CHEVRON AND ORIGINALISM: WHY *CHEVRON* DEFERENCE CANNOT BE GROUNDED IN THE ORIGINAL MEANING OF THE ADMINISTRATIVE PROCEDURE ACT

Michael B. Rappaport[*]

The Chevron *doctrine, which requires courts to defer to an agency's interpretation of a statute that it administers, is a central component of the administrative state. But in recent years, the doctrine has been strongly criticized for being inconsistent with the original meaning of the Administrative Procedure Act ("APA").*

In a recent article, Cass Sunstein defends Chevron *against this charge, arguing that the original meaning evidence is equivocal. Sunstein maintains that one cannot clearly reject* Chevron *and therefore the Supreme Court should not overturn the case.*

In this Article, I criticize Sunstein's defense of Chevron *and argue that Chevron is plainly inconsistent with the APA's original meaning. Some commentators reject* Chevron *on the ground that the APA does not allow for agency deference. While I agree with these commentators that this is the best reading of the APA, I also agree with Sunstein that this is not the only possible reading of the statute. But this lack of clarity about the APA does not help Sunstein's argument. Even if one interprets the APA's text as Sunstein does, this still does not justify Chevron deference. Instead, it results in deference for mixed questions but no deference for pure questions of law. This interpretation would involve a narrower type of deference that would significantly trim the Chevron doctrine.*

The Article then reviews and criticizes a more recent defense of Chevron *deference by administrative law scholar Ronald Levin. While Levin presents additional arguments for* Chevron *deference, I conclude that these arguments are no more successful than Sunstein's.*

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INTRODUCTION

The *Chevron* doctrine, which requires courts to defer to an agency's interpretation of a statute that it administers,[1] is a central component of the administrative state. In recent years, though, the doctrine has become the object of much criticism. It has been attacked as inconsistent with the Constitution's original meaning,[2] the

∗ Hugh & Hazel Darling Professor of Law, University of San Diego, and Director of the Center for the Study of Constitutional Originalism. I would like to thank Gary Lawson, John McGinnis, Sharmila Sohoni, and Christopher Walker for their helpful comments.

1. Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1191 (2016) (quoting Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring)).

2. *Id.*; Baldwin v. United States, 140 S. Ct. 690, 690 (2020) (denying certiorari); *id.* at 690–91 (Thomas, J., dissenting) (arguing that *Chevron* is unconstitutional); Michigan v. EPA, 576 U.S. at 760 (Thomas, J., concurring) (arguing that *Chevron* is unconstitutional).

Administrative Procedure Act's ("APA") original meaning,[3] and desirable political principles or good policy.[4]

But *Chevron* has not gone without its defenders. As to the original meaning of the APA, which is the subject of this Article, *Chevron* has been defended on the ground that the APA's original meaning was not clear, and therefore, *Chevron* is a permissible understanding of its meaning. This justification has been voiced by Justice Antonin Scalia,[5] Dean John Manning,[6] and Professor Adrian Vermeule.[7]

Professor Cass Sunstein has now added his voice to this chorus of *Chevron*'s defenders. What distinguishes Sunstein's argument is that it is the most developed version of this justification.[8] In a recent article, Sunstein, who once was a critic of *Chevron*,[9] has argued that *Chevron* is not inconsistent with the APA's original meaning.[10] Examining the arguments for concluding that the APA did not authorize *Chevron*, Sunstein finds them inconclusive.[11] In his view, the evidence of the APA's original meaning does not clearly rule out *Chevron*.[12] While there is evidence against *Chevron*, there is also evidence for it.[13] Thus, Sunstein seems to suggest that this equivocal

3. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 995–99 (2017) (arguing that *Chevron* is inconsistent with the APA's original meaning). For a general discussion of APA originalism, see Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018).

4. Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 131–32 (Todd Henderson ed., 2018) (arguing that *Chevron* is inconsistent with separation of powers political principles); Michael B. Rappaport, *Replacing Agency Adjudication with Independent Administrative Courts*, 26 GEO. MASON L. REV. 811, 811 (2019) [hereinafter Rappaport, *Replacing Agency Adjudication*].

5. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

6. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 n.123, 636–37 (1996) (defending *Chevron* as a means of promoting the values underlying the constitutional structure of a statute that did not clearly answer how agency statutes should be interpreted).

7. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 208 (2006) ("[C]andid observers, on all sides, acknowledge that Congress has not authoritatively required or forbidden the *Chevron* principle.").

8. Cass Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613 (2019).

9. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 465–69 (1987).

10. Sunstein, *supra* note 8, at 1619–20.

11. *Id.* at 1678–79.

12. *Id.* at 1643.

13. *Id.* at 1643–44, 1649–51, 1656–57.

evidence would not support overturning a precedent that has existed for more than thirty-five years.

Here, I argue that this uncertainty defense of *Chevron* is mistaken and that the original meaning of the APA is clearly inconsistent with *Chevron*. The original meaning can be summed up with two basic claims. First, there is a single interpretation of the APA that is the best of the available interpretations. Under that view, there is no deference conferred on agencies and therefore there is no *Chevron* deference. Second, while there is a single best view, the argument for this interpretation is not so strong as to render all other interpretations clearly mistaken. There is another interpretation that is reasonable, even if it is not the best interpretation. But significantly, even that interpretation does not yield *Chevron* deference but rather a narrower form of agency deference. Thus, even if one regards the APA as having more than one reasonable interpretation, neither of those interpretations yield *Chevron*.

To be more specific, there are two plausible interpretations of the APA. Under the first interpretation, the APA does not confer deference on administrative agencies, but it does render the actions of administrative agencies relevant in determining the meaning of the law. Under this view, the meaning of the statute is determined by the courts, but the courts consider the contemporaneous exposition and the customary interpretation of the statute. The contemporaneous exposition is the meaning it was given by official actions at the time of its enactment. The customary interpretation is the meaning it was given in official actions over a period of time. Thus, when an agency interprets a statute near the time of its enactment or over a period of time, that interpretation is entitled to some weight in discerning the meaning of the statute.

But that weight does not constitute deference to agency interpretations of statutes because this weight is not restricted to agency interpretations nor to interpretations of statutes. Instead, it is also applied to judicial and legislative interpretations and to interpretations of constitutions. And even if one treated that weight as deference, it would differ from *Chevron* deference because it would deny such weight in many situations when *Chevron* is now provided, such as a change in an agency's interpretation.

While this first interpretation is the best understanding of the APA, there is another interpretation that is not unreasonable. Under this second interpretation, the APA does confer a particular type of deference on agencies—a form of deference that agencies enjoyed in the 1940s prior to the APA's enactment. But that deference extended only to mixed questions, not to pure questions of law. Thus, once again, this interpretation does not justify *Chevron* deference, which extends to both mixed and pure questions.[14]

14. Bamzai, *supra* note 3, at 966–67.

Sunstein relies on something like this latter interpretation to justify *Chevron* deference.[15] While Sunstein appears to recognize that this form of deference only extends to mixed questions, he rejects that limitation on the ground that the distinction between pure and mixed questions "is a confusion."[16]

But this argument cannot save Sunstein's defense of *Chevron*. The original meaning does not change because a law professor disagrees with the view that underlies that meaning. Moreover, it is by no means clear that Sunstein is right to reject the coherence of the distinction between mixed and pure questions of law. There is something to be said for the distinction. Finally, even if one were to reject the distinction between mixed and pure questions of law, that would not indicate that deference would extend to both mixed and pure questions. The purpose of the APA suggests that the statute is better read as extending deference to neither of these questions.[17]

Recently, *Chevron* deference under the APA has also been defended by administrative law scholar Ronald Levin.[18] Levin supports Sunstein's argument, but he also provides some additional arguments for this conclusion.[19] But Levin's arguments are no more successful than Sunstein's.

This Article develops these points. Part I provides some needed background on the law that governed the interpretation of agency statutes prior to the APA's enactment in 1946. Part II then examines the different possible interpretations of the APA's original meaning.

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15. *See* Sunstein, *supra* note 8, at 1643.

16. *Id.* at 1650 n.185.

17. Another possible originalist argument for *Chevron* deference would rely not on the APA's original meaning but on the original meaning of the organic statute that authorizes the agency's action. Under this view, the organic statute would confer deference on the agency. This alternative argument is largely outside the scope of this Article, which is focused on the APA's original meaning. But it is worth briefly noting one obvious problem with this argument. Since *Chevron* only became the established law at some point after 1984, none of the organic statutes passed prior to 1984 can be plausibly read as adopting *Chevron* deference (unless they give some strong indication of that meaning). Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 837 (1984). Thus, organic statutes from this period cannot support *Chevron* deference. While that objection does not apply to the statutes enacted after 1984, that does not mean that those statutes should necessarily be read as requiring *Chevron* deference. Since the APA adopts a different interpretive approach than *Chevron*, it is by no means clear that post-1984 organic statutes should be read as overriding the APA and requiring *Chevron*. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 198 (1998) (arguing that § 558(b) of the APA should make a court hesitate to find organic statutes as implicitly conferring *Chevron* deference).

18. Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 130 (2021).

19. *Id.* at 129.

Part III discusses the case law immediately prior to the enactment of the APA, argues that it drew a distinction between mixed and pure questions, claims that this distinction was not obviously problematic, concludes that Sunstein's reason for not following this distinction should be rejected, and illustrates the distinction with two modern Supreme Court cases. Part IV then criticizes two significant arguments that Ronald Levin makes to defend *Chevron* deference. Part V draws out some implications for whether and, if so, how *Chevron* should be cut back or eliminated.

I. BACKGROUND

To understand the APA's original meaning concerning the judicial review of questions of law, some background is necessary. The APA was enacted in 1946 as a reform statute that accepted the fundamental changes in American institutions established by the New Deal but also attempted to address what were regarded as some of its excesses.[20]

A key question involved the judicial review of agency interpretations of statutes. The language of the APA provides in relevant part that, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[21]

To understand this provision, it is essential to understand how agency interpretations of statutes were treated prior to the APA. In the early years of the republic, the law appears to have largely followed a dual regime. On the one hand, when an agency's action was challenged in federal court through a writ of mandamus or another prerogative writ, something like deference was given to the agency's action.[22] This apparent deference was based on the view that mandamus would only lie for a nondiscretionary act and that legal

20. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1678 (1996) ("[T]he APA was the cease-fire agreement of exhausted combatants in the battle for control of administrative agencies."). Shepherd argues that the APA was a compromise between those opposed to the New Deal and those who sought to maintain it. *Id.* The purpose of some of its provisions was to cement the position of New Deal institutions, while the purpose of others was to cut back on the New Deal powers of agencies. *Id.*

21. 5 U.S.C. § 706.

22. Bamzai, *supra* note 3, at 948–49; Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1296–98 (2014) ("Nineteenth-century judicial review of agency action instead came in two main forms. The first involved the issuance of extraordinary writs, especially mandamus, to compel federal officers to carry out their nondiscretionary duties.").

interpretations that were not clear were discretionary.[23] Therefore, if an agency had not violated a clear legal meaning, no remedy against the agency would exist in federal court.[24] This rule provided a kind of deference to an agency that allowed it to prevail if the legal meaning was not clear.

On the other hand, an agency's actions could often be challenged in state court in a tort suit against an agency official in his private capacity.[25] In these lawsuits, no deference was provided in favor of the agency's legal interpretations.[26]

This dual regime can be understood as the result of the remedies available to litigants. Since there was no general federal-question jurisdiction, the main way to get direct review of the agency's action in federal court was through a prerogative writ.[27] Thus, the apparent deference conferred on agencies was the result of the limited remedies available in federal court. By contrast, no such limitation on remedies was imposed in state tort proceedings and therefore no deference was conferred on agency legal interpretations.[28]

Eventually, Congress passed a law conferring general federal-question jurisdiction that operated to change the rules governing review of agency interpretations of statutes.[29] No longer limited to review of agency actions through mandamus, the federal courts could engage in ordinary legal interpretation of agency statutes, determining on their own the meaning of statutes.[30] Thus, agencies did not receive deference.

While agencies did not receive any deference, two of the interpretive rules during this period did take the actions of administrative agencies into account. One rule was that of contemporary exposition, which viewed the interpretation of a law near the time of its enactment as providing significant evidence of its meaning.[31] Thus, early agency interpretations were treated as having substantial weight.[32] A second rule was that of customary interpretation, which gave weight to a custom or practice of

23. Bagley, *supra* note 22, at 1296.

24. *Id.*

25. Bamzai, *supra* note 3, at 948 (noting that "[b]ecause federal courts lacked general federal-question jurisdiction until 1875," "[s]ome statutory issues" were brought "in the context of tort or contract actions").

