
THE TWO FACES OF CHEVRON

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,¹ the Supreme Court opinion that increased the level of deference given by courts to administrative agencies in their interpretation of statutory language, has generated a substantial body of legal scholarship.² A large portion of the scholarly ink spilled has been devoted to unearthing the principle that motivates the familiar two-step deference inquiry. The scholarship has settled into two roughly defined camps. One camp argues that *Chevron* is a separation of powers decision, designed to prevent the courts from interfering with tasks delegated by Congress to the executive branch — designed, in other words, to abide by and police congressional intent.³ The other camp believes that *Chevron* deference is driven by the greater competence and experience that agencies have relative to courts in interpreting the statutes the agencies are charged with implementing — what this Note refers to as “expertise.”⁴ Of course, there are also commentators who see both dynamics at work in *Chevron*.⁵

Almost all of these scholars view *Chevron* doctrine as a monolith, either by focusing entirely on the doctrine as developed in the Supreme Court or by treating applications of *Chevron* by the Supreme Court and the lower courts as threads in the seamless fabric of the law.⁶ It distorts the picture of *Chevron* doctrine to ignore the circuit courts of

¹ 467 U.S. 837 (1984).

² A Westlaw KeyCite search conducted March 5, 2007, yielded 6094 law review articles that have cited *Chevron*.

³ See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 389–90 (1986); David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 329–30 (2000); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 260 (1993); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739 (2002); Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 4 (1985); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 305 (1988); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

⁴ See, e.g., Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 (1985); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2084 (1990).

⁵ See, e.g., Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1264 (1999); Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995, 1022–23 (2005).

⁶ See, e.g., Hasen, *supra* note 3, at 339–62 (relying solely on Supreme Court cases); Sunstein, *supra* note 4, at 2084–91 (considering Supreme Court and lower court cases together). *But see, e.g.,* Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1457–75 (2005) (separately considering the application of *United States v. Mead Corp.*, 533 U.S. 218 (2001), in the courts of appeals).

appeals, the final stage of review for most *Chevron* cases.⁷ Moreover, disaggregating *Chevron* opinions by the courts that issue them reveals an interesting phenomenon: the Supreme Court's *Chevron* jurisprudence seems motivated primarily by separation of powers concerns, with agency expertise relevant only at the margins of the doctrine, whereas in the circuit courts, expertise plays a more central role in the deference decision.

Some divergence between the doctrine espoused by the Supreme Court and the doctrine as applied by the lower courts is to be expected. There are many cases to which Supreme Court precedent does not squarely apply, and the lower courts must fill in the gaps. Likewise, it would not be surprising to find some variation as different courts interpret the Supreme Court's sometimes vague language. But despite this doctrinal noise, a noticeable pattern emerges in the way that the courts of appeals apply *Chevron*: they have come to rely on agency expertise in more contexts, and more heavily, in deciding the degree of deference to provide to agency interpretations than the Supreme Court does. It is important to note, however, that the expertise-heavy *Chevron* inquiry is a plausible interpretation of the Supreme Court's jurisprudence — it is just not the way the Supreme Court has approached the inquiry. After considering a variety of explanations for the divergence in approaches, this Note concludes that the courts of appeals' reliance on expertise is highly pragmatic: the courts of appeals review agency interpretations with much greater frequency and in a greater variety of contexts than the Supreme Court does, and the consideration of expertise allows the lower courts more flexibility in dealing with this mass of cases.

This Note proceeds as follows. Part I discusses in detail the role that expertise has played in the Supreme Court's jurisprudence on the review of agency interpretations of statutes and concludes that a consideration of agency expertise comes into play only at the margins of the inquiry. In some circumstances, it may be considered as part of the *Mead*⁸ threshold test, and it is part of the *Skidmore*⁹ standard that applies if *Chevron* deference does not. Expertise also serves a non-functional role as an implied motivation for the congressional delegation to the agency that is the real focus of the Supreme Court's *Chevron* inquiry. Part II reviews the jurisprudence of the federal courts of appeals and finds three distinct ways in which they have given a more prominent role to expertise than the Supreme Court has. The courts

⁷ A Westlaw KeyCite search conducted on March 5, 2007, yielded 8579 federal court cases, 4386 of which were issued by the courts of appeals and only 177 of which were issued by the Supreme Court. The D.C. Circuit alone was responsible for 1070, or about 12.5%, of the opinions.

⁸ *Mead*, 533 U.S. 218.

⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

have looked to the degree of expertise an agency brings to bear in deciding whether that agency's interpretation is "reasonable" at Step Two of the *Chevron* inquiry; they have considered expertise as a factor in the *Mead* inquiry when deciding whether to apply *Chevron* at all; and they have, on occasion, collapsed the whole review process into a *Skidmore* inquiry, in which expertise plays a substantial role. Part II concludes with a rough empirical study of decisions in the D.C. Circuit, the nation's premier administrative law court, to show that these distinct approaches to *Chevron* are, in fact, a significant phenomenon. Finally, Part III discusses the possible reasons behind the lower courts' more expertise-heavy approach to *Chevron* and concludes that it is driven by a need to deal more flexibly with (and, in particular, to withhold deference more frequently from) the agencies, institutions they know better than the Supreme Court does.

I. THE SUPREME COURT'S *CHEVRON*

A. *From Skidmore to Chevron*

From the beginning of the modern era of the administrative state, the Supreme Court has recognized that in many areas agencies are in a better position than the courts to understand what Congress meant by the statutes they are called upon to execute. Writing for the Court in *Skidmore*, Justice Jackson held that although the determination of statutory meaning was ultimately in the hands of the judiciary, an agency's interpretation might have the "power to persuade" depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," and other factors.¹⁰ In addition to providing these decisionmaking criteria, Justice Jackson noted that agency "rulings, interpretations and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."¹¹

Under *Skidmore*, deference to agency interpretations of statutes was largely guided by the court's view of whether an agency stood in a better position than the court itself to interpret the statute because of factors like experience, technical knowledge, and proximity to the facts on the ground — in other words, *expertise* in the area of concern. Justice Jackson's focus on the agency decisionmaking process also demonstrates the importance the Court placed on the agency's application of its expertise in answering the interpretative question. The earliest evidence that the Supreme Court's *Chevron* jurisprudence is focused more on separation of powers than on agency expertise is the fact that

¹⁰ *Id.* at 140.

¹¹ *Id.*

the *Chevron* decision ended the era of the expertise-heavy *Skidmore* approach.

