

MEANS AND ENDS IN *CITY OF ARLINGTON V. FCC*:  
IGNORING THE LAWYER'S CRAFT TO  
RESHAPE THE SCOPE OF *CHEVRON* DEFERENCE

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ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2015.332  
<http://lawreview.law.pitt.edu>



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# MEANS AND ENDS IN *CITY OF ARLINGTON V. FCC*: IGNORING THE LAWYER'S CRAFT TO RESHAPE THE SCOPE OF *CHEVRON* DEFERENCE

Michael P. Healy\*

## ABSTRACT

*In last year's term, the United States Supreme Court considered the question of the scope of Chevron deference in City of Arlington v. FCC. This article discusses how the decision is an example of the work of an activist Court. The case should have been resolved by a straight forward determination under the analysis of United States v. Mead that Chevron deference simply did not apply to the Federal Communications Commission's ("FCC") legal determination. The Court ignored this restrained approach to the case and instead addressed the question the Justices desired to decide: the reach of Chevron deference. The article discusses and criticizes the approach of Justice Scalia writing for the majority and of Chief Justice Roberts writing for three dissenting Justices.*

*Practitioners and scholars of administrative law can only be confused by the Court's willingness to apply Chevron in City of Arlington, given the informal administrative action being reviewed and the fact that neither reviewing court actually applied each of the two parts of the Mead test. The Court's flawed administrative law analysis results from the activist concerns of Justice Scalia and Chief Justice Roberts. Justice Scalia uses the case as a vehicle to undermine Mead, a decision that Justice Scalia loathes. Chief Justice Roberts uses the case as a vehicle to advocate for less judicial deference and less law defining power for increasingly powerful agencies. Neither member of the Court allowed the applicable rules of contemporary administrative law to hinder his efforts to achieve his broader goals. Administrative law would have been better served if a properly*

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*restrained Court had considered and applied the previously determined rules for judicial review of administrative agencies.*

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## INTRODUCTION

Chief Justice Roberts at his confirmation hearings notably claimed that the judiciary should properly play only a minimalist, restrained role in our modern democracy.<sup>1</sup> In contrast with this view of the modest role the judiciary ought to play, Chief Justice Roberts and his conservative colleagues have stated grave concerns about the “vast power” that administrative agencies “wield” over regulated parties.<sup>2</sup> Central to reducing these concerns is a strong role of review to

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<sup>1</sup> See Sheryl Gay Stolberg & David E. Rosenbaum, *Court Nominee Prizes “Modesty,” He Tells the Senate*, N.Y. TIMES, Aug. 3, 2005, at A1 (“In his first written response to questions from the lawmakers who will review his nomination to the Supreme Court, Judge John G. Roberts Jr. told the Senate Judiciary Committee on Tuesday that judges must possess ‘a degree of modesty and humility,’ must be respectful of legal precedent and must be willing to change their minds. . . . ‘Judges must be constantly aware that their role, while important, is limited,’ Judge Roberts wrote. ‘They do not have a commission to solve society’s problems, as they see them, but simply to decide cases before them according to the rule of law.’”); Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at 1 (“‘Judges are like umpires,’ Judge Roberts declared in the opening remarks to his own confirmation hearings. ‘Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.’ . . . [S]ince the Roberts hearings, the umpire metaphor has become synonymous, at least in public debate, with judicial restraint, the idea that judges are merely arbiters, that their job is not to set aside precedent and create law but to decide cases on the basis of established law.”); see also Adam Liptak, *In His Opinions, Nominee Favors Judicial Caution*, N.Y. TIMES, July 22, 2005, at A1 (“[H]is insistence, in the two years he has sat on the federal appeals court in Washington, that judges must engage in considerable self-restraint could add a distinctive voice to a court that has not been shy in recent years in asserting its own dominance. In a decision last year, Judge Roberts referred to ‘the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.’”); Jeffrey Rosen, Op-Ed., *The Trial of John Roberts*, N.Y. TIMES, Sept. 12, 2009, at 18 (“[Chief Justice Roberts] said he would try to persuade his colleagues to converge around narrow, unanimous opinions that avoided the most contentious constitutional issues. The result, he said, would help shore up the [C]ourt’s legitimacy in a polarized age.”); Sheryl Gay Stolberg & David D. Kirkpatrick, *Next Debate: Must Future Court Nominees Match Qualifications of Roberts?*, N.Y. TIMES, Sept. 18, 2005, at 30 (“Wendy Long, counsel of the Judicial Confirmation Network and a former clerk for Justice Thomas, said no other nominee ‘has ever given as crisp and convincing and strong a statement of the essence of originalism and judicial restraint’ as Judge Roberts did, when he told the committee that, unlike politicians, judges should be faithful to a law’s text and history without regard to their personal views, campaign promises or social results.”).

<sup>2</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (“The administrative state ‘wields vast power and touches almost every aspect of daily life.’”) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010)); see also *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (Scalia, J., plurality opinion) (“The burden of federal regulation on those who would deposit fill materials in locations denominated ‘waters of the United States’ is not trivial. In deciding whether to grant or deny a permit, the [United States] Army Corps of Engineers [] exercises the discretion of an enlightened despot. . . .”).

be played by the federal courts.<sup>3</sup> The Roberts Court has found it difficult to balance judicial restraint with a perceived need to constrain administrative power when the Court decides administrative restraint is needed.

One would expect that a restrained Court would, at a minimum, resolve preliminary, technical issues before finding it necessary to confront other, more controversial issues. Recent decisions by the Roberts Court, however, suggest that the Court may actively seek to redefine administrative law without the constraints that the more mundane norms of decision making and legal doctrines impose on the development of law. Notwithstanding the protestations of the Chief Justice, his Court has decided to resolve issues at the heart of modern administrative law, even though more modest, more restrained options were available. Such decisions cast doubt on the Chief Justice's claim of judicial restraint.<sup>4</sup>

The most obvious example of an activist Court reaching out to redefine administrative law is *Free Enterprise Fund v. Public Accounting Oversight Board*.<sup>5</sup> There, the Chief Justice wrote the opinion for the conservative majority and struck down as unconstitutional a limitation on the President's removal power. The Court established a broad new constitutional rule limiting the independence of agencies<sup>6</sup>

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<sup>3</sup> *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting) (“Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. In the present context, that means ensuring that the Legislative Branch has in fact delegated law making power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last [fifty] years from Congress to the Executive—a shift effected through the administrative agencies.”) (citation omitted); cf. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012) (“The Government warns that the [Environmental Protection Agency (‘EPA’)] is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The [Administrative Procedure Act’s] presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.”) (citation omitted).

<sup>4</sup> A reporter recently concluded that the Chief Justice has led a more restrained Court. See Adam Liptak, Op-Ed., *How Activist Is the Supreme Court?*, N.Y. TIMES, Oct. 12, 2013, at SR4, available at [http://www.nytimes.com/2013/10/13/sunday-review/how-activist-is-the-supreme-court.html?page-wanted=all&\\_r=0](http://www.nytimes.com/2013/10/13/sunday-review/how-activist-is-the-supreme-court.html?page-wanted=all&_r=0) (“If judicial activism is defined as the tendency to strike down laws, the court led by Chief Justice John G. Roberts Jr. is less activist than any court in the last [sixty] years.”).

<sup>5</sup> 561 U.S. 477.

<sup>6</sup> *Id.* at 501–02.

without first deciding a critical statutory question,<sup>7</sup> thereby breaking a long-accepted prudential limit on the Court's constitutional law making authority.<sup>8</sup>

In last year's term, the Court considered the scope of *Chevron* deference in *City of Arlington v. FCC*.<sup>9</sup> Justice Scalia wrote the Court's opinion, while the Chief Justice dissented. Both Justices decided to resolve a foundational question regarding the scope of *Chevron* deference without first considering the threshold question defined by the Court's decision in *Mead* whether *Chevron* deference properly applied. As to that question, the Court should have come to the straightforward conclusion that *Chevron* simply did not apply to the review of the FCC's decision.<sup>10</sup>

This article will discuss how this recent decision illustrates that the Roberts Court is neither restrained nor minimalist in its efforts to shape administrative law.

## I. THE DECISION BEING REVIEWED

A proper understanding of the Court's activism necessitates a review of the Fifth Circuit's decision in *City of Arlington v. FCC*.<sup>11</sup> That court's application of administrative law was surprising and worthy of reversal. That the court's decision was reviewed and affirmed by the Supreme Court indicates that the Court had a different objective.<sup>12</sup>

The FCC plays the critical regulatory role over cellular phone operations.<sup>13</sup> Those operations are dependent on the use of local antennas attached to towers.<sup>14</sup> Local government has some regulatory authority over these towers because of

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<sup>7</sup> The Court decided the case based on the parties' agreement that members of the Securities and Exchange Commission (the "SEC") may be removed by the President only for cause. *Id.* at 486–87. In his dissent, Justice Breyer chided the Court for deciding an important constitutional question based on an assumption made by the parties. *Id.* at 545–48 (Breyer, J., dissenting). He argued that the statutory issue was "certainly not obvious." *Id.*

<sup>8</sup> A contrary interpretation of the statute, that SEC Commissioners held their positions at the will of the President, was supported by the well-accepted constitutional question avoidance canon. *Id.*

<sup>9</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

<sup>10</sup> See *infra* notes 54–73 and accompanying text.

<sup>11</sup> *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

<sup>12</sup> *City of Arlington*, 133 S. Ct. at 1875.

<sup>13</sup> *Id.* at 1866–67.

<sup>14</sup> *Id.*

zoning and land use law.<sup>15</sup> When Congress amended the Federal Communications Act in 1996, Congress added a requirement that state or local government agencies “act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed.”<sup>16</sup>

In 2008, an association of wireless communications providers petitioned the FCC for a “declaratory ruling” that would impose presumptive limits on the time within which state or local agencies would have to decide on cell phone tower requests filed by providers.<sup>17</sup> The FCC published a notice of the petition and “received dozens of comments from wireless service providers, local zoning authorities, and other interested parties.”<sup>18</sup> The FCC thereafter issued its Declaratory Ruling, establishing presumptive limits for the “reasonable period of time” permitted by the statute.<sup>19</sup> That ruling was then challenged in the United States Court of Appeals for the Fifth Circuit.

