
ADMINISTRATIVE LAW — *CHEVRON* DEFERENCE — D.C. CIRCUIT HOLDS THAT DEPARTMENT OF LABOR’S INTERPRETATION OF STATUTE OF LIMITATIONS IN OCCUPATIONAL SAFETY AND HEALTH ACT IS UNREASONABLE. — *AKM LLC v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012).

The doctrine of judicial deference to administrative agencies’ reasonable interpretations of ambiguous statutes announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹ has been described as “foundational, even . . . quasi-constitutional.”² Still, the Supreme Court has articulated limits on the scope of *Chevron*’s applicability: for instance, not all statutes qualify,³ and not all agency pronouncements of interpretations merit deference.⁴ Perhaps the most important — even if not the most definite — limitation was announced in *United States v. Mead Corp.*,⁵ in which the Court held that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”⁶

Recently, in *AKM LLC v. Secretary of Labor*,⁷ the D.C. Circuit considered the Secretary of Labor’s interpretation of the Occupational Safety and Health Act’s⁸ six-month clock for issuing citations under sections 5 and 6 as allowing punishments for continuing violations after more than six months.⁹ Assuming without deciding that an agency’s interpretation of a statute of limitations deserved *Chevron* deference, the court held that the Secretary’s interpretation was unreasonable.¹⁰ Judge Brown, the author of the majority opinion, filed a concurrence for herself only, urging the court not to afford *Chevron* deference for agency interpretations of statutes of limitations in future cases¹¹ and emphasizing that “the same separation-of-powers,

¹ 467 U.S. 837, 842–43 (1984).

² Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006).

³ See, e.g., *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1997) (noting that agency interpretations of the Administrative Procedure Act do not receive *Chevron* deference).

⁴ E.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that interpretations announced in pronouncements that “lack the force of law . . . do not warrant *Chevron*-style deference”).

⁵ 533 U.S. 218 (2001).

⁶ *Id.* at 226–27.

⁷ 675 F.3d 752 (D.C. Cir. 2012).

⁸ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2006)).

⁹ *AKM*, 675 F.3d at 754.

¹⁰ *Id.* at 754–55.

¹¹ See *id.* at 768–69 (Brown, J., concurring).

expertise, and agency trust concerns” raised by deferring to agency interpretations of jurisdictional boundaries¹² counseled against deference in this context as well.¹³ However, such expansions of *Mead* have been criticized both because of the difficulty inherent in distinguishing substantive from procedural provisions and because of administrability and efficiency concerns. As *AKM* demonstrates, these critiques ring true for statutes of limitations as well. And those concerns, along with *Chevron*’s capacity to address fears of unreliable agency interpretations, counsel against creating a new exception to *Chevron*’s domain.

On November 10, 2006, the Occupational Safety and Health Administration (OSHA) issued a number of citations against Volks Constructors (Volks)¹⁴ based on numerous failures to comply with OSHA regulations.¹⁵ Volks and OSHA agreed in April 2007 to settle most of the alleged violations.¹⁶ Five citations remained, relating to Volks’s failure — at various times between 2002 and 2006 — to keep, verify, certify, and post records relating to employee illnesses and injuries.¹⁷ Volks responded that the citations were untimely under section 9(c) of the Occupational Safety and Health Act.¹⁸ Volks and OSHA then filed cross-motions for summary judgment, requiring the Administrative Law Judge (ALJ) in the case to evaluate whether OSHA had failed to issue the citations in compliance with section 9(c).¹⁹

Relying on a previous Occupational Safety and Health Review Commission (OSHRC or Commission) decision, the ALJ granted the Secretary of Labor’s motion for summary judgment and denied Volks’s motion.²⁰ The previous opinion, *Johnson Controls Inc.*,²¹ had held that “an inaccurate entry on an OSHA [log] violates the Act until it is corrected, or until the 5-year retention requirement . . . expires.”²² Thus, “an uncorrected error or omission in an employer’s OSHA-

¹² *Id.* at 766.

¹³ *See id.* at 767–68.

