

Fall 2016

Toward a Context-Specific Chevron Deference

Christopher J. Walker

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Christopher J. Walker, *Toward a Context-Specific Chevron Deference*, 81 Mo. L. REV. (2016)
Available at: <https://scholarship.law.missouri.edu/mlr/vol81/iss4/13>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Toward a Context-Specific *Chevron* Deference

Christopher J. Walker*

ABSTRACT

With Justice Scalia's passing, the Supreme Court is less likely to consider overturning the administrative law doctrines affording deference to agency statutory interpretations (Chevron deference) or agency regulatory interpretations (Auer deference). Without Justice Scalia on the Court, however, a different kind of narrowing becomes more likely. The Court may well embrace Chief Justice Roberts's context-specific Chevron doctrine, as articulated in his dissent in City of Arlington v. FCC and his opinion for the Court in King v. Burwell. This Article, which is part of a symposium on the future of the administrative state, explores the Chief Justice's more limited approach to Chevron deference and details how recent empirical studies of statutory and regulatory drafters may well provide some support for a context-specific Chevron doctrine. Although the wisdom of such a reform lies outside the Article's scope, litigants and scholars should pay more attention to the Chief Justice's dissent in City of Arlington, as it may well soon become the law of the land.

TABLE OF CONTENTS

I. INTRODUCTION.....	1095
II. THE CHIEF JUSTICE'S CONTEXT-SPECIFIC <i>CHEVRON</i> DOCTRINE.....	1098
A. <i>A New Major Questions Doctrine in King v. Burwell</i>	1099
B. <i>A Context-Specific Chevron Deference in City of Arlington</i>	1103
III. LESSONS FROM CONGRESSIONAL AND AGENCY DRAFTERS.....	1105
A. <i>Findings on Major Questions Doctrine</i>	1107
B. <i>Findings on Context-Specific Chevron Deference</i>	1110
IV. CONCLUSION.....	1114

I. INTRODUCTION

As the title for this *Missouri Law Review* Symposium – *A Future Without the Administrative State?* – reflects, there has been a growing call in the

* Associate Professor of Law, Michael E. Moritz College of Law, The Ohio State University. Many thanks are owed to the Symposium participants, as well as to my research assistant Aaron Stevenson for helpful feedback. Thanks are also due to the *Law Review* editors and Erin Morrow Hawley for organizing such a terrific and engaging symposium.

legal academy and within policy circles, mostly from those right of center, to reconsider the foundations of the modern regulatory state.¹ These calls for reform have largely focused on revisiting judicial deference doctrines to federal agency interpretations of law. The reform efforts reached the Supreme Court last year, with Justices Scalia, Thomas, and Alito all questioning the constitutionality of judicial deference owed to agency interpretations of their own regulations (*Auer* or *Seminole Rock* deference)² and Justice Thomas questioning the constitutionality of deference to agency statutory interpretations (*Chevron* deference).³ Indeed, even the other six Justices joined the majority opinion in *King v. Burwell*, in which the Court ultimately sided with the federal government in interpreting the Affordable Care Act's tax credit provisions but refused to accord any deference to the agency's interpretation of the ambiguous statutory provision.⁴ Republicans in Congress have recently followed suit by introducing legislation that would abolish *Auer* and *Chev-*

1. A sample of conferences from this year – in addition to this Symposium – typifies this general mood: *Deference in Doubt? The Future of Chevron and the Administrative State*, Panel, American Constitution Society National Convention (June 2016); *Rethinking Judicial Deference: History, Structure, and Accountability*, Policy Conference, George Mason University's Center for the Study of the Administrative State (June 2016); *The State of Chevron: 15 Years After Mead*, *Administrative Law Review* Annual Symposium (Mar. 2016); *A Modest Proposal for Reforming the Administrative State*, Online Symposium, LIBERTY LAW FORUM (Feb. 2016), <http://www.libertylawsite.org/liberty-forum/a-modest-proposal-for-reforming-the-administrative-state/>; *The New Chevron Skeptics*, Panel, The Federalist Society 18th Annual Faculty Conference (Jan. 2016). Indeed, a number of Symposium contributions focus on such reforms and their aftermath. See, e.g., Jeffery A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016).

2. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring) (“I would therefore restore the balance originally struck by the [Administrative Procedure Act] with respect to an agency’s interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written.”); *id.* at 1225 (Thomas, J., concurring) (“By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.”); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment) (“The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect.”). See generally *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (instructing courts to defer to an agency’s interpretation of its own regulation “unless plainly erroneous or inconsistent with the regulation”); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

3. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (instructing courts to defer to an agency’s reasonable interpretation of an ambiguous statute that the agency administers).

4. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

ron deference and require agencies to review *de novo* all agency statutory and regulatory interpretations.⁵

With Justice Scalia's passing in February, however, judicial efforts to overturn *Auer* or *Chevron* seem less likely to succeed. Indeed, three months after Justice Scalia's death, the Court denied review of a petition Judge Easterbrook flagged as a suitable vehicle to reconsider *Auer* deference,⁶ with only Justice Thomas dissenting.⁷ As for *Chevron* deference, the chances for reconsideration, even with Justice Scalia still on the Court, were more remote – though whispers shortly after his death suggested that he may have been reconsidering *Chevron* deference in addition to *Auer* deference.⁸ In all events, without Justice Scalia on the Court, *Chevron* and *Auer* are likely to remain bedrock principles of administrative law for years to come.

A different kind of narrowing of *Chevron* deference, however, becomes much more likely now that Justice Scalia is no longer on the Court: Chief Justice Roberts's context-specific approach to *Chevron* deference. This Article addresses that possibility and some empirical support for the Chief Justice's approach. Part II of this Article outlines the Chief Justice's more limited approach to *Chevron* deference, as articulated in his dissent in *City of Arlington v. FCC*,⁹ as well as Justice Scalia's sharp criticism of it in his opin-

5. See Separation of Powers Restoration Act, H.R. 4768, 114th Cong. § 2 (2016) (amending the Administrative Procedure Act to require courts to review “*de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules”); Separation of Powers Restoration Act, S. 2724, 114th Cong. § 2 (2016) (same); see also Christopher J. Walker, *Courts Regulating the Regulators*, REG BLOG (Apr. 25, 2016), <http://www.regblog.org/2016/04/25/walker-courts-regulating-the-regulators/> (explaining how this pending legislation is an outgrowth of recent Supreme Court criticism of *Chevron* deference).

6. *Bible v. United Student Aid Funds, Inc.*, 807 F.3d 839, 841 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc) (“The positions taken by the three members of the panel show that this is one of those situations in which the precise nature of [*Auer*] deference (if any) to an agency’s views may well control the outcome.”), *cert. denied*, 136 S. Ct. 1607 (2016) (mem.).

7. *Bible*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari) (“This is the appropriate case in which to reevaluate *Seminole Rock* and *Auer*. But the Court chooses to sit idly by, content to let [h]e who writes a law also adjudicate its violation.”).

8. See Adam J. White, *Scalia and Chevron: Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), <http://www.yalejreg.com/blog/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white> (“And in fact Scalia was seriously reconsidering *Chevron* deference – or so he said in conversations in recent months, word of which spread quickly, if quietly, in legal circles.”); see also C. Boyden Gray, *On Justice Scalia’s Contributions to Administrative Law*, ADMIN. & REG. L. NEWS, Spring 2016, at 4, 5 (“The downgrading of *Chevron* and the lift of the non-delegation doctrine in [Justice Scalia’s] recent opinions fits well with the theme of his most recent speeches about the separation of powers.”).

9. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting) (arguing that the Court should “ask[] whether Congress had delegat[ed] au-

ion for the Court in *City of Arlington*. Part II also explains how the Chief Justice's opinion for the Court in *King v. Burwell* reflects a similar context-specific approach, which perhaps has been overshadowed by commentators' focus on the major questions doctrine articulated in the opinion.¹⁰ It then details why a majority of the current Court may well embrace this narrowing of *Chevron* deference.¹¹

Part III provides some empirical support for the Chief Justice's approach. This comes from two, perhaps unlikely, sources: statutory and regulatory drafters. This Part presents the relevant findings from a 195-question survey I conducted of 128 agency rule drafters at seven executive departments and two independent agencies.¹² It likewise reviews the findings from Lisa Bressman and Abbe Gluck's pathbreaking study of congressional drafters.¹³ The congressional and agency officials surveyed seem to embrace a more context-specific, expertise-driven approach to *Chevron* deference, as opposed to the bright-line *Chevron* rule Justice Scalia rearticulated for the Court in *City of Arlington*. This Article concludes without taking a normative position on this context-specific *Chevron* doctrine. Instead, it ends with a call for litigants and scholars to pay more attention, especially in light of Justice Scalia's passing, to the Chief Justice's dissent in *City of Arlington*.