The parties challenging the ruling argued first that the FCC had promulgated a regulation without complying with the Administrative Procedure Act’s (the “APA”) requirements for informal rulemaking.<sup>20</sup> The FCC had two responses to this challenge: The agency asserted that its action on the petition was an adjudication rather than a rulemaking, and, alternatively, that if the agency had issued rules, those rules were interpretive.<sup>21</sup> The agency notably did *not* claim that it had promulgated a legislative rule. The FCC contended that under either of

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1866 (quoting 47 U.S.C. § 332(c)(7)(B)(ii) (2012)).

<sup>17</sup> The petition was quite detailed in specifying the requirements that the providers believed to be appropriate. *Id.* at 234–35.

<sup>18</sup> *Id.* at 235.

<sup>19</sup> The Declaratory Ruling provided that the statutory “‘reasonable period of time’ . . . presumptively would be 90 days for personal wireless service facility siting applications requesting collocations and 150 days for all other applications.” *Id.* (footnotes omitted) (citation omitted). The Ruling also provided that “although the 90- and 150-day time frames established by the Declaratory Ruling were presumptively reasonable, state or local authorities would have the opportunity in any given case to rebut that presumption in court.” *Id.* at 236 (footnote omitted).

<sup>20</sup> *See* 5 U.S.C. § 553 (2012).

<sup>21</sup> *City of Arlington*, 668 F.3d at 240.



theory, the agency was not required to comply with informal rulemaking requirements.<sup>22</sup>

The Fifth Circuit initially concluded, in agreement with the agency's characterization of its action, that the FCC had engaged in an informal adjudication when it issued its Declaratory Ruling.<sup>23</sup> The Court then turned its attention to the question whether the agency had been arbitrary or capricious in deciding to proceed by adjudication, rather than rulemaking.<sup>24</sup> On this question, the court "harbor[ed] serious doubts."<sup>25</sup> The court had such "doubts" because the results of the agency's action—presumptively unreasonable time limits for action by a local agency—"bear all the hallmarks of products of rulemaking, not adjudication,"<sup>26</sup> and did, indeed, constitute "classic rulemaking."<sup>27</sup>

The agency, of course, had not complied with the APA § 553 requirements for notice and comment rulemaking, a failure that the city claimed was unlawful.<sup>28</sup> The agency provided its response to this claimed illegality: The APA did not require compliance with § 553 because the rulemaking had been interpretive and thus exempt from the procedural requirements.<sup>29</sup> Such an argument ought to have appealed to the court because it had earlier used language suggesting exactly that conclusion when it characterized the FCC's action as "ha[ving] provided guidance on the meaning of § 332(c)(7)(B)(ii) and (v) that is utterly divorced from any

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 241. The court's decision in this regard relied on circuit precedent that a declaratory ruling by the FCC is an adjudication. *Id.* at 241 n.45.

<sup>24</sup> *Id.* at 241.

<sup>25</sup> *Id.* at 242.

<sup>26</sup> *Id.* at 242–43 ("[T]he FCC established the 90- and 150-day time frames, not in the course of deciding any specific dispute between a wireless provider and a state or local government, but in a proceeding focused exclusively on providing an interpretation of § 332(c)(7)(B) that would apply prospectively to every state and local government in the United States."). The court's conclusion that the ruling was not an adjudication was reinforced by the court's rejection of the petitioners' argument that the agency violated Due Process by failing to provide notice to localities whose practices were challenged by the petition for a ruling. *Id.* at 246. The court held that such individual notice was not required because the agency "was not adjudicating the legality of the actions of those state and local governments." *Id.*

<sup>27</sup> *Id.* at 243 ("This is classic rulemaking.").

<sup>28</sup> *Id.* at 240.

<sup>29</sup> *Id.* at 243 ("We also do not address the FCC's argument that, even if it did engage in rulemaking, the rulemaking was interpretative rulemaking of the type excepted from the APA's notice-and-comment requirements.").

specific application of the statute.”<sup>30</sup> “[P]rovid[ing] guidance on the meaning of” statutory provisions, rather than making law pursuant to a delegation of law making power, is precisely what an agency does in an interpretive rule.<sup>31</sup>

Having rejected this coherent response to the claimed procedural violation, the court concluded instead that the FCC’s failure to comply with § 553 was harmless error.<sup>32</sup> The court concluded that the petitioners had received adequate notice and opportunity for comment and that the agency had considered all of the substantive issues that the petitioners were advocating before the Court of Appeals.<sup>33</sup>

The court then turned its attention to the challenges to the FCC’s substantive determination of time frames for local agencies’ decisions on petitions. The first such challenge, later reviewed by the Supreme Court, was that “the FCC lacked the statutory authority to adopt the 90- and 150-day time frames.”<sup>34</sup> The FCC replied to this contention by relying on its general rulemaking authority.<sup>35</sup> In summarizing the argument, the court did not reflect on the irony of the agency’s argument: The FCC had not purported to exercise that power when it issued the Declaratory Ruling.<sup>36</sup>

The court then proceeded to its analysis, which began immediately with application of *Chevron*: “We ordinarily review an agency’s interpretation of the statutes it is charged with administering using the *Chevron* two-step standard of review.”<sup>37</sup> The court never cited *United States v. Mead Corp.*<sup>38</sup> There is, thus, no

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see also *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 94–95 (1995).

<sup>32</sup> *City of Arlington*, 668 F.3d at 243.

<sup>33</sup> *Id.* at 245–46. The court’s harmless error analysis suggested an *exceptionally* minimal view of the APA’s § 553 requirements. There was, for example, no discussion of the logical outgrowth requirement. See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174–75 (2007) (holding that the logical outgrowth test, which has the “object” of “fair notice,” had been met).

<sup>34</sup> *City of Arlington*, 668 F.3d at 247.

<sup>35</sup> *Id.* at 247 (“The FCC, on the other hand, contends that it possessed statutory authority to adopt the 90- and 150-day time frames pursuant to its general authority to make such rules and regulations as may be necessary to carry out the Communication Act’s provisions.”).

<sup>36</sup> The FCC, it may be recalled, had argued that the declaratory ruling was an adjudication or an interpretive rule. *Supra* notes 21–22 and accompanying text.

<sup>37</sup> *City of Arlington*, 668 F.3d at 247 (footnote omitted).

<sup>38</sup> See generally *id.*; *United States v. Mead Corp.*, 533 U.S. 218 (2001).

discussion, not even so much as a mention, that *Mead* had imposed threshold requirements before an agency interpretation of law would be accorded *Chevron* deference.<sup>39</sup> Instead, the court turned to the disputed question “whether *Chevron* review should apply when we determine the extent of the agency’s jurisdiction.”<sup>40</sup> Although the court opined that “[t]he Supreme Court has not yet conclusively resolved the question of whether *Chevron* applies in the context of an agency’s determination of its own statutory jurisdiction,”<sup>41</sup> the court stated that the Fifth Circuit had decided the question and that *Chevron* deference did apply.<sup>42</sup>

The court accordingly proceeded with its *Chevron* analysis, construing the step one clear statute analysis as a proper component of *Chevron* review.<sup>43</sup> The court stated:

The question we confront under *Chevron* is whether these provisions unambiguously indicate Congress’s intent to preclude the FCC from implementing § 332(c)(7)(B)(ii) and (v). If they do, the FCC lacked statutory authority to issue the 90- and 150-day time frames. If the provisions are ambiguous, however, we must defer to the FCC’s interpretation—an interpretation under which the FCC possessed authority to issue the 90- and 150-day time frames—so long as the FCC’s interpretation represents a reasonable construction of their terms.<sup>44</sup>

The court then concluded that the Communications Act “is silent on the question of whether the FCC can use its general authority under the

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<sup>39</sup> See *City of Arlington*, 668 F.3d 229; *Mead*, 533 U.S. at 226–27. The failure of the Court of Appeals to consider *Mead*’s requirements for the application of *Chevron* deference is not uncommon. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1464–65 (2005) (“In many cases, the courts express their uncertainty about *Mead* by refraining from deciding clearly whether *Chevron* deference applies. Instead, they find an easier way out. Some refuse to choose between *Chevron* deference and *Skidmore* deference and simply determine that lower-level *Skidmore* deference supports the agency’s interpretation. Others refuse to choose and simply determine that both *Chevron* deference and *Skidmore* deference support the agency’s interpretation.”) (footnote omitted).

<sup>40</sup> *City of Arlington*, 668 F.3d at 248.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 248–49.

<sup>44</sup> *Id.* at 250.

Communications Act to implement § 332(c)(7)(B)'s limitations. We proceed to *Chevron* step two.”<sup>45</sup> The court's step-two analysis was innovative, but unilluminating. The court did not engage in arbitrary or capricious review.<sup>46</sup> Rather the court, *inter alia*, reviewed the statute's legislative history to determine whether there was clear legislative intent on the question of the scope of the FCC's authority to define law.<sup>47</sup> This is a novel, but surely incorrect, view of the *Chevron* step-two inquiry.<sup>48</sup> At the end of its analysis, the court held that “the FCC is entitled to deference with respect to its exercise of authority to implement § 332(c)(7)(B)(ii) and (v).”<sup>49</sup>

The court then proceeded to its consideration of whether the time limits identified by the FCC were permissible. The court again made no mention of the *Mead* analysis in determining the applicable review standard: *Chevron* or *Skidmore*. The court again proceeded immediately to an application of *Chevron* review. The court concluded that the statute is “inherently ambiguous” on the question of the meaning of “a reasonable period of time.”<sup>50</sup> The court then concluded that the FCC's interpretation was reasonable.<sup>51</sup>

## II. THE MINIMALIST, RESTRAINED APPROACH TO REVIEW

Having summarized the Fifth Circuit's deeply flawed decision, this article considers briefly, what a minimalist and properly restrained review of the decision would have involved. For purposes of this discussion, this article omits an evaluation of the Fifth Circuit's provocative harmless error analysis, by which the court concluded that the agency's failure to conform to required notice and

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<sup>45</sup> *Id.* at 252.

