interpretative authority" argument from cases concerning agency "jurisdiction."⁷⁴

Having punted on the question that it asked the Court to consider, Arlington proceeded to brief the question that the Court had specifically declined to hear: the FCC's authority to interpret Section 322(c)(7), in particular. The illustration is instructive. That provision begins with "jurisdiction-limiting language" (that is, the savings clause), concerns

⁶⁹ Brief for Petitioner at 12, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545) [hereinafter "Arlington Br."]. Confusingly, the brief alternatively refers to this concept as "interpretive jurisdiction." For clarity's sake, this article sticks with "interpretive authority" to refer to Arlington's argument, and "agency jurisdiction" to refer to the broader question.

⁷⁰ *Id.* at 15.

⁷¹ *Id.* at 16–17.

⁷² *Id.* at 19.

⁷³ *Id.* at 19–20 (citing, *inter alia*, *Long Island Care at Home, Ltd.*, 551 U.S. at 165; *Gonzales*, 546 U.S. at 258–68; *National Cable*, 545 U.S. at 980–81; *Barnhart*, 535 U.S. at 221–22; *Mead*, 533 U.S. at 233–34; *Christensen*, 529 U.S. at 587).

⁷⁴ *Id.* at 24–26.

a matter of traditional state police power, lacks any clear statement that Congress intended the FCC to intrude on that state authority, and places judicial review of unreasonable delays in approving antenna siting not in the FCC, but in the courts.⁷⁵ So while Congress did generally confer rulemaking authority on the agency, its interpretative authority does not extend to this particular provision. That was the issue, Arlington argued, that the Fifth Circuit should have addressed *de novo* at the outset.⁷⁶ Truth be told, that was the issue that the FCC had addressed at the outset of its declaratory ruling.⁷⁷

The International Municipal Lawyers Association, which had intervened in support of Arlington before the Fifth Circuit, was not quite so retiring, filing a forceful brief on the “agency jurisdiction” issue that the Court had actually agreed to hear. That question, the IMLA argued, implicates both the horizontal and vertical separation of powers. As to the horizontal, “*Chevron* deference is premised on the necessary precondition that Congress has granted the agency authority to administer the statute being construed.”⁷⁸ Therefore, “[i]t would make nonsense of *Chevron’s* logic to grant an agency deference on the very question of whether it is entitled to deference.”⁷⁹ On that basis, the IMLA proposed a hard line governing when to accord agencies deference:

Jurisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and under what conditions. Substantive interpretations entitled to *Chevron* deference concern the *how* of regulatory power: in what fashion may an agency implement an administrative scheme.⁸⁰

Implicitly acknowledging the scant case law in support of this approach, the IMLA argued that this distinction was compelled by “separation of powers principles.”⁸¹ Agencies would always act to

⁷⁵ *Id.* at 35–40.

⁷⁶ *Id.* at 34.

⁷⁷ 24 FCC Rcd. at 14000 (discussing the agency’s “interpretive authority”).

⁷⁸ Brief for Respondent IMLA at 17, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545) [hereinafter “IMLA Br.”].

⁷⁹ *Id.* at 17.

⁸⁰ *Id.* at 18–19 (emphasis in original).

⁸¹ *Id.* at 27.

aggrandize their power, "broadly constru[ing] ambiguous statutes in favor of agency jurisdiction."⁸² As a check, and to place such authority in a more accountable branch, Congress, the rule should be to deny "agencies deference in interpreting the metes and bounds of their own authority."⁸³

And as to the vertical separation of powers, the IMLA argues that there is "no room for *Chevron* deference where, as here, an agency claims jurisdiction over local governmental procedures."⁸⁴ Instead, such jurisdiction must be presumed lacking in the face of statutory silence. Any other rule "would unnecessarily place *Chevron* and the clear statement rule on a collision course."⁸⁵

The government, in response, urged the Court to reject arguments to create an exception for "jurisdictional" statutory provisions that "would be inadministrable in practice."⁸⁶ It addressed the agency-jurisdiction and interpretative-authority arguments, in turn. As to the former, after reciting the Court's cases applying the *Chevron* framework to jurisdictional questions,⁸⁷ the government embraced the rationale of Justice Scalia's *Mississippi Power* concurrence, arguing that the same presumption of legislative intent underlying *Chevron* applies equally to jurisdictional interpretations and that maintaining a "statutory authority" exception would be "unworkable."⁸⁸ The IMLA's proposed distinction, in addition to being "flatly inconsistent with this Court's precedents," is unnecessary to protect against

⁸² *Id.* at 28.