II. THE CHIEF JUSTICE'S CONTEXT-SPECIFIC *CHEVRON* DOCTRINE

To appreciate the Chief Justice's context-specific approach to *Chevron* deference, this Part begins with his opinion for the Court last year in *King v.*

thority to the agency to elucidate a *specific provision* of the statute by regulation" – that is, "the statutory ambiguity at issue").

10. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014))).

11. To be sure, the Chief Justice was not the first to suggest a context-specific narrowing of *Chevron*; Justice Breyer has long argued for one, perhaps most forcefully in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

12. See Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015) [hereinafter Walker, *Inside Agency Statutory Interpretation*]. See also Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 475 (2014) (further exploring findings related to administrative law's deference doctrines); Christopher J. Walker, *Inside Regulatory Interpretation: A Research Note*, 114 MICH. L. REV. FIRST IMPRESSIONS 61 (2015) (exploring findings related to regulatory interpretation).

13. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Part I*]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014) [hereinafter Bressman & Gluck, *Part II*].

*Burwell*¹⁴ and then explores how that opinion builds on his 2013 dissent in *City of Arlington v. FCC*.¹⁵ This Part concludes by exploring the likelihood that the Court may adopt the Chief Justice's more context-specific approach to *Chevron* deference in the near future.

A. A New Major Questions Doctrine in *King v. Burwell*

Last year, in *King v. Burwell*, the Supreme Court upheld a Treasury regulation interpreting the Affordable Care Act to allow for tax subsidies in healthcare exchanges established by the federal government.¹⁶ The statute grants premium tax credits to certain taxpayers who are “enrolled in [insurance plans] through an Exchange established by the State under section 1311.”¹⁷ To ensure all qualifying taxpayers receive the tax credits regardless of whether their State has established its own exchange, the Treasury Department, through the Internal Revenue Service (“IRS”), promulgated a regulation via notice-and-comment rulemaking. This regulation interpreted the statutory phrase “an Exchange established by the State” to include any “State Exchange, regional Exchange, subsidiary Exchange, and Federally-facilitated Exchange.”¹⁸ The challengers to the regulation argued that the agency's interpretation was contrary to the plain text of the statute.¹⁹

In a 6-3 decision authored by the Chief Justice, the Court found the statutory language ambiguous.²⁰ In an interesting twist, however, the Court refused to apply any deference to the agency's interpretation of the statutory ambiguity.²¹ Instead, the Court interpreted the statute *de novo* and concluded that “the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase” to “allow[] tax credits for insurance purchased on any Exchange created under the Act.”²² That is because the premium tax “credits are necessary for the

14. See *King*, 135 S. Ct. at 2485–96.

15. *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (Roberts, C.J., dissenting).

16. *King*, 135 S. Ct. at 2496. Part II.A draws on Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 33–35, 39–45.

17. I.R.C. § 36B(c)(2)(A)(i) (West 2016).

18. Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377-01, 30,378 (May 23, 2012) (codified at 26 C.F.R. pts. 1 & 602) (citing 45 C.F.R. § 155.20) (noting that “[c]ommentators disagreed on whether the language in section 36B(b)(2)(A) limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges,” but concluding that it did not so limit because the broader interpretation “is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole”).

19. *King*, 135 S. Ct. at 2495.

20. *Id.* at 2492.

21. *Id.* at 2489.

22. *Id.* at 2495–96.

Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.”²³

Although the Court ultimately agreed with the federal government’s interpretation of the Affordable Care Act, it refused to accord deference to the regulation interpreting the statute. In two short paragraphs, the Chief Justice introduced a new “Step Zero” exception to *Chevron* deference based on the importance of the policy question at issue.²⁴ Invoking *FDA v. Brown & Williamson Tobacco Corp.*, he noted that, “in extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”²⁵ He went on to explain:

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.²⁶

Put differently, *Chevron* deference does not apply to certain major questions unless there is clear congressional intent. The Chief Justice further observed that “[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”²⁷ His refusal to apply *Chevron* deference thus focused on a disbelief concerning congressional intent to delegate by ambiguity, based on two types of evidence: the deep importance of the policy question and the IRS’s lack of expertise in the subject matter.