26. *Id.*; *cf.* Bagley, *supra* note 22, at 1299 (noting that over time, some courts were influenced by mandamus norms to defer to executive actions).

27. Bamzai, *supra* note 3, at 948–55. Another avenue for federal review was the limited pockets of federal-question jurisdiction that existed prior to the enactment of general federal-question jurisdiction. *Id.* at 948.

28. *Id.* at 948–50.

29. 28 U.S.C. § 1331 (1980); Bamzai, *supra* note 3, at 955–58.

30. Bamzai, *supra* note 3, at 958.

31. *Id.* at 933–37.

32. *Id.*

interpretation.[33] Under this rule, a customary interpretation followed by an agency over time would also be evidence of the meaning of the statute.[34]

For example, in *United States v. Healey*,[35] the Supreme Court determined the "true interpretation" of a statute administered by the interior department.[36] While the Court noted that it would have accepted the agency's interpretation of a statute which had a "doubtful or obscure" meaning if the agency "had uniformly interpreted" the statute, the Court did not confer such weight on the agency's interpretation due to the lack of uniformity in the "practice of the department."[37] Similarly, in *United States v. Alabama Great Southern Railroad Co.*,[38] the Supreme Court relied upon the "contemporaneous construction . . . given by the executive department of the government, and continued" by the department for a period of time.[39] The Court then rejected a sudden change by the executive department from that prior position.[40] While these two interpretive rules might seem to confer deference on agencies, I argue below that they are not best characterized in this fashion.[41]

This approach to agency interpretation of statutes, however, began to change in the 1940s in a brief period prior to the APA's enactment. Beginning in this period, the Supreme Court started to grant deference to agency interpretation of statutes involving mixed questions of fact and law but not pure questions of law.[42]

Thus, when the APA was enacted in 1946, the Supreme Court had interpreted agency statutes for a period of approximately half a century without conferring deference (as had state courts from the beginning of the republic).[43] But then, for approximately five years in the 1940s, the Supreme Court began to confer deference on agencies for mixed questions.[44] A significant question, then, is which of these regimes did the APA's original meaning enact. But, as shown in the next two Parts, whatever the answer to that question, neither of these approaches supports *Chevron* deference.[45]

33. *Id.* at 937–38.
34. *Id.* at 937.
35. 160 U.S. 136 (1895).
36. *Id.* at 145.
37. *Id.*
38. 142 U.S. 615 (1892).
39. *Id.* at 621.
40. *Id.*
41. *See* discussion *infra* Subpart II.E.
42. Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 24–26 (2013); Bamzai, *supra* note 3, at 967, 973, 978–79.
43. Bamzai, *supra* note 3, at 954–58.
44. *Id.* at 977–79.
45. *See* discussion *infra* Parts II, III.

II. THE APA AND QUESTIONS OF LAW

The APA does not specifically indicate how courts should interpret questions of law. In this Part, I identify four different interpretations of the statute's language. After reviewing the interpretations, I conclude that only three of them are plausible. Two of these three interpretations lead to the view that the two canons should be employed and thus deny any deference to agency interpretations. One of the interpretations does lead to the view that agencies may enjoy deference. While I believe this interpretation is weaker than the two that lead to no deference, it cannot be rejected as an unreasonable interpretation. But while this interpretation does provide some support for deference, the type of deference it yields differs from, and therefore cannot be used to justify, *Chevron* deference.

A. The First Interpretation: No Deference and No Reference to Agency Interpretations

The first interpretation of the APA provides no deference to administrative agencies. Under this interpretation, the courts are to interpret the statute entirely on their own. They do not consider the agency's interpretation of the statute at all. Since they interpret the statute as if the agency had never previously interpreted it, no deference is conferred.

There is some evidence from the APA to support this interpretation. Most importantly, the text of the APA provides strong evidence to indicate that it does not confer deference on an agency. The APA provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[46]

This language supports no deference in several ways. First, the provision states that "the reviewing court shall decide *all relevant questions of law*."[47] This language seems to indicate that the agency should not enjoy deference. When an agency possesses deference, it decides part of the issue, and the courts decide the remainder. For example, if the deference rule requires the court to approve any reasonable interpretation of the agency, the court decides which interpretations are not reasonable, but the agency gets to decide which of the reasonable interpretations to follow. By contrast, when the courts decide "all relevant questions of law," they do not allow the agency to decide any part of it and therefore confer no deference.

Second, the provision appears to treat constitutional and statutory issues on a par, stating that the court shall "interpret

46. 5 U.S.C. § 706.

47. *Id.* (emphasis added).

constitutional and statutory provisions."[48] But all agree that agencies are not given deference as to constitutional issues.[49] This language suggests that agencies should not be given deference as to statutory issues either, since the parallel phrasing of statutory and constitutional provisions suggests that the two types of provisions should be treated the same.

Third, this statutory language, which suggests that agencies do not receive deference, is reinforced by other statutory language that clearly provides deference for other types of issues. For example, the APA provides that the reviewing court shall "set aside agency action, findings, and conclusions" that are "(A) arbitrary, capricious [or], an abuse of discretion" or "(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title."[50] By contrast, the parallel provision for statutory interpretation does not indicate deference, providing that the reviewing court set aside agency action "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[51]

But while the language appears to support this no-deference interpretation, the evident purpose of the APA strongly cuts against it. The APA was enacted in response to the New Deal revolution in the law governing administrative regulation.[52] The statute was a compromise between two different positions. On the one hand, the APA accepted the basic changes of the New Deal revolution.[53] It did not attempt to repeal all of those changes and to move back to the pre-New Deal arrangements. On the other hand, the APA was intended to cut back on what were regarded as some excesses in which the New Deal agencies had engaged.[54] Thus, some provisions of the APA imposed additional restrictions on the agencies.

Given these purposes, it seems clear that the APA should not be read as the first interpretation would. Prior to the New Deal and until the 1940s, courts interpreted agency statutes using the traditional or two-canon approach.[55] Under this approach, agency interpretations were entitled to some weight if their interpretation was contemporaneous with the enactment of the rule or had been followed over a period of time.[56] Since the first interpretation would not confer weight based on contemporary exposition or practical usage, it would be more restrictive of agencies than the traditional

48. *Id.*
49. *See* Rust v. Sullivan, 500 U.S. 173, 190–91 (1991).
50. 5 U.S.C. § 706.
51. *Id.*
52. *See* Shepherd, *supra* note 20, at 1560–61.
53. *Id.*
54. *See* Bamzai, *supra* note 3, at 977.
55. *See* discussion *infra* Subpart II.B.
56. Bamzai, *supra* note 3, at 964–65.

two-canon approach. Given that the purpose of the APA was not to restrict agency power beyond that which existed under the pre-New Deal approach, it seems extremely unlikely that the APA should be read to impose even stricter limits on agencies than existed under the pre-New Deal regime. At most, the APA would have returned to the two-canon approach that preceded the New Deal. Thus, the first interpretation strongly conflicts with the APA's purpose.

B. The Second Interpretation: The Traditional Two-Canon Approach

This rejection of the first interpretation of the APA leads us directly to the second interpretation. Under this interpretation, the language of the APA refers not to the interpretative approach that would occur if there were no agency or agency action. Instead, it refers to an interpretive approach that employs the traditional two canons of contemporaneous exposition and customary interpretation.[57]

The second interpretation flows from the language of the APA in much the same way that the first interpretation does. The two-canon approach does not provide deference to the agencies and therefore the various phrases in the APA that suggest no deference are fully respected. It is true that the two-canon interpretation does look to the prior actions of the administrative agencies, but it does not give deference to the agencies.[58] Instead, it looks to agencies' contemporaneous and customary interpretations because these interpretations are seen as evidence of what the law is.[59]

Since the strength of the second interpretation depends in part on not conferring deference on agencies, it is important to discuss why the two canons do not involve deference for the agencies. There are three features of the two-canon approach that serve to distinguish it from agency deference. First, these two canons look to contemporaneous and customary decisions from entities other than agencies.[60] The canons are applied not merely to agency interpretations but also to interpretations by the courts and Congress.[61] Thus, the two canons cannot be accurately described as conferring deference on *agencies*. Second, these two canons were applied not merely to statutes but also to the Constitution and to

57. *Id.* at 987.
58. *Id.*
59. *Id.* at 941.
60. *Id.* at 930–37.
61. *Id.* at 932–43; Stuart v. Laird, 5 U.S. (1 Cranch) 299, 307–08 (1803); McCulloch v. Maryland, 17 U.S. 316, 356, 373 (1819).

treaties.[62] Since agencies do not enjoy deference as to the Constitution,[63] these canons are not best thought of as deference.

Third, these two canons were not justified based on the idea that a specific entity—the administrative agency—had a superior understanding of the enactment or had been delegated this authority.[64] Rather, they were justified based on considerations unrelated to a specific entity's expertise or authority. The contemporaneous-exposition canon is based on the idea that a contemporaneous interpretation is close to the time of the law and therefore its author is in a better position to understand the law.[65] The customary-usage canon is based on various ideas. The continued conformity to an interpretation over time suggests it is more likely to be correct or at least workable since it has been tried and not abandoned.[66] There is also likely to be greater reliance on a long-followed practice.[67] While the justifications differ, the justifications for neither canon are based on the special expertise or powers of agencies.

The lack of deference to the agencies is confirmed by the circumstances when the two canons do not apply. If an agency adopts an interpretation many years after the enactment of a statute, its understanding is not given weight since it would not be contemporaneous.[68] Similarly, if an agency were to depart from an interpretation that had been followed for a long period, it would also not be entitled to weight since it would not be customary.[69]

Since the two-canon approach does not involve deference, it fits the language of the APA. In fact, the various arguments made for the first interpretation apply as well to this two-canon interpretation.[70]

But unlike the first interpretation, this interpretation also accords with the purpose of the APA as accepting the New Deal

62. Bamzai, *supra* note 3, at 935–41.

63. *See* 5 U.S.C. § 706.

64. It is true, as discussed below, that the courts limited the weight they provided to contemporaneous and customary interpretations to formal decisions of government officials. *See infra* notes 221–23 and accompanying text. But that limitation was applied not merely to executive actions by agency officials but also to legislative and judicial decisions. *See infra* notes 221–23 and accompanying text. Thus, the weight was not based on the view that executive officials alone had a superior understanding of an enactment.

65. FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 562 (2d ed. 1848) (attributing this view to Coke); Bamzai, *supra* note 3, at 934–35.

66. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 392 (1833); Bamzai, *supra* note 3, at 937; Sheppard v. Gosnold (1672) 124 Eng. Rep. 1018, 1023; Vaugh. 159, 170.

67. STORY, *supra* note 66, at 390.

68. *Id.* at 388–89.

69. *Id.*

70. *See supra* notes 47–51 and accompanying text.

revolution but cutting back on some of its excesses.[71] The first interpretation problematically adopts a stricter approach than existed prior to the New Deal and therefore conflicts with the APA's purpose not to adopt a stricter regime than the pre-New Deal regime.[72] In contrast, the second interpretation fits the statute's purpose because it merely adopts the pre-New Deal regime.