⁸³ *Id.* at 30.

⁸⁴ *Id.* at 36.

⁸⁵ *Id.* at 38. See *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (quotation marks omitted)); *Jones v. United States*, 529 U.S. 848, 858 (2000) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" (quotation marks omitted)).

⁸⁶ Brief for the Federal Respondents at 11, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545).

⁸⁷ *Id.* at 18–19.

⁸⁸ *Id.* at 21–22.

agency usurpations, which the Court had policed in prior cases through ordinary statutory interpretation under *Chevron* step one.⁸⁹

Arlington's narrower interpretative-authority argument, the government argued, was simply inconsistent with the reality of statutory delegations, which are typically phrased in broad terms reaching the entirety of an agency's governing statute.⁹⁰ Where Congress wishes to rebut the presumption that it meant what it said, it can and has done so "by enacting a specific exception to a general grant of regulatory authority."⁹¹ A "provision-by-provision search for delegation," as urged by Arlington, was therefore "obviated" by broad grants of rulemaking authority, as even *Mead* had recognized.⁹² Accordingly, because Section 332(c)(7) had not expressly negated the FCC's general interpretative authority, the agency's resolution of any ambiguity in that section is entitled to deference.⁹³ Finally, that this provision concerns the relationship between state and federal power was of no moment, given that the FCC had done nothing more than "interpret[] a statutory phrase that explicitly constrains the discretion of state and local zoning authorities."⁹⁴ In other words, the balance of power had already been set by the statute, and the FCC's interpretation therefore created no additional federal requirement.

Oral argument began with the admission of Arlington's counsel, Tom Goldstein, that the case was "complicated" because "the word 'jurisdiction' means a lot of different things to a lot of different people"⁹⁵—and the argument did indeed reflect the confusion between the different questions briefed by Arlington and the IMLA. Goldstein, Justice Elena Kagan noted, was "running as fast as [he could] away from the arguments that IMLA has presented," attempting to present his position as a modest application of *Mead*.⁹⁶ But as

⁸⁹ *Id.* at 27–28 (discussing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), *Dole v. United Steelworkers*, 494 U.S. 26 (1990), and *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

⁹⁰ *Id.* at 30–31.

⁹¹ *Id.* at 31–32.

⁹² *Id.* at 32–33.

⁹³ *Id.* at 36.

⁹⁴ *Id.* at 37.

⁹⁵ Oral Arg. Tr. at 4, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545).

⁹⁶ *Id.* at 60.

to his point that the Court must decide first whether “the FCC [has] the power to implement this statute,” the Court was largely unreceptive.⁹⁷ Justice Kagan’s dismissive response was representative: “[A]t one level, you are right. It’s just a level that doesn’t help you very much,” because the Court had always looked first to an agency’s organic statute to determine whether it provided the agency with general administrative authority before proceeding to apply the *Chevron* framework.⁹⁸

The solicitor general, in turn, warned the Court of a “Pandora’s Box situation” if it accepted either Arlington’s or the IMLA’s argument, because of the hopelessness of drawing “a clear, neat dividing line” between issues of jurisdiction or interpretative authority and issues of substance.⁹⁹ Of course, he conceded, “there is *de novo* review of the question of whether Congress has delegated authority to the agency, generally, to act with the force of law and whether the interpretation claiming deference is an exercise of that delegated authority.”¹⁰⁰ But after that, “*Chevron* kicks in.”¹⁰¹

“*Chevron* is at an end. It’s unraveled,” quipped Justice Anthony Kennedy as Goldstein launched into his rebuttal.¹⁰²

III. *Chevron* Unchained . . . and That Jurisdiction Thing, Too

A. *The End of the Line for Mead and Skidmore?*

Twenty-nine years after the Court announced its accidental landmark in *Chevron*, that case’s eponymous doctrine finally has a principled basis agreed to by a majority of the Court: “Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”¹⁰³ This is “a stable background rule against which Congress can legislate”; it is not a presumption or fiction about what Congress actually intended when

⁹⁷ *Id.* at 14.