In *Chevron* the Court was faced with a dispute over the best interpretation of the phrase “major stationary sources” in the Clean Air Act Amendments of 1977.¹² One interpretation was that “source” referred to any new source of pollution; another (known as the “bubble concept”) was that “source” referred to only a net increase in the amount of pollution generated by a plant.¹³ The EPA had switched from the former definition to the latter when the Reagan Administration took over, and several environmental groups sued.¹⁴ The Court upheld the agency’s interpretation of the statute.¹⁵

The Court could easily have held for the agency under the *Skidmore* test. The statutory provision at issue raised questions that demanded knowledge of engineering, environmental science, and industry economics. The EPA was much better situated than the Court to determine where to draw the line for permissible new pollution. But instead of engaging in a multifactor inquiry into the EPA’s competence and decisionmaking process, Justice Stevens devised the now-famous *Chevron* two-step inquiry. First, courts should determine if Congress had spoken clearly to the question at issue: “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁶ If the statute is ambiguous or silent,¹⁷ however, the court should proceed to Step Two and determine whether “the agency’s answer is based on a permissible construction of the statute.”¹⁸ Finding the statute ambiguous and the EPA’s bubble concept a reasonable interpretation of “major stationary sources,” the *Chevron* Court upheld the agency’s interpretation.¹⁹

After *Chevron*, the focus was squarely on congressional intent — in the first instance on whether the intent was clear and in the second in-

¹² Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.); see *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 848–51 (1984).

¹³ See *Chevron*, 467 U.S. at 839–41.

¹⁴ See *id.* at 840–41, 857–58.

¹⁵ *Id.* at 866.

¹⁶ *Id.* at 842–43.

¹⁷ The Court made clear that the congressional decision to leave an interpretative decision to the executing agency could be either explicit or implicit. See *id.* at 843–44.

¹⁸ *Id.* at 843. Justice Stevens alluded to two other formulations of Step Two. When Congress has explicitly left a gap for the agency to fill, the agency’s interpretation will be overturned only if “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 844. Furthermore, Justice Stevens appears to have used the terms “reasonable” and “permissible construction” interchangeably. See, e.g., *id.* at 843, 845. This Note, following most of the subsequent case law, also treats “reasonable” and “permissible construction” as synonymous, but recognizes the different character of the arbitrary and capricious test. See *infra* section I.D, pp. 1568–70.

¹⁹ See *Chevron*, 467 U.S. at 845, 866.

stance on whether the agency's interpretation was within the bounds defined by Congress's implicit or explicit delegation. Factors like the agency's experience and technical knowledge were no longer important to the decision whether to defer in the face of such ambiguity: after *Chevron*, the fact that Congress had delegated authority to the agency to administer the statute rendered the agency's competence in making the interpretation moot.

B. Expertise as an Imputed Congressional Motivation

One barrier to reading the Supreme Court's *Chevron* jurisprudence as centered on separation of powers rather than expertise is that Justice Stevens explicitly referred to the agency's expertise in his majority opinion in *Chevron* itself. First, he wrote that Congress may have decided to give the EPA, with its "great expertise," the responsibility of accommodating competing interests when "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies."²⁰ Second, he noted that "[j]udges are not experts" in fields like pollution control, implying that agencies do have such expertise.²¹ But a careful reading reveals that Justice Stevens was not relying on the EPA's expertise in holding that the agency's interpretation was valid; rather, he was imputing agency expertise as a possible motivation for Congress's delegation of authority to the EPA. After noting that judges are not experts, Justice Stevens also stated that they "are not part of either political branch of the Government."²² Agencies, by contrast, have been "delegated policy-making responsibilities" by Congress and "rely upon the incumbent administration's views of wise policy."²³ The agency's actual expertise does no work in the decision to give deference; indeed, the Court did not inquire into the expertise of the EPA, but rather assumed it.²⁴ *Chevron*'s references to expertise are thus best viewed as projecting motivations onto Congress in an attempt to explain the congressional delegation that is really at the heart of the inquiry.

C. Chevron Step One

Step One is, on its own terms, about congressional intent: the inquiry is focused on whether Congress has clearly indicated its view of the appropriate interpretation of the disputed statutory language. Ordinarily, the Supreme Court answers this question based on the statu-

²⁰ *Id.* at 865 (footnotes omitted).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *See id.*

tory language itself²⁵ or by using traditional and accepted tools of statutory interpretation.²⁶ The agency's expertise certainly has no relevance to this step in the Supreme Court's doctrine, and the emphasis on divining congressional intent evinces a desire both to protect the legislation from misapplication by the executive agency and to protect Congress's instructions to the Executive from interference by the courts. In other words, Step One serves a separation of powers function in which agency expertise has no place.

Even when the Court backs away from a textual approach in Step One, its focus remains on Congress and not on the agency. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,²⁷ the Court considered a challenge to the FDA's interpretation of a section of the Federal Food, Drug, and Cosmetics Act²⁸ (FDCA) that would have subjected cigarettes to FDA regulation. The statute gives the FDA the authority to regulate "drugs" and "devices."²⁹ It defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body,"³⁰ and it defines "device" as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is . . . intended to affect the structure or any function of the body."³¹ It was the FDA's position that cigarettes were "drug delivery devices" for the "drug" nicotine.³² Without so much as mentioning the FDA's relative expertise in determining what constituted a drug or a drug delivery device, Justice O'Connor held that Congress clearly had not intended for the FDA to regulate cigarettes pursuant to the FDCA, and rejected the agency's interpretation at the first step of the *Chevron* inquiry.³³ The dissenting Justices rightly criticized the methods of statutory construction that Justice O'Connor employed in determining that Congress spoke clearly on the question at issue,³⁴ but they too neglected the agency's technical knowledge and experience with drug

²⁵ See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 227-30 (1994).

²⁶ See, e.g., *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 980-81 (1986).

²⁷ 529 U.S. 120 (2000).

²⁸ 21 U.S.C.A §§ 301-399 (West 1999 & Supp. 2006).

²⁹ See *id.* §§ 321(g)-(h), 393.

³⁰ *Id.* § 321(g)(1)(C).

³¹ *Id.* § 321(h).

³² *Brown & Williamson*, 529 U.S. at 127 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,418, 44,397, 44,402 (Aug. 28, 1996)).

³³ *Id.* at 161. *Brown & Williamson* was decided prior to *Mead*, so the Court went straight to *Chevron* Step One without considering whether the *Chevron* inquiry was appropriate. Because the decision was made through statutorily permitted informal rulemaking, see *id.* at 125-27, the Court would have undoubtedly applied the *Chevron* inquiry after *Mead* as well.

³⁴ See, e.g., *id.* at 181-82 (Breyer, J., dissenting) (criticizing the majority's use of subsequent legislative history to inform the interpretation of the FDCA).

definitions in arguing for the FDA's ability to regulate tobacco products.³⁵ The debate is over congressional intent and how it is best divined — a core separation of powers concern — and not over which institution (the Court or the agency) is in the best position to make the determination.

D. Chevron Step Two

At *Chevron's* second step the Court, having divined no clear congressional intent, decides whether the agency's interpretation is "reasonable" or a "permissible construction" of the ambiguous language.³⁶ In the Supreme Court's jurisprudence, this decision is typically based on a comparison of the agency's interpretation with the language of the statute and sometimes also with the legislative history and legislative purpose of the statute.³⁷ As in Step One, the emphasis here is on a core separation of powers concern: ensuring that Congress's delegation to the agency is honored by the agency and protected from interference by the judiciary.³⁸ Nevertheless, many commentators have argued that expertise plays a role at Step Two in the Supreme Court's *Chevron* jurisprudence.³⁹ There are two reasons for this, neither of which holds up to scrutiny.