<sup>46</sup> Compare *id.* at 252–54, with Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 42–45 (2011) (discussing how courts should apply arbitrary or capricious review at the second step of *Chevron*).

<sup>47</sup> *City of Arlington*, 668 F.3d at 252–53.

<sup>48</sup> If consideration of legislative intent and legislative history is proper when interpreting a statute, such consideration is part of traditional statutory construction. A court relies on those traditional methods to determine whether a statute is clear at step one of *Chevron*. See Healy, *supra* note 46, at 33–39 (discussing step one of *Chevron*).

<sup>49</sup> *City of Arlington*, 668 F.3d at 254.

<sup>50</sup> *Id.* at 255 (citation omitted) (internal quotation marks omitted).

<sup>51</sup> *Id.* at 255–60. The court also concluded that the FCC was not arbitrary or capricious in defining the time frames for state and local decision-making. *Id.* at 260–61.

comment rulemaking procedures was harmless error.<sup>52</sup> The critical issue in the case concerned, of course, whether *Chevron* deference applied to an agency's determination regarding the scope of its own jurisdiction. This question is relevant only if the case is one in which *Chevron* deference otherwise applies. If *Chevron* deference is simply inapplicable, the question would never arise.

In *United States v. Mead*, the Supreme Court decided that *Chevron* did not apply in every case in which an agency has interpreted a statute.<sup>53</sup> Rather, the Court decided, based on its view of inferred congressional intent, that Congress intended that a court defer to an agency's interpretation of an ambiguous statute only when *two* conditions are met: 1) Congress must have delegated lawmaking power to the agency *and* 2) the agency must have interpreted the statute in the exercise of that delegated law making power—the agency itself must have acted to make law.<sup>54</sup> As mentioned above, the Fifth Circuit did not engage in the *Mead* analysis; the Fifth Circuit neither cited nor discussed *Mead*.<sup>55</sup> The court instead proceeded immediately to apply *Chevron*, which the court viewed as including both of the famous steps described in that case. The only issue that the court addressed regarding the applicability of *Chevron* was whether it applied to an agency's determination of its own jurisdiction, an issue the court found had been resolved by circuit precedent.<sup>56</sup>

Had the Fifth Circuit applied the rule of law defined by *Mead*, and reconfirmed by, *inter alia*, *Oregon v. Gonzales*<sup>57</sup> and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>58</sup> it would have considered whether the two requirements for the application of *Chevron* deference had been met. The first of those requirements is that Congress must have delegated to the agency the power to engage in the making of law.<sup>59</sup> Indeed, those challenging the declaratory ruling claimed that Congress had not delegated to the FCC the power to

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<sup>52</sup> See *supra* notes 32–33 and accompanying text.

<sup>53</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>54</sup> *Id.*

<sup>55</sup> See *City of Arlington*, 668 F.3d at 247–48.

<sup>56</sup> See *supra* notes 41–42 and accompanying text.

<sup>57</sup> 546 U.S. 243 (2006).

<sup>58</sup> 545 U.S. 967 (2005).

<sup>59</sup> See *Mead*, 533 U.S. at 226–27.

define by regulations the reasonable time within which local agencies had to decide on applications for the use of cell phone antennas.<sup>60</sup> Moreover, in its Petitioner's Brief to the Supreme Court, the Petitioner specifically argued that "[t]he error committed by the Fifth Circuit Panel is that it mechanically applied *Chevron* deference without first, *de novo*, performing a *Chevron* Step 0 analysis."<sup>61</sup>

The first *Mead* requirement is necessarily a question of the scope of the agency's delegated lawmaking authority. In *Oregon v. Gonzales*,<sup>62</sup> the Supreme Court engaged in an elaborate analysis of the lawmaking authority that Congress had delegated to the Department of Justice (the "DOJ") under the Controlled Substances Act (the "CSA") to determine whether Congress had delegated to the DOJ the power to define as unlawful the prescribing of drugs to allow euthanasia in Oregon, a state that had permitted such practices. The Court's analysis, which considered the scope of authority delegated to the agency under two different provisions and involved the application of canons and presumptions of meaning, involved the Court discerning Congress' intended delegation to the DOJ and plainly did not involve any deference to the agency.<sup>63</sup> The Court concluded that there had been no delegation of lawmaking power to the DOJ regarding the particular decision it had made, although the DOJ had received delegated lawmaking power to address other regulatory matters.<sup>64</sup>

Of course, it would not have made sense for the Court to have accorded deference to an agency on the question whether Congress had delegated lawmaking power to the agency. Such an application of the *Mead* analysis conflicts with the separate role defined for courts and agencies in determining the content of public law. The court alone has the power to interpret a statute in order to determine the

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<sup>60</sup> *City of Arlington*, 668 F.3d at 247.

<sup>61</sup> Petitioner's Brief on the Merits at 17, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1547); *see also id.* at 38 ("*Chevron* Step 0 mandates that deference not be applied in this particular circumstance."). The Petitioner used the label "*Chevron* Step 0" to refer to the *Mead* analysis. *See id.* at 17 ("[Th[e] [*Mead*] approach, which is called *Chevron* Step 0, is grounded in the uncontroversial idea that deference to agency interpretation of statutes it administers is appropriate only where Congress has delegated that authority."); *see also id.* at 46-54.

<sup>62</sup> 546 U.S. 243.

<sup>63</sup> *See id.* at 258-69. Notably, the Court relied on the elephants-in-mouseholes canon in concluding that "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable." *Id.* at 267.

<sup>64</sup> *Id.* at 259 ("The CSA gives the Attorney General limited powers, to be exercised in specific ways.").

content of the law enacted by Congress, including the nature of the authority that Congress has delegated to an agency.<sup>65</sup>

Moreover, according deference to the agency on the question whether Congress delegated lawmaking power simply conflicts directly with the basic theory of *Mead*. *Mead*'s purpose and effect are lost if a court is to accord proper *Chevron* deference to the agency when the court is deciding whether to accord *Chevron* deference. *Mead* held that such deference is not to be accorded to an agency's legal interpretation until *after* the court itself has decided whether Congress intended such deference based on the congressional delegation of lawmaking power and the agency's exercise of that power.<sup>66</sup> Such congressional intent may be determined by a court based on a presumption of the sort that Justice Scalia identified in his decision: the presumption that a broad grant of rulemaking power is a grant of such authority as to any application of the statute.<sup>67</sup> This is a presumption that may properly answer the first of the two *Mead* questions that determine whether *Chevron* deference applies. This would not, however, in any sense itself be an application of *Chevron* deference, which *Mead* holds is not applicable until each of the two threshold questions is answered in the affirmative.<sup>68</sup>

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<sup>65</sup> See Healy, *supra* note 46, at 21 (“*Mead* reinforced the principle that Congress determines the degree of deference courts owe to agency legal interpretations. This principle applies even though the judiciary is the institution that necessarily decides what Congress had intended as the proper amount of deference.”) (footnote omitted).

<sup>66</sup> *United States v. Mead Corp.*, 533 U.S. 218, 237 (2001).

<sup>67</sup> *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, and what the dissent proposes is a massive revision of our *Chevron* jurisprudence.”). The FCC argued that Congress had delegated broad lawmaking power to the agency. Brief for Federal Respondents at 10–14, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545). The FCC argued that given the broad congressional delegation, the conclusion that Congress delegated lawmaking power to the FCC regarding the antenna provision was correct regardless of whether the determination was reviewed *de novo*. *Id.* at 13–14.

<sup>68</sup> *Mead*, 533 U.S. at 227–34. Professor Strauss has contended that *Skidmore* deference should apply in resolving the initial *Mead* inquiry. Peter L. Strauss, *In Search of Skidmore* 7–8 (Columbia Univ. Pub. Law & Legal Theory, Research Paper Series, Paper No. 13-355, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2287343##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287343##) (“One can readily agree with the [*City of Arlington v. FCC*] dissent's proposition that, ‘Whether Congress has conferred such power is the “relevant question[] of law” that must be answered before affording *Chevron* deference,’ without at all having to agree that ‘the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.’ Without *Chevron* deference, yes; without *Skidmore* deference, no.”). The Petitioner

In *City of Arlington*, reasonable minds may have differed on the question whether Congress delegated to the FCC lawmaking power to define the duration of a “reasonable period.”<sup>69</sup> No such difference of opinion should be present regarding the agency’s self-avowed failure actually to exercise lawmaking power, even assuming the delegation by Congress.<sup>70</sup> Indeed, a court performing the *Mead* analysis in *City of Arlington* would almost surely have decided that it was unnecessary to resolve the disputed question of the scope of delegated lawmaking power, because the second *Mead* condition clearly had *not* been met.<sup>71</sup> The FCC had informed the court that the agency had not intended to promulgate a substantive rule, that is, a rule that the agency intended to define new law.<sup>72</sup> Rather, the agency claimed it was merely interpreting what Congress had intended regarding a reasonable time period for local decisions.<sup>73</sup> This is not the exercise of lawmaking power by an agency. Even *before* the Court decided *Mead*, such an interpretive rule was *not* accorded *Chevron* deference.<sup>74</sup>

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advanced this same argument in its Reply Brief. *See* Reply Brief for Petitioners City of Arlington et al. at 1–5, 15, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545) (arguing that the Court should determine *de novo* whether there has been a delegation of lawmaking power, with the agency’s view of the scope of delegated power receiving *Skidmore* deference).

<sup>69</sup> The dissent did not provide an answer to this question, concluding instead that the Court should have remanded the question to the Fifth Circuit. *See City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting). The Petitioner’s requested relief was that the Court remand to the Fifth Circuit the *Mead* determination whether Congress had delegated applicable law making power. *See* Brief for Petitioners at 44, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545).