⁹⁸ *Id.* at 14–15.

⁹⁹ *Id.* at 33.

¹⁰⁰ *Id.* at 35.

¹⁰¹ *Id.*

¹⁰² *Id.* at 59.

¹⁰³ *City of Arlington*, 133 S. Ct. at 1868.

it did.¹⁰⁴ And this rule applies whenever “a court reviews an agency’s construction of the statute which it administers.”¹⁰⁵

If those concepts sound familiar, that is because they echo Justice Scalia’s *Mead* dissent. As the senior justice in the majority, Scalia assigned to himself the opinion of the Court, which was joined by Justices Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Kagan.¹⁰⁶

Yes, that’s right, the Court has apparently reversed *Mead*. *Mead*, Justice Scalia’s opinion breezily explains, requires only that, “for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.”¹⁰⁷ Of course, if that were all that had been at issue in *Mead*, the case would have come out the other way, Congress clearly having authorized the Customs Service to “fix the final classification and rate of duty applicable to . . . merchandise.”¹⁰⁸ To be sure, the majority opinion distinguishes *Mead* on the basis that it denied “deference to action, by an agency with rulemaking authority, that was not rulemaking.”¹⁰⁹ But that is not a rule, it is a distinction.¹¹⁰

And what happens when an agency interpretation is not entitled to *Chevron* deference? According to the majority, the statute then apparently falls within the “scope for *de novo* judicial review.”¹¹¹ *Skidmore* deference? The majority has never heard of it. Nor is the possibility broached in Chief Justice Roberts’s opinion in dissent, joined by Justices Kennedy and Samuel Alito. The dissent states that, in

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1865.

¹⁰⁷ *Id.* at 1874.

¹⁰⁸ *Mead*, 533 U.S. at 222 (quoting 19 U.S.C. § 1500(b)).

¹⁰⁹ 133 S. Ct. at 1874.

¹¹⁰ Even for those who may be skeptical of this conclusion, there can be no question that *City of Arlington* at the least undermines any suggestion that a “rulemaking proceeding is neither a necessary nor a sufficient condition for according *Chevron* deference,” *Brand X*, 545 U.S. at 1004 (Breyer, J., concurring). Cf. *City of Arlington*, 133 S. Ct. at 1874 (“What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field. There is no such case.”).

¹¹¹ 133 S. Ct. at 1873–74.

Mead, “[t]he Court did not defer to the agency’s views” at all.¹¹² That might come as a surprise to anyone who has read *Mead*, which actually “h[e]ld that under *Skidmore*, the [agency] ruling is eligible to claim respect according to its persuasiveness.”¹¹³ If there were any doubt, the dissent states plainly that an “agency’s interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive”—in other words, the *Chevron/Mead* formula.¹¹⁴ Adding it up, that is eight of nine justices apparently denying that *Skidmore* deference maintains any vitality.

The lonely voice in this debate is Justice Stephen Breyer, writing in concurrence, who remains faithful to *Mead* in every respect. To Justice Breyer, statutory ambiguity standing alone is “not enough” to warrant deference.¹¹⁵ Instead, to determine whether to apply the *Chevron* framework, a court should consider, among any number of other things, “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.”¹¹⁶ And when all else fails, “sometimes an agency interpretation, in light of the agency’s special expertise, will still have the ‘power to persuade, if lacking power to control’”¹¹⁷—in other words, *Skidmore* deference. Considering the totality of the circumstances—and ducking the interpretative/jurisdictional deference question presented—Breyer would defer in this case because there is no “good reason” not to.¹¹⁸ With apparent exasperation, Breyer states that he “consequently join[s] the majority’s judgment and such portions of its opinion as are consistent with what I have written here.”¹¹⁹

¹¹² *Id.* at 1882 (Roberts, C.J., dissenting).