³⁵ See *id.* at 171–80.

³⁶ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 845 (1984).

³⁷ See, e.g., *Rapanos v. United States*, 126 S. Ct. 2208, 2220–21 (2006) (plurality opinion) (rejecting the agency's interpretation at Step Two for going beyond any permissible reading of ambiguous statutory terms); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485–86 (2001) (finding the agency's interpretation impermissible because it nullified portions of the statute); *Lopez v. Davis*, 531 U.S. 230, 242–44 (2001) (finding the agency's interpretation permissible based on the "revealed design" of the statute (quoting *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995)) (internal quotation mark omitted)); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389–92 (1999) (rejecting the agency's interpretation as inconsistent with the fair meaning of the statutory language and inconsistent with other statutory terms); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704–07 (1995) (citing legislative history in support of the position that the agency's interpretation was a permissible construction of the statute); *IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 929–31 (1990) (rejecting the agency's interpretation at Step Two because it was "not reasonable" in light of language elsewhere in the statute).

³⁸ See, e.g., *Lopez*, 531 U.S. at 242 ("[W]here Congress has enacted a law that does not answer 'the precise question at issue,' all we must decide is whether . . . the agency empowered to administer the [statute] has filled the statutory gap 'in a way that is reasonable in light of the legislature's revealed design.'" (quoting *NationsBank*, 513 U.S. at 257)).

³⁹ See, e.g., ABA Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 38 (2002); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997); Mark Seidenfeld, *A Synco-pated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 128–30 (1994); Laurence H. Silberman, *Chevron — The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 827–28 (1990).

First, in one line of the *Chevron* opinion itself, Justice Stevens described the second step using the phrase “arbitrary [and] capricious.”⁴⁰ This phrase has a set meaning to students of administrative law, who will recognize it as the default form of review of agency action established by the Administrative Procedure Act⁴¹ (APA) and defined by the Supreme Court in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*⁴² to include a determination of whether the agency has applied its expertise in deciding upon its action.⁴³ The Supreme Court does not, however, use Step Two as the equivalent of the arbitrary and capricious test. Two further considerations demonstrate this point. The first is that in the *Chevron* opinion itself, Justice Stevens limited the arbitrary and capricious version of Step Two to situations in which Congress has explicitly given the agency the authority to give meaning to the statutory language.⁴⁴ In such a situation, the issue is not the accord between the agency’s interpretation and the statutory language because the statutory language leaves the interpretation entirely up to the agency. The question is instead one of the rationality of the agency’s action, and judicial review reverts to the default arbitrary and capricious test. The second and probably more important consideration is that, in 177 agency interpretation decisions since *Chevron*, the Court has associated Step Two with the arbitrary and capricious test only five times.⁴⁵ These few references to the arbitrary and capricious test may have opened the door for the lower courts to use the test as part of *Chevron*’s second step, but they do not establish that the Supreme Court incorporates agency expertise in that way.

The second potential reason that scholars have viewed the Supreme Court’s version of Step Two as including some consideration of agency expertise is a set of passing references in *Chevron*’s progeny to exper-

⁴⁰ *Chevron*, 467 U.S. at 844.

⁴¹ 5 U.S.C. § 706(2)(A) (2000).

⁴² 463 U.S. 29 (1983).

⁴³ See *id.* at 43 (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action.”).

⁴⁴ See *Chevron*, 467 U.S. at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

⁴⁵ See *Lopez v. Davis*, 531 U.S. 230, 240 (2001); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *Sullivan v. Strop*, 496 U.S. 478, 495–96 (1990); *Atkins v. Rivera*, 477 U.S. 154, 162 (1986); *Bennett v. Ky. Dept. of Educ.*, 470 U.S. 656, 670 (1985). In *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), the Court upheld an FDA interpretation at Step Two because it was “sufficiently rational to preclude a court from substituting its judgment,” but focused on the relationship between the FDA’s interpretation and congressional intent, rather than engaging in an arbitrary and capricious analysis. *Id.* at 981. After describing *Chevron* Step Two, the Court in *Mead* gave a “cf.” citation to 5 U.S.C. § 706(2)(A), but ultimately decided that *Chevron* did not apply. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

tise in connection with the second step. For example, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,⁴⁶ the Court upheld the Secretary of the Interior's definition of the word "harm" in a section of the Endangered Species Act of 1973⁴⁷ (ESA) to include "habitat modification that results in actual injury or death to members of an endangered species."⁴⁸ After denying the petitioner's claim that the ESA clearly precluded the Secretary's definition,⁴⁹ the Court held that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."⁵⁰ Thus, the Court seemed to base its holding, at least in part, on the Secretary's expertise. In fact, however, this reference to expertise is much like the Court's reference to expertise in *Chevron*. For one thing, the Secretary's expertise is assumed — it is not actually a part of the inquiry. Although a few lines of text are dedicated to the discussion of expertise,⁵¹ the Court spent the bulk of its opinion analyzing Congress's intent, including four pages on the legislative history of the ESA.⁵² Moreover, as in *Chevron* the Court couched its discussion of expertise in the language of separation of powers. Although the Court noted that "[t]he task of defining and listing endangered and threatened species requires . . . expertise," the basis of its deference was the assertion that "Congress has entrusted the Secretary with broad discretion," making the Court "reluctant to substitute [its] views of wise policy for his."⁵³ Expertise was in the background, as an implied justification for Congress's delegation of the interpretational authority to the agency, but it carried no decisional weight.

E. Mead and the Reintroduction of Expertise

The Supreme Court reintroduced a consideration of expertise in *United States v. Mead Corp.* by reincorporating *Skidmore* into the web of *Chevron* doctrine. *Mead* also opened the door for further consideration of expertise in the threshold decision whether *Skidmore* or *Chevron* applies to a given case. But both situations are at the margins of the doctrine; for the Supreme Court, separation of powers is still the central concern.

⁴⁶ 515 U.S. 687 (1995).

⁴⁷ 16 U.S.C. §§ 1531–1544 (2000 & Supp. IV 2004).

⁴⁸ *Sweet Home*, 515 U.S. at 687; see also 50 C.F.R. § 17.3 (2006) (interpreting the word "harm" in 16 U.S.C. § 1532(19), which provides a definition for the word "take" in the ESA).

⁴⁹ See *Sweet Home*, 515 U.S. at 696–703.

⁵⁰ *Id.* at 703.

⁵¹ See *id.* at 703, 708.

⁵² See *id.* at 704–08.

⁵³ *Id.* at 708.