The major questions doctrine is not new. Even Justice Scalia has invoked it, colorfully explaining in *Whitman v. American Trucking Ass’ns* that Congress “does not . . . hide elephants in mouseholes.”²⁸ Indeed, with Justice

23. *Id.* at 2496.

24. See, e.g., Christine Kexel Chabot, *Selling Chevron*, 67 ADMIN. L. REV. 481, 497–506 (2015) (arguing that *King* created a new and confusing *Chevron* Step Zero exception for major policy questions). Tom Merrill and Kristin Hickman coined the term “*Chevron* Step Zero” shortly after the Court’s decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001). Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836–37 (2001); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 207–11 (2006). For a recent review of the literature and case law on the scope of *Chevron* deference under Step Zero, see Peter M. Shane & Christopher J. Walker, *Foreword – Chevron at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 477–84 (2015).

25. *King*, 135 S. Ct. at 2488–89 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), *superseded by statute*, Family Smoking Prevention & Tobacco Control Act, 21 U.S.C.A. §§ 387–387u (West 2016)).

26. *Id.* at 2489.

27. *Id.*

28. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

Scalia writing for the majority in *Utility Air Regulatory Group v. EPA* (*UARG*), the Court struck down an EPA interpretation of the Clean Air Act because the issue was one of “vast ‘economic and political significance,’” and the EPA’s interpretation “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”²⁹ Perhaps the appearance of the major questions doctrine in *King v. Burwell* is similar to its use in *Brown & Williamson*, *UARG*, and *Whitman*. Indeed, it may not have even been the Chief Justice’s original idea to apply the doctrine in *King*. At oral argument, it was Justice Kennedy who seemed to raise the major questions point:

[I]f it’s ambiguous then we think of *Chevron*, . . . [b]ut it seems to me a drastic step for us to say that the Department of Internal Revenue and its director can make this call one way or the other when there are, what, billions of dollars of subsidies involved here? Hundreds of millions?³⁰

But what distinguishes *King* from the prior cases is *how* the Chief Justice invoked the major questions doctrine. Justice Scalia’s invocation of the major questions doctrine took place within the two steps of *Chevron* – as part of the Step One inquiry in *Whitman*³¹ and as part of the Step Two inquiry in *UARG*.³² Similarly, *Brown & Williamson*, on which both *UARG* and *King* relied, applied the major questions doctrine within the two-step framework – at Step One.³³

In *King v. Burwell*, by contrast, the Chief Justice grounded his major questions doctrine as a threshold, Step Zero inquiry. Although the Court ultimately concluded that the statute is ambiguous – and that the agency’s interpretation is a reasonable, indeed the best, interpretation – the Court decided that it, rather than the agency, is the authoritative interpreter of the statutory ambiguity.³⁴ As Catherine Sharkey has observed, “The Chief Justice’s

29. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

30. Transcript of Oral Argument at 74, *King*, 135 S. Ct. 2480 (No. 14-114).

31. *Whitman*, 531 U.S. at 471 (“The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the [Clean Air Act] as a whole, unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA.”).

32. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444 (“EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”).

33. *Brown & Williamson*, 529 U.S. at 133 (“With these principles in mind, we find that Congress has directly spoken to the issue here and precluded the FDA’s jurisdiction to regulate tobacco products.”).

34. *See also* Hoffer & Walker, *supra* note 16, at 40 (noting that the application of the major questions doctrine at Step Zero or Step One – as opposed to Step Two – has the additional benefit of “foreclos[ing] a subsequent presidential administration from

majority decision in *King* – setting *Chevron* aside on the basis that the agency before it is not relevant – enlarges *Chevron*'s Step Zero and thereby signals a potential avenue for challenging agency action."³⁵

It will be interesting to see whether the Chief Justice's new major questions doctrine has staying power to narrow *Chevron*'s domain, or whether it was just a one-off application based on the extraordinary circumstances. It seems foolish to read too much into the fact that five other Justices – including the four Justices appointed by Democratic Presidents – joined the Chief Justice's opinion without objecting to its novel Step Zero major questions doctrine. As Stephanie Hoffer and I have explored elsewhere, we are unsure if the Chief Justice intended for this doctrine to apply to other regulatory contexts; instead, "this new major questions doctrine may well be good for tax only."³⁶

In all events, it will probably not be long before the staying power of the doctrine is clarified. Litigants have raised *King*'s major questions doctrine in a number of high-profile challenges to federal regulations this year, including: the agency's interpretation of the contraceptive mandate in the Affordable Care Act, the FCC's net neutrality regulation, and the Obama Administration's executive actions on immigration.³⁷

reinterpreting the statute via regulation to prohibit tax subsidies in exchanges established by the Federal Government").