¹¹³ *Mead*, 533 U.S. at 221.

¹¹⁴ *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting).

¹¹⁵ *Id.* at 1875 (Breyer, J., concurring).

¹¹⁶ *Id.* (Breyer, J., concurring) (quoting *Barnhart*, 535 U.S. at 222).

¹¹⁷ *Id.* at 1876 (Breyer, J., concurring) (quoting *Skidmore*, 323 U.S. at 140).

¹¹⁸ *Id.* at 1877 (Breyer, J., concurring).

¹¹⁹ *Id.* (Breyer, J., concurring).

B. *The Jurisdiction Thing*

Justice Scalia's majority opinion, no surprise, rejects the agency jurisdiction argument raised by the IMLA, much along the lines of Scalia's *Mississippi Power* concurrence.

To begin with, "the distinction between 'jurisdictional' and 'non-jurisdictional' interpretations is a mirage" as it concerns agency action. In every case, the question is simple: "whether the agency has stayed within the bounds of its statutory authority."¹²⁰ With a court, "a jurisdictionally proper but substantively incorrect . . . decision is not ultra vires," because the court had the power to issue the decision. But with agencies, "[b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than why they act beyond their jurisdiction, what they do is ultra vires."¹²¹

And that, the majority contends, causes the practical difficulty of distinguishing between jurisdictional and non-jurisdictional provisions. "The [jurisdictional] label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction."¹²² For example: "Who is an 'outside salesman'? What is a 'pole attachment'? Where do the 'waters of the United States' end?"¹²³ "Make no mistake," Scalia warns, "the ultimate target here is *Chevron* itself," because "[s]avvy challengers of agency action would play the 'jurisdictional' card in every case."¹²⁴

Of the risk that affording agencies deference as to their statutory jurisdiction will permit them to aggrandize their powers, the majority counsels greater attention to the art of statutory interpretation:

The fox-in-the-hen-house syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where

¹²⁰ *Id.* at 1868 (emphasis omitted).

¹²¹ *Id.* at 1869.

¹²² *Id.* at 1870.

¹²³ *Id.*

¹²⁴ *Id.* at 1873.

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Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.¹²⁵

Finally, the majority dismisses the vertical separation-of-powers concerns here as “faux-federalism,” for much the reason provided by the government. Given that the agency is doing nothing more than clarifying an ambiguity in a statute already subject to federal court review, “[t]hese lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges. It is hard to spark a passionate ‘States’ rights’ debate over that detail.”¹²⁶

Chief Justice Roberts, of course, dissents on these points, albeit in characteristically modest fashion. (Which is not to say that the entirety of his dissent is modest—more on that anon.) Rather than address the agency jurisdiction question taken on by the majority, Roberts would resolve the case on the narrower ground, interpretative authority, proposed by Arlington. He begins with a simple enough proposition: “[a] court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”¹²⁷ The obligatory citation to *Marbury* follows.¹²⁸ And, from there, it is a short leap to *Mead*:

In *Mead*, we again made clear that the “category of interpretative choices” to which *Chevron* deference applies is defined by congressional intent. *Chevron* deference, we said, rests on a recognition that Congress has delegated to an agency the interpretive authority to implement “a particular provision” or answer “a particular question.” An agency’s interpretation of “a particular statutory provision” thus qualifies for *Chevron* deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”¹²⁹

¹²⁵ *Id.* at 1874.

¹²⁶ *Id.* at 1873 (quotation marks omitted).

¹²⁷ *Id.* at 1877 (Roberts, C.J., dissenting).

¹²⁸ *Id.* at 1880 (Roberts, C.J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province of the judicial department to say what the law is.”)).

¹²⁹ *Id.* at 1882 (Roberts, C.J., dissenting) (citations omitted) (quoting *Mead*, 533 U.S. at 229, 226–27).