In *Mead*, the Customs Service had issued a ruling letter stating that the Mead Corporation's day planners were not included in a statutory category that was exempt from duties.⁵⁴ The Supreme Court, in an opinion by Justice Souter, held that the Customs Service was not entitled to *Chevron* deference for its ruling letter.⁵⁵ In coming to this conclusion, the majority employed what some have called "*Chevron* Step Zero"⁵⁶: before deciding whether Congress has spoken directly to the question at issue (Step One), a reviewing court must determine whether the agency advanced its interpretation in the type of agency action that merits deference.⁵⁷ The *Mead* inquiry focuses on whether "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."⁵⁸ If the agency acted through formal or informal rule-making procedures, or through formal adjudication (the so-called *Mead* safe harbors⁵⁹), then the delegation of law-like authority is presumed.⁶⁰ If not, as in the case of the Custom Service's ruling letter, the reviewing court can still apply *Chevron* if it finds other indicia of such a delegation.⁶¹ Because the ruling letters were not issued under one of the safe harbors and because it did not find other indicia of a "force of law" delegation, the *Mead* Court did not apply *Chevron*.⁶² This was not the end of the inquiry, however, because the Court held that the agency may be entitled to *Skidmore* deference even when *Chevron* does not apply.⁶³ Accordingly, the Court remanded to the Federal Circuit for a determination of whether *Skidmore* deference was appropriate.⁶⁴ As discussed above, one of the factors in the *Skidmore* deference test is expertise,⁶⁵ by creating a place for *Skidmore* deference in *Chevron*, the Court reintroduced a consideration of expertise into the doctrine.

In *Barnhart v. Walton*,⁶⁶ the Court also stated that expertise could be a part of the *Mead* inquiry into whether *Chevron* or *Skidmore* is the appropriate standard for deference. The plaintiff in *Walton* challenged the Social Security Administration's denial of his applications for dis-

⁵⁴ United States v. Mead Corp., 533 U.S. 218, 225 (2001).

⁵⁵ *Id.* at 226–27.

⁵⁶ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

⁵⁷ See *Mead*, 533 U.S. at 229–30.

⁵⁸ *Id.* at 229.

⁵⁹ See *id.* at 246 (Scalia, J., dissenting) ("[I]nformal rulemaking and formal adjudication are the only more-or-less safe harbors from the storm the Court has unleashed . . .").

⁶⁰ See *id.* at 229–30 (majority opinion).

⁶¹ See *id.* at 231.

⁶² See *id.* at 231–34.

⁶³ See *id.* at 234–35.

⁶⁴ *Id.* at 238–39.

⁶⁵ See *supra* pp. 1564–65.

⁶⁶ 535 U.S. 212 (2002).

ability insurance benefits and Supplemental Security Income.⁶⁷ The Social Security Act⁶⁸ authorizes such payments to individuals who have an “inability to engage in any substantial gainful activity by reason of any medically determinable . . . impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months.”⁶⁹ The Administration found that Walton’s inability to work had lasted only eleven months and denied him benefits.⁷⁰ Writing for the Court, Justice Breyer held that the statute was silent as to whether the twelve-month limitation applied to the impairment or to the inability to work, and that the Court would defer to the Administration’s reasonable interpretation in the face of such congressional silence.⁷¹ In addressing the *Mead* step, the *Walton* Court found that the regulation was not issued through the safe harbor of notice-and-comment rulemaking.⁷² But the Court went on to state that “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” nevertheless entitled the Administration to *Chevron* deference.⁷³ Thus, the Court paved the way for a limited consideration of expertise at the *Mead* stage for cases in which the agency did not protect its interpretation by employing a safe harbor.

Mead and *Walton* created space for the consideration of expertise in *Chevron* jurisprudence, but the role of expertise is still marginal in the Supreme Court’s own jurisprudence for two reasons. First, expertise is not considered until the agency’s interpretation fails some other test that is based on congressional intent. The use of expertise in the *Mead* inquiry is appropriate only when the agency has not issued its interpretation through a safe harbor, which the Court in *Mead* recognized as a clear indication that Congress intended to delegate to the agency the ability to interpret with the force of law. The *Walton* expertise inquiry aims to determine whether the required congressional delegation has occurred — not whether the agency is competent to interpret the statute. And *Skidmore* is available only if the reviewing court finds that Congress has not delegated authority to make interpretations with the force of law — in other words, when there are no concerns about separation of powers because the agency is acting of its

⁶⁷ *Id.* at 215.

⁶⁸ 42 U.S.C. §§ 301–1397jj (2000).

⁶⁹ *Id.* § 423(d)(1)(A); *see also id.* § 1382c(a)(3)(A).

⁷⁰ *Walton*, 535 U.S. at 215.

⁷¹ *See id.* at 218–20.

⁷² *See id.* at 221.

⁷³ *Id.* at 222.

own accord and not as Congress's delegee. Second, these expertise factors can be characterized as marginal because the Supreme Court has heard thirty *Chevron* cases since *Mead* was issued, but it has only mentioned expertise at Step Zero in *Walton* and has never employed *Skidmore* to review an agency interpretation of a statute.⁷⁴ Granted, the time since the *Mead* decision has been relatively short, but if nothing else, this silence indicates the secondary, fallback nature of the situations in which expertise becomes relevant.

F. Summary

With the advent of *Mead* and *Walton*, the Court has elaborated a fairly clear decision tree for adjudicating disputes over agency interpretations of statutes. First, the reviewing court should determine whether Congress intended to delegate law-like authority to the agency and whether the interpretation was promulgated in exercise of that authority. If so, the court must evaluate whether Congress has spoken clearly to the question at issue; if there is ambiguity or silence regarding the question, then any reasonable agency interpretation will be accepted. If there is no congressional intent to delegate law-like authority, then the agency is still entitled to deference under *Skidmore* if the context of its interpretation generates the "power to persuade." There are two points on this decision tree at which expertise plays a role: at "Step Zero," as one of several factors to consider if the agency's interpretation is not promulgated through a safe harbor; and as one factor in the *Skidmore* inquiry if the agency is not entitled to *Chevron* deference. Expertise also occasionally appears as an assumed motivation for Congress's delegation to the agency, although in this form it does no decisional work. Apart from these marginal applications of expertise, the Supreme Court's *Chevron* jurisprudence is rooted in congressional intent and the concomitant principle of separation of powers.

II. CHEVRON IN THE COURTS OF APPEALS

A review of *Chevron* cases in the courts of appeals reveals three distinct ways in which the lower courts take a more expertise-focused approach to *Chevron* than the Supreme Court does. First, the courts of appeals are more inclined to incorporate expertise into *Chevron* Step Two, in many instances by associating Step Two with the arbitrary and capricious test. Second, the lower courts use expertise in the *Mead* inquiry even when the agency's interpretation is advanced through a safe harbor. Finally, since the reincorporation of *Skidmore* via the *Mead* decision, the courts of appeals have occasionally col-

⁷⁴ The only case since *Mead* in which the Court has applied *Skidmore* is *Gonzales v. Oregon*, 126 S. Ct. 904, 922 (2006), which involved an interpretation of a regulation, not a statute.

lapsed the whole deference inquiry into a determination of whether the *Skidmore* test is satisfied, ignoring the Supreme Court's *Chevron* process entirely. After providing examples and analysis of each of these aspects of *Chevron* as applied by the courts of appeals, this Part concludes with a rough empirical analysis of their frequency in the D.C. Circuit.