¹⁴ AKM LLC does business as Volks Constructors. *See* AKM LLC, No. 06-1990, 2007 WL 7366308, at *1 (OSHRC June 25, 2007) (ALJ). In accordance with the decisions, this comment uses “Volks Constructors” or “Volks” for short.

¹⁵ *See id.*

¹⁶ *See id.* at *2.

¹⁷ *See id.* at *1–2.

¹⁸ Occupational Safety and Health Act of 1970 § 9(c), 29 U.S.C. § 658(c) (2006) (“No citation may be issued under this section after the expiration of six months following the occurrence of any violation.”).

¹⁹ *See AKM*, 2007 WL 7366308, at *2, *4.

²⁰ *Id.* at *6.

²¹ 15 BNA OSHC 2132 (No. 89-2614, 1993).

²² *Id.* at 2135. The five-year retention requirement is the product of an OSHA regulation: for those documents that the Act mandates employers produce, verify, or certify, OSHA requires the employer to “save the [documents] . . . for five (5) years following the end of the calendar year that these records cover.” 29 C.F.R. § 1904.33(a) (2011); *see also AKM*, 675 F.3d at 753 (describing interaction of the Act with OSHA regulations).

required injury records may be cited six months from” when the Secretary of Labor discovers or should have discovered the facts underlying the violation.²³ The ALJ in Volks’s case, quoting *Johnson Controls* approvingly²⁴ and distinguishing the cases relied on by Volks,²⁵ concluded that — on the authority of *Johnson Controls* and similar OSHRC decisions — the OSHA citations were not time-barred.²⁶ Volks appealed the decision to the OSHRC.²⁷

The three-member OSHRC panel affirmed in part and vacated in part, holding that the Secretary’s first four citations (relating to recordkeeping and verification) were not time-barred but that the last citation (for failure to post an annual report for the required period of time) was.²⁸ A majority of the panel²⁹ first reaffirmed *Johnson Controls*’s precedential value and dismissed Volks’s contention that subsequent cases had rendered *Johnson Controls* bad law.³⁰ Describing those cases as “fundamentally different” from the instant case and from *Johnson Controls*,³¹ the Commission held that the recordkeeping and verification citations were not untimely, because the violating events persisted after the issuance of citations.³² The citation for failure to post an annual report for the entire required period, however, could not be treated as a continuing violation — and therefore was untimely — because the relevant regulation “imposed a duty to post the summary for only a specified time period.”³³

Commissioner Thompson dissented in part, arguing that the Secretary’s theory of continuing violations “eviscerates the very concept of statutes of limitations and violates all notions of fundamental fairness

²³ *Johnson Controls*, 15 BNA OSHC at 2136. Volks argued that, for the five citations at issue, the violations were discrete occurrences, each of which had taken place more than six months before OSHA issued the citations. See *AKM*, 675 F.3d at 753; see also *AKM LLC*, No. 06-1990, 2011 WL 896347, at *1 (OSHRC Mar. 11, 2011) (“[B]ased on the stipulated record, it is undisputed that the Secretary issued a citation for these violations more than six months after the record-keeping duties at issue initially arose.”).

²⁴ *AKM*, 2007 WL 7366308, at *5 (quoting *Johnson Controls*, 15 BNA OSHC at 2135–36).

²⁵ See *id.*

²⁶ See *id.* at *6.

²⁷ *AKM*, 2011 WL 896347, at *1.

²⁸ See *id.* at *15.

²⁹ The panel majority consisted of Chairman Rogers and Commissioner Attwood.

³⁰ *AKM*, 2011 WL 896347, at *3 (citing *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2185–86 (No. 90-2775, 2000), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001); *Manganas Painting Co.*, 21 BNA OSHC 2043, 2048 (Nos. 95-0103 & 95-0104, 2007), *rev’d in part on other grounds sub nom.* *Chao v. Occupational Safety & Health Review Comm’n*, 540 F.3d 519 (6th Cir. 2008); *Hercules Inc.*, 20 BNA OSHC 2097, 2104 (No. 95-1483, 2005); *id.* at 2106 n.2 (Rogers, Comm’r, concurring in part and dissenting in part); *Arcadian Corp.*, 20 BNA OSHC 2001, 2013 (No. 93-0628, 2004)).