<sup>70</sup> *But cf.* Strauss, *supra* note 68, at 6 (“That the *Chevron* framework would apply [in *City of Arlington*] was to some extent a forgone conclusion—the FCC was acting formally, with evident juris-generative intent.”).

<sup>71</sup> The Petitioner’s discussion of the *Mead* analysis in its brief addressed only the first part of the *Mead* analysis, whether Congress had delegated lawmaking power to the agency. *See generally* Brief for Petitioners, *supra* note 69. The brief, however, ignored the second *Mead* requirement—the agency must have exercised its lawmaking power, assuming it had been delegated. *See generally id.*

<sup>72</sup> *See City of Arlington v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

<sup>73</sup> *See id.*

<sup>74</sup> *See Mead*, 533 U.S. at 232 (“[I]nterpretive rules . . . enjoy no *Chevron* status as a class.”); *see also* *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995). The Court’s statements in these cases have resulted in a view that an agency effectively earns *Chevron* deference by employing procedures that ensure an opportunity for affected parties to be engaged in the development of the agency’s position. *See* Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011) (footnote omitted), who state that:

In the statutory interpretation context, agencies have a choice: they can use notice-and-comment proceedings to promulgate their statutory interpretations



The FCC's other argument, that the declaratory ruling was an (informal) adjudication, fares no better regarding its status as agency lawmaking. Informal adjudication is the type of agency action least likely to involve the making of law and thus to gain the benefit of *Chevron* deference.<sup>75</sup> An informal adjudication of the sort at issue in *City of Arlington* did not adjudicate the rights of *any* party and surely did not indicate that the agency had made law.<sup>76</sup> A conclusion that the FCC's informal adjudication actually did involve the agency's intended making of law would be a most difficult showing—a showing that would be likely to rely on tradition<sup>77</sup>—and neither court nor agency attempted to make such a showing. The *Mead* analysis would accordingly have led to the straightforward conclusion that the FCC would not receive *Chevron* deference for its interpretation of the duration of a reasonable period for local decision-making about cell phone antennas.<sup>78</sup>

In sum, standard analysis mandated by the Supreme Court's decision in *Mead* would have established that the FCC was *not* owed *Chevron* deference. The case,

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as legislative rules, in which case they will presumptively receive *Chevron* deference, or they can opt to issue these interpretations informally as interpretive rules, in which case they will have to defend their interpretations under the less deferential *Skidmore* standard. But they have to select one or the other. This “pay me now or pay me later” principle has gradually emerged as a crucial feature of the doctrine, one that allows courts to avoid direct regulation of agency choice of policymaking form while retaining some form of meaningful check—either ex ante procedural safeguards or ex post judicial scrutiny—on administrative decisions.

See also Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 398–99 (2012) (“As reflected in the Supreme Court’s decision in [*Mead*], statutory authority alone is not sufficient to warrant deference under *Chevron*; the agency’s reason-giving is a precondition to, and the object of, deference. In other words, the agency’s reasoned analysis is the coin by which it pays for (and warrants) deference to its interpretation of the law.”) (footnotes omitted).

<sup>75</sup> See Healy, *supra* note 46, at 41–42 n.263.

<sup>76</sup> In its Appellee’s Brief, the FCC barely mentioned the second *Mead* requirement, that the agency actually have acted in the exercise of delegated lawmaking power. It stated only that the FCC order was “the result of an adjudication” and that the court of appeals found the agency’s use of an adjudication, rather than a rulemaking, to be harmless error. See Brief for the Federal Respondents at 34–35 n.8, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1545). The FCC appeared quite content to submerge the matter of the procedural formalities to a single footnote. Procedural formalities are critical, however, to the determination of the proper standard of judicial review. See *supra* note 74.

<sup>77</sup> See *Mead*, 533 U.S. at 230–31 & 231 n.13.

<sup>78</sup> One important consequence of such a decision would be that an agency would have an incentive to comply with informal rulemaking requirements if it wished to be accorded *Chevron* deference. See *supra* note 74.

in short, was surely one that did not warrant *any* discussion about the scope of *Chevron* deference. The only possible legal issue regarding scope of review would have been how the *Mead* test would be applied to the FCC's declaratory ruling. Only in that context would the scope of lawmaking power delegated to the FCC have been considered, and *Chevron* deference would clearly not have applied in resolving that question.

### III. THE ACTIVIST DECISIONS OF THE JUSTICES

The Supreme Court's decision affirming the Fifth Circuit is most notable for undercutting the Court's post-*Mead* regime for reviewing agency legal determinations, particularly the rules for defining when a court must defer to an agency's legal determination.<sup>79</sup> The fact that none of the opinions written by the Justices directly presented the proper framework for analysis shows either that the Court itself does not understand how the framework should be applied or that the Justices simply viewed the case as a vehicle to accomplish other jurisprudential goals.<sup>80</sup> Those goals for the principal antagonists here were to expand (Justice Scalia) or to contract (Chief Justice Roberts) the scope of application of *Chevron* deference.

#### A. Justice Scalia's Majority Opinion

The past decade or so has not been kind to Justice Scalia regarding his views of the proper review standard for agency legal determinations. Justice Scalia was a lone voice in decrying the Court's decision in *United States v. Mead*, which defined the two-part test for the application of *Chevron* deference.<sup>81</sup> Justice Scalia was also alone in his dissent in *Brand X* five years later, in which the Court resolved concerns about public law ossification that he had presented so fervently in his dissent in *Mead*.<sup>82</sup> Justice Scalia was unhappy about *Brand X* and explained his

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<sup>79</sup> The *Mead* test is already a test that lower courts actively seek to avoid. See Bressman, *supra* note 39. The fact that the Court majority in *City of Arlington* completely ignores the significance of *Mead* is likely to discourage lower courts from applying *Mead*'s two threshold requirements for the application of *Chevron* deference. In an even more recent decision, the Court applied *Chevron* deference with neither discussion of nor citation to *Mead*. See *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (Kagan, J., plurality opinion) (according *Chevron* deference to interpretation of "the immigration laws" by the Board of Immigration Appeals); *id.* at 2214 (Roberts, C.J., concurring) (applying *Chevron* deference without discussion of or citation to *Mead*).

<sup>80</sup> See generally *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

<sup>81</sup> See 533 U.S. at 239–41 (Scalia, J., dissenting).

<sup>82</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1014–16 (2005) (Scalia, J., dissenting).

disagreement with the Court in very strong terms.<sup>83</sup> Justice Scalia also dissented in a high-profile case in which the Court's application of *Mead* yielded its refusal to accord *Chevron* deference to a DOJ interpretation of the CSA.<sup>84</sup> Justice Scalia viewed that case as one in which *Chevron* deference to the agency was plainly owed.<sup>85</sup>

Justice Scalia must therefore have been delighted to craft a decision for the Court majority on an issue that appeared to test the scope of application of *Chevron* deference. He very likely saw the case as providing an opportunity to further two related goals. First, he would be able to ensure broad reach of *Chevron*'s application by holding that the doctrine applied even when an agency was determining the scope of its own jurisdiction. Second, he would limit the effect of *Mead* by establishing that *Chevron* deference is owed to an agency's determination that Congress has delegated lawmaking power to the agency.

For the Court's decision in *City of Arlington* to serve these related goals, however, Justice Scalia had to be purposefully obscure and disingenuous in the review of an agency determination that simply should not have received *Chevron* deference under *Mead*. Justice Scalia's trope is simple, yet obscure: He changes the shape of his discussion of *Chevron* from a discussion of the application of *Chevron* deference to his discussion of "the *Chevron* framework." His unstated hope seems to be that *Mead* will be forgotten and its impact undone if the Supreme Court is seen as accepting the application of *Chevron* in cases and in contexts in which there is very good reason to doubt the applicability of *Chevron* deference post-*Mead*.<sup>86</sup>

Justice Scalia's jurisprudential strategy to redefine the scope of *Chevron*'s applicability echoes the strategy that Justice Brennan pursued more than a quarter-century ago as he sought to shape the law governing the permissibility of adjudication by non-Article III adjudicators. Justice Brennan opposed the adjunct of the court doctrine, which permitted a non-Article III tribunal to adjudicate private rights if the tribunal was a proper adjunct to an Article III court.<sup>87</sup> Justice

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<sup>83</sup> See *id.* at 1017 ("This is not only bizarre. It is probably unconstitutional.").

<sup>84</sup> *Gonzales v. Oregon*, 546 U.S. 243, 293–94 (2006) (Scalia, J., dissenting).

<sup>85</sup> See *id.* at 276.

<sup>86</sup> Indeed, the Court's decision affirmed the application of *Chevron* in a case in which neither reviewing court ever actually applied the *Mead* analysis.

<sup>87</sup> See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69–70 (1982) (Brennan, J., plurality opinion) (arguing that *Crowell v. Benson*, 285 U.S. 22 (1931), accepted non-Article III

Brennan sought to define a bright line rule that would determine the permissibility of adjudication by a non-Article III tribunal, and he wished to draw that line solely by reference to whether the matter involved the adjudication of private or public rights.<sup>88</sup>

Shaping such a legal rule was difficult because the Court had decided cases in this area employing more flexible standards that accounted for circumstances other than only the nature of the rights being adjudicated.<sup>89</sup> Justice Brennan apparently lacked the votes to overrule that standards-based approach, so he simply decided to expand the scope of private rights cases and view all of the cases that the Court had permitted to be adjudicated by non-Article III tribunals as public rights cases.<sup>90</sup> Although Justice Brennan's strategy appeared to succeed when he gathered a majority of votes in *Granfinanciera*,<sup>91</sup> its failure was clear when the Court recently reaffirmed that prior cases had indeed held that a non-Article III tribunal may adjudicate private rights, provided that the tribunal is properly an adjunct of the court.<sup>92</sup> Time will tell whether Justice Scalia's effort to undo the consequences of *Mead* by defining an enlarged "*Chevron* framework" will also fail.