C. The Third Interpretation: An Alternative Path to the Two-Canon Approach

The first two interpretations rely on an interpretation of the APA's language instructing courts to "decide all questions of law" as understanding that language to require courts not to confer deference on agencies.[73] But that is not the only interpretation of this language. Instead, the language can also be interpreted as instructing judges to decide questions of law *in the way that judges ordinarily do*. Under this reading, the APA requires judges to follow the standard or ordinary rules of interpretation for reviewing agency determinations of legal questions.[74]

This interpretation is consistent with the APA's language. When the APA says, "decide all questions of law,"[75] this is plausibly understood as instructing judges to follow the interpretive approach that they ordinarily follow. When one assigns a task to a person, one often, as part of normal speech, implicitly directs that person to perform the task in the way that he or she ordinarily does. This is especially the case where there is a custom or ordinary practice. So, when a mother says to a child who regularly goes to the supermarket to purchase food and uses the father's credit card, "Please pick up some cherries," the implicit direction is that the child should use the father's credit card. This implicit communication in ordinary language is also mirrored in legal language. When a constitutional or statutory provision assigns a task to an entity or official, such as a court or judge, it is often assumed that the power will be exercised in the ordinary or traditional way that the entity or officer engages in that activity.[76]

Under this interpretation, the question, then, becomes: what were the ordinary or standard rules of interpretation for statutes involving agencies when the APA was enacted? At that time, there were two plausible ways to understand those interpretative rules. One way was the traditional two-canon approach that had existed for

71. *See supra* note 20 and accompanying text.
72. *See supra* notes 55–56 and accompanying text.
73. *See* 5 U.S.C. § 706.
74. *Id.*
75. *Id.*
76. John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and Wrongs of Interpretation*, 47 DUKE L.J. 327, 334 (1997).

at least half a century and arguably for much longer.[77] This approach might be thought of as the standard interpretive approach. While the courts had been applying a different interpretive rule in an uneven way for the brief five-year period since 1941,[78] the much longer period during which the two-canon approach existed might be a better account of the standard approach.[79]

Under this understanding, even though the language "decide all questions of law" is not read as necessarily prohibiting judges from conferring deference on agencies, the APA would still result in no deference because the two canons would be the standard rules of interpretation.[80]

As with the second interpretation, the no-deference result gains force from the other APA language that groups the interpretation of constitutional and statutory provisions together, as well as the fact that APA provisions expressly indicate deference for policy and factual questions but not for legal questions.[81] Finally, this interpretation would be entirely consistent with the APA's purpose in that it follows the pre-New Deal rule rather than requiring a stricter approach.

D. The Fourth Interpretation: The Path to Deference

There is, however, another way to understand the language of the APA that requires judges to decide questions of law in the way that judges ordinarily do. Under this fourth interpretation, the way that judges ordinarily decide what the law is involves giving deference to agencies. If there were deference rules for legal questions at the time of the APA's enactment, then the courts would assess the agency's action under those deference rules. For example, if the deference rule allowed agencies to adopt any reasonable interpretation of a statute, then the court would determine the law by applying that deference rule and then ask whether the agency's action was reasonable.

While the two-canon rule existed for many years, in 1941 the Supreme Court started to apply a deference rule.[82] As discussed extensively below, in several cases prior to the APA's enactment, the Court followed a rule that applied de novo review to pure questions of law but deference to mixed questions of law and fact.[83] It is quite possible that Congress should be understood as referencing this brief period as the way that judges ordinarily decide questions of law.

77. Bamzai, *supra* note 3, at 930, 943.
78. *Id.* at 917–18.
79. *See id.*
80. *See* 5 U.S.C. § 706.
81. *See id.*
82. Gray v. Powell, 314 U.S. 326, 411–12 (1941).
83. *See infra* Subpart III.A.

While the two-canon approach endured for a much longer period, the mixed question deference approach existed when the APA was enacted.[84]

The fourth interpretation also accords with the purpose of the statute. Since this interpretation yields a deference rule that was applied during the New Deal,[85] the interpretation conforms to that part of the APA's purpose that accepted the New Deal revolution.

E. Overall Assessment

Overall, this exploration of the APA's meaning yields three plausible interpretations. While the first interpretation is excluded because it is inconsistent with the APA's purpose, the second, third, and fourth interpretations are all plausible. The second and third interpretations both yield the same result—the two-canon approach—and therefore, I will focus on the second interpretation because I believe it is stronger.[86] Thus, the real choice is between the second and fourth interpretations.

In my view, while both the second and fourth interpretations are plausible, the second interpretation is stronger because it provides a better reading of the APA's text. The language instructing "the reviewing court [to] decide all relevant questions of law" more naturally suggests that judges should decide all legal issues—and therefore a no-deference approach—than it suggests that judges should follow the existing interpretive rules, which might confer deference.[87] Moreover, the language grouping together "constitutional and statutory provisions" to be interpreted by the courts also favors the second interpretation because constitutional provisions do not receive deference.[88] Finally, that the APA expressly indicates that fact and policy questions should receive deference, but not legal questions,[89] also suggests that the second interpretation is stronger.

While the second interpretation is stronger than the fourth interpretation, the latter interpretation cannot be rejected out of hand. It is clearly plausible. Perhaps the best way to put it is, ironically, in terms of *Chevron* deference. While the second

84. *See Gray*, 314 U.S. at 411.

85. Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1110 (1989); *see Gray*, 314 U.S. at 332.

86. This is true for the same reason that I believe the second interpretation is stronger than the fourth interpretation. *See infra* notes 87–89 and accompanying text (explaining why the second interpretation is stronger than the fourth interpretation).

87. *See* 5 U.S.C. § 706.

88. *Id.*

89. *Id.*

interpretation is stronger, the fourth interpretation is still reasonable. Nonetheless, since the second interpretation is the stronger interpretation, that is the correct reading of the APA. It is hard to argue that courts have the option of following the weaker interpretation of the original meaning.[90] But even if courts could properly choose the weaker interpretation, this would not establish the case for *Chevron*.[91] As I will show in the next Part, the deference rule followed at the time of the APA's enactment differed from

90. In arguing for something like the fourth interpretation, Sunstein spends a considerable amount of space discussing the legislative history of the APA. Sunstein, *supra* note 8, at 1644–52. While some commentators place weight on legislative history, others do not. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2109 n.181 (1990). But I need not address this issue at length because Sunstein uses the legislative history mainly to show that the fourth interpretation cannot be rejected as being clearly inconsistent with the APA's original meaning. Sunstein, *supra* note 8, at 1647–52, 1657. But since I acknowledge that the fourth interpretation is not clearly inconsistent with the APA's original meaning, there is no need for me to contest Sunstein's analysis of the legislative history. Still, it is worth noting two weaknesses of his legislative history argument. First, while Sunstein relies on the Attorney General's Committee report, the report is too early to be very informative. *See id.* at 1646–47 nn.159–64. It was issued five years prior to the enactment of the APA. ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 77–78 (1941). And even more significantly, it was written before the Supreme Court had departed from the traditional two-canon approach. Thus, it does not seem very helpful as to whether the subsequent practice of deference was adopted by the APA. Second, the legislative history near the time of the APA's enactment, even as recounted by Sunstein, actually appears to support my argument. Sunstein mainly discusses two possible interpretations of this legislative history. One interpretation suggests that the APA attempted to move back to the two-canon approach. *See* Sunstein, *supra* note 8, at 1652 ("It is tempting to point out that the APA was enacted against a background of distrust of administrative institutions, and was designed to strengthen judicial scrutiny of agency decisions."). The other interpretation suggests that the APA attempted to follow the existing law. *Id.* (noting "the absence of evidence that the APA was meant or understood to overrule *Gray* and *Hearst*"). But, as discussed below, the existing law drew a distinction between pure and mixed questions, which again does not get us *Chevron*.

91. It is important to distinguish here between an initial interpretation and permissible interpretations under liquidation and precedent rules. *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (discussing constitutional liquidation). If an interpreter is reading a provision on a blank slate, then he or she should select the better interpretation. *Id.* at 44. By contrast, if there have been prior interpretations that are reasonable but not necessarily the best interpretations, then liquidation and precedent rules may allow or require the interpreter to follow those reasonable interpretations. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 56–60 (2001). Since I am discussing the original meaning on a blank slate, there is no justification for following the weaker interpretation.

Chevron deference and therefore cannot be used to support such deference.[92]

III. MIXED QUESTIONS, THE DEFERENCE REGIME, AND ORIGINALISM

Sunstein relies on something like the fourth interpretation in arguing that *Chevron* might be consistent with the APA's original meaning.[93] But Sunstein's argument does not work because the 1940s case law prior to the APA did not follow the *Chevron* approach.[94] Instead, the case law only recognized deference for mixed questions but not for pure questions. Sunstein appears to recognize this problem with his argument because he acknowledges that the cases from this period involved mixed questions.[95] But Sunstein attempts to defend his approach by arguing that the category of mixed questions is a confusion and therefore deference should apply to all questions of law, whether mixed questions or pure questions.[96]

This Part critiques Sunstein's argument. First, it discusses the case law during this period, arguing that it applied deference to mixed questions but not to pure questions. This Part then argues that Sunstein's argument, that the category of mixed questions is a confusion, is misguided. Whether the APA's original meaning adopts the category of mixed questions does not turn on what a law professor believes about the coherence of a category, but instead on the case law prior to the statute's adoption. Moreover, even if one chose to reject the category of mixed questions, Sunstein would still need an argument to conclude that mixed questions should be treated as fact questions rather than as pure law questions. But if one assumes that mixed questions must be treated as either pure law or fact questions, a stronger case exists for concluding that they should be treated as pure law questions. This Part then argues, contra Sunstein, that the category of mixed questions is not necessarily a confusion. Under one view, the category is a confusion but under another entirely plausible view it is part of a coherent approach. Finally, this Part concludes by applying the distinction between mixed and pure questions to two modern Supreme Court cases.

A. The Deference Case Law from 1941–1946

During the five years prior to the enactment of the APA, the Supreme Court applied a judicial review standard that drew a distinction between pure questions and mixed questions.[97] While the cases are complicated and the decisions are not always clear or

92. *See* discussion *infra* Part III.
93. Sunstein, *supra* note 8, at 1642.
94. *See* Gray v. Powell, 314 U.S. 326, 412 (1941).
95. Sunstein, *supra* note 8, at 1649 n.185.
96. *See infra* notes 173–75 and accompanying text.
97. Lawson & Kam, *supra* note 42, at 67.

entirely consistent, the dominant approach of these cases provides deference for mixed questions but not for pure questions.[98]

The rule of deference for mixed questions appears to have emerged from the prior regime, which tied the existence of deference to whether the agency had decided a law or fact question.[99] As noted, prior to 1941, courts did not confer deference on questions of law.[100] But courts did confer deference for agency determinations of fact.[101] In the 1940s, the courts extended the deference for fact questions to mixed questions of fact and law but continued to confer no deference for pure questions of law.[102]

This deference rule for mixed questions continued, in an uneven and more complicated form, for many years after the enactment of the APA.[103] Indeed, three years after the *Chevron* decision, the author of *Chevron*, Justice Stevens, wrote an opinion for a majority of the Court that stated that deference did not apply to "a pure question of statutory construction" as opposed to a "question of interpretation" in which "the agency is required to apply" a legal standard "to a particular set of facts."[104] But the Court soon abandoned the remnants of this older rule,[105] although there are occasional efforts to resurrect it.[106]

1. NLRB v. Hearst Publications, Inc.

We can illustrate the old deference rule by discussing the important 1944 case of *NLRB v. Hearst Publications, Inc.*[107] The case raised the issue of whether "newsboys" were employees under the National Labor Relations Act ("NLRA").[108] The Supreme Court analyzed the case as involving two questions—one pure question of law and one mixed question.[109] Employing its approach at the time, it decided the pure question with no deference and the mixed question with deference.[110]

The first question the Court asked was whether the term "employee" in the NLRA had the same meaning that the term had at

98. *Id.* at 26; Bamzai, *supra* note 3, at 976–81. In this section, I rely substantially on the work of Lawson and Kam.

99. Lawson & Kam, *supra* note 42, at 19, 26–27.

100. *Id.* at 9.

101. *See* Bamzai, *supra* note 3, at 959–62.

102. *Id.* at 976–77.

103. *See* Lawson & Kam, *supra* note 42, at 50–51.

104. INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987).

105. Lawson & Kam, *supra* note 42, at 72–73.

106. *See* Negusie v. Holder, 555 U.S. 511, 538 (2009) (Stevens, J., concurring) (adhering to the approach announced in *Cardoza-Fonseca*).

107. 322 U.S. 111 (1944).

108. *Id.* at 120.

109. *Id.* at 120, 124.