35. Catherine M. Sharkey, In the Wake of *Chevron*'s Retreat 10 (2016) (unpublished manuscript), http://administrativestate.gmu.edu/wp-content/uploads/2016/06/Sharkey_In-the-Wake-of-Chevron_5_20_16.pdf.

36. Hoffer & Walker, *supra* note 16, at 46; *see id.* at 42–45 (further exploring evidence of tax exceptionalism in the Chief Justice's *King* opinion).

37. *See, e.g.*, Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 1, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 15-105, 15-35, 15-105, 15-119, 15-191), 2015 WL 5029190, at *2 (arguing that "the threshold question is whether the Departments had the requisite interpretive authority and 'expertise' to resolve this 'major question' of profound social, 'economic and political significance'" (quoting *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015))); Amicus Curiae Brief of International Center for Law & Economics and Administrative Law Scholars in Support of Petitioners at 3–4, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063), 2015 WL 4698404, at *3–4 (arguing that "the [net neutrality] Order should be rejected as exceeding the Commission's statutory authority and as presenting and addressing major questions – questions of 'deep economic and political significance,' *see, e.g., King v. Burwell* . . . – that can only be addressed by Congress"); Brief for the State Respondents at 16, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (No. 15-674) ("Congress would have needed to delegate such power 'expressly,' because this is 'a question of deep "economic and political significance" that is central to [the INA's] statutory scheme.'" (quoting *King*, 135 S. Ct. at 2489)).

B. A Context-Specific Chevron Deference in City of Arlington

Perhaps the narrowing of *Chevron* deference in *King v. Burwell* was not really about major questions. Instead, it could have been the start of a much more systemic narrowing of *Chevron*'s domain and the Chief Justice's attempt to relitigate the battle he had previously lost to Justice Scalia in *City of Arlington v. FCC*.³⁸

In 2013, the Court held in *City of Arlington* that *Chevron* deference applies to statutory ambiguity concerning the scope of an agency's regulatory authority (or jurisdiction).³⁹ In reaching this conclusion, Justice Scalia, writing for the Court, framed the inquiry of whether *Chevron* deference applies to statutory ambiguity in broad and bright-line terms: "[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the [agency] with general authority to administer the [statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."⁴⁰

The Chief Justice, joined by Justices Alito and Kennedy, dissented. The dissent lamented that "the administrative state 'wields vast power and touches almost every aspect of daily life'" and that "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities."⁴¹ To combat this regulatory sprawl, the Chief Justice argued that *Chevron* deference should not apply to every statutory ambiguity whenever Congress has granted the agency general rulemaking or adjudicatory power.⁴² Instead, quoting the *Chevron* decision itself, he argued that the reviewing court should evaluate "whether Congress had 'delegat[ed] authority to the agency to elucidate a *specific provision* of the statute.'"⁴³ The Chief Justice then documented how the Court has "never faltered in [its] understanding of this straightforward principle, that whether a particular agency interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue."⁴⁴ In sum, the Chief Justice concluded, "An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner."⁴⁵

38. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1881 (2013) (Roberts, C.J., dissenting).

39. *Id.* at 1873–75 (majority opinion).

40. *Id.* at 1874.

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

42. *Id.*

43. *Id.* at 1881 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–84 (1984)).

44. *Id.*; see also *id.* at 1881–83 (reviewing precedent on point).

45. *Id.* at 1883.