Justice Scalia's effort to make the scope of "the *Chevron* framework" synonymous with the scope of *Chevron* deference must be rejected for three reasons. First, Justice Scalia is being disingenuous at best in his undefended view that cases decided at step one of *Chevron*—cases in which the statute is clear in foreclosing an agency's interpretation—are in any meaningful sense *Chevron* cases.<sup>93</sup> In Justice Scalia's zeal to present a strong claim that *Chevron* properly

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adjudication because the case involved the adjudication of congressionally-created rights rather than private rights).

<sup>88</sup> See *CFTC v. Schor*, 478 U.S. 833, 859 (1986) (Brennan, J., dissenting) (finding only three permissible categories of cases for permissible non-Article III adjudication: "territorial courts, courts martial, and courts that adjudicate certain disputes concerning public rights") (citations omitted).

<sup>89</sup> E.g., *Schor*, 478 U.S. at 853.

<sup>90</sup> See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–55 (1989).

<sup>91</sup> See *id.*

<sup>92</sup> See *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (Roberts, C.J.) (permitting proper non-Article III adjunct of the court to litigate private rights cases but concluding that the bankruptcy court is not a proper adjunct).

<sup>93</sup> Cf. Kristen E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1548 (2006) ("Th[e] extension of strong judicial deference from explicit to so-called implicit delegations represents a transfer of interpretive power from the judicial branch to administrative agencies. This, more than the two-part test, is the heart of the *Chevron* doctrine.").

applies when an agency has acted to define the scope of its own jurisdiction, he relies on the Court's decisions in *FDA v. Brown & Williamson Tobacco Corp.*<sup>94</sup> and *MCI Telecommunications Corp. v. AT&T Co.*<sup>95</sup> To be sure, the agencies in those cases acted to define controversially the broad scope of their regulatory authority.<sup>96</sup> The agencies in those cases would undoubtedly be surprised, however, to find the Court describing them as *Chevron* cases. In each of these cases, the Court held that the agency lacked the delegated authority claimed by the agency because the Court alone decided that the *statute* clearly foreclosed the agency's legal interpretation.<sup>97</sup> Surely in neither case did the Court defer to the agency's interpretation.<sup>98</sup> The scope of application of *Chevron* deference, of course, is the matter at issue in *City of Arlington*.

To describe the first step of the analysis defined by *Chevron* as *Chevron* review is, post-*Mead*, at best misleading. If *Mead* had never been decided, there would be neither harm nor misdirection in the claim that *Chevron* review is comprised of the two steps famously identified in that case. In truth, however, the differences between the two steps are critical in the post-*Mead* world of administrative law and must be distinguished so that the scope of proper *Chevron* deference can be demarcated. The first step described by *Chevron* involves the court's exercise of its own interpretive authority in deciding whether a statute is clear in defining the law.<sup>99</sup> When a court exercises this interpretive authority, the

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<sup>94</sup> 529 U.S. 120 (2000).

<sup>95</sup> 512 U.S. 218 (1994).

<sup>96</sup> See *Brown & Williamson*, 529 U.S. at 125 (noting that the Food and Drug Administration (the "FDA") reversed its position and concluded that it had authority to regulate tobacco products under the Food, Drug and Cosmetic Act); *MCI*, 512 U.S. at 220 (stating that the FCC decided "to make tariff filing optional for all nondominant long-distance carriers" pursuant to "its modification authority").

<sup>97</sup> See *Brown & Williamson*, 529 U.S. at 126; *MCI*, 512 U.S. at 234; cf. Strauss, *supra* note 68, at 8 ("[T]he majority in [*Brown & Williamson* and *MCI*] was able to stop its inquiry at the first step, on finding an impermissible meaning given earlier, stable agency views that commanded respect."); *but cf.* Strauss, *supra* note 68 ("[*Brown & Williamson* and *MCI* were] two cases in which *Chevron* had been applied (as indeed it was). . .").

<sup>98</sup> The *Brown & Williamson* Court required a clearer delegation of power to the FDA before the Court would permit the FDA's exercise of regulatory authority over tobacco products. See 529 U.S. at 161. The *MCI* Court concluded that the text of the statute clearly precluded the FCC's exercise of the "modification" authority, because the agency's change was much more than a mere "modification." See 512 U.S. at 231–32.

<sup>99</sup> See Healy, *supra* note 46, at 33–39 (discussing the step one analysis).

court accords no deference to the agency's interpretation.<sup>100</sup> The court is exercising its own critical law-defining role in the government of separated powers.<sup>101</sup> It is only at the second step defined by *Chevron* that the court must defer to the agency, and that step is reached only after the *court* determines that the statute is ambiguous.<sup>102</sup>

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<sup>100</sup> See Peter L. Strauss, *Overseers or "The Deciders"—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 819 (2008) [hereinafter Strauss, *Overseers*] ("*Chevron* step one is the terrain of independent (albeit perhaps influenced) judicial judgment, cases resolved at that level have more in common with other judicial judgments about statutory interpretation than with agency review, as such. Judges will accept the use of legislative history or not; will be open to liberal or constrained views of the reach of statutory language; will tend to focus on purposes or on text; and will perhaps be more generous with the work of Republican-dominated legislatures than Democratic, or vice versa, across the broad range of statutory interpretation issues."). Professor Strauss has argued that a court should properly accord *Skidmore* deference to an agency when deciding whether a statute is clear at the first step of *Chevron*. See Strauss, *supra* note 68, at 8 ("[F]ew of those tools [of statutory construction] are more traditional than the one that was first voiced by the Court in 1827, repeatedly invoked over the ensuing years, and captured by Justice Jackson's formulation in *Skidmore*."); see also Strauss, *Overseers, supra*, at 818 ("As part of its step one determination, a court might well turn to a responsible agency's judgment about the matter as one weight to be considered on the scales the court is using. That is, *Skidmore* deference is one of those 'traditional tools of statutory interpretation' that bear on a court's independent conclusion about the extent of agency authority."). To be sure, when a court determines whether a statute is clear in foreclosing an agency interpretation, the court may account for an agency's consistent view of a legal question because that consistent agency view may properly indicate that the statute had a clear meaning. See Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 603 n.237 (2001) (discussing the value of agencies' views in discerning legislative intent when the agency has played a significant role in drafting legislation); *id.* at 583–84 (discussing how agencies' and the legal community's understanding of the meaning of a statute is important evidence about the meaning of the statute). I disagree, though, that the agency's view should otherwise count in a court's decision about whether a statute is clear.

<sup>101</sup> Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 624 (2009) ("At *Chevron*'s first step, courts reviewing administrative constructions should begin by identifying whether congressional instructions clearly either require or preclude the choice the agency has made or, instead, whether the agency's choice falls within a range of possibilities permitted by language that Congress has left ambiguous. If the former, statutory meaning is set; consistent agency interpretations should be upheld on the court's own authority, while contrary constructions must be rejected. If the latter, agency interpretations that do not fall within the zone of indeterminacy permitted by the statute's language must be struck down. This constitutes the scope of the independent judicial task."); see also Strauss, *Overseers, supra* note 100, at 818 ("Defining the areas of ambiguity within which, *Chevron* says, agencies have presumptively the leading oar is a part of the independent judicial task of step one.").

<sup>102</sup> See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1260–61 (1997) ("Under the structure of the *Chevron* formula, a court should not reach step two unless it has already found during step one that the statute supports the government's interpretation or at least is ambiguous with respect to it. In other words, the agency's view is not clearly contrary to the meaning of the statute. If the court has made such a finding, one would think that the government's interpretation must be at least 'reasonable' in the court's eyes.").

By misleadingly claiming an overly broad scope of *Chevron* review—“the *Chevron* framework”—Justice Scalia is able to describe cases as *Chevron* cases, despite the fact that there was no deference to an agency because a clear statute as determined by the court resolved the interpretive question.<sup>103</sup> The proposition that the application of the *Chevron* standard is so broad as to include cases decided at both the first and second steps described in *Chevron* has an important consequence for the *Mead* analysis. The *Mead* analysis, of course, determines whether *Chevron* deference applies. Justice Scalia’s broad view of *Chevron*’s application would mean that the *Mead* analysis would have to be conducted *before* the court has itself decided whether the statute is clear or ambiguous. This approach would define the *Mead* analysis as a step zero inquiry,<sup>104</sup> rather than a step one and one-half inquiry.<sup>105</sup> The step zero view of the timing of the *Mead* analysis is flawed for two reasons. First, if the statute is clear, the legal matter is resolved and there is no reason to employ *Mead* to determine whether Congress intended that the court defer to the agency’s legal interpretation of an ambiguous statute. Defining the *Mead* analysis as a step zero inquiry would result in unnecessary analysis in any case in which the court concludes (at step one) that the statute clearly bars the agency interpretation. Second, if the *Mead* analysis were conducted prior to the step one analysis, if it were a step zero inquiry, one would have to decide what the step one analysis would be under *Mead*. Presumably, such an analysis would be identical to the longstanding *Chevron* step one analysis: a determination of whether the statute is clear without any deference to the agency. Moreover, the Court’s decision in *Brand X* means that it is now important that a court decide whether a statute’s meaning is clear (a step one determination) or ambiguous with the court determining the statute’s meaning by employing *Skidmore* review.<sup>106</sup> If the statute

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<sup>103</sup> *Brown & Williamson*, 529 U.S. at 161; *MCI*, 512 U.S. at 231–32.

<sup>104</sup> The Petitioner had equated the *Mead* analysis with a *Chevron* step zero analysis. *See supra* note 61.

<sup>105</sup> For a discussion about the Court’s inconsistency in defining when a court should undertake the *Mead* analysis, see Healy, *supra* note 46, at 25–27. That article strongly advocated that the *Mead* analysis should be conducted after step one of *Chevron* is completed. *See id.* at 39–42.

<sup>106</sup> *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (“A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. . . . Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”); *id.* at 985 (“Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency’s, the court must hold that the statute unambiguously requires the court’s construction.”).



is ambiguous, *Brand X* permits the agency to change its interpretation by exercising its lawmaking power, and the new interpretation will receive *Chevron* deference (assuming that Congress has delegated lawmaking power to the agency).<sup>107</sup> Because the first step under either regime would be identical, it would be unnecessary judicial analysis to perform the potentially difficult *Mead* analysis in a case in which the statute would be found clear in either event. In short, the Court erred in its failure both to conduct a *Mead* analysis before addressing the scope of properly applicable *Chevron* deference and to characterize its initial analysis of whether the statute is clear as *Chevron* analysis.