³¹ *Id.* at *4.

³² *Id.* at *15.

³³ *Id.* at *10. The Commission also affirmed the ALJ’s conclusions as to the merits of the four citations it upheld, over Volks’s arguments to the contrary. See *id.* at *10–15.

and due process.”³⁴ Commissioner Thompson would have held that the phrase “following the occurrence of any violation”³⁵ in the statute of limitations clearly did not allow for a continuing-violation theory, contrasting the use of “occurrence” with other words Congress may have chosen, such as “accrual.”³⁶ He further rejected the Secretary of Labor’s analogy of the instant events to a violation involving an unguarded machine — because in this instance, unlike in the case of a machine continuously unguarded, “all elements of a violative log omission are complete” once the time period allowed by statute or regulation has run.³⁷ He also found that the Secretary’s power to require employers to maintain the requisite documents for five years once produced could not be read either as an extension of the normal statute of limitations or as an authorization for the Secretary to extend it.³⁸

On Volks’s petition for review, the D.C. Circuit vacated the remaining citations.³⁹ Writing for the court, Judge Brown⁴⁰ held that section 9(c)’s use of the word “occurrence” clearly required treating Volks’s violations as discrete instances, rather than events that continued over time.⁴¹ Rejecting the Secretary’s contrary interpretation, the court first “assume[d] without deciding that *Chevron* deference [was] available because the interpretation offered by the agency . . . ‘cannot survive even with the aid of *Chevron* deference.’”⁴² Noting *Chevron*’s mandate that a clear expression of congressional will on the question at issue ends the judicial inquiry,⁴³ the court concluded that the statute’s text was clear: “the word ‘occurrence’ clearly refers to a discrete antecedent event — something that ‘happened’ or ‘came to pass’ ‘in the past.’”⁴⁴ Contrary to the Secretary’s interpretation, the court read the Act to impose (or allow the Secretary to impose) two duties: First, “employers must make records of workplace injuries” in accordance with regulations promulgated by the Secretary; a violation of this duty was subject to citation only within six months of its occurrence.⁴⁵ Second, “once an employer has made such a record, it must *also* retain it

³⁴ *Id.* at *17 (Thompson, Comm’r, dissenting in part).

³⁵ 29 U.S.C. § 658(c) (2006).

³⁶ *AKM*, 2011 WL 896347, at *18 (Thompson, Comm’r, dissenting in part) (internal quotation marks omitted).

³⁷ *Id.* at *19.

³⁸ *See id.* at *21.

³⁹ *AKM*, 675 F.3d at 753, 759.

⁴⁰ Judge Brown was joined by Judge Henderson.

⁴¹ *AKM*, 675 F.3d at 755.

⁴² *Id.* at 754 (quoting *Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191, 1210 (D.C. Cir. 1996)).

⁴³ *Id.* at 755 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

⁴⁴ *Id.* (quoting *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109–10 & n.5 (2002)).

⁴⁵ *Id.* at 755–56.

for as long as the Secretary demands . . . here, for five years.”⁴⁶ “OSHA only cited *Volks* for the failure to create a record, but it did so far too late.”⁴⁷ Explaining that the Secretary’s theory impermissibly conflated the two distinct duties imposed by the Act and rendered section 9(c)’s six-month clock superfluous, the court held that the citations must be vacated as untimely.⁴⁸

Judge Garland concurred in the judgment, arguing that the case could be decided on narrower grounds: while the Act *could*, in other circumstances, allow for a continuing-violation theory, it would be sufficient here to hold that OSHA’s own regulations did not “impose continuing obligations that may be continually violated.”⁴⁹ Judge Garland did not believe, however, that section 9(c) necessarily precluded continuing violations: “[W]here a regulation (or statute) imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied, and the statute of limitations will not begin to run until it does.”⁵⁰ Noting that both the D.C. Circuit and other courts of appeals had interpreted similar statutes of limitations to allow continuing violations,⁵¹ Judge Garland would have held that, in this instance, the regulations themselves admitted no continuing violations.⁵²