110. *Id.* at 123, 130.

common law.[111] The Court concluded that employee did not have the common law meaning.[112] In reaching this conclusion, the Court gave no indication that it was affording deference to the agency.[113] Instead, the Court engaged in traditional statutory interpretation, considering various factors, including the need for national uniformity; the uncertainty of the common law standards; the fact that the common law standards were applied to different questions than the NLRA addressed; and the purpose of the NLRA to promote industrial peace.[114]

The second question the Court addressed concerned the application of the statute's definition of employee to the newsboys.[115] The Court read the definition of employee to be a broad one that was to be determined "by underlying economic facts rather than technically and exclusively by previously established legal classifications."[116] Given this understanding of the statute, the Court did not see its role as making "a completely definitive limitation around the term 'employee.'"[117] Instead, the agency's "[e]veryday experience in the administration of the statute" regarding the facts and operations of employment in different industries would help it answer "who is an employee under the Act."[118]

While noting that "questions of statutory interpretation . . . are for the courts to resolve,"[119] the Court identified a class of cases where this was not the case.[120] The Court wrote: "But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited."[121] The agency's "determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in the law."[122]

The *Hearst* case illustrates several important aspects of judicial review immediately prior to the APA. First, in *Hearst*, deference did not extend to all questions of law.[123] Rather, the opinion did not confer deference on the first, pure question of whether the statute

111. *Id.* at 120.
112. *Id.* at 125.
113. *See id.*
114. *Id.* at 120–24.
115. *Id.* at 124.
116. *Id.* at 129.
117. *Id.* at 130.
118. *Id.*
119. *Id.* at 130–31.
120. *Id.* at 131.
121. *Id.*
122. *Id.*
123. *Id.* at 130–31.

employed the common law definition, only on the mixed question of whether the newsboys were employees.[124]

The Court's analysis also helps illustrate the differences between pure and mixed questions. Pure questions of law are decided using legal techniques rather than an expert's understanding of the industry.[125] Here, the pure question (whether the common law definition had been adopted) was decided using the traditional lawyer's skill of statutory interpretation.[126] Pure questions also involve general questions of meaning rather than narrow questions that are tied to specific facts.[127] Thus, the answer to a pure question results in a rule that applies across a range of factual situations. In *Hearst*, the Court's conclusion that the common law meaning did not apply was relevant to a whole range of jobs, not simply the single position of newsboys.[128]

By contrast, mixed questions involve the application of an unclear or broad statutory term to a "specific" fact situation.[129] This type of question is not resolved through legal techniques but through factual understandings about the industry involved.[130] Here, the Court understood Congress to have adopted an unclear provision that would get its meaning from how an expert would understand how the newsboys functioned in the industry.[131] Moreover, this type of question did not involve a broad question of meaning but the application of the term to a specific matter. Here, the answer would not apply across a broad range of different types of employees but would apply merely to newsboys. Thus, overall, the answer to a mixed question would be largely determined inductively by the agency rather than deductively by the court applying a legal rule, with the agency deciding whether, given the facts about newsboys, treating them as employees would further the purposes of the act.[132]

2. Gray v. Powell

A similar approach was followed in the well-known case of *Gray v. Powell*.[133] *Gray* involved a 19.5 percent tax intended to induce sellers of bituminous coal to comply with a code.[134] The tax was imposed "upon *the sale or other disposal of bituminous coal* produced

124. *Id.*
125. Lawson & Kam, *supra* note 42, at 16–18.
126. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 123–24 (1944), *overruled on other grounds by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).
127. Lawson & Kam, *supra* note 42, at 42.
128. *Hearst*, 332 U.S. at 126–27.
129. Lawson & Kam, *supra* note 42, at 9.
130. *Id.* at 9, 15.
131. *Hearst*, 332 U.S. at 130.
132. Lawson & Kam, *supra* note 42, at 16–21.
133. 314 U.S. 402 (1941).
134. *Id.* at 414–15.

within the United States."[135] An exemption, however, was provided "to coal consumed by the *producer* or to coal transported by the *producer* to himself for consumption by him."[136] The question in the case was whether a coal company that had leased coal lands and then hired an independent contractor to mine the coal and deliver it to the company was exempt from the tax.[137]

The coal company made two arguments that it was not subject to the tax.[138] First, the coal company argued that it was a producer of the coal and therefore exempt from the tax since it consumed the coal.[139] Second, the coal company argued that, even if it was not a producer of the coal, the coal had not been sold or otherwise disposed of and therefore was not subject to the tax in the first place.[140] The Court decided both issues against the company.[141] But while the Court provided deference to the agency as to the first issue, it did not provide any deference as to the second issue.[142]

The first issue—whether the coal company was a producer for purposes of the exemption from the tax—was treated as a mixed question on which the agency received deference.[143] The Court's justification did not merely note that the term "producer" was being applied to the specific facts in this case.[144] The Court also stated that the term "producer" was undefined in the statute and that the term did not address the specific facts of this case.[145] Moreover, the Court emphasized that application of the term to the facts "calls for the expert, experienced judgment of those familiar with the industry" rather than the legal techniques of statutory interpretation.[146] As in *Hearst*, the idea is that an undefined, unclear term should be defined

135. *Id.* at 403 n.1 (emphasis added) (citing Bituminous Coal Act of 1937, 15 U.S.C. § 828 (1940)).

136. *Id.* at 403–04 n.1 (emphasis added).

137. *Id.* at 403, 407–08.

138. Lawson & Kam, *supra* note 42, at 15.

139. *Gray*, 314 U.S. at 403.

140. *Id.* at 414.

141. *Id.* at 415.

142. *Id.* at 411, 414–16.

143. *Id.* at 411.

144. *Id.* at 412–13.

145. *Id.* at 413. The Court wrote that the meaning of the term was clear in the extremes but that:

> Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry.

Id.

146. *Id.*

inductively through fact-based judgments by an agency with expertise in the industry.

The second issue—whether the company's actions involved "the sale or other disposal of bituminous coal" that would have subjected it to the tax in the first place—was treated as a pure question of law.[147] The precise question here was whether the term "other disposal" required a transfer of title, as the company argued in opposition to the agency.[148] In treating this as a pure question, the Court adopted the same approach as in *Hearst*.[149] This issue involved a broad question of meaning that applied not merely to the facts in this case but also to other factual situations. Moreover, the Court treated this issue as one that could be answered by using legal methods that did not require expert knowledge of facts about the industry.[150] To determine the meaning of the statute, the Court first looked to the purpose and precise language of the statute, then to other provisions of the statute as well as a prior statute—all traditional lawyers' tasks.[151]

This discussion of the two leading cases concerning judicial review of legal questions from the brief period prior to the APA's enactment shows that the Court was applying an approach that gave agencies deference for mixed questions but not for pure questions. Admittedly, the Court was not always explicit about the distinction it was drawing. The Court did not mention pure or mixed questions by name.[152] While it did describe mixed questions (without using the term) as being entitled to deference,[153] it could have been more explicit about the distinction it was drawing. But the failure of the Court to be more explicit does not justify ignoring the distinction. These two cases are best read as following the distinction between mixed and pure questions.

147. *Id.* at 416–17.

148. *Id.* at 414.

149. *Id.* at 414–17; NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 126–32 (1944), *overruled on other grounds by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

150. *Gray*, 314 U.S. at 414–17.

151. *Id.* at 416 ("[T]he purpose of Congress which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code."). The Court held that the definition of disposal in the Act, which provided that the term "disposal" "includes consumption or use . . . by a producer, and any transfer to title by the producer other than by sale," did not require that the disposal involve a transfer of title; the use of the term "include" did not limit the term to what was specifically included. *Id.*

152. *See Hearst*, 322 U.S. at 130–31; *Gray*, 314 U.S. at 413.

153. *See Gray*, 314 U.S. at 416–17.

3. Other Cases

This approach to judicial review was also followed in many other cases near the time of the APA's enactment. While Sunstein cites several Court decisions from the 1940s as supporting deference for agency determinations of law generally,[154] these decisions overall do not support extending deference from mixed questions to pure questions.[155] Most, if not all, of those cases are consistent with the mixed question/pure question approach, and none of them clearly apply deference to pure questions.[156] By contrast, several of the cases

154. Sunstein cites to four additional cases: Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947); Unemployment Comp. Comm'n v. Aragan, 329 U.S. 143 (1946); Billings v. Truesdell, 321 U.S. 542 (1944); Dobson v. Comm'r, 320 U.S. 489 (1943). *See* Sunstein, *supra* note 8, at 1649–50 n.185.

155. *See Cardillo*, 330 U.S. at 478–79 (treating question of whether an accidental death arose out of and in the course of employment, which the court described as the "application of a broad statutory term or phrase to a specific set of facts," as a mixed question that involved deference to the agency); *Aragan*, 329 U.S. at 148–49 (conferring deference to the agency on the mixed question of whether, on the specific facts of the case, "a labor dispute" had occurred and a labor dispute was "in active progress"). A case not cited by Sunstein, but which appears to involve deference for mixed questions, is *Interstate Commerce Commission v. Parker*. 326 U.S. 60, 65 (1945) (stating the Commission's duty involves "the finding of facts and the exercise of its judgment to determine public convenience and necessity[,]" and it has discretion "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances").

156. The one case that may provide support for Sunstein's claim is *Dobson v. Commissioner*, but even this support is unclear and is probably dicta. 320 U.S. 489, 500–03 (1943). The case involved the standard of review for decisions of the Board of Tax Appeals, which later became the Tax Court. *Id.* at 492. The Court applied the same standard it would repeat in *Hearst*—that an agency decision "must have 'warrant in the record' and a reasonable basis in the law." *Id.* at 501 (citing Rochester Tel. Corp. v. United States, 307 U.S. 125, 146 (1939)). But where the reviewing court could "separate the elements of a decision" to identify a legal question, the Court appeared to note a different standard. *Id.* at 502. The Court wrote that "[i]n deciding law questions, courts *may* properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience . . . ." *Id.* (emphasis added). While the Tax Court's "decisions *may not be binding precedents for courts dealing with similar problems*, uniform administration would be promoted by conforming to them where possible." *Id.* (emphasis added). This language is unclear. First, it is not evident that this language should be understood as requiring deference, as in *Hearst*; instead, it might simply be a more permissive standard like *Skidmore* deference, announced the next year in another Justice Jackson opinion. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944). Moreover, that *Dobson* was followed by *Hearst* (which did not confer deference on the pure question) the next year suggests also that *Dobson* did not confer deference on a pure question. *See Hearst*, 322 U.S. at 120; *Dobson*, 320 U.S. at 495. But even if this language is understood as a requirement, it seems to be different than the Court's cases that required

are best understood as conferring no deference on pure questions of law.[157]

Cases decided in the years immediately following the enactment of the APA also conform to this pattern. For example, in *O'Leary v. Brown-Pacific-Maxon, Inc.*,[158] which was decided a few years after the APA was passed, the Court again followed a distinction between pure and mixed questions.[159] In construing the Longshoremen's and Harbor Workers' Compensation Act of 1927, which required employers to provide benefits for "accidental injury or death arising out of and in the course of employment," the Court first held that the act did not employ the common law meaning of "arising out of and in the course of employment."[160] This pure question was decided

deference for mixed questions, both in the language it used and in its location in the opinion. Thus, even if *Dobson* does stand for the claim that agencies are entitled to deference for pure questions, it still seems to suggest that pure questions are reviewed by a different and presumably weaker standard—a result that would conflict with using *Dobson* as support for *Chevron*'s uniform standard for both pure and mixed questions. *See Dobson*, 320 U.S. at 500–03.

157. *See, e.g.*, *Hearst*, 322 U.S. at 123; *Gray*, 314 U.S. at 412; O'Leary v. Brown-Pac.-Maxon, Inc., 340 U.S. 504, 506–09 (1951). Another case in which the Court appears not to confer deference on a pure question but does so for another question is *Billings v. Truesdell*. 321 U.S. 542 (1944). In *Billings*, the Court first addressed the question of when military courts acquire jurisdiction over a person drafted into the armed forces. *Id.* at 546–47. The Court concluded that the military courts only acquire jurisdiction after the draftee has been "inducted" into the military. *Id.* at 543, 546–47. To reach this conclusion, the Court had to determine the relationship between two different laws. *Id.* at 546–47. Unsurprisingly, the Court treated the issue as a pure question of law, relying upon legal methods such as the relationship between different terms of the statute, the legislative history, and the purpose of the statute. *Id.* at 545–49; *see supra* note 157 and accompanying text (noting that the relationship between two different laws is a core example of a pure question). The Court appears to decide the issues on its own without giving deference to the agency. It is true that, after an extended discussion of the legal issue and reaching its own conclusion, the Court does note that the Selective Service Regulations support its view of the Act. *Billings*, 321 U.S. at 552–53. But the discussion does not state or imply deference, only that the regulations agree with the Court's interpretation. *Id.* Even if one were to view the reference to the regulations as having an important role in the Court's decision, which I do not, the reference would best be understood as an example, not of deference to an agency, but of a court considering an agency's contemporaneous exposition of the statute. The Court then turns to the separate question of when the draftee has been inducted. *Id.* at 552. Here, the Court clearly affords deference to the agency, citing *Gray v. Powell* and noting that the agency interpretations are "entitled to persuasive weight." *Id.* at 553 (citing *Gray*, 314 U.S. at 462).