This is so, Chief Justice Roberts continues, because “*Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority”—the presumption rejected by the majority.¹³⁰ On that basis, it is the court’s duty to ascertain, *de novo*, whether a congressional delegation of interpretative authority extends to the specific statutory ambiguity at issue. That inquiry, Roberts argues, would be no more difficult in any case than in the present one, where even the agency identified the issue properly.

Finally, the dissent responds to the majority’s charge that *Chevron* is in its crosshairs:

The Court touches on a legitimate concern: *Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive. But there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.¹³¹

So who has the better of this argument, Scalia or Roberts? That question should be answered on two dimensions: adherence to the Court’s precedents and doctrinal soundness.

On the former, Scalia stands on firm ground. From *Chevron* on, the Court has always looked to an agency’s general administrative authority, rather than conducting any sort of provision-by-provision inquiry into congressional intent. Although the language in *Adams Fruit Co., Inc. v. Barrett*¹³² and *Gonzales v. Oregon*¹³³ is arguably to the contrary, it is less apparent that those cases do any more than recognize express limitations on interpretative authority.¹³⁴ In other words, the “Step 0” analysis is still conducted at a relatively high level, fo-

¹³⁰ Compare *id.* at 1883 (Roberts, C.J., dissenting) with *id.* at 1868 (majority opinion).

¹³¹ *Id.* at 1883 (Roberts, C.J., dissenting).

¹³² 494 U.S. 638, 649–50 (1990) (“[I]t is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.” (quotation marks omitted)).

¹³³ 546 U.S. at 258–60 (“To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.”).

¹³⁴ *Adams Fruit Co.*, 494 U.S. at 650 (noting that the delegation at issue “does not empower the Secretary to regulate the scope of the judicial power vested by the statute”); *Gonzales*, 546 U.S. at 259 (“The CSA gives the Attorney General limited powers, to be exercised in specific ways.”).

ocusing on the delegation provision itself. Neither case conducts the kind of detailed, contextual search for interpretative authority that Arlington urged the Court to do with respect to Section 332(c)(7).¹³⁵ Instead, such limitations on agency authority have generally been recognized under *Chevron* step one.¹³⁶ In this respect, the chief justice's approach is a definite break with precedent, giving litigants two bites at the apple in every regulatory challenge: (1) contest the agency's interpretative authority *de novo* based on statutory context and then (2) contest the agency's interpretation under *Chevron* step one, on more or less the same basis. Justice Scalia does have a point that the dissent's "ultimate target here is *Chevron* itself."¹³⁷

As for doctrinal soundness, there is literally no comparison—the majority and dissent chose to address different arguments, and each has its merits and faults. Scalia's claim that any distinction between jurisdictional and non-jurisdictional provisions would be "illusory" is overblown. As Michael Greve memorably put it, jurisdiction "concerns a regulatory agency's question, 'Can we screw 'em?'" while "[s]ubstance goes to, 'Screw 'em *how*?"¹³⁸ This line—effectively the one urged by the IMLA—is certainly administrable. But is it the right one? If Congress authorizes an agency to exercise "jurisdiction over emissions of pollutants that threaten human health and welfare" is it really likely that it intended the courts to decide, on a *de novo* basis, what is and is not a "pollutant," without substantial deference to the agency's views? And what if the statute expressly confers rulemaking authority on the agency to interpret that term? Its rules would still be jurisdictional. One could argue, more modestly, that *Chevron*'s presumption regarding *implicit* grants of interpretative authority should not apply to jurisdictional provisions, but it is not apparent that that was even at issue in this case or in most cases—after all, Congress did authorize the FCC to "prescribe such rules and

¹³⁵ See *supra* § II.B.

¹³⁶ E.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000); *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 229–31 (1994).

¹³⁷ *City of Arlington*, 133 S. Ct. at 1873.

¹³⁸ Michael S. Greve, *From Chevron to Arlington: The Court and the Administrative State at Sea*, Liberty Law Blog, Jan 19, 2013, <http://www.libertylawsite.org/2013/01/19/from-chevron-to-arlington-the-court-and-the-administrative-state-at-sea>.

regulations as may be necessary in the public interest to carry out [the Communication Act's] provisions."¹³⁹ It is the rare case where an agency proffers a putatively authoritative interpretation of a statute that is not its to administer.