Judge Brown authored a separate concurrence for herself only to emphasize that the majority opinion’s “assuming without deciding that *Chevron* applies” did not preclude a future court’s holding that agency interpretations of statutes of limitations should not, as a general matter, receive *Chevron* deference.⁵³ Judge Brown argued that such a disposition would be appropriate, given that *Chevron* and subsequent cases emphasized that deference should be afforded only when Congress has in fact delegated interpretive authority to the agency.⁵⁴ Pointing to agencies’ dearth of expertise relative to courts in interpreting statutes of limitations,⁵⁵ the inapplicability of policy expertise to the provisions,⁵⁶ and the provisions’ important role in “constrain[ing]

⁴⁶ *Id.* at 756.

⁴⁷ *Id.*

⁴⁸ *See id.* at 756, 759.

⁴⁹ *Id.* at 759 (Garland, J., concurring in the judgment); *see also id.* at 759–62 (describing the interaction of the Act and the OSHA regulations at issue).

⁵⁰ *Id.* at 763.

⁵¹ *See id.* at 763–64 (citing *Postow v. OBA Fed. Sav. & Loan Ass’n*, 627 F.2d 1370, 1380 (D.C. Cir. 1980) (Consumer Credit Protection Act); *United States v. Clements*, 655 F.3d 1028, 1029 (9th Cir. 2011) (Sex Offender Registration and Notification Act); *United States v. Edelkind*, 525 F.3d 388, 393 (5th Cir. 2008) (18 U.S.C. § 228(a)(3) child support statute)).

⁵² *See id.* at 764.

⁵³ *Id.* at 769 (Brown, J., concurring).

⁵⁴ *See id.* at 765 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45, 866 (1984)).

⁵⁵ *Id.* at 767.

⁵⁶ *See id.*

the government's enforcement authority and . . . promot[ing] finality, repose, and the efficient and prompt administration of justice,"⁵⁷ Judge Brown discouraged future courts from "reflexively" granting *Chevron* deference for statutes of limitations.⁵⁸

Although Judge Brown's argument for withholding *Chevron* deference for agency interpretations of statutes of limitations draws from the Supreme Court's recent *Chevron* jurisprudence, it ultimately fails to account for the difficulties and costs that doing so would entail. Indeed, the general objections to *Mead*'s exceptions to *Chevron* apply with particular force to statutes of limitations. First, there is no coherent line to be drawn between, on the one hand, substantive provisions implicating policy concerns and thus meriting deference and, on the other hand, statutes of limitations implicating only straightforward legal questions and thus not deserving deference, even when they are ambiguous. Second, because ambiguous statutes of limitations are well suited to agencies' unique knowledge of their respective regulatory schemes, *Chevron* deference is appropriate. A faithful application of *Chevron* — in combination with existing constraints on agency behavior — can appropriately address the most serious fears of agency overreach.

Judge Brown's vision of *Chevron* as dependent on Congress's specific intent to delegate interpretive authority over particular issues — not simply all instances of ambiguity⁵⁹ — reflects the Supreme Court's recent jurisprudence⁶⁰ but was not *Chevron*'s inevitable application.⁶¹ The *Mead* doctrine's insistence, echoed by Judge Brown, that ambiguity requires an inquiry into congressional intent rather than a presumption that deference is appropriate⁶² represents Justice Breyer's triumph over Justice Scalia in defining *Chevron*'s scope.⁶³ However, *Mead* and

⁵⁷ *Id.* (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *Carter v. Wash. Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985)).

⁵⁸ *Id.* at 765; *see id.* at 768–69.

⁵⁹ *See id.* at 765 ("What makes an agency's interpretation of a provision special is that Congress has manifested its intent that the agency's interpretation of that provision *be* special. It is by Congress's 'delegation of authority to the agency to elucidate a specific provision of the statute' that an agency's interpretation is deserving of the court's deference." (quoting *Chevron*, 467 U.S. at 843–44)).

⁶⁰ *See, e.g.*, *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843–44 (2012) (plurality opinion); *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

⁶¹ *See* Sunstein, *supra* note 2, at 197–206.

⁶² *See* Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 348 (2003).