158. 340 U.S. 504 (1951).

159. *See id.* at 508.

160. *Id.* at 506 (citing the Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 902(2)).

without conferring any deference on the agency.[161] The Court then addressed the mixed question of whether, given the specific facts of the case, the employee's action arose out of and in the course of employment.[162] Here, the Court gave deference to the agency, concluding that the standards governing liability were "not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as 'questions of law.'"[163]

Another important case, decided one year after the APA's enactment, is *Packard Motor Car Co. v. NLRB*.[164] In *Packard*, the Supreme Court held, without conferring any deference, that foremen at a plant were not employees under the Wagner Act.[165] It is not clear whether the Court treated the issue as a mixed question or a pure question.[166] But either way one interprets the Court, it cuts strongly against the view that the APA conferred *Chevron* deference.

If one viewed the issue as a mixed question, as many commentators have done,[167] then the failure of the Court to confer deference moved the Court farther away from the no deference for pure questions/deference for mixed questions pattern established during the 1940s. Perhaps, one might even view the Court as applying the two-canon, pre-New Deal approach.[168] Alternatively, if one views *Packard* as treating the question as a pure one, then the case is an example of treating a pure question with no deference. The case would then cut against viewing the APA as adopting *Chevron* deference. Instead, it would be consistent with the view that the APA adopted the pure question, mixed question regime that the Court followed in the 1940s.

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161. *Id.* at 506–08.

162. *Id.* at 507–08.

163. *Id.* It is true that the Court called the mixed question a fact question, but this cannot be taken seriously and must be treated as an error. *See* Lawson & Kam, *supra* note 42, at 19 n.68 (treating the reference to a fact question as meaning that mixed questions are afforded deference "comparable in scope" to that "afforded agency findings of fact").

164. 330 U.S. 485 (1947).

165. *Id.* at 488, 491.

166. *See* Lawson & Kam, *supra* note 42, at 20–21. The Court seemed to say it was a pure question, but interpretive charity suggests the Court treated the question as a mixed question.

167. *See* Herbert Rothenberg, *Foremen—The Industrial Question Mark*, 51 DICK. L. Rev. 211, 211 (1947); *see also* Herman E. Cooper, *The Status of Foremen as "Employees" Under the National Labor Relations Act*, 15 FORDHAM L. REV. 191, 191–92 (1946).

168. *Cf. Packard*, 330 U.S. at 492 ("[I]f we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark.").

Thus, the dominant trend in these cases appears clear.[169] There was a category of mixed questions that received deference and a category of pure questions that did not. The mixed question cases were associated with general terms that were thought to have applications that were highly dependent on the facts, whereas the pure questions were identified with broad questions that involved legal techniques, such as the comparison of different provisions and different laws, and the purpose of statutes. While it was not always clear in particular cases that the Court properly drew the distinction or adequately explained its decisions, it is clear that the Court was not applying a rule that all legal questions receive deference but rather was attempting to draw a distinction between mixed and pure questions.[170]

169. Bamzai argues that other cases from this period are hard to understand. *See* Bamzai, *supra* note 3, at 979–80 (discussing both *Nierotko* and *Medo*). I agree that *Nierotko* is difficult to fathom at points. *See* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 368 n.22 (1946) (citing to *Skidmore* in a case implicating ordinary deference). But in my view, there was significant evidence in *Nierotko* that the Court treated the decision as involving a mixed question. *See id.* at 369 (citing *Gray* and *Hearst*) (saying it involved application to particular facts). *Medo* is also hard to understand. It is true that *Medo* does have some language that could potentially be read as conferring deference on both mixed and pure questions. *See* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 681 n.1 (1944) ("It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, *save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight*." (emphasis added)). But the italicized language is best read as a reference either to solely mixed questions or as mistaken dicta for two reasons. First, *Medo* claims that this standard of review "has now long been settled," but the cases it cites for direct support from earlier years do not support the italicized language involving law and instead refer exclusively to the weighing of facts or inferences from facts. *Id.*; *see* NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105, 106–07 (1942) (referring only to the standards of review for factual issues); NLRB v. S. Bell Tel. & Tel. Co., 319 U.S. 50, 60 (1943). Second, the decision itself does not seem to confer deference as to pure questions of law.

170. In his recent book on *Chevron*, Tom Merrill argues that the Supreme Court's decisions from the 1940s until *Chevron* may be best understood not as adopting the pure question/mixed question distinction but as recognizing deference when Congress was understood to be delegating decision-making authority to the agency. *See* THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 39–42 (2022). If Merrill is correct, then the fourth interpretation would result in such delegated deference rather than the pure question/mixed question distinction. But, significantly, the delegated deference that Merrill envisions for the APA does not coincide with *Chevron* deference. Instead, it would be much more limited. In particular, Merrill's reading of the cases suggests that agencies would not

B. Sunstein's Argument Against the Mixed Question/Pure Question Distinction

Now consider Sunstein's argument for the plausibility of *Chevron* deference as the original meaning of the APA. While Sunstein acknowledges that there is evidence supporting a no-deference rule, he also argues that there is evidence for a deference rule and therefore concludes that the question is not clear.[171] To put Sunstein's point in my terms, Sunstein acknowledges that there is evidence for the second interpretation (the two-canon approach), but he also argues that there is evidence for the fourth interpretation (the deference approach). And, significantly, Sunstein maintains that the fourth interpretation supports *Chevron* deference.[172]

But, as should be clear by now, this argument for *Chevron* deference fails. The fourth interpretation reads the APA as having judges decide legal questions in the way that judges ordinarily did at the time. But judges in the years immediately prior to the APA did not confer deference on all questions of law. Judges conferred deference for mixed questions but not for pure questions. Thus, the fourth interpretation can only provide deference for mixed questions.

Sunstein seems to be aware of this objection to his position. In a footnote, he writes of the cases that conferred deference to agencies prior to the APA: "In many such cases, the Court seemed to speak of

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automatically receive deference when they interpret statutes that they administer that are ambiguous but would only receive deference when the organic statute indicates that Congress intended such deference. *See id.* at 229–30. Thus, even if Merrill's reading of the cases is correct, it would not result in *Chevron* deference. Although Merrill's reading of the cases does not support *Chevron* deference, it is still worth raising some questions about his argument. First, it is by no means clear that Merrill's interpretation is correct. While his interpretation does have some support in some of the cases from the 1940s and at the time of the APA, it is not clear that it better accounts for the cases than the mixed question/pure question account. Significantly, some of the later justices appear to have embraced the mixed question/pure question view. *See infra* notes 209–12 and accompanying text (discussing INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448 (1987) and Negusie v. Holder, 555 U.S. 511, 531, 534, 538 (2009) (Stevens, J., joined by Breyer, J., concurring)). Second, it is also not clear how distinct Merrill's account is from the mixed question/pure question account. After all, one way to understand the mixed question/pure question pattern in the cases is that the Court presumed Congress to have intended to delegate deference as to mixed questions but not pure questions. But even if Merrill's account of the cases is distinct from the mixed question/pure question account, the pattern of cases does seem to be similar. *See* MERRILL, *supra*, at 42 (acknowledging that many lower court cases might be characterized as either applying a distinction between pure and mixed questions, as Lawson argues, or as attempting to determine whether Congress had delegation authority to the agency to interpret the provision with deference).

171. *See* Sunstein, *supra* note 8, at 1615, 1620, 1668.

172. *See id.* at 1628, 1661.

'mixed' questions of law and fact, as where the question requires knowledge of both facts and law."[173] Thus, Sunstein seemed to recognize the possibility that these cases would not justify *Chevron* but only deference for mixed questions. But then Sunstein responds to this objection: "Note, however, that mixed questions actually have pure legal components and pure factual components. Whenever a court defers to an agency's answer, it is giving that agency interpretive authority with respect to purely legal questions. The notion of 'mixed questions' is a confusion."[174]

And that is it. A key component of Sunstein's argument rests simply on a couple of sentences in a footnote that reject the concept of a mixed question.

Unfortunately, this defense is seriously flawed for at least two reasons. First, that Sunstein believes the distinction between mixed and pure questions is problematic—what he terms "a confusion"—is irrelevant to the APA's original meaning. If, as the fourth interpretation asserts, the APA's original meaning is that the statute enacted the 1940s interpretive approach of the Supreme Court, then the original meaning is that interpretive approach. The fact that one may not agree with that Supreme Court approach is irrelevant. It is the meaning of the statute, rather than the views of commentators or judges, that is relevant.[175]

Second, even if one were to accept Sunstein's argument that the legal component of mixed questions and pure legal questions should be treated in the same manner, it does not follow that one should confer deference on both of them. Another possibility is that neither

173. *Id.* at 1650 n.185.

174. *Id.*

175. Another strong argument for not extending the deference for mixed questions to pure questions derives from one of the primary reasons why deference was first extended to mixed questions in the 1940s. That reason was the perceived difficulty of drawing a distinction between fact questions and law questions. Bamzai, *supra* note 3, at 976–84. If drawing that distinction was difficult, extending deference to mixed questions had the advantage of ensuring that the court would avoid mistakenly refusing to extend deference to a fact question since there would now be a buffer zone as to mixed questions. But if this is the reason for applying deference to mixed questions, then it cuts against extending deference to pure questions. Even if there is no difference as to the legal portion of mixed questions and pure questions, as Sunstein suggests, there would still be a reason not to treat them both with deference. The reason for conferring deference for the legal portion of mixed questions but not for pure questions is that conferring deference for the legal portion of mixed questions would protect against mistakenly not conferring deference on fact questions, while conferring deference for the latter would not. But pure questions are unlikely to be confused with fact questions. Put another way, since the reason for conferring deference on mixed questions placed no inherent value on deferring as to the legal portion of the mixed question, there would be no value in applying deference to pure questions where no facts are involved.

type of question should receive deference. Thus, Sunstein requires an argument for *extending* deference to pure questions rather than *contracting* deference only to fact questions.

The problem is that there are considerably stronger original meaning arguments for eliminating deference than for extending it to mixed questions. To the extent that the APA's original meaning is unclear, it is entirely appropriate to consider the purpose of the APA. And the APA's purpose strongly favors contracting rather than extending deference.

As previously discussed, an extremely important purpose of the APA was to accept the New Deal revolution but to cut back on perceived excesses of that New Deal approach.[176] This analysis indicates that the APA's purpose was not to enact provisions that restricted agencies more than the pre-New Deal rule or allow agencies more power than they enjoyed during the New Deal.

If Sunstein is correct that one must choose between no deference and deference for both pure and mixed law questions, then the APA's purpose strongly favors the former approach. The pre-New Deal no-deference approach conforms to the APA's purpose since it does not enact a more restrictive approach than existed prior to the New Deal. By contrast, deference for both mixed and pure law questions—*Chevron* deference—conflicts with the APA's purpose because it expands deference and therefore grants agencies more power than they possessed under the New Deal.

C. The Coherence of Mixed Questions as a Category

While I have argued that Sunstein's criticism of mixed questions is not relevant to the APA's original meaning, it is still worth noting that his criticism is questionable. Thus, even if the APA's original meaning turned on the coherence of the distinction in the cases between pure and mixed questions, it is by no means clear that the distinction should be rejected.[177]

Sunstein does not elaborate on his argument that mixed questions either turn out to be fact questions or law questions.[178] But one can imagine what his argument is. We can illustrate his argument with the *Hearst* case, where the Court considered two questions—the pure question of whether the NLRA adopted the common law definition of employee and the mixed question of

176. *See supra* notes 53–54 and accompanying text.

177. For an interesting and clear discussion of the mixed questions, see generally Randall H. Warner, *All Mixed up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005).