A. *Expertise in the Determination of "Reasonableness"*

The D.C. Circuit appears to be particularly inclined to introduce a consideration of agency expertise into *Chevron* Step Two, the determination of the reasonableness of the agency's interpretation. In *Verizon Telephone Cos. v. FCC*,⁷⁵ for example, Judge Tatel noted that at *Chevron* Step Two the court's "deference is particularly great where . . . the issues involve 'a high level of technical expertise in an area of rapidly changing technological and competitive circumstances.'"⁷⁶ The D.C. Circuit has also made expertise a part of its Step Two inquiry in more subtle ways. Not long after *Chevron*, the D.C. Circuit began to demand an agency record of "reasoned analysis" as a part of the *Chevron* Step Two determination when the agency's interpretation represented a change from a previous interpretation.⁷⁷ The requirement of such a record seems to flow from Justice Stevens's reference to the arbitrary and capricious standard in *Chevron*.⁷⁸ A record of the agency's decisionmaking process is crucial to the determination under the arbitrary and capricious test of whether the agency came to its decision through a rational process.⁷⁹ But, as discussed above, *Chevron* described only a limited use of the arbitrary and capricious test at Step Two, and the Supreme Court has been even more reluctant to apply it in practice.⁸⁰ The courts of appeals, and the D.C. Circuit in particular, have more freely used the arbitrary and capricious standard and the requirement of a record. The D.C. Circuit's recent opinion in *Alabama Education Ass'n v. Chao*,⁸¹ a challenge to the Department of Labor's rule reinterpreting the Labor-Management Reporting and Disclosure Act of 1959⁸² (LMRDA) to require annual financial statements from wholly public-sector labor organizations, provides an example.

The litigation in *Alabama Education Ass'n* focused on a clause in the LMRDA that placed "a conference, general committee, joint or sys-

⁷⁵ 292 F.3d 903 (D.C. Cir. 2002).

⁷⁶ *Id.* at 909 (quoting *Sprint Commc'ns Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001)).

⁷⁷ See *AFL-CIO v. Brock*, 835 F.2d 912, 917 (D.C. Cir. 1987).

⁷⁸ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁷⁹ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸⁰ See *supra* notes 44-45 and accompanying text.

⁸¹ 455 F.3d 386 (D.C. Cir. 2006).

⁸² Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 42 U.S.C.).

tem board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of [the section]” within the group of organizations required to file a financial statement under the Act.⁸³ A “labor organization engaged in an industry affecting commerce” was limited by this and other sections of the Act to those whose members include private sector employees.⁸⁴ From 1963 until 2002, the Department of Labor interpreted these sections to mean that an organization representing only government employees was not required to file a financial statement.⁸⁵ In 2002, however, the Department issued a notice of proposed rulemaking that reinterpreted the clause at issue to mean that a conference, etc., composed entirely of public employees would be subject to the financial statement requirement if it were subordinate to a national or international labor organization that represented private sector employees.⁸⁶ Essentially, the Department had changed its reading so that the clause “which includes a labor organization [etc.]” modified “a national or international labor organization” and not “a conference, general committee, [etc.]”⁸⁷

The panel, in an opinion written by Chief Judge Ginsburg, found that *Chevron* applied to the proposed rule⁸⁸ and that under *Chevron* Step One the statute was ambiguous as to whether “a body without private sector members may be subject to the LMRDA if it is subordinate to or part of a larger organization that does have private sector members.”⁸⁹ Moving to Step Two, Chief Judge Ginsburg held that “the Department’s position that the ‘which includes . . .’ clause modifies the phrase immediately preceding it is, from a purely grammatical standpoint, by no means an impermissible one.”⁹⁰ Under *Chevron* doctrine as espoused and applied by the Supreme Court, this would end the inquiry. But the Chief Judge continued, under Step Two, to analyze whether the Department’s new interpretation was supported by “reasoned analysis” and determined that it was not.⁹¹ The court concluded that the Department’s statement in the Federal Register regard-

⁸³ *Id.* § 402(j)(5); *see also id.* §§ 402(i), 431(b).

⁸⁴ *See id.* § 402(j)(1)–(4) (describing organizations representing “employees”); *see also id.* § 402(e), (f) (defining “employer” to exclude “any State or subdivision thereof” and “employee” to include only those employed by an “employer”).

⁸⁵ *Ala. Educ. Ass’n*, 455 F.3d at 390 (citing 29 C.F.R. § 451.3(a)(4) (2006)).

⁸⁶ *Id.* (citing Labor Organization Annual Financial Reports, 67 Fed. Reg. 79,280, 79,284 (Dec. 27, 2002) (codified at 29 C.F.R. pts. 403, 408)).

⁸⁷ *See id.*

⁸⁸ *Id.* at 393. The court held that the proposed rule came under the Department’s statutory authority to “promulgate rules ‘prevent[ing] the circumvention or evasion of [the statutory] reporting requirements.’” *Id.* (quoting 29 U.S.C. § 438 (2000)) (alterations in original).

⁸⁹ *Id.* at 395.

⁹⁰ *Id.* at 396 (omission in original).

⁹¹ *See id.* at 396–97.

ing its notice of proposed rulemaking suggested that it had adopted the interpretation to conform to a decision of a panel of the Ninth Circuit, rather than relying on its own reasoned judgment.⁹² Accordingly, the court remanded to the Department “for a reasoned explanation of [the] change.”⁹³

Requiring a “reasoned explanation” for a new interpretation, while not obviously counter to *Chevron* doctrine, does not seem to comport fully with how the Supreme Court has applied this doctrine. Having found that the agency has authority under *Mead* and that Congress had not itself spoken clearly to the question, the Supreme Court’s decisions indicate that it would uphold any agency interpretation consistent with the statute’s language and structure.⁹⁴ The court in *Alabama Education Ass’n* found that the text would bear the Department’s interpretation, but it still remanded to get more information on how the Department came up with its interpretation. The reasons why the agency came to its interpretation do not seem to matter under the Supreme Court’s *Chevron* doctrine, but they were dispositive for the D.C. Circuit.

B. Expertise at the Mead Step

As described above, *Chevron* doctrine contains a threshold inquiry into whether *Chevron* applies at all. According to *Mead*, only those agency interpretations that are promulgated pursuant to a congressional delegation of authority are entitled to *Chevron* deference.⁹⁵ In deciding whether such a delegation has occurred, courts are to look to the procedures by which the agency promulgated the interpretation (informal or formal rulemaking and formal adjudication indicate such a delegation) and other indicia of congressional intent.⁹⁶ In *Walton*, the Court suggested that agency expertise could be a factor in the *Mead* inquiry when the interpretation was not promulgated through safe harbor procedures.⁹⁷ Not surprisingly, then, a number of courts have employed expertise as a factor in the absence of a safe harbor.⁹⁸

⁹² See *id.* at 397 (citing 67 Fed. Reg. 79,280, 79,284 (Dec. 27, 2002) (codified at 29 C.F.R. pts. 403, 408)).