In response, Justice Scalia sharpened the distinction between these two approaches to *Chevron* deference. Justice Scalia called the dissent's approach "a massive revision of our *Chevron* jurisprudence" because, under the dissent's "open-ended hunt for congressional intent," "even when general rulemaking authority is clear, every agency rule must be subjected to a *de novo* judicial determination of whether the particular issue was committed to agency discretion."⁴⁶ For Justice Scalia, the dissent's context-specific approach would result in "some sort of totality-of-the-circumstances test – which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent."⁴⁷ Accordingly, he argued, "The excessive agency power that the dissent fears would be replaced by chaos."⁴⁸

In his concurring opinion, Justice Breyer agreed that the jurisdictional-nonjurisdictional distinction was unavailing in this case, but he wrote separately to underscore that "the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant."⁴⁹ In other words, Justice Breyer agreed with the dissent's context-specific approach to *Chevron* deference and provided additional guidance on how to determine if Congress intended to delegate by ambiguity interpretive authority to the agency.

Drawing on his opinion for the Court in *Barnhart v. Walton*, Justice Breyer noted that the Court had previously "assessed 'the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time.'"⁵⁰ He further noted the relevance of the statutory provision's subject matter – "its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority."⁵¹ "Although seemingly complex in abstract description" (perhaps alluding to Justice Scalia's criticism of the context-specific approach), Justice Breyer explained that "in practice this framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency."⁵²

When *King v. Burwell* is read against the backdrop of the Chief Justice's dissent in *City of Arlington*, a more substantial narrowing of *Chevron*'s domain emerges. Perhaps *King* is not just about major policy questions but

46. *Id.* at 1874 (majority opinion).

47. *Id.*

48. *Id.*

49. *Id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment).

50. *Id.* (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

51. *Id.* at 1875–76 (citing *Gonzales v. Oregon*, 546 U.S. 243, 265–66 (2006); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1007–10 (1999)).

52. *Id.* at 1876.

more generally about assessing implied congressional intent to delegate policymaking authority by ambiguity to federal agencies. Instead of applying *Chevron* deference to statutory ambiguity whenever Congress has delegated general rulemaking or formal adjudication authority to the agency (and the agency has utilized that procedure), the Chief Justice would propose that the court assess whether Congress reasonably intended to delegate by ambiguity that *particular issue* to the agency. Accordingly, the *Chevron* Step Zero inquiry would focus not just on the formality of the agency procedure creating the interpretation, but also whether Congress intended to delegate that particular substantive question to the agency.

Unlike abandoning *Chevron* deference whenever there is a major policy question per *King v. Burwell*, the likelihood the Court will adopt this context-specific approach is much more realistic. Based on the opinions in *City of Arlington*, Justices Alito, Breyer, and Kennedy already agree with the Chief Justice. Justices Ginsburg, Kagan, and Sotomayor also joined the Chief's opinion in *King v. Burwell* – although one would be wise not to read too much into their joinder.⁵³ Additionally, Justice Thomas is now concerned that *Chevron* deference is unconstitutional⁵⁴ and thus may be inclined to adopt a move to limit *Chevron*'s domain. Even if Justice Thomas were unwilling to join the Chief Justice's context-specific approach to *Chevron* deference, he would likely concur in the judgment based on *Chevron*'s unconstitutionality, which would provide the fifth vote with the Chief Justice's plurality opinion being the narrowest and thus precedential decision. In sum, what was just a dissenting opinion three years ago could well become the law of the land and, at least in Justice Scalia's view, would result in "a massive revision of our *Chevron* jurisprudence."⁵⁵

III. LESSONS FROM CONGRESSIONAL AND AGENCY DRAFTERS

Despite the Chief Justice's novel approach to major questions in *King v. Burwell* and the lack of precedential value for his context-specific approach to *Chevron* deference in *City of Arlington*, these positions find some empirical support from a number of congressional staffers and federal agency rule drafters surveyed in prior empirical studies.

This Part draws on the author's 195-question survey of federal agency rule drafters that covered a variety of topics related to agency statutory interpretation and rule drafting.⁵⁶ The survey was modeled on Lisa Bressman and

53. See Hoffer & Walker, *supra* note 16, at 46 (noting that "[w]e do not know yet if the Court (or the lower courts) will extend this sweeping change in administrative law to other regulatory contexts" or whether "this new major questions doctrine may well be good for tax only").

54. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

55. *City of Arlington*, 133 S. Ct. at 1874.