178. *See* Sunstein, *supra* note 8, at 1649 n.185.

whether, given the facts about newsboys, they were employees under the act.[179]

One can sympathize with part of what Sunstein might be arguing. If one looks at the mixed question that the Court addresses, it seems that it can be divided into a fact component and a law component. The facts about the conditions of the newsboys' employment are the factual component, and whether they are employees is the legal component. It is true that the law is being applied to the facts, but ultimately the question is the parameters of the term "employee," and that would seem to be a legal matter—a matter of law without any mixed or factual component.[180]

But while mixed questions might be distinguishable into fact and law questions, that does not defeat the New Deal idea that mixed questions are also distinguishable from pure questions and that mixed questions should receive deference, but pure questions should not.[181] Even if we assume, with Sunstein, that one can identify one part of mixed questions as a legal question, nothing follows from that.[182] Certainly, it does not imply that because the legal part of mixed questions received deference, pure questions of law should also receive deference. One can still distinguish between pure questions and the legal part of mixed questions and decide to apply different deference rules to them.

Distinguishing between them can also make sense. The cases from the 1940s appeared to identify two types of questions. The pure questions involved matters that employed traditional legal techniques and generally involved rules that applied to a broad range of factual circumstances.[183] By contrast, the mixed questions involved matters that employed an expert's understanding of the industry and depended upon the specific factual circumstances involved.[184]

If the two types of legal issues—pure questions and the legal component of mixed questions—differ in this way, then it might be desirable to treat these legal issues differently. In the case of the legal component of mixed questions, the resolution will depend much more on the expert's factual understanding of what makes sense, and therefore, one might provide deference to the agency. By contrast, the legal issues that arise as part of pure questions employ traditional

179. NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120, 124 (1944), *overruled by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

180. *See id.* at 120.

181. Sunstein, *supra* note 8, at 1646–48.

182. *See id.* at 1649 n.185.

183. *Id.* at 1648–49.

184. *See id.* at 1681.

legal methods, and therefore it might be appropriate to have judges make these decisions without deference.[185]

D. Applying the Distinction Between Pure and Mixed Questions

If the distinction between pure and mixed questions were adopted, the courts would have to apply it. While the distinction was once quite familiar to the courts, it is no longer applied in this context and seems peculiar to some modern administrative law scholars.[186] Like most other legal distinctions, it is unclear on the margins. Nonetheless, the courts employed the distinction in the past and could employ it again in the future.[187]

The distinction can be illustrated with two Supreme Court cases—one where the Court expressly applied the distinction and one where it did not but could have.

1. INS v. Cardoza-Fonseca

In *INS v. Cardoza-Fonseca*,[188] the Court considered whether two provisions of the Immigration and Nationality Act imposed the same standard. Section 243(h) of the Immigration and Nationality Act required the attorney general to withhold deportation of an alien if "it is more likely than not that the alien would be subject to persecution" in the country to which he would be returned.[189] In contrast, section 208(a) of the act authorized the attorney general to grant asylum to a "refugee" who is unable or unwilling to return to his home country because of persecution or "a well-founded fear" thereof on account of particular factors.[190] The Court concluded that the two standards differed based on two factors—whether the standard turned on a

185. Another reason why it might make sense to distinguish between mixed and pure questions derives from a reason why the legal portion of mixed questions was first granted deference: the difficulty of distinguishing fact from law questions. As discussed above, granting deference for mixed questions would operate to ensure that no fact questions were mistakenly classified as law questions and thereby denied deference. *See supra* note 175 and accompanying text. But granting deference for pure questions would not serve that function.

186. *But see* Lawson & Kam, *supra* note 42, at 23–29 (applying the distinction to scores of cases).

187. In addition to the cases during the 1940s, the Supreme Court employed the distinction in the years after *Chevron* was decided. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446–48 (1987); NLRB v. United Food & Com. Workers Union, Local 23, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'"); *see also* Negusie v. Holder, 555 U.S. 511, 531, 534–38 (2009) (Stevens, J., concurring in part and dissenting in part).

188. 480 U.S. 421 (1987).

189. *Id.* at 423.

190. *Id.*

subjective mental state or objective evidence and how likely the persecution needed to be.[191]

In response to the Bureau of Immigration Affairs's argument that its position that the two standards were equivalent should be accorded substantial deference, the Court wrote that "the narrow legal question" of whether the standards are identical "is a pure question of statutory construction for the courts to decide" and "is not a question of case-by-case interpretation of the type traditionally left to administrative agencies."[192] Thus, the Court refused to confer deference on the agency's interpretation. This pure question is "quite different from the question of interpretation that arises" when "the agency is required to apply" a standard to a particular set of facts through a process of case-by-case adjudication.[193] In the latter case, "the courts must respect the interpretation of the agency."[194]

The Court's conclusion that the question is a pure one seems clearly correct.[195] The question involves a lawyer's skills—in particular, the comparison of two laws.[196] And the question is not tied to a particular application but to an abstract question of wide applicability.

2. Massachusetts v. EPA

While the Court no longer applies the distinction between pure and mixed questions to decide whether to confer deference, that distinction could be readily applied to the more modern cases. The differences between the two approaches can be illustrated with the case of *Massachusetts v. EPA*, [197] in which the Supreme Court held

191. *Id.* at 430–31.

192. *Id.* at 422, 446, 448.

193. *Id.* at 448.

194. *Id.*

195. *Id.* In a later opinion joined by Justice Breyer, Justice Stevens contrasted the question in *Cardoza-Fonseca* with a mixed question involving a similar provision. *See* Negusie v. Holder, 555 U.S. 511, 533 (2009) (Stevens, J., concurring in part and dissenting in part). Justice Stevens discussed *INS v. Aguirre-Aguirre*, where the Court reviewed a BIA decision that "denied withholding of deportation because it found that the respondent had 'committed a serious nonpolitical crime' before he entered the United States." *See id.* (citation omitted) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415 (1999)). Justice Stevens suggested that the application of this term to the specific crime in that case was a mixed question and therefore should be accorded deference. *Id.* The BIA had given "ambiguous statutory terms 'concrete meaning through a process of case by case adjudication.'" *Id.* at 533–34. The application of this general, undefined term to specific facts was a mixed question.

196. *See also* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 114–15, 130–31 (1944) (treating the comparison of the statute standard and the common law as a pure question), *overruled on other grounds by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

197. 549 U.S. 497 (2007).

that the Clean Air Act placed significant limits on the EPA's actions concerning whether it could regulate greenhouse gases for mobile sources.[198]

Dissenting in the case, Justice Scalia argued that the majority ignored *Chevron* deference in reaching its decision.[199] The majority had interpreted the meaning of "air pollutant" in the Clean Air Act, which was defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."[200] The majority had concluded that the broad definition of pollutant clearly included greenhouse gases, which are emitted into the ambient air.[201]

Justice Scalia's criticism of the majority noted that the definition of air pollutant involved two categories—whether something was an air pollution agent and whether a substance was emitted into the air.[202] According to Scalia, the majority had interpreted the second category as necessarily contained within the first category based on how the word "including" is used.[203] But while Scalia acknowledged that one way that "including" was used would indicate that the second category was necessarily contained in the first category, he gave examples of a different usage where the second category was broader than the first and therefore had to be read "as limited in light" of the first category.[204] Concluding that the provision was thus ambiguous, Scalia maintained that the agency's interpretation should prevail under the second step of *Chevron* but that the majority had improperly refused to confer such deference. [205]

While Scalia made a plausible case that the agency should prevail under *Chevron*, it is clear that the agency would not be entitled to deference under the approach that distinguishes between pure and mixed questions. The proper interpretation of "including" within this provision is a pure question. The issue involves a broad, abstract question rather than the application of a general term to specific facts, and it relies on the lawyer's skills of statutory

198. *Id.* at 533–35.
199. *Id.* at 553 (Scalia, J., dissenting).
200. 42 U.S.C. § 7602(g).
201. Massachusetts v. EPA, 549 U.S. at 531.
202. *Id.* at 556–58 (Scalia, J., dissenting).
203. *Id.* at 556.
204. *Id.* at 556–57. For example, Scalia offered the phrase "any American automobile, including any truck or minivan." *Id.* at 557. In this phrase, the terms that followed "including" might be thought to be broader than the category of "American automobile" but in context should be understood as limited to an American truck or minivan. *Id.*
205. *Id.* at 557–58.

interpretation.[206] Thus, a significant part of the Court's interpretation in *Massachusetts v. EPA* would not have been entitled to deference under the 1940s approach.[207]

IV. LEVIN'S ARGUMENT

In a recently published article, administrative law scholar Ronald Levin argues against the view that the APA precludes *Chevron* deference.[208] While Levin does not write from an originalist perspective, much of his article is relevant to how one understands the original meaning of the APA.

Although Levin's article covers much ground, here I focus on the two most relevant of his arguments for my original meaning thesis. First, Levin raises questions about the claim that the two-canon approach prevailed during the period prior to the 1940s.[209] Second, Levin argues, in accord with Sunstein, that the deference cases of the 1940s can be understood to justify *Chevron* deference under the APA.[210] I argue against each of these claims.

A. The Interpretive Regime Prior to the 1940s

Levin disputes the account of the two canons that Bamzai presents in his article.[211] In particular, he claims that there were a number of cases during this period that suggested that the courts conferred deference on agencies.[212] But upon examination, Levin is only able to identify an exceedingly small number of cases that are a genuine exception to Bamzai's two-canon claim.[213] And therefore this evidence ends up having virtually no relevance to the original meaning of the APA.

In my view, the key question in determining the implications of Levin's evidence is how common were the cases that he identifies as providing agency deference. If these cases were the minority view, then they would not be terribly important. While they would indicate

206. *Massachusetts v. EPA* may also have involved other pure questions. *See id.* at 532–34 (majority opinion), 549–53 (Scalia, J., dissenting) (disagreeing over whether the statute significantly limited the EPA's reasons for refusing to make a dangerousness judgment).

207. The majority viewed this provision as unambiguous and therefore resolved it under step one of *Chevron*. *Id.* at 529 n.26 (majority opinion). Under the 1940s approach, however, the Court did not need to strain to conclude the language was unambiguous. It could have simply concluded that the question was a pure one and therefore the agency was not entitled to deference.

208. Levin, *supra* note 18, at 130.

209. *Id.* at 167–68.

210. *Id.* at 173, 176–78.

211. *Id.* at 167–70; Bamzai, *supra* note 3, at 930–31.

212. Levin, *supra* note 18, at 167–70.

213. *Id.* at 160–63 (citing five cases as an exception to Bamzai's two-canon claim).

that some cases departed from the two-canon approach, they would not question the claim that the two-canon approach represented the standard approach to judicial review of questions of law. If Levin's cases were a very small minority of the cases, as I believe the evidence shows, they would be even less relevant to interpreting the APA.[214] By contrast, if the deference rule were the majority view, that would be quite a significant result.[215]

But my review of the evidence strongly suggests that the deference cases presented by Levin constituted neither the majority rule nor even a significant minority rule. Once the cases are closely examined, they are best understood as following the two-canon approach, except for two cases that should be understood as aberrations.

Let us begin with Levin's discussion of *Edwards' Lessee v. Darby*.[216] The case stated that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction *of those who were called upon to act under the law, and were appointed to carry its provisions into effect,* is entitled to very great respect."[217] While Levin acknowledges the reference to "contemporaneous construction," he focuses on the words I have italicized, writing, "[U]nless we suppose that the Court included [the italicized words] for no reason, we have to infer that it thought that the 'great respect' to which the

214. My conclusion that Levin's cases only constitute a very small number of cases is reinforced by the weakness of the claims that Levin makes for them. He does not assert that they constituted the majority rule, which he would have a strong incentive to claim if he believed that they had that status. Instead, he merely asserts that they render the rule that applied during the pre-1941 period "more" diffuse. *See* Levin, *supra* note 18, at 170 (making an assertion that the case law during this period was diffuse).

215. If the majority view provided deference, then the second interpretation would be substantially weakened, since deference would have been conferred in the period prior to the 1940s. The second interpretation would then fall prey to the same objection as the first interpretation—that it would result in an interpretive rule that was stricter than existed prior to the New Deal and therefore would conflict with the purpose of the APA. It is worth noting that even if the cases that Levin believes indicate deference were the majority rule during this period and that deference was incorporated into the APA, that would not result in *Chevron* deference. If that deference were incorporated into the APA, it would have to be under the third interpretation, which incorporates the rule of deference that existed prior to the 1940s. But the rule of deference as described by Levin would differ from *Chevron* deference in several ways. The deference would not employ the two steps of *Chevron*. Instead, the agency's interpretation would merely be entitled to some weight. And that weight would be greater if it were a contemporary exposition or customary usage. Thus, once again, even if one finds deference under the APA, it is not *Chevron* deference.

216. 25 U.S. 206 (1827).