Meanwhile, the dissent's "interpretative authority" line avoids the absurdity of a hard jurisdictional rule at the expense of administrability. It is all well and good to say that, before applying the *Chevron* framework, a court "must on its own decide whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue,"¹⁴⁰ but how does that work in practice if, as here, an *express grant of rulemaking authority* over the act in question apparently is not enough? At best, this under-determinative approach would foment the same kind of confusion as *Mead* in the lower courts, robbing *Chevron* of one of its chief virtues: predictability. At worst, it would give courts a plausible rationale to address any statutory ambiguity *de novo*, taking important decisions from agencies (in the hypothetical above, for example, whether water vapor is a regulable "pollutant") because they are important. Manipulation of the standard of review is not an uncommon charge,¹⁴¹ and giving courts another lever to do so in administrative cases would only cause it to be leveled more often, likely with some basis.

But if the keystone of deference is what Congress actually intended, then Chief Justice Roberts has the upper hand, because that is precisely what he would plumb—even where doing so is at odds with the whole *Chevron* approach. If, however, deference is meant to confine the courts to questions that are entirely legal in nature, and thereby leave matters of implementation and policy to the political branches, then Justice Scalia's near-blanket presumption of deference to an administering agency fits the bill. Once again, the dispute is over the fundamental purpose of *Chevron* and, more broadly, judicial review of agency action.

¹³⁹ 47 U.S.C. § 201(b).

¹⁴⁰ *City of Arlington*, 133 S. Ct. at 1880 (Roberts, C.J., dissenting).

¹⁴¹ See, e.g., Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 *Lewis & Clark L. Rev.* 233, 236 (2009) (empirical study illustrating "how appellate judges sometimes disregard or manipulate the various standards of review").

C. Roberts's Radical Turn

Chief Justice Roberts's dissent does address that broader question, in a manner that is anything but modest. To say that his "disagreement with the Court is fundamental," as he does,¹⁴² may be the understatement of this term and perhaps of his tenure to date.

The target of Roberts's concern is nothing less than the administrative state. It "wields vast power and touches almost every aspect of daily life."¹⁴³ Indeed, the Framers of the Constitution "could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."¹⁴⁴ It is unchecked by presidential control, because "no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity."¹⁴⁵ And too often "Congressional delegations to agencies are often ambiguous—expressing 'a mood rather than a message.'"¹⁴⁶ Only rarely are the agencies checked in how they resolve those ambiguities thanks to *Chevron* deference, "a powerful weapon in an agency's regulatory arsenal."¹⁴⁷ "It would be a bit much to describe the result as 'the very definition of tyranny,'" Roberts allows, "but the danger posed by the growing power of the administrative state cannot be dismissed."¹⁴⁸

¹⁴² City of Arlington, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

¹⁴³ *Id.* at 1878 (Roberts, C.J., dissenting) (quoting Free Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010)).

¹⁴⁴ *Id.* (Roberts, C.J., dissenting) (quoting Free Enterprise Fund, 130 S. Ct. at 3156).

¹⁴⁵ *Id.* (Roberts, C.J., dissenting) (quoting Elena Kagan, Presidential Administration, 144 Harv. L. Rev. 2245, 2250 (2001), and citing Stephen Breyer, Making Our Democracy Work 110 (2010)).

¹⁴⁶ *Id.* at 1879 (Roberts, C.J., dissenting) (quoting Henry J. Friendly, Administrative Agencies: The Need for a Better Definition of Standards, 75 Harv. L. Rev. 1263, 1311 (1962)).

¹⁴⁷ *Id.* (Roberts, C.J., dissenting).