Justice Scalia's desire to claim the broadest application of *Chevron* by discussing the breadth of "the *Chevron* framework" rather than *Chevron* deference also fails because it simply proves too much.<sup>108</sup> The Court in *City of Arlington* accorded *Chevron* deference to the agency even though it issued a regulation that the agency did not intend to be an exercise of lawmaking power and which did not conform to the APA's procedural requirements for notice and comment rulemaking.<sup>109</sup> This agency ruling would very likely not have received *Chevron* deference even before *Mead* was decided on grounds that the agency had not earned judicial deference because it had relied on the APA exception to rulemaking procedures.<sup>110</sup> The ruling surely should not receive *Chevron* deference after *Mead*.

The danger that *City of Arlington* poses is that Justice Scalia relied on the assumption or the acceptance that the case was within "the *Chevron* framework" to enable the conclusion that an agency receives *Chevron* deference if a statute is not clear about the delegation of lawmaking power. *Mead* held,<sup>111</sup> and *Gonzales v. Oregon* confirmed,<sup>112</sup> that that decision was one to be made by a court without any deference to an agency. This inquiry about whether Congress delegated lawmaking power to the agency is the first question asked by *Mead*, prior to any application of deference.<sup>113</sup> Indeed, *City of Arlington* undercuts *Gonzales*, a decision sharply

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<sup>107</sup> See *id.* at 983.

<sup>108</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870 (2013).

<sup>109</sup> See *supra* notes 21–22 and accompanying text.

<sup>110</sup> See *supra* note 74 and accompanying text.

<sup>111</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>112</sup> See *Gonzales v. Oregon*, 546 U.S. 243, 258–69 (2006).

<sup>113</sup> See *Mead*, 533 U.S. at 226–27.



criticized by Justice Scalia.<sup>114</sup> The *Gonzales* Court employed the first part of the *Mead* analysis—questioning whether Congress delegated lawmaking power to the agency—to foreclose *Chevron* deference to the agency by narrowly construing, contrary to the agency’s interpretation, the scope of lawmaking power that Congress had delegated to the DOJ.<sup>115</sup> The result in *City of Arlington*, therefore, necessarily weakens *Mead*, no doubt to the delight of Justice Scalia.<sup>116</sup>

Justice Scalia’s delight at undermining *Mead* can be inferred from his loathing of that decision.<sup>117</sup> His loathing seems to have two important sources. First, *Mead*’s limitation on the scope of *Chevron* deference is a consequence of the Court’s inference about the degree of deference intended by Congress for an agency’s legal interpretations.<sup>118</sup> Justice Scalia has been outspoken in his rejection of legislative intent as a basis for the interpretation of statutes.<sup>119</sup> Although he is quite comfortable employing interpretive rules or canons that prescribe the presumptive meaning of statutes,<sup>120</sup> he rejects reliance on intent of the legislature when interpreting a statute.<sup>121</sup> *Mead* is heavily dependent on inferring

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<sup>114</sup> See *Gonzales*, 546 U.S. at 275–99 (Scalia, J., dissenting).

<sup>115</sup> See *id.* at 258–69. The Court employed the elephants-in-mouseholes canon to support its narrow interpretation of the delegation of law making power to the DOJ. See *id.*

<sup>116</sup> Cf. Strauss, *supra* note 68, at 6 (“[B]y [sleight] of hand, perhaps, [Justice Scalia] appears to have accomplished in *City of Arlington* the proposition for which he alone argued in *Mead*.”).

<sup>117</sup> See *Mead*, 533 U.S. at 261 (Scalia, J., dissenting) (“[*Mead* is] one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad.”); see also *id.* at 239 (“Today’s opinion makes an avulsive change in judicial review of federal administrative action.”).

<sup>118</sup> See *id.* at 226–27 & 229.

<sup>119</sup> See ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1998) (“It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not men. Men may intend what they will; but it is only the laws that they enact which bind us.”).

<sup>120</sup> E.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468–69 (2001).

<sup>121</sup> See *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (“Our job begins with a text that Congress has passed and the President has signed. We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined.”) (citation omitted).

congressional intent about the circumstances under which deference is owed to an agency.<sup>122</sup>

The second, and possibly more important, reason Justice Scalia so strongly objected to *Mead* was that the decision revived the application of *Skidmore* review,<sup>123</sup> a regime Justice Scalia believed had been entirely superseded by *Chevron*.<sup>124</sup> Justice Scalia scorns *Skidmore* review because he believes it elevates a standard over a rule and, as a result, places too much interpretive power in courts.<sup>125</sup> To be sure, *Skidmore* review is dependent (as all review standards are) on the good faith of the reviewing court. *Skidmore* review permits courts to account for the agency's experience and expertise when the court must itself determine the proper meaning of an ambiguous statute and *Chevron* deference does not apply.<sup>126</sup>

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<sup>122</sup> See generally Michael P. Healy, *Spurious Interpretation Redux: Mead and the Shrinking Domain of Statutory Ambiguity*, 54 ADMIN. L. REV. 673 (2002).

<sup>123</sup> See *Mead*, 533 U.S. at 234 (“To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires[.]” (citation omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944))).

<sup>124</sup> See *id.* at 250 (Scalia, J., dissenting) (characterizing *Skidmore* as an “anachronism”); *id.* (Scalia, J., dissenting) (“[T]he rule of *Skidmore* deference is an empty truism and a trifling statement of the obvious[.]”); see also *id.* at 252 (Scalia, J., dissenting) (“The principles central to today's opinion have no antecedent in our jurisprudence.”); Strauss, *supra* note 68, at 5 (“*Chevron*, [Justice Scalia] argued, had consigned *Skidmore* to the waste-bin of history.”).

<sup>125</sup> Justice Scalia expressed his view in *Mead* that *Skidmore* review is nothing more than “that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.” *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

<sup>126</sup> It is worth noting that Justice Scalia's rejection of *Skidmore* review fails to engage with the core of its significance, which is that the court itself has the authority to construe the legal source being interpreted and ought to consider relevant information in reaching its judgment. See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996) (“[A]n agency's interpretation, . . . if not binding upon a reviewing court, retains value as a tool of construction. Congress's decision to commit lawmaking power to agencies vests substantial regulatory authority in specialized bodies with knowledge, expertise, and experience that generalist courts lack. Agencies may therefore have insights into regulatory history, context, or purpose that may not be readily apparent to even the most seasoned federal judge.”); see also Peter L. Strauss, “*Deference*” Is Too Confusing—Let's Call Them “*Chevron Space*” and “*Skidmore Weight*,” 112 COLUM. L. REV. 1143, 1156 (2012) (“What is ‘exclusively a judicial function’ does not exclude agency views. Once a question of statutory interpretation has been put before a court, it is for the court to resolve the question of meaning. Among the matters indispensable for it to consider, however, are the meanings attributed to it by prior (administrative) interpreters, their stability, and the possibly superior

Justice Scalia's claim to abjure broad judicial decision-making authority by advocating the broad scope of "the *Chevron* framework" should be taken, however, with a very large grain of salt. Justice Scalia has a well-known and often-practiced ability to reject agency interpretations that expand the agencies' regulatory authority.<sup>127</sup> He exercises this judicial power, however, at step one of *Chevron* by concluding either that the statute is clear<sup>128</sup> or that ambiguity, because of the application of a required clear statement rule, is an insufficient legislative grant of power when the agency is making a decision that has great regulatory effect.<sup>129</sup> Indeed, there is a rich irony that Justice Scalia, who developed and then christened the modern administrative law elephants-in-mouseholes canon,<sup>130</sup> chided Chief Justice Roberts in *City of Arlington* for supporting a rule that Justice Scalia claimed defined a distinction between big and small questions when deciding whether deference applies.<sup>131</sup> In this regard, it is worth recognizing the different results of judicially active decisions that restrain the regulatory authority of agencies. When, following proper application of the *Mead* analysis, a court reviews an agency's interpretation under the *Skidmore* regime and the court interpreting the ambiguous statute reaches a different interpretation than the agency's interpretive conclusion, the agency may, if it has delegated lawmaking power, change the law to its original view, which would be accorded *Chevron* deference if the agency did later exercise its lawmaking power.<sup>132</sup> When, however, a court employs the elephants-in-

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body of information and more embrace responsibilities that underlay them. They may be entitled to great 'weight' on the judicial scales."). Perhaps Justice Scalia simply knows courts too well to support a rule that depends on judicial good faith.

<sup>127</sup> *E.g.*, *Rapanos v. United States*, 547 U.S. 715, 732 (2006) (Scalia, J., plurality opinion) (relying on the determinate meaning of "the waters" in the Clean Water Act); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468–69 (2001) (relying on the text of the Clean Air Act and the clear statement rule to conclude that an agency lacked certain regulatory authority).

<sup>128</sup> *E.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 107 (2007) (Scalia, J., dissenting); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 226–29 (1994).

<sup>129</sup> *E.g.*, *Whitman*, 531 U.S. at 468–69.

<sup>130</sup> *Id.*

<sup>131</sup> *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

<sup>132</sup> This proposition, as is stated, is based on the assumption that Congress has delegated lawmaking power to the agency. Part III.C of this article contends that Chief Justice Roberts is suggesting that courts ought to employ a clear statement rule that requires Congress to delegate lawmaking power expressly before a court should conclude that the agency possesses such power. This interpretive rule would have an effect analogous to the elephants-in-mouseholes canon. *See infra* notes 157–58 and accompanying text.

mouseholes canon and rejects the agency's interpretation under step one of *Chevron*, an amendment of the statute by Congress is necessary before the agency's interpretation would be permitted (even though the statute is otherwise ambiguous on its face regarding the legal issue).