217. *Id.* at 210 (emphasis added).

interpretation was entitled was in part a function of the perspective that the commissioners possessed as implementers of the statute."[218]

Levin appears to read this language as suggesting that the agency would be entitled to some deference even if the construction had not been contemporaneous with the law's enactment.[219] But this language need not be understood in this way. The better way to read this language is as stating that to receive deference, one must be a commissioner and should have interpreted the statute as part of one's official duties near the time of the statute's enactment. If an interpretation was not reached by an official acting in his or her official capacity, it would not be entitled to respect even if the interpretation occurred close in time to the statute's enactment. Thus, the language restricting respect to officials does not suggest that interpretations by officials are always entitled to respect; instead, interpretations by officials are entitled to respect only when such interpretations are contemporaneous (or customary).

This understanding of the language accords with the history of the contemporaneous and customary interpretation canons. The interpretations given weight under the contemporaneous and customary canons have typically been official actions of government officials. For example, the Court gave weight to the constitutional interpretations of many judges when they made the determination to engage in circuit riding.[220] Similarly, the Court gave weight to the constitutional interpretations of Congress when it authorized the Bank of the United States near the time of the Constitution's enactment and then again some years later.[221]

In fact, contemporaneous and customary interpretations have sometimes not been given weight, even when they are voiced by government officials, if they lack sufficient formality. For example, there was a dispute in England about whether or not interpretations offered in legislative debates counted as contemporaneous construction.[222] A significant example of the importance of the distinction between formal and informal actions is shown by the import given to statements of delegates in the ratification conventions.[223] While statements made by individual delegates are often treated as being entitled to significant weight,[224] people at the time do not appear to have done that.[225] As shown in the debate on

218. Levin, *supra* note 18, at 168.

219. *See id.* at 168–70.

220. Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).

221. McCulloch v. Maryland, 17 U.S. 316, 401 (1819).

222. Bamzai, *supra* note 3, at 935–37.

223. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. L. REV. 1371, 1412–13 (2019).

224. *Id.* at 1415.

225. *Id.* at 1412–15.

the constitutionality of the First Bank of the United States, the prevailing view appeared to be that the formal actions of an entire ratification convention, such as proposing amendments to the Constitution, were entitled to significant weight as contemporaneous constructions, but that individual statements of delegates that had no formal effect were not.[226]

It makes sense that official acts would only be entitled to weight when they are contemporaneous or customary. Official acts have actual consequences and therefore are likely to be taken with a seriousness and caution that would not exist for hypothetical acts. Officials also have experience and expertise in the relevant area. But while the official actions provide reasons for giving their contemporaneous or customary interpretations weight, they do not supply a reason for giving them weight when they lack the indicia of reliability that derives from being contemporaneous or customary.

Other cases offered by Levin as supporting deference also appear to be even more clearly misinterpretations of the Supreme Court's statements. Levin cites to language in *Webster v. Luther*[227] that provided:

> [T]he practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted.[228]

While he acknowledges that the case involved a customary interpretation, he argues that this language suggests deference should occur in the absence of a practice because it states "especially when important interests have grown up under the practice adopted."[229] In other words, the Court's statement that weight should be accorded "especially when important interests have grown up under the practice adopted" suggests that weight should sometimes be conferred when there is no practice.[230]

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226. *See id.* at 1412–16. For example, Edmund Randolph, the nation's first attorney general, wrote:

> The opinions too of several respectable characters have been cited, as delivered in the state conventions. As these have no authoritative influence, so ought it to be remembered, that observations were uttered by the advocates of the constitution, before its adoption, to which they will not, and, in many cases, ought not to adhere.

Id. at 1414–15.

227. 163 U.S. 331 (1896).

228. *Id.* at 342.

229. Levin, *supra* note 18, at 169 n.213 (emphasis omitted).

230. *Id.*

But this interpretation is weak. While Levin interprets the Court's language to indicate that weight should be "especially" accorded when there is a practice, the Court actually says that weight should be especially accorded when important interests have *relied* upon the practice.[231] Thus, one cannot infer that the Court is saying that weight should be accorded when there is no practice. Instead, one can only infer that the Court is saying that weight should sometimes be accorded when there is no reliance upon a practice—a position which is consistent with the two-canon approach (since the two-canon approach does not require reliance but only the existence of a practice).

The argument against Levin's interpretation is even stronger when one considers the Court's sentences prior to and after the language that Levin focuses upon. A fuller quotation of the Court's language suggests that the Court intended that weight should be given to the agency only when there is a practice of interpretation, not just a single case of interpretation. The Court writes:

> Much stress is placed by the plaintiff in error upon *the practice of the Land Department* during a certain period, based upon the idea that the right of entry given by the statute of additional lands was entirely personal, and not assignable or transferable. We cannot give to *this practice in the land office* the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under *the practice* adopted. *Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 34, 15 Sup. Ct. 508; *U.S. v. Healey*, 160 U.S. 136, 141, 16 Sup. Ct. 247. But this Court has often said that it will not permit *the practice of an executive department* to defeat the obvious purpose of a statute.[232]

The sentences immediately prior to and immediately after the one quoted here referred to the "practice" in the agency, clearly indicating a customary interpretation.[233] This suggests that the reference to "the practical construction" in the quoted language was also intended to refer to a series of actions, especially since the quoted sentence again referred to "the practice adopted."[234] The only counter to this argument is that the subject of the sentence refers to "the practical construction," which might be thought to reference a single

231. *See id.* at 169; *Webster*, 163 U.S. at 342.
232. *See Webster*, 163 U.S. at 341–42 (emphasis added).
233. *Id.*
234. *Id.*

act.[235] But this argument seems problematic because the surrounding references to a practice suggest that the practical construction refers to multiple acts and because the meaning of "practical construction" appears to include interpretations followed in more than a single case.[236]

Moreover, the two cases that the Court cites here for the claim that the practical construction given to an act of Congress is always entitled to the highest respect both involved a series of acts, which adds further support for this interpretation.[237] Neither case stated anything to suggest that a single decision was entitled to weight. Reading this language as Levin does, then, has peculiar consequences. It would first read the language as being dicta, going beyond the facts as presented in this case. And that dicta would be unsupported dicta since it cited no decisions that supported it. It is far better to read the language as I suggest since it avoids assuming that the Court engaged in a problematic judicial method.

Similar problems are exhibited by Levin's use of *United States v. Moore*.[238] Levin cites the following language in *Moore*:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterward called upon to interpret.[239]

Levin interprets this language as suggesting that interpretations by agency officials are entitled to significant respect even if they are neither contemporary nor customary.[240]

But once again, when the context is taken into account, this language is better interpreted as merely indicating that these interpretations are only entitled to respect when they satisfy the contemporaneous or customary canons. First, the case itself involved a series of actions, not just a single action.[241] Second, the cases cited by this decision also all involved a series of actions.[242] Rather than

235. *Id.*

236. *See Practical Construction*, BLACK'S LAW DICTIONARY (2d ed. 1910) (defining practical construction as "one determined, not by judicial decision, but by practice sanctioned by general consent").

237. *See* Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 34 (1895); United States v. Healey, 160 U.S. 136, 141 (1895).

238. 95 U.S. 760 (1877).

239. Levin, *supra* note 18, at 169.

240. *Id.* at 168–70.

241. *See Moore*, 95 U.S. at 762.

242. *See* Edwards v. Darby, 25 U.S. 206 (1827) (involving multiple acts); United States v. State Bank of N.C., 31 U.S. 29 (1832) (same); United States v. MacDaniel, 32 U.S. 1 (1833) (same).

interpret *Moore* as engaging in unsupported dicta, it is preferable to interpret it as I have suggested, as indicating that only the interpretations of officials who enforce the statute should be accorded weight for contemporaneous or customary interpretation.

What Levin's argument needs is a case where the Supreme Court conferred respect on an agency where its decisions involved neither contemporaneous nor customary interpretation. In that situation, one could be reasonably confident that the Court intended to confer deference rather than simply following the traditional rule that recognized weight from an official action that was either contemporaneous or customary. But virtually all of Levin's cases involve either a contemporaneous or customary interpretation.[243]

The only genuine exceptions to this conclusion are two cases. One of the cases, *Bates & Guild Co. v. Payne*,[244] was acknowledged by Bamzai to be an outlier, as Levin recognizes.[245] The other is *Boston & Maine R.R. v. Hooker*,[246] where the Court grants weight to a practical interpretation of the agency even though it does not appear to involve a contemporary or customary interpretation.[247] But two isolated cases that failed to follow the two-canon rule, as compared to the large number of cases that did, do very little to question the prevalence of that rule. Thus, Levin's evidence does not seriously question the conclusion that the two-canon approach was the standard way of interpreting agency statutes during this period.

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243. *See* Great N. Ry. Co. v. United States, 315 U.S. 262, 275–77 (1942) (granting weight to a customary interpretation); Est. of Sanford v. Comm'r, 308 U.S. 39, 52–54 (1939) (same); Brewster v. Gage, 280 U.S. 327, 336 (1930) (same); La Roque v. United States, 239 U.S. 62, 64 (1915) (same); Hastings & Dakota R.R. Co. v. Whitney, 132 U.S. 357, 366 (1889) (same). There are two other cases mentioned by Levin that do not provide the authority he needs but for reasons other than that they involved contemporaneous or customary agency interpretation. In *United States v. Reynolds*, the Court granted weight to an interpretation reached by the agency not because of the agency's expertise but because the *legislature* had engaged in a series of interpretations of the language. 250 U.S. 104, 109–10 (1919). This accords with the two-canon approach because legislative interpretations can be customary interpretations. In *FTC v. R.F. Keppel & Bro., Inc.*, the Court granted weight to the agency based not on ordinary deference but what appears to be a type of *Skidmore* deference. 291 U.S. 304, 313–14 (1934); s*ee id.* ("If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence"). *Skidmore* deference is usually analyzed as a type of deference that differs from *Chevron* or mixed question deference. Levin, *supra* note 18, at 166–67.

244. 194 U.S. 106 (1904).

245. Bamzai, *supra* note 3, at 966–69; Levin, *supra* note 18, at 170.

246. 233 U.S. 97 (1914).

247. *Id.* at 117–19.

B. The Argument for Deference Based on the 1940s Cases

Levin's second argument is similar to Sunstein's position that *Chevron* can be rooted in the deference cases from 1941 to 1946.[248] While Levin presents some additional arguments, his position is no more successful than Sunstein's.

Levin can be understood as making three related arguments. First, Levin appears to argue that, in some sense, *Chevron* is equivalent to the deference cases of the 1940s. He writes that "the second step of the *Chevron* formula is best understood to be equivalent to the proposition that questions of *law application* are primarily for the agency that administers the statute."[249] It is not entirely clear what Levin precisely means by this claim, but I shall interpret him to be arguing what his language appears to be saying—that deference under *Chevron* only applies to questions of law application.[250]

If this claim about *Chevron* were true, then Levin would have a strong case for rooting *Chevron* in the 1940s deference cases. Indeed, *Chevron* would not really differ from my reading of these 1940s cases. Step one of *Chevron* would entirely coincide with pure questions and

248. *See* Levin, *supra* note 18, at 186.

249. *Id.* at 185–86 (emphasis in original).

250. While the text here interprets Levin as claiming that the *Chevron* approach and the 1940s deference cases are identical, in my view, Levin might be interpreted as merely claiming that there is a significant similarity between these two sets of cases. He writes:

> In our more positivist age, courts more often characterize issues of law application in terms of the review of the exercise of delegated authority. But these are essentially equivalent names for the same underlying type of issue. *In this sense*, one can draw a straight line from the deference prescribed in the early 1940s cases to the deference contemplated in the second step of the *Chevron* test.

Id. at 186 (emphasis added). By interpreting him to be claiming that there is merely a significant similarity between *Chevron* and the 1940s deference cases, rather than a precise identity, we avoid any tension between this first claim and the one discussed below, where he recognizes that *Chevron* does diverge from the 1940s deference cases in some ways. *See infra* note 254 and accompanying text. If Levin can also be understood as only making the claim that there is a substantial similarity between these two doctrines, then why do I interpret him in the text as claiming that they are identical? First, this is what his text appears to be saying, and many readers may interpret him in that way. Second, by interpreting him in this way, one can make clear how much the two doctrines diverge. The substantial similarity claim is vague, and therefore, it is hard to know how much the doctrines diverge. Ultimately, nothing substantive turns on the interpretation of Levin in the text. If one reads him as making the substantial similarity claim, one then needs to determine whether, given the differences between the *Chevron* and the pure question/mixed question doctrines, there is a substantial similarity between the two doctrines.

would involve no deference. Step two of *Chevron* would entirely coincide with mixed questions and would involve deference.