⁹³ *Id.* (quoting *AFL-CIO v. Brock*, 835 F.2d 912, 920 (D.C. Cir. 1987)) (internal quotation mark omitted).

⁹⁴ See *supra* notes 37–38 and accompanying text.

⁹⁵ See *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001).

⁹⁶ See *id.* at 229–31.

⁹⁷ See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

⁹⁸ See, e.g., *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 61 (2d Cir. 2004) (applying *Chevron* deference to a Department of Housing and Urban Development (HUD) Statement of Policy that was not promulgated through notice-and-comment rulemaking, in part because of HUD’s expertise in real estate settlement fees and home mortgage lending); *Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 281–82 (3d Cir. 2002) (applying *Chevron* deference to Department of Health and Human Services interpretative guidelines because of the Department’s

However, lower courts have also shown a willingness to go beyond the limited use of expertise that *Walton* prescribes and have brought expertise to the center of the *Mead* inquiry, without regard to the agency's use of a safe harbor.

A nice illustration of this scenario is provided by *Patel v. Ashcroft*.⁹⁹ In *Patel*, the Third Circuit reviewed the decision of an immigration judge (IJ) who ordered Patel, a permanent resident, removed to India based on his conviction for harboring an alien.¹⁰⁰ The IJ found that harboring an alien constituted an "aggravated felony" under the Immigration and Nationality Act¹⁰¹ (INA) and that the conviction rendered Patel removable.¹⁰² The Board of Immigration Appeals (BIA) affirmed.¹⁰³ The Third Circuit upheld the IJ's interpretation of the statute, but not before casting doubt on the applicability of *Chevron*.¹⁰⁴ The court stated that, when considering "legal issues that turn on a pure question of law not implicating the agency's expertise," it will "decide the issue de novo without deferring to an administrative agency that may be involved."¹⁰⁵ It characterized the interpretation of "aggravated felony" as such a situation.¹⁰⁶ Although the Supreme Court had recently held in *INS v. Aguirre-Aguirre*¹⁰⁷ that the Ninth Circuit should have applied the *Chevron* inquiry to the BIA's interpretation of an INA provision dealing with the characterization of foreign criminal convictions,¹⁰⁸ the *Patel* court distinguished that decision by noting that Patel's case did not raise the same foreign relations concerns.¹⁰⁹ However, despite these assertions, the court declined to decide whether *Chevron* applied, saying that the "result would be the

expertise); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1011–13 (9th Cir. 2002) (applying *Chevron* deference to the same HUD Statement of Policy at issue in *Kruse*, partly because of HUD's "expertise in the home mortgage lending industry"). *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002), denied *Chevron* deference to the same HUD Statement of Policy at issue in *Kruse* and *Schuetz*, but did so using the same expertise-focused inquiry. *See id.* at 879; *see also* Bressman, *supra* note 6, at 1459–61.

⁹⁹ 294 F.3d 465 (3d Cir. 2002), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (changing jurisdictional scheme), *as recognized in* *Kamara v. Attorney Gen.*, 420 F.3d 202, 209–10 (3d Cir. 2005).

¹⁰⁰ *Id.* at 466.

¹⁰¹ 8 U.S.C. § 1101(a)(43)(N) (2000).

¹⁰² *Patel*, 294 F.3d at 466.

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 466–68, 473. The decision was handed down after the Supreme Court's decision in *Mead*, but the court did not cite that case in evaluating whether *Chevron* was applicable.

¹⁰⁵ *Id.* at 467.

¹⁰⁶ *Id.*

¹⁰⁷ 526 U.S. 415 (1999).

¹⁰⁸ *Id.* at 424–25.

¹⁰⁹ *Patel*, 294 F.3d at 467–68 ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations." (quoting *Aguirre-Aguirre*, 526 U.S. at 422)).

same whether we afford the BIA's statutory interpretation deferential or *de novo* review."¹¹⁰

Although the Third Circuit avoided a formal holding that *Chevron* did not apply, it evaluated the BIA's interpretation without following the *Chevron* framework. In general, "[w]here the BIA simply affirms the *results* of an IJ's decision without issuing its own opinion, . . . the *Mead* test is not met."¹¹¹ But because the interpretation that the IJ used in deciding Patel's case was developed through formal adjudication — a *Mead* safe harbor — the Supreme Court likely would have held that *Chevron* applied under *Mead* and *Walton*, regardless of the agency's expertise.¹¹² Indeed, the court acknowledged that *Aguirre-Aguirre*, a seemingly on-point Supreme Court decision, had applied *Chevron*. The Third Circuit distinguished *Aguirre-Aguirre* by again focusing on relative expertise: it noted that the characterization of foreign criminal convictions required competence in foreign relations that courts did not possess, whereas no special competence was necessary to characterize the domestic conviction at issue in *Patel*.¹¹³ As in the case of the lower courts' application of Step Two, the *Patel* court's use of expertise was not clearly contrary to the Supreme Court's *Chevron* doctrine, but it brought expertise to the fore in a way that the Supreme Court has not.

C. *The Collapse into Skidmore Deference*

Another phenomenon that has arisen since *Mead* is the decision by lower courts to refrain from deciding whether *Chevron* or *Skidmore* applies and merely to find the agency's interpretation persuasive under the "less deferential" *Skidmore* standard. Professor Lisa Schultz Bressman identifies two different versions of this phenomenon, which she calls "*Chevron* avoidance."¹¹⁴ In one type of *Chevron* avoidance, the court simply decides the case under *Skidmore*.¹¹⁵ For example, in *Pension Benefit Guaranty Corp. v. Wilson N. Jones Memorial Hospital*,¹¹⁶ the Fifth Circuit refused to decide whether *Chevron* or

¹¹⁰ *Id.* at 468.

¹¹¹ *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 922 (9th Cir. 2006).

¹¹² The IJ followed formal BIA precedent in interpreting a conviction for harboring aliens as an aggravated felony. See *Patel v. Zemski*, 275 F.3d 299, 304 (3d Cir. 2001); see also *Miranda Alvarado*, 449 F.3d at 921–22 (“[A] considered, precedential statutory interpretation adopted by the Attorney General or his delegatee, the BIA, is entitled to *Chevron* deference as an interpretation that has ‘the force of law.’”). The Fifth Circuit has also recognized that the BIA's interpretations demand *Chevron* deference because they are issued through formal adjudication. See *Omagah v. Ashcroft*, 288 F.3d 254, 258 n.3 (5th Cir. 2002).

¹¹³ See *Patel*, 294 F.3d at 467–68.

¹¹⁴ See Bressman, *supra* note 6, at 1464–69.

¹¹⁵ See *id.* at 1464 & n.139.