⁶³ *See* Sunstein, *supra* note 2, at 216–17. *See generally Mead*, 533 U.S. at 239–61 (Scalia, J., dissenting); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). *Mead*'s effect on the course of *Chevron* jurisprudence is difficult to overstate. *See, e.g.*, Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 807 (2002) ("[*Mead*] is the U.S. Supreme Court's most im-

the related idea of a *Chevron* Step Zero⁶⁴ have been criticized for unnecessarily increasing both the complexity of the *Chevron* inquiry and the decision costs of statutory interpretation.⁶⁵ Whatever the arguments for limiting *Chevron*'s scope in certain instances — an open question given the uncertainty of *Mead*'s contours⁶⁶ — the arguments against *Mead* apply powerfully to statutes of limitations and counsel strongly against expanding *Mead* to exempt statutes of limitations from deference. This issue is relevant not only to *AKM*, but also more broadly given the uncertainty among the circuit courts of appeals.⁶⁷

Because of the difficulty in demarcating whether an ambiguous statutory provision implicates only *durations* of time, or whether it also touches upon substantive grants of authority, it would be functionally difficult to carve out statutes of limitations from *Chevron* deference. As Judge Brown noted, statutes of limitations are “limitations on agency authority,”⁶⁸ and at least some statutes of limitations implicate agencies’ superior policy expertise, as recognized in D.C. Circuit precedent.⁶⁹ But the line between ambiguous statutes of limitations that simply circumscribe already-established substantive authority⁷⁰ and ambiguous statutes of limitations that help define the scope of substantive authority and thus present questions of policy is elusive, if not il-

portant pronouncement to date about the scope of the *Chevron* doctrine.”); Vermeule, *supra* note 62, at 348 (arguing that “*Mead* reverses [the] global presumption” in favor of ambiguity as delegation commonly held prior to *Mead*).

⁶⁴ The term “Step Zero” was introduced by Professors Thomas Merrill and Kristin Hickman and popularized in the legal lexicon by Professor Cass Sunstein. See Sunstein, *supra* note 2, at 191 & n.19; see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

⁶⁵ See, e.g., *Mead*, 533 U.S. at 245–46 (Scalia, J., dissenting); Sunstein, *supra* note 2, at 228–29; Vermeule, *supra* note 62, at 355–57. But see, e.g., Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203, 265–68 (2004) (finding such a limitation on *Chevron* desirable in some circumstances); Merrill, *supra* note 63, at 833–34 (concluding that “[o]n the whole, ‘the *Mead* doctrine’ is a sound development,” *id.* at 833).

⁶⁶ See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1474 (2005).

⁶⁷ See *AKM*, 675 F.3d at 768 (Brown, J., concurring) (collecting cases).

⁶⁸ *Id.* at 767.

⁶⁹ See *id.* (citing *Intermountain Ins. Serv. of Vail v. Comm’r*, 650 F.3d 691, 694, 707 (D.C. Cir. 2011)). Still, she argued, “many [statutes of limitations] do not” fit that mold. *Id.* Thus, the question — at least for Judge Brown — appears to be where to draw the line: what separates a statute of limitations that implicates policy expertise from one that does not? Certainly, as courts analyzing the issue have concluded, the presence of technical intricacies may be a useful way to identify a member of the former group. See *id.*; *Intermountain*, 650 F.3d at 707; *Asika v. Ashcroft*, 362 F.3d 264, 270 & n.8 (4th Cir. 2004). The absence of obvious technical intricacy, however, should not be taken to mean that policy expertise would not improve interpretation of a given statute of limitations or at least lead to a reasonable interpretation subject to review under *Chevron* Step Two.

⁷⁰ In considering this issue, it is crucial to recognize that when the statute of limitations at issue is clear, the *Chevron* inquiry ends at Step One, leaving no room for divergent agency interpretations. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

lusory.⁷¹ *AKM* demonstrates the point well: had Congress used a more ambiguous term than “occurrence” in defining the relevant time period, one could characterize the ambiguity as a matter of defining the nature of the activity that the Act was intended to address — a question of policy where the agency’s superior expertise and accountability support deference (so long as the agency’s interpretation is reasonable).