But this claim, interpreted as I do here, seems obviously false. A pure question can be addressed at step two of *Chevron*. In fact, Justice Scalia claimed that the *Chevron* case itself involved a pure question.[251] And a mixed question can be addressed at step one of *Chevron* if the question of law application is clear. Thus, *Chevron* does not coincide with the 1940s deference regime.

Second, Levin does acknowledge that *Chevron* differs in some ways from the deference approach of the 1940s. While he maintains that there are some similarities,[252] he admits that the earlier cases differ from *Chevron* in that the earlier cases follow a multiple factor approach to determining whether deference should apply while *Chevron* applies a more categorical rule.[253] In terms of my argument and understanding of the 1940s cases, this admission is key. It acknowledges that the 1940s cases diverge from *Chevron*. This means that *Chevron* cannot be justified under the fourth interpretation as the approach that existed at the time of the APA's enactment.

Finally, Levin tries to defend *Chevron* as a reasoned elaboration of the deference rulings of the 1940s.[254] In other words, while those deference cases did not precisely adopt the *Chevron* approach, the rulings were close enough to justify a court in moving to *Chevron* over time through a process of reasoned elaboration.[255] Whether or not Levin's argument works under reasoned elaboration jurisprudence, my focus here is on originalism. Still, Levin's argument might be recast within originalism and fruitfully explored. Under this recasting, it might be argued that the original meaning of the APA intended the courts to exercise the power of reasoned elaboration, and therefore *Chevron* can be justified as a product of reasoned elaboration that the original meaning of the APA authorizes.

Although Levin does not make this specific argument, Sunstein does briefly appear to do so. He writes: "We could read section 706 of

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251. INS v. Cardoza-Fonseca, 480 U.S. 421, 454–55 (1987) (Scalia, J., concurring) (the claim that agencies should not receive deference for "a pure question of statutory construction" is "contradicted" by *Chevron*, "since in *Chevron* the Court deferred to the Environmental Protection Agency's abstract interpretation of the phrase 'stationary source'").

252. Levin argues that the deference cases relied upon similar factors to decide whether to confer deference as *Chevron* does—factors such as an agency's "technical expertise, experience in dealing with the subject matter, and responsibility for implementing their mandates effectively on a concrete level." Levin, *supra* note 18, at 187.

253. *Id.* at 188. Levin also acknowledges that *Chevron* departed from the earlier cases by adding a new factor—"a focus on the agencies' political accountability." *Id.*

254. Levin, *supra* note 18, at 187.

255. *Id.*

the APA as a restatement of judge-made law, authorizing courts to continue to build out deference principles on the basis of judgments about comparative competence."[256]

But this argument clearly does not work from an originalist perspective. To reach this conclusion, one would have to adopt the third interpretation of the APA—follow the standard interpretive approach at the time of the APA's enactment—and conclude that the standard interpretive approach was one that authorized the courts "to build out deference principles" based on "judgments about comparative competence."[257]

But there is no evidence that this was the standard interpretive approach at the time of the APA's enactment. It is true that the Supreme Court had changed the interpretive approach beginning in 1941.[258] But the Court did not indicate that it was engaged in an ongoing enterprise of adopting what it regarded as appropriate deference principles. Instead, it simply changed the interpretive rules, which sounds like the normal process of overruling a prior case or doctrine that happens regularly throughout the law.

To support the conclusion that the APA authorized courts to build out deference principles, one would need to conclude that this was the interpretive rule at the time and that lawyers understood this, either because it was articulated or because it was generally recognized. Neither Levin nor Sunstein provide such evidence.

V. IMPLICATIONS AND CONCLUSION

Overall, there is a strong case that the APA's original meaning does not justify *Chevron* deference. In my view, the evidence most strongly supports the two-canon approach with no deference to agencies as to legal questions. But there is some evidence for an approach that would confer deference for mixed questions but not for pure questions. Thus, while the APA's precise original meaning is not certain, it clearly does not support *Chevron*, which extends deference to both mixed and pure questions.[259]

Once one concludes that the APA's original meaning is inconsistent with *Chevron*, the next question is what the Court should do about it. Here, the question turns on one's views on the overturning of precedents.[260] While a complete examination of this question is beyond the scope of this Article, I can beneficially address some important points about two considerations—(1) the relative normative desirability of the APA's original meaning versus *Chevron*,

256. Sunstein, *supra* note 8, at 1659.

257. *Id.*

258. *See* Bamzai, *supra* note 3, at 976–77.

259. Lawson & Kam, *supra* note 42, at 60.

260. For my own views, see John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. L. REV. 803, 803 (2009).

and (2) how one should assess and balance the disruption caused by overturning *Chevron*.

While normative approaches vary, I believe there is much to be said on normative grounds for overturning *Chevron*, especially with the two-canon approach. First, overturning *Chevron* would return to the regime that Congress enacted, which would enhance the legitimacy of the law. Overturning *Chevron* would also further separation of powers principles. *Chevron* deference is often thought of as a delegation of either legislative or judicial power to the executive.[261] Under either conception, the executive will be exercising a nonexecutive power, which conflicts with separation of powers political principles.[262]

While the two-canon approach avoids conferring deference on the executive, it still allows for agency input into the meaning of the statute but in circumstances that are more likely to lead to good results than under *Chevron*. First, if the executive interprets the statute near the time it was enacted, it is more likely to discern the meaning that was enacted, since it will have better knowledge of the meanings of the terms, the problems the statute was supposed to address, and the background values at the time. The executive is also likely to be more constrained in its interpretation. If an agency were to adopt an interpretation that was not within the contemplation of Congress at the time, it would risk strong protests from the enactors of the law.

Second, if the executive has followed an interpretation consistently over time, then that interpretation has shown itself to be workable, and continuing to follow it will protect reliance interests and accord with expectations of the government and public.

Finally, the two-canon approach naturally addresses one of the most serious problems with *Chevron* deference—that it allows agencies the discretion to use statutes that were designed for one set of problems to address an entirely new set of problems.[263] This problem has been recognized by scholars on both sides of the political spectrum with issues such as climate change and sexual assault.[264] Under the two-canon approach, novel interpretations that are offered many years after the statute was enacted would tend not to fit under either of the canons.

261. Michigan v. EPA, 576, U.S. 743, 761–62 (2015) (Thomas, J., concurring).

262. Separation of powers political principles are not necessarily the original meaning of the Constitution. Instead, they are political principles that one might favor on political grounds. *See* Rappaport, *Replacing Agency Adjudication*, *supra* note 4, at 812–13 (critiquing *Chevron* and other aspects of the administrative state from the perspective of separation of powers political principles).

263. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 78 (2014).

264. *Id.* at 76.

The second basic consideration that I address here involves the possible disruption caused by overturning *Chevron*. Many regulations and other agency actions have been based on *Chevron* deference, and the courts have approved such actions under that approach.[265] Holding those actions to be illegal might be extremely disruptive.

Despite the possible disruption from overturning *Chevron*, there are strong arguments against simply retaining *Chevron*. First, even if *Chevron* were replaced with the two-canon approach, agency interpretations that were adopted when the statute was enacted or that were followed over a period of time would be accorded weight by the courts. Thus, some agency interpretations would continue to receive treatment similar to deference. Second, even though there may be significant disruption from overturning *Chevron*, one must also recognize that *Chevron* worked a substantial transfer of power from courts to agencies that Congress did not enact. Thus, there has been a serious distortion of the regime that was enacted into law. Failing to overturn *Chevron* would leave that distortion in place.

But even if one concludes that *Chevron* should not be entirely overruled, that does not mean it should be retained unchanged. If it would be too disruptive to entirely overrule *Chevron*, then the Court could cut back on *Chevron*, reducing its import but not overruling it entirely. The Supreme Court recently did exactly that in *Kisor v. Wilkie*[266] in the analogous context of deference for agency interpretation of legislative regulations.[267] While the Court declined to overrule *Auer* deference, it nonetheless cut back on such deference.[268] The Court attempted to camouflage this cutting back by stating it was attempting to "clear up some mixed messages we have sent," but the cutting back was clear to all concerned.[269]

The Court could do something similar with *Chevron*. First, it could narrow the scope of *Chevron* deference by expanding the scope of step one of *Chevron*. In other words, it could make it less likely

265. *See, e.g.*, Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 58 (2011); City of Arlington v. FCC, 569 U.S. 290, 300 (2013); Montgomery Cnty. v. FCC, 811 F.3d 121, 133 (4th Cir. 2015).

266. 139 S. Ct. 2400, 2423–24 (2019).

267. *Id.*

268. *Id.* at 2408.

269. *Id.* at 2414. The pruning of *Auer* was discussed by Chief Justice Roberts, who joined the majority opinion, and Justice Kavanaugh, who did not. *Id.* at 2424 (Roberts, C.J., concurring in part); *id.* at 2448 (Kavanaugh, J., concurring in the judgment). Both justices noted that the difference between *Skidmore*, which would apply if *Auer* were overruled, and the Court's description of *Auer* in *Kisor* were not that far from one another. *Id.* at 2424 (Roberts, C.J., concurring in part); *id.* at 2448 (Kavanaugh, J., concurring in the judgment). Similarly, Justice Gorsuch described the majority's opinion as a new modeling of *Auer*. *Id.* at 2425 (Gorsuch, J., concurring in the judgment).

that the Court would conclude that Congress had not spoken to an issue. The Court could accomplish this in several different ways. One way would involve adopting Justice Scalia's view that the traditional rules of statutory interpretation often resolve issues of meaning under step one.[270] Another way would be to reduce how strong an interpretation needs to be in order to resolve an issue under step one. For example, a judge might conclude that an interpretation is justified under step one so long as the judge is left with the distinct impression that that interpretation is the strongest one. Even more radically, a judge might treat the case as a step-one case unless the two strongest interpretations are tied in strength.

Second, the Court could expand the major question doctrine, which holds that questions of deep "economic and political significance" are not covered by *Chevron* because Congress would not have intended to confer deference on agencies for such important questions.[271] The Court could expand this doctrine by applying a less demanding standard for what a major question is. Or the Court could expand the doctrine in a particular direction. For example, the Court could extend the doctrine to issues such as climate change or sexual assault, where an agency applies a statute to a problem that it was not designed to address.

A final way that the Court might limit *Chevron* is by not applying it to questions where the agency has not yet relied upon *Chevron* deference. If the agency has not interpreted a provision, or has not interpreted it in a manner that would be entitled to *Chevron* deference, then it would not be disruptive if the courts did not provide *Chevron* deference for those interpretations in the future because the courts would not be overturning any agency actions that relied on *Chevron*.

In addition, the Court might not provide *Chevron* deference for a provision that has been interpreted in the past but where the agency has now repealed the action that would have been entitled to *Chevron* deference. For example, if an agency interpreted a statutory provision as part of its adoption of a legislative regulation but then subsequently repealed that regulation, then the agency would no longer be entitled to *Chevron* deference for future actions since the

270. Scalia, *supra* note 5, at 520–21.

271. King v. Burwell, 576 U.S. 473, 485–86 (2015). It should be noted that the Court has two major questions doctrines. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021). I am here referring to the version that does not apply *Chevron* deference to major questions. I am not referring to the Court's other major questions doctrine, which requires a clear statement "'before concluding that Congress' meant to confer" an "'[e]xtraordinary grant[] of regulatory authority' to the agency." West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)). Of course, this latter doctrine might also cut back on *Chevron* deference by deciding more cases under step one.

agency would now be in the same position as an agency that had never interpreted the provision in the first place.[272]

Overall, then, there are several actions that the Court could take to address the conflict between *Chevron* deference and the APA's original meaning. The Court could overturn *Chevron* entirely, reduce the scope and strength of *Chevron* deference, or limit its application to issues in the future. Given these alternatives, it is hard to argue that the Court must simply accept the unlawfulness of *Chevron* deference rather than take action to limit it or overturn it.

272. Further, the Court might allow an agency that had adopted a regulation based on *Chevron* deference to renounce *Chevron* for the future, even if it did not repeal the regulation. In this situation, the agency could subsequently repeal the regulation but could not claim *Chevron* deference for other regulations.