¹¹⁶ 374 F.3d 362 (5th Cir. 2004).

Skidmore applied after holding that the agency order at issue passed *Skidmore* deference because it was “promulgated by an acknowledged expert acting within its statutory mandate after a thorough review of the Plan’s termination.”¹¹⁷ The problem is that *Skidmore* review is not simply less deferential than *Chevron* review; it is focused on different factors. As discussed above, *Skidmore* review looks to the context of the agency’s interpretation, including especially its expertise in the subject area, whereas *Chevron* focuses on the correspondence between the agency’s interpretation and Congress’s intent. Accordingly, a court might find an agency’s expert interpretation persuasive, but had it gone through the *Chevron* inquiry it might have found that Congress had clearly indicated a different interpretation, which would have ended the analysis. Consider, for example, *Brown & Williamson*, discussed above: the Court likely would have deferred had it sincerely applied *Skidmore* deference, but instead it employed creative statutory construction to find clear congressional intent.¹¹⁸

The second type of *Chevron* avoidance that Professor Bressman identifies occurs when the reviewing court ignores the *Chevron* framework entirely and instead decides through an all-things-considered inquiry that the agency’s interpretation satisfies both *Chevron* and *Skidmore*.¹¹⁹ In *Community Health Center v. Wilson-Coker*,¹²⁰ the Second Circuit deferred to the Centers for Medicare and Medicaid Services’ interpretation of the Federal Medicaid statute but refused to identify whether the deference granted was *Chevron* or *Skidmore* deference: “In cases such as this, where a highly expert agency administers a large and complex regulatory scheme in cooperation with many other institutional actors, the various possible standards for deference begin to converge.”¹²¹ Professor Bressman cites uncertainty over how to apply *Mead* as the reason for *Chevron* avoidance.¹²² *Mead* is certainly open to multiple interpretations,¹²³ but in light of the decisions that postdate it, an interpretation that returns the multifactor *Skidmore* test (and the use of expertise it implies) to the forefront of the inquiry is not among the most plausible.

¹¹⁷ *Id.* at 370.

¹¹⁸ See *supra* note 33 and accompanying text.

¹¹⁹ See Bressman, *supra* note 6, at 1464–66.

¹²⁰ 311 F.3d 132 (2d Cir. 2002).

¹²¹ *Id.* at 135, 138–39.

¹²² Bressman, *supra* note 6, at 1466.

¹²³ For example, it is not clear from *Mead* whether other indicia of Congress’s intent to delegate authority to the agency should be considered in every case or only when the interpretation is not issued through a safe harbor. See *supra* p. 1571. *Walton*, this Note argues, clears this up. See *supra* p. 1572.

D. The D.C. Circuit: A Rough Empirical Analysis

Thus far, this Note has examined several instances in which the federal courts of appeals have placed more emphasis on expertise (and less emphasis on separation of powers) in *Chevron* cases than the Supreme Court has in its *Chevron* jurisprudence. These are, of course, just illustrations of how the courts of appeals have diverged from the Supreme Court's *Chevron* doctrine; they do not establish that the divergence is a widespread phenomenon. While it is beyond the scope of this Note to do a full-scale empirical study of lower court cases demonstrating the frequency of the observed divergence, some further empirical verification is necessary. Accordingly, the following rough study of recent D.C. Circuit opinions is included to demonstrate the prevalence of the three forms of heightened consideration of expertise (in determining reasonableness, in conducting the *Mead* inquiry, and in collapsing the entire inquiry into a *Skidmore* analysis) discussed above.

Between 2004 and 2006, the D.C. Circuit issued ninety-seven opinions that cited *Chevron*.¹²⁴ Sixteen of these opinions (about 16.5%) unambiguously employed some form of the arbitrary and capricious standard or otherwise considered the agency's expertise as part of the Step Two analysis.¹²⁵ The sixteen opinions cited do not include those in which the court treated *Chevron* Step Two and the arbitrary and capricious test as two distinct inquiries.¹²⁶

Of the thirteen opinions that raised a *Mead* issue (most only in passing), two invoked expertise in deciding that *Chevron* applied.¹²⁷ In one of these cases, the regulation was issued pursuant to the notice-and-comment safe harbor, but the court still considered the agency's expertise before ultimately deciding to apply *Chevron*.¹²⁸

¹²⁴ This statistic was determined by performing a Westlaw KeyCite search for D.C. Circuit opinions issued between January 2004 and December 2006 that cited *Chevron*.

¹²⁵ See *Ala. Educ. Ass'n v. Chao*, 455 F.3d 386, 396 (D.C. Cir. 2006); *Goldstein v. SEC*, 451 F.3d 873, 881–82 (D.C. Cir. 2006); *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 537 (D.C. Cir. 2006); *Am. Council on Educ. v. FCC*, 451 F.3d 226, 231 (D.C. Cir. 2006); *PDK Labs. Inc. v. DEA*, 438 F.3d 1184, 1191–92 (D.C. Cir. 2006); *Shays v. FEC*, 414 F.3d 76, 96–97 (D.C. Cir. 2005); *Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61, 69 (D.C. Cir. 2005); *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 414 F.3d 50, 57 (D.C. Cir. 2005); *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005); *Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 401–02 (D.C. Cir. 2005); *AFL-CIO v. Chao*, 409 F.3d 377, 392–93 (D.C. Cir. 2005); *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363, 1374 (D.C. Cir. 2004); *Nat'l Home Equity Mortgage Ass'n v. Office of Thrift Supervision*, 373 F.3d 1355, 1360–61 (D.C. Cir. 2004); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1273 (D.C. Cir. 2004); *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004); *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 797–98 (D.C. Cir. 2004).

¹²⁶ See, e.g., *New York v. EPA*, 413 F.3d 3, 18 (D.C. Cir. 2005).

¹²⁷ See *Ala. Educ. Ass'n*, 455 F.3d at 393; *Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279–80 (D.C. Cir. 2004).

¹²⁸ See *Ala. Educ. Ass'n*, 455 F.3d at 390–93.

There were three opinions in the set studied in which the D.C. Circuit collapsed the entire deference inquiry into *Skidmore* deference.¹²⁹ Although these three opinions represent a small fraction of the total number of opinions, the collapse into *Skidmore* is the most serious of the observed deviations from the Supreme Court's *Chevron* approach.

In short, the D.C. Circuit departs from the Supreme Court's approach to *Chevron* cases in three identifiable ways with some, if not overwhelming, frequency. The D.C. Circuit is generally considered the nation's most sophisticated administrative law court; the extent of its departures from the Supreme Court's approach suggests that, across the range of lower courts, the emphasis on expertise (and the downplaying of the Supreme Court's preferred separation of powers rationale) is a significant phenomenon.