Another concern that Judge Brown raised as a reason against *Chevron* deference for statutes of limitations — agency self-aggrandizement⁷² — does not apply uniquely to statutes of limitations but rather is common to the majority of constraints that operate upon agencies. It is true that agencies often (though certainly not always) have an interest in increasing the scope of their authority.⁷³ But a great many ambiguities — whether in statutes of limitations, explicit jurisdictional provisions, or (as in *Chevron* itself) substantive provisions⁷⁴ — implicate whether an agency can or cannot do something that it wishes to do. Judge Brown’s contention that statutes of limitations are unique because they limit agencies “*even within* otherwise lawful bounds”⁷⁵ obfuscates the issue: any time more than one constraint operates on an agency, those constraints *together* define the lawful bounds. Indeed, one could establish the “lawful bounds” of what an agency may do by *first* prescribing the temporal limit — for instance, the agency may act only six months after any triggering event — and *then* defining the triggering event itself. The temporal

⁷¹ To make her argument, Judge Brown relied in part on an analogy to the dangers of allowing agencies to interpret jurisdictional provisions. See *AKM*, 675 F.3d at 766–67 (Brown, J., concurring). Although the debate over whether jurisdictional provisions deserve *Chevron* deference exceeds the scope of this comment, a similar ambiguity exists in distinguishing jurisdictional from substantive provisions. See, e.g., *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment) (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984)) (“[T]here is no discernible line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority. . . . Virtually any administrative action can be characterized as either the one or the other . . .”). The Supreme Court appears ready to address this issue, having recently granted certiorari in two cases for the October 2012 Term presenting the question whether *Chevron* should apply to agencies’ determinations of their own jurisdiction. See *Cable, Telecomms. & Tech. Comm. v. FCC*, Nos. 11-1545 & 11-1547, 2012 WL 4748084 (granting certiorari in *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012)).

⁷² See *AKM*, 675 F.3d at 767–68 (Brown, J., concurring) (“Statutes of limitations — being constraints on agency power — are qualitatively different than grants of plenary power. A statute of limitations uniquely limits when an agency may act — *even within* otherwise lawful bounds.”).

⁷³ See Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1502–07 (categorizing agency interpretations of jurisdictional provisions based on the increase, decrease, or modification of the agency’s power).

⁷⁴ See *Chevron*, 467 U.S. at 859 (discussing the contentions of the parties regarding the meaning of “source,” the answer to which controlled whether an agency regulation fell within the Clean Air Act’s authorization).

⁷⁵ *AKM*, 675 F.3d at 768 (Brown, J., concurring).

aspect of an ambiguous statute of limitations, if distinct, is not meaningfully so. Without that starting point, little of the rationale for withholding deference as a general rule remains.

Moreover, *Chevron*'s assumption of agency expertise is particularly relevant in the context of statutes of limitations, which are dependent on the nature of the scheme. Where the statute of limitations in question is truly ambiguous, a reasonable agency interpretation may be the most efficient way to approximate congressional intent, at least to the extent that it exists.⁷⁶ Notwithstanding that courts are "intimately familiar" with the task of interpreting statutes of limitations *generally*,⁷⁷ agencies benefit from their superior expertise relative to courts in understanding the *particular* statutory scheme at issue in a given case.⁷⁸ *Chevron* itself conveniently provides a simple and reliable method for drawing a line: in cases where Congress speaks relatively clearly, courts can rely on their routine exposure to statutes of limitations in the interpretive analysis; in cases of ambiguity, the ambiguity itself and the policy implications of resolving it suggest that the agency's particular expertise may prove most valuable. Judge Brown's analysis, moreover, proves too much — after all, courts routinely interpret all sorts of provisions, not merely statutes of limitations.

Notwithstanding the concerns about the uniqueness of statutes of limitations, creating a new exception to deference is unnecessary because *Chevron* and the structure of the administrative state already effectively constrain agency discretion. As the majority opinion in *AKM* itself demonstrates, a faithful application of *Chevron* can prevent agencies from reaching unacceptable results.⁷⁹ Although the Secretary's interpretation in *AKM* might have been an easy target for unreasonableness, who is to say that either a more ambiguous statute of limitations or a sufficiently reasonable interpretation by the agency

⁷⁶ Cf. Vermeule, *supra* note 62, at 356–57 ("Given that there is at least a substantial domain of cases that come out the same way under *Chevron* or *Skidmore*, the benefits of *Mead*'s fine-tuning of the applicable standards of review may be swamped by the extra predecision costs it creates." *Id.* at 357 (footnote omitted)).