Worth considering, finally, is how *City of Arlington* may affect the future application of *Mead*. To be sure, *City of Arlington* may have the perverse and *sub silentio* effect of substantially weakening the *Mead* test by requiring deference to an agency's conclusion that Congress delegated lawmaking power to the agency. *Mead* would still, however, require a judicial determination about whether the agency had actually exercised the lawmaking power Congress had delegated to it. If there is no such agency exercise (as there had not been in *City of Arlington*), there is no *Chevron* deference, even if a court were to defer to an agency's view that the agency had been delegated (unexercised) lawmaking power.

### B. Justice Breyer's Concurring Opinion

Justice Breyer concurs in part and concurs in the Court's judgment.<sup>133</sup> His opinion is much more consistent with the Court's post-*Mead* regime for review of agency legal interpretations. Nevertheless, his opinion is not nearly as clear as it could be in explaining how *City of Arlington* ought to fit within that regime. Justice Breyer initially presented *Mead* as something less than a test that must be applied once a court has determined that a statute is ambiguous. *Mead* is described as an "example" of how the Court "looked to several factors other than simple ambiguity to help determine whether Congress left a statutory gap, thus delegating to the agency the authority to fill that gap with an interpretation that would carry 'the force of law.'"<sup>134</sup> That Justice Breyer has failed to present *Mead* as having defined a clear rule that determines the scope of application of *Chevron* deference is somewhat unsurprising given that Justice Breyer wrote the Court's opinion in *Barnhart v. Walton*.<sup>135</sup> That post-*Mead* decision is likely the most standard-like and least rule-like decision determining whether *Chevron* deference or *Skidmore* review applies.<sup>136</sup>

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<sup>133</sup> *City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring in part and concurring in the judgment).

<sup>134</sup> *Id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001)).

<sup>135</sup> 535 U.S. 212 (2002).

<sup>136</sup> *See id.* at 222 (applicable regime is determined based on "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"); *see also* *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

Despite this lack of full clarity, Justice Breyer's opinion does provide important insights into the *Mead* analysis, even though those insights have to be teased out. First, Justice Breyer rejected the view implicitly presented by Justice Scalia, that the *Mead* analysis is a step-zero analysis. He instead correctly stated that courts are to pursue the *Mead* analysis of whether *Chevron* deference is appropriate only after "consider[ing] 'traditional tools of statutory construction'" and concluding that the statute is ambiguous.<sup>137</sup> The *Mead* analysis then determines whether *Chevron* deference or *Skidmore* review applies to the agency's interpretation of the statute, which the court has determined to be ambiguous.

Without specifically stating that he was pursuing the *Mead* analysis, Justice Breyer decided near the end of his opinion, without according any deference to the agency, that Congress had "[left] a gap for the FCC to fill."<sup>138</sup> This conclusion about the scope of the lawmaking power delegated to the agency reflects Justice Breyer's view that nothing in the statute "'expressly describ[es] an exception' to the FCC's plenary authority to interpret the act."<sup>139</sup> Under this approach, a broad delegation presumptively gives the agency lawmaking power in particular applications, unless Congress has defined specific exceptions to the agency's delegated power.<sup>140</sup>

Justice Breyer's attention to the first part of the *Mead* analysis contrasts with his conclusory one-sentence treatment of the second *Mead* inquiry: "I would hold that the FCC's lawful effort to do so[,] [that is, to fill the statutory gap,] carr[ies] 'the force of law.'"<sup>141</sup> Justice Breyer provided no analysis to support this conclusion. This article contends that this conclusion about the second part of the *Mead* inquiry is incorrect and that a proper consideration of the FCC's declaratory

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967, 1004 (Breyer, J., concurring) ("Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.") (citation omitted). Justice Scalia has criticized Justice Breyer's flexibility in determining whether *Chevron* deference is to be accorded to an agency's interpretation. *See id.* at 1015 n.9 (Scalia, J., dissenting).

<sup>137</sup> *City of Arlington*, 133 S. Ct. at 1876 (quoting *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 (1987)).

<sup>138</sup> *Id.* at 1877.

<sup>139</sup> *Id.* (quoting *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991)).

<sup>140</sup> This is a presumptive meaning of the statute, similar to the meaning suggested by Justice Scalia. *See supra* note 67 and accompanying text.

<sup>141</sup> *City of Arlington*, 133 S. Ct. at 1877 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)).

ruling would demonstrate that the agency did not intend to make law and did not exercise its delegated lawmaking powers, even assuming such powers had been delegated to the FCC.<sup>142</sup>

### C. *Chief Justice Roberts's Dissenting Opinion*

Chief Justice Roberts wrote the dissent in *City of Arlington*.<sup>143</sup> Justices Kennedy and Alito joined the dissent.<sup>144</sup> The Chief Justice began by stating a proposition that is at the core of *Mead's* limitation of the scope of *Chevron* deference. Indeed, the dissent repeated the proposition defined by *Mead*, that the proper review standard depends on a determination to be made by the court alone about the scope of authority delegated to an agency by Congress:

Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.<sup>145</sup>

Although the dissent asserted that this principle is “easily expressed,”<sup>146</sup> it would have been more clearly and helpfully expressed if it had simply cited *Mead* for this core principle and had substituted lawmaking authority for “interpretive authority.”

The dissent then proceeded to describe the great power exercised by agencies in the modern American state,<sup>147</sup> power that the dissent later stated must be closely scrutinized by the federal judiciary to ensure the proper separation of powers.<sup>148</sup>

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<sup>142</sup> See *supra* notes 69–74 and accompanying text.

<sup>143</sup> *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> The Chief Justice stated that “[t]he administrative state ‘wields vast power and touches almost every aspect of daily life,’” *id.* at 1878 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010), although he did also accept that “[i]t would be a bit much to describe the result as the very definition of tyranny.”) *Id.* at 1879 (citation and internal quotations omitted).

<sup>148</sup> See *id.* at 1886 (“An agency’s interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of law making power from Congress to the Executive. Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive.”) (citation omitted).

The dissent presented “against this background” of powerful administrative agencies the question posed by the case: “whether the authority of administrative agencies should be augmented even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power.”<sup>149</sup>

The dissent claimed that “it is necessary to sort through some confusion over what this litigation is about. The source of the confusion is a familiar culprit: the concept of ‘jurisdiction.’”<sup>150</sup> In the dissent’s view, the jurisdictional question presented by the case was whether “a court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.”<sup>151</sup> Unfortunately, the dissent did not establish in clear and direct terms that this is the very question considered as the first half of the *Mead* analysis (provided that the dissent understood “interpretive authority” as the power to define law on the question). If the dissent had framed the question as one that is at the center of the *Mead* analysis, the dissent could have demonstrated more clearly that the majority’s approach at the very least ignores the application of *Mead*. The dissent, in other words, confused matters because it failed to clarify that the majority erred when it applied *Chevron* deference without determining first that each of the two requirements for such deference had been met.

The dissent’s brief Part II discussion restated the core principle of *Mead* that Congress determines whether a court is to defer to an agency’s interpretation of an ambiguous statute.<sup>152</sup> The dissent then relied on the separation of powers to reinforce that principle by declaring that “before a court may grant such deference, it must on its own decide whether Congress—the branch vested with law making authority under the Constitution—has in fact delegated to the agency [lawmaking] power over the ambiguity at issue.”<sup>153</sup> The dissent suggested, moreover, that the

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<sup>149</sup> *Id.* at 1879. One may wonder why the dissent did not state at this point that *Mead* had already definitively resolved this question.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1879–80.

<sup>152</sup> *See id.* at 1880.

<sup>153</sup> *Id.* (citation omitted). Part III of the dissent discussed how the limitation on the scope of deference followed from the Court’s decisions in several cases, including *Chevron* and *Mead*. *See id.* at 1881. The dissent’s conclusion at the end of Part III echoed its conclusion at the end of Part II: “[W]e do not defer to an agency’s interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide. Simply put, that question is ‘beyond the *Chevron* pale.’” *Id.* at 1883 (quoting *United States v. Mead*, 533 U.S. 218, 234 (2001)); *see*

judiciary's independent role had become increasingly important as agencies have come to play a critically important role in modern public law.<sup>154</sup>

Only Part IV of the dissent included analysis that suggested how a judicial review regime motivated by heightened concern about the great authority now exercised by administrative agencies might properly constrain the exercise of such authority.<sup>155</sup> Such a limitation could arise from presumptions regarding the congressional delegation of lawmaking power to an agency:

If a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue. The appropriate question is whether the delegation covers the "specific provision" and "particular question" before the court. *Chevron*, 467 U.S. at 844. A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions.<sup>156</sup>

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*also City of Arlington*, 133 S. Ct. at 1886 ("*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.>").

<sup>154</sup> *See id.* at 1886 ("An agency's interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of law making power from Congress to the Executive. Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. In the present context, that means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last [fifty] years from Congress to the Executive—a shift effected through the administrative agencies.") (citations omitted).

<sup>155</sup> *Id.* at 1883.

<sup>156</sup> *Id.* (second citation omitted). The Chief Justice did not opine that a proper non-deferential construction of the statute would be that Congress had not delegated to the FCC the power to define law prescribing a "reasonable time" for final local action on antenna applications. The dissent would simply have remanded for reconsideration without according deference to the FCC regarding the scope of the agency's lawmaking power. *See id.* at 1886 (Roberts, C.J., dissenting) ("Because the court should have determined on its own whether Congress delegated interpretive authority over § 332(c)(7)(B)(ii) to the FCC before affording *Chevron* deference, I would vacate the decision below and remand the cases to the Fifth Circuit to perform the proper inquiry in the first instance.>").