¹⁴⁸ *Id.* (Roberts, C.J., dissenting) (quoting The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961)). On this point, the chief justice's dissent specifically notes that the "PPACA 'creates, requires others to create, or authorizes dozens of new entities to implement the legislation.'" *Id.* at 1878 (Roberts, C.J., dissenting) (quoting Congressional Research Service, New Entities Created Pursuant to the Patient Protection and Affordable Care Act 1 (2010)). But see *NFIB v. Sebelius*, 132 S. Ct. 2566, 2593–2600 (2012) (Roberts, C.J.) (finding it "fairly possible" that the PPACA's core individual mandate is an exercise of the taxing power and therefore not *ultra vires*).

Yes, he concedes, it is true that when agencies issue rules, they do not exercise the “legislative power,” and when they conduct adjudications, they do not exercise the “executive power”—were the Court to hold those things to be anything other than exercises of the “executive power,” they would plainly be unlawful.

And yet . . . the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, “in the public interest”—can perhaps be excused for thinking that it is the agency really doing the legislating. And with hundreds of federal agencies poking into every nook and cranny of daily life, that citizen might also understandably question whether Presidential oversight—a critical part of the Constitutional plan—is always an effective safeguard against agency overreaching.¹⁴⁹

This is radical stuff. The chief justice has previously expressed his concerns regarding executive control and accountability,¹⁵⁰ but this is something more. His dissent calls into question the constitutional basis of the administrative state, the idea that Congress need only provide an “intelligible” principle to guide the agencies in their exercise of their broad grants of authority.¹⁵¹

Less clear is what this has to with the question presented in *City of Arlington* and, in particular, the narrow way that the chief justice would resolve it. If the problem is standardless delegations of legislative authority, there is a doctrine for that to be plucked from near-desuetude.¹⁵² What the chief justice seems to be saying, by combining a broad statement of principle with an exceedingly narrow rule of law, is that *enough is enough*.

¹⁴⁹ *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting) (ellipsis in original).

¹⁵⁰ E.g., *Free Enter. Fund*, 130 S. Ct. at 3156 (2010) (“The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

¹⁵¹ See *Whitman v. American Trucking Assocs.*, 531 U.S. 457, 472 (2001) (“Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.” (emphasis in original) (quotation marks and citation omitted)).

¹⁵² See *Fed. Maritime Comm’n v. S.C. State Ports Authority*, 535 U.S. 743, at 773–74 (2002) (Breyer, J., dissenting) (citing, *inter alia*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

IV. Final Thoughts

Really, it's anyone's guess as to whether Justice Scalia's renunciation of *Mead* will hold. In its favor are the departures of Justices Stevens and David Souter, who both favored the totality-of-the-circumstances approach that Justice Breyer is now left to defend alone. But it is too soon to say whether Justices Thomas and Ginsburg, who joined Scalia's majority opinion, necessarily embrace it in its entirety.¹⁵³ And to say that the Court's approach to agency deference has not been entirely consistent would be entirely accurate. Still, *Chevron* was an improvement in that respect, and *City of Arlington* may be one too. The fact that three of the Court's four "liberals"—Justices Ginsburg, Kagan, and Sotomayor—joined the majority suggests that, this time around, the Court's *Chevron* coalition may be more durable.

As for *City of Arlington's* headline holding on agency jurisdiction, it is certainly *relevant* to a number of current questions. May the FCC promote an "Open Internet" by prohibiting broadband providers from managing their networks by prioritizing certain traffic?¹⁵⁴ Must EPA regulate lead bullets as an environmental toxin?¹⁵⁵ May EPA regulate carbon-dioxide emissions from stationary sources under a statutory scheme that certainly does not contemplate anything of the sort?¹⁵⁶ May FERC regulate "demand response" (that is, utility customers drawing less electricity off the grid) as if it were a generating source?¹⁵⁷ And may the U.S. Army Corps of Engineers and EPA regulate a backyard puddle as "waters of the United States"?¹⁵⁸ While certainly helpful to defending agencies' positions on these questions, *City of Arlington* probably will not make much of a difference. In general, the real action in these cases was at *Chevron* step one, anyway. When agencies overstep their statutory bounds, it should

¹⁵³ Perhaps not. See, e.g., Christensen, 529 U.S. at 586–87 (Thomas, J.); Gonzales, 546 U.S. at 258–68 (Thomas, J.); Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461, 487–88 (Ginsburg, J.).