⁷⁷ *AKM*, 675 F.3d at 767 (Brown, J., concurring).

⁷⁸ See, e.g., *Intermountain Ins. Serv. of Vail v. Comm'r*, 650 F.3d 691, 707 (D.C. Cir. 2011); *Asika v. Ashcroft*, 362 F.3d 264, 270 n.8 (4th Cir. 2004).

⁷⁹ See *AKM*, 675 F.3d at 755–59. This account, at least semantically, relies on the convenient fiction upon which *Chevron* deference itself is founded: that ambiguity constitutes a delegation. For a description (and criticism) of this fiction, see David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212–25; for a defense of the fiction, see Lisa Schultz Bressman, Essay, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2042–43 (2011). Although *Mead* can be read broadly to require more specific evidence of intent to delegate, the case itself focused on the process by which the agency reached its interpretation. See *United States v. Mead*, 533 U.S. 218, 231–34 (2001). This process-focused restriction on its face has nothing to do with whether the provision at issue is a statute of limitations or any other provision.

would be problematic? Insofar as *Chevron* itself “actively encourage[d] . . . agenc[ies] to adopt and further the policy agenda of the current President”⁸⁰ in cases of ambiguity, courts need not engage in an outcome-based analysis.⁸¹ Further, substantial obstacles outside the judiciary impede unacceptable agency self-dealing⁸²: namely, the political branches’ various abilities to direct, constrain, or impede agency actions.⁸³

Judge Brown’s attempt to tame *Chevron* is nothing novel; of even older vintage is the more general concern over inadequately constrained agency authority.⁸⁴ And given *Chevron*’s substantial shift of interpretive authority to administrative agencies,⁸⁵ judicial attempts to limit the doctrine’s scope are understandable. The variety of approaches taken by the circuit courts of appeals⁸⁶ certainly reflects this anxiety. Yet the questionable case against *Chevron* deference for statutes of limitations, combined with the costs of crafting and applying this new limitation, leads to the conclusion that neither the D.C. Circuit nor the other courts of appeals should further undermine the doctrine in this manner.

⁸⁰ Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 476 n.97 (1989) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984)); see also Sunstein, *supra* note 2, at 235–36 (describing one example of diverging but reasonable interpretations by agencies during the Bush and Clinton Administrations).

⁸¹ Even on an ends-based metric, agencies may — at least in the abstract — be preferable to courts as loci of discretion. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 592 (1985) (“[A] comparison of courts and agencies as lawmakers points to a general conclusion that agencies are more appropriate interpreters than courts . . .”); see also *id.* at 582–92 (comparing agencies to courts in several regards). Moreover, even in the *Chevron* analysis itself, the choice is likely not one between biased agencies and neutral courts. See generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (highlighting correlations between judges’ party affiliations and voting patterns in *Chevron* cases).

⁸² The qualifier “unacceptable” is used in the text because, as Professor Adrian Vermeule convincingly demonstrates, the ability to self-deal is present far more often in the American legal order, and is less inherently problematic, than popular belief dictates. See Adrian Vermeule, *Contra “Nemo Iudex in Sua Causa”* 1–4 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-31, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950230.

⁸³ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2257–60, 2284–303 (2001) (describing methods of congressional and presidential control).

⁸⁴ See, e.g., Administrative Procedure Act, Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243–44 (1946) (codified as amended at 5 U.S.C. § 706 (2006)). For a historical review of judicial and congressional attempts to establish a workable relationship between courts and agencies, see generally Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2001).

⁸⁵ See, e.g., Sunstein, *supra* note 2, at 189 (“*Chevron* seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is.”).

⁸⁶ See *AKM*, 675 F.3d at 768 (Brown, J., concurring) (collecting cases).