Chief Justice Roberts was focused only on the role that courts must play to ensure that agencies act only in contexts and ways that Congress has given them power to act. His focus was accordingly on the role of courts in defining the limits on agency power based on the direction of Congress. He suggested strongly in this regard that courts should be wary when deciding whether Congress has delegated lawmaking power to an agency and “determine whether the delegation covers the specific provision and particular question before the court.”<sup>157</sup>

Chief Justice Roberts’s reasoning could, in a subsequent iteration, be reconfigured to yield a clear-statement rule regarding congressional delegation of substantial, as distinguished from routine, lawmaking power. Such an approach would mean that a court would be less likely, in resolving the first part of the *Mead* analysis, to conclude independently that Congress had delegated lawmaking power to the agency. The inadequacy of ambiguity in this context of the scope of delegated power would be closely analogous to the elephants-in-mouseholes canon advocated by Justice Scalia in determining whether an otherwise ambiguous statute nevertheless has a clear meaning because a clear-statement rule applies.<sup>158</sup> In *Gonzales*, the Court did rely in part on this clear statement canon when the Court declined to accord *Chevron* deference to an Interpretive Regulation issued by the DOJ to interpret the CSA.<sup>159</sup> Notwithstanding a facially ambiguous statute, such an inferred limit on the agency’s scope of authority would necessitate amendment of the statute before the agency could exercise the power that the Court has concluded Congress may delegate to an agency only when it has enacted a statute that clearly gives the agency such authority.

*Mead* does not itself resolve the extent to which courts may or should employ presumptions to discern the nature of lawmaking power delegated by Congress to an agency. Presumably, a court is to apply the traditional tools of statutory construction when it decides whether Congress has delegated lawmaking power to

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<sup>157</sup> *Id.* at 1883. The Petitioner had advocated the use of a clear-statement rule when a court interprets the scope of lawmaking power that Congress has delegated to an agency. See Petitioner’s Brief on the Merits at 13, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (No. 11-1547) (“*Chevron* step 0 requires some *affirmative* indication on the part of Congress of its intention to delegate interpretive jurisdiction to the agency.”) (footnote omitted); *cf. id.* at 19 (“This determination [of the delegation of lawmaking power] is done *de novo*, and ambiguity falls to the benefit of the courts rather than the agency.”).

<sup>158</sup> This canon is discussed *supra* at notes 129–32 and accompanying text.

<sup>159</sup> See *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006).

the agency.<sup>160</sup> The clarity and development of administrative law would have been better served if the majority had been engaged directly in this debate. The opinions written in *City of Arlington* fail, however, to define in clear and direct terms the key issue that the Justices seemed to want to address in the case: the application of the first part of the *Mead* test and whether any presumptions do or should apply when answering *Mead*'s question about the delegation of lawmaking power.<sup>161</sup> *Mead*'s limit on the application of *Chevron* deference is based on the inferred intent of Congress. The limits on agency authority suggested by Chief Justice Roberts would be added to the limits already established by *Mead*.

Based upon Justice Scalia's longstanding loathing for the Court's decision in *Mead*, he is likely happy simply to ignore *Mead*'s applicability to further his own ends. Why would Chief Justice Roberts, however, ignore the significance of *Mead* to the question whether an agency is to be accorded *Chevron* deference by a court? Although *Mead* and *Gonzales* may not have established precisely the limits that Chief Justice Roberts appeared to be advocating in *City of Arlington*, *Mead* still has already defined two important threshold requirements for the application of *Chevron* deference. The Chief Justice should have focused on the application of those accepted limits rather than on seeking to define new limits. If the Chief Justice had attended to *Mead*, he may have seen that the *Mead* approach properly accounts for the role of courts, Congress, and agencies in modern public law.

### **CONCLUSION: THE MEANING AND EFFECT OF *CITY OF ARLINGTON***

A critically important value animating *Mead* is that the application of judicial deference to an agency's interpretation of an ambiguous statute is dependent on the actions of each of the two non-judicial actors in modern public law: Congress and the administrative agency responsible for executing the law. *Mead* holds that before an agency is accorded judicial deference, Congress must have delegated relevant

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<sup>160</sup> When a court undertakes the *Mead* analysis to determine whether *Chevron* deference applies, it exercises its own interpretive power. *See supra* note 65 and accompanying text. The court exercises the same type of interpretive authority when it decides (without deference) whether the statute clearly forecloses an agency's interpretation at the first step of its analysis. *See Healy, supra* note 46, at 33–39. When exercising its own interpretive authority to make either of these decisions, a court should have the authority to consider traditional aids to statutory construction. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 n.9 (1984).

<sup>161</sup> This article argued earlier that the case could have been resolved most easily if the reviewing courts had considered the second requirement of the *Mead* test, whether the agency did actually act in the exercise of the lawmaking power delegated to the agency. *See supra* Part II.

lawmaking power to that agency.<sup>162</sup> This is the first of two actions. In the event Congress has delegated such lawmaking power, the agency must actually have exercised that delegated power when interpreting the statute. Exercising delegated lawmaking power will typically involve notice and comment rulemaking or formal adjudication procedures.<sup>163</sup> In both of these administrative contexts, the required procedures—by involving parties interested in the exercise of the lawmaking power contemplated by the agency—help ensure a fully and fairly considered exercise of agency lawmaking power. This agency action is the second of the two non-judicial actions, and *Mead* requires both before the court will accord *Chevron* deference to the agency’s interpretation.

None of the decisions in *City of Arlington* properly accounts for this value and understanding of *Mead*. Justice Scalia chose to ignore altogether the *Mead* limitation on judicial deference. Justice Breyer understood the *Mead* limitation but concluded that deference to the FCC was appropriate only by providing an *ipse dixit* conclusion about the FCC’s exercise of the lawmaking power that he concluded Congress had delegated to the FCC.<sup>164</sup>

Chief Justice Roberts hoped to limit the power of agencies by constraining the scope of application of *Chevron* deference. He suggested that when a court considers the first of the *Mead* questions, a broad, general grant of lawmaking power may not be sufficient to authorize agency lawmaking in specific contexts.<sup>165</sup> If courts were to take that approach, *Skidmore* review rather than *Chevron* deference would apply in a broader range of cases. This approach would also make the second of the *Mead* inquiries—whether the agency actually exercised the delegated lawmaking power—less important. This approach would accordingly be less attentive to the action of the agency in determining whether *Chevron* deference should apply. The focus would be more firmly fixed on the statute enacted by Congress and the rules of interpretation, including the rules of clear statement, fashioned by the judiciary, in many cases after the time of enactment.

That the Chief Justice sought to articulate in *City of Arlington* a new limit on the scope of *Chevron* deference is ironic for two reasons. First, Congress had delegated broad lawmaking power—“plenary authority” in the words of Justice

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<sup>162</sup> United States v. Mead, 533 U.S. 218, 226 (2001).

<sup>163</sup> *Id.* at 229.

<sup>164</sup> See *supra* notes 141–42 and accompanying text.

<sup>165</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013).

Breyer<sup>166</sup>—to the FCC regarding regulation of telecommunications, and Congress had not defined an “express[] . . . exception” to that authority.<sup>167</sup> Second, a restrained court would resist opining about the extent of lawmaking power that Congress had delegated to an agency when the agency had not purported to exercise *any* lawmaking power. In such a case, there is surely no need for a properly restrained judiciary to determine whether lawmaking authority had been delegated.

The Court’s decision has the potential to undercut significantly the impact of *Mead* because it is unlikely that many statutes will clearly limit the delegation of lawmaking power to an agency. The decision may accordingly be read as establishing that a court must defer to an agency’s decision that it has received delegated authority when the statute is ambiguous. Such an approach may be defensible if defined as a presumption of legislative intent.<sup>168</sup> The approach, however, directly conflicts with *Mead*, if it is understood as a context for deference to the agency. The decision also undercuts *Mead* because application of the accepted, proper *Mead* analysis would have foreclosed the application of *Chevron* deference. Practitioners of administrative law can only be confused by the application of *Chevron* deference, given the administrative action reviewed in *City of Arlington* and the fact that neither reviewing court actually bothered to apply the *Mead* test before proceeding to accord *Chevron* deference.<sup>169</sup> Because none of the decisions properly framed the *Mead* analysis, perhaps the likeliest effect of the Court’s decision is that it will simply yield greater confusion about the proper standards for judicial review of agencies’ legal determinations.

That the majority decision is joined by Justices who have accepted the significance of *Mead* and its limitations on the application of *Chevron* deference surely means that the significance of Justice Scalia’s decision is uncertain. That *City of Arlington* has overruled *Mead sub silentio* would be remarkable. More likely, the decision means only that when properly applicable (following the *Mead*

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<sup>166</sup> *See id.* at 1877 (Breyer, J., concurring in part and concurring in the judgment).

<sup>167</sup> *Id.* (internal quotations and citation omitted). Indeed, the Court in *Gonzales* had contrasted the circumscribed law making power delegated to the Attorney General in that case with the broad lawmaking power that Congress had delegated to the FCC regarding telecommunications. *See Gonzales*, 546 U.S. at 258–59.

<sup>168</sup> This is close to the approach to the first *Mead* question taken by Justice Breyer. *See City of Arlington*, 133 S. Ct. at 1877 (Breyer, J., concurring in part and concurring in the judgment).

<sup>169</sup> This may encourage lower courts to apply *Chevron* deference without any prior application of the *Mead* test. Lower courts do not need such encouragement. *See supra* note 39.

analysis), *Chevron* deference extends to agency interpretations that define the extent of the agency's jurisdiction.<sup>170</sup> This understanding of the decision would be entirely noncontroversial. Because the meaning of the decision is unclear, perhaps its impact will be limited.<sup>171</sup> That lack of clarity is a consequence of the Court's activist agenda and failure to exercise restraint in the application of its own precedent.

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<sup>170</sup> This seems to be the position taken by Justice Breyer at the beginning of his concurring opinion. *See City of Arlington*, 133 S. Ct. at 1875. The FCC also made this argument. *See* Brief for the Federal Respondents, at 30–32, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Nos. 11-1545, 11-1547) (presenting the unexceptional argument that *Chevron* deference may properly apply to an agency's interpretation of a statutory provision that effectively defines the scope of the agency's jurisdiction); *see also id.* at 22–25 (arguing that defining a limit on *Chevron* deference based on whether the provision limited the agency's jurisdiction would be unworkable).

<sup>171</sup> *See* Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1 (2015).