¹⁵⁴ Verizon v. FCC, No. 11-1355 (D.C. Cir. filed Sept. 30, 2011).

¹⁵⁵ Trumpeter Swan Society v. EPA, No. 13-5228 (D.C. Cir. appeal filed July 24, 2013).

¹⁵⁶ Coal. for Responsible Reg., Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012).

¹⁵⁷ Elec. Power Supply Assoc. v. FERC, No. 11-1486 (D.C. Cir. filed Dec. 23, 2011).

¹⁵⁸ See EPA & U.S. Army Corps of Engineers, Draft Guidance on Identifying Waters Protected by the Clean Water Act (Apr. 2011), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4-2011.pdf.

not matter much or at all whether their interpretations are addressed at the level of jurisdiction/interpretative authority or “substance.”

And that, in turn, speaks to the final question: is *City of Arlington* good or bad for liberty? Prior to the decision, most conservatives and libertarians were rooting for a victory against the perceived excesses of the administrative state.¹⁵⁹ But that position raises the same question as the chief justice’s impassioned dissent: is monkeying with the application of *Chevron* deference really the right way to achieve that result? As Justice Scalia’s opinion suggests, if the courts are not appropriately cabining agency authority within statutory limits, that is a failure of statutory interpretation, not the standard of review for agencies’ statutory constructions.¹⁶⁰ There is probably no reason to believe that a Court that, applying *Chevron*, upholds an agency’s view that “up” means “down” or (less hypothetically) that “take” means “kill[] or injure[] wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering,”¹⁶¹ would necessarily reach a different result if the issue were framed as jurisdictional and the agency were afforded some lesser degree of deference. Scalia, after all, defers to agencies but is not “soft” on them; he undertakes the hard work of statutory construction to hold them to a “permissible construction of the statute” in each instance.¹⁶²

At the same time, deference on jurisdictional matters may be welcome when an agency has declined to act or is reducing regulatory burdens, which was, after all, the reason that many conservatives initially took up the *Chevron* banner. Decisions like *Massachusetts v. EPA*—which rejected the EPA’s view that it lacked jurisdiction to regulate greenhouse gas emissions—are a timely reminder that

¹⁵⁹ For example, the Cato Institute filed an amicus brief in support of the petitioner. Brief of Amici Curiae Cato Institute et al. in Support of Petitioners at 19, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545). So did the author of this article. Brief of the Southern Company as Amicus Curiae in Support of Petitioners, *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545).

¹⁶⁰ *City of Arlington*, 133 S. Ct. at 1872 (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. 120).

¹⁶¹ *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, 515 U.S. 687 (1995).

¹⁶² *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (quoting *Chevron*, 467 U.S. at 843, and rejecting the Army Corps of Engineers’ interpretation of “the waters of the United States” to include “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”).

there are real risks to greater judicial engagement with the regulatory state. It would be short-sighted, as a matter of legal policy, to advocate a doctrine that depends entirely on having the right judges on the bench and enables endless mischief otherwise.¹⁶³ At least with *Chevron*, you know what you're getting, and only rarely is there any opportunity for judicial improvisation—certainly less than under de novo review. So long as administrative agencies' activity generally falls short of the full extent of their regulatory authority—as it surely must, by a large margin, given Congress's preference for capacious delegations and "moods"—*Chevron* at least stands as an obstacle to judicial decisions that push the agencies to undertake new missions that they would otherwise lack the political capital to carry out.

On that point, leave the last word to George Mason University law professor Michael Greve: Judge David Tatel on the D.C. Circuit is "smart and clever, and he decides more AdLaw cases in a month than the Supremes will see in a decade. You don't want to arm him."¹⁶⁴

¹⁶³ See *supra* note 11 & surrounding text (discussing the judicial creation of the Prevention of Significant Deterioration program).

¹⁶⁴ Michael S. Greve, *City of Arlington: Some Cheerful Thoughts*, Liberty Law Blog, May 27, 2013, <http://www.libertylawsite.org/2013/05/27/city-of-arlington-some-cheerful-thoughts>.