III. REASONS FOR THE DIVERGENCE IN APPROACHES TO *CHEVRON*

This Note provides evidence that the courts of appeals apply *Chevron* with a greater emphasis on expertise whereas the Supreme Court applies it with a greater emphasis on separation of powers. Although this Note cannot fully explain the motivations behind this pattern, it can set forth a few hypotheses and test them against the evidence. After rejecting a theory of ordinary doctrinal slippage and a theory of political or ideological manipulation, this Part concludes that the most likely primary driver of the *Chevron* divergence is an institutional need among the lower courts for greater doctrinal flexibility.

A. "Ordinary" Doctrinal Slippage

Some variety in how lower courts apply Supreme Court precedent is to be expected, simply because of reasonable disagreement about the meaning of vague pronouncements and the inevitable advent of fact situations that fall through the doctrinal net.¹³⁰ *Chevron*, *Mead*, and the other Supreme Court opinions on deference to agency interpretations often involve complicated regulations and fact scenarios, and the Court is not always clear about the rule it is announcing or applying, let alone the abstract principles underlying its decision. Moreover, as

¹²⁹ See *Nevada v. Dep't of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005); *Ranbaxy Labs. Ltd. v. FDA*, No. 04-5079, 2004 WL 886333, at *1 (D.C. Cir. Apr. 26, 2004); *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 540-41 (D.C. Cir. 2004).

¹³⁰ See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 306 (2005) ("Under the most optimistic of views, . . . there are going to be many cases that lower courts resolve with limited guidance."). In fact, the late Chief Justice Rehnquist argued that the limited docket of the Supreme Court necessarily meant that almost all legal issues would "percolate" in the lower courts, with only occasional checks by the Supreme Court. See William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 10-11 (1986).

in every area of law, the Court cannot anticipate every new doctrinal wrinkle. There is thus bound to be *Chevron* law developed in the lower courts that differs from the Supreme Court's doctrinal approach.

But the consistency and the extent of the divergence suggests that there is more going on than mere gap filling. The lower courts' focus on expertise is too consistent and too different from the Supreme Court's approach to be a result of random gap filling. Section II.D demonstrates that the three identified types of divergence are more than mere idiosyncrasies in the D.C. Circuit, and the cases described elsewhere in Part II were from courts of appeals across the country. The courts of appeals' use of expertise in *Chevron* cases has the feel of a doctrinal trend, not a patchwork of ad hoc gap-fillers.

B. Judges' Political Affiliations

In a recent article, Professors Thomas Miles and Cass Sunstein report on a study of Supreme Court and courts of appeals *Chevron* cases, which shows that the factor most correlated with the decision to uphold an agency's interpretation is the judge's political affiliation: Democratic appointees were more likely to uphold; Republicans were less likely.¹³¹ It is conceivable that there is also a correlation between political affiliation and a preference for expertise or separation of powers principles — in other words, that politics is driving the *Chevron* divergence.

The main problem with the political affiliation hypothesis is that the preference for principles cuts against the preference for deferring to agencies. Common wisdom suggests that conservatives tend to prefer formal principles such as the separation of powers and a limited federal government, while liberals tend to prefer functional principles such as expertise and a more active federal government. As Justice

Scalia has argued¹³² (and demonstrated¹³³), it is possible to take a separation of powers approach and limit agency discretion, but in the abstract one would expect such an approach to be more deferential to agency interpretations than an expertise-focused approach. Imagine a four-square matrix of agency interpretation situations: box 1 is an agency interpreting a clear statute to which its expertise is relevant; box 2 is an agency interpreting an ambiguous statute to which its expertise is relevant; box 3 is an agency interpreting a clear statute to

¹³¹ See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

¹³² See Scalia, *supra* note 3, at 520–21 (noting that deference will be limited with rigorous statutory construction, such as that espoused by Justice Scalia, at Step One).

¹³³ See Miles & Sunstein, *supra* note 131, at 826 (noting that “Justice Scalia, the Court’s most vocal *Chevron* enthusiast, is the least deferential” to agency interpretations).

which its expertise is not relevant; and box 4 is an agency interpreting an ambiguous statute to which its expertise is not relevant. Under the separation of powers approach, one would expect a court to defer in boxes 2 and 4; under expert-focused review, one would expect a court to defer only in box 2. This result is illustrated in the table below.

TABLE 1

	<i>Expertise Is Relevant and Applied</i>	<i>Expertise Is Irrelevant or Not Applied</i>
<i>Clear Statute</i>	<i>SoP</i> : no deference <i>Expertise</i> : no deference	<i>SoP</i> : no deference <i>Expertise</i> : no deference
<i>Ambiguous Statute</i>	<i>SoP</i> : deference <i>Expertise</i> : deference	<i>SoP</i> : deference <i>Expertise</i> : no deference

C. Institutional Reasons

Given the pattern of the lower courts' use of expertise across courts and political lines, an institutional explanation seems plausible. One characteristic that courts of appeals judges share is that they hear many more *Chevron* cases than the Supreme Court does, and with a greater variety in circumstances. A rational response to this caseload would be an effort to make the doctrine more flexible and more pragmatic. The increased use of expertise offers these benefits by creating more doctrinal hooks on which to hang a decision not to defer. Bringing expertise more to the center of the doctrine also allows the court more flexibility in responding to situations in which the agency has not fulfilled its duties, as in *Alabama Education Ass'n*, or in which the complexity of the regulatory scheme demands greater deference to the agency than a formal separation of powers approach to the doctrine would allow, as in *Wilson-Coker*.¹³⁴ The consideration of expertise makes the doctrine more concrete, a helpful attribute to courts that reside at the point of application of what can be an abstract doctrine. In short, with their large and varied dockets, the circuit courts seem to have responded to *Chevron* doctrine by taking an expertise-focused approach that is more malleable and more pragmatic than the Supreme Court's own.

¹³⁴ Cf. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992) ("*Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.>").

IV. CONCLUSION

Expertise is often cited as a rationale for *Chevron* deference, but a review of the Supreme Court's *Chevron* jurisprudence reveals that the Court's inquiry focuses mostly on congressional intent and the separation of powers at each of its three steps: the initial determination of whether *Chevron* applies at all, the Step One inquiry into the clarity of the statutory language, and the Step Two deference to reasonable interpretations. The Supreme Court does make room for expertise — as one of several factors in the *Mead* inquiry when there is no safe harbor and as one of several factors in the *Skidmore* inquiry when *Chevron* fails — but only at the margins of the doctrine.

Despite the Supreme Court's marginalization of agency expertise, the circuit courts of appeals have found ways to reintroduce it to the inquiry. The lower courts have added expertise to the review of agency interpretations in three main ways: by using it as a basis for determining whether an agency's interpretation was reasonable at *Chevron* Step Two; by considering expertise as a factor in the *Mead* evaluation of whether *Chevron* applies at all; and by applying *Skidmore* and using the result as a proxy for the application of *Chevron*. The courts' motivation for straying from the Supreme Court's *Chevron* doctrine to include expertise is not wholly clear, but the most likely explanation is the lower courts' need for flexibility and concreteness in reviewing a larger and more varied array of agency interpretations than the Supreme Court faces.