56. The full findings are reported in Walker, *Inside Agency Statutory Interpretation*, *supra* note 12. The survey consisted of thirty-five main questions, with twenty-

Abbe Gluck's pioneering study on congressional drafting, the findings of which are also discussed in this Part.⁵⁷ The rule-drafting survey was administered in 2013 at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (Federal Communications Commission and Federal Reserve). In total, 128 agency rule drafters responded, resulting in a 31% response rate. Although confidentiality concerns imposed methodological limitations on the survey – including anonymity as to the individual respondent and the respondent's respective agency – the study's findings include a number of insights into agency perceptions about *Chevron's* domain.⁵⁸

Before turning to the study's findings on the major questions doctrine (Part III.A) and the scope of *Chevron* deference more generally (Part III.B), it is worth underscoring the widespread influence of *Chevron* deference on the agency rule drafters surveyed. Figure 1 presents the findings with respect to the rule drafters' use of all interpretive tools explored in the study – reported as the percentage of rule drafters who indicated that they use these tools when interpreting statutes or drafting rules.⁵⁹

Chevron deference was the clear winner of the entire study. Among all twenty-two interpretive tools included in the survey, *Chevron* was the most known by name (94%) and most reported as playing a role in rule drafting (90%). The next-most-recognized tools were: the ordinary meaning canon (92%), *Skidmore* deference (81%), and the presumption against preemption of state law (78%).⁶⁰ As Figure 1 shows, after *Chevron*, the tools most reported as playing a role in rule drafting were: the whole act rule (89%), the ordinary meaning canon (87%), the *Mead* doctrine (80%), *noscitur a sociis* (associated-words canon) (79%), and legislative history (76%).

However, just because nine in ten agency rule drafters reported they use *Chevron* when interpreting statutes and drafting rules does not mean they

three questions containing three to thirty-three subquestions. See *id.* at 1068–79 (reproducing survey as appendix).

57. See Gluck & Bressman, *Part I*, *supra* note 13; Bressman & Gluck, *Part II*, *supra* note 13. Unlike the Bressman and Gluck study, however, nearly half of the questions (97 of 195) dealt with administrative law doctrines.

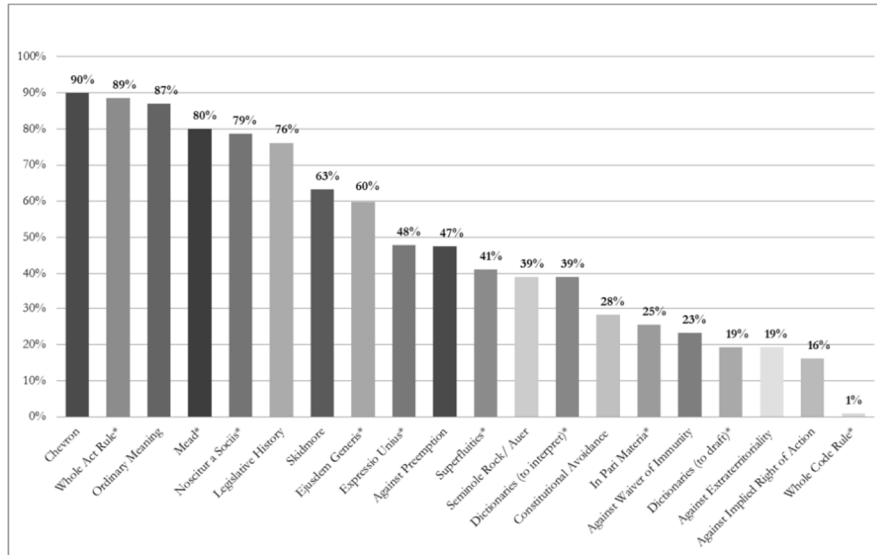
58. For more on the study methodology and its accompanying limitations, see Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1013–18. This Part draws substantially on the administrative law findings explored in *Inside Agency Interpretation* at 1048–66.

59. Figure 1 is reproduced from *id.* at 1020 fig.2. For readability, the rule of lenity (13%) and *Curtiss-Wright* deference (2%) were not included. *Id.* at 1020 n.82. Moreover, Figure 1 reports the rule drafters' indication of use of the interpretive principle by name – except where indicated with an asterisk, in which case the use is reported by concept. For canons reported by concept, use is calculated by including those who responded that those concepts were always or often true. The *Mead* doctrine is calculated by concept by taking the lower percentage reported of the two conditions. See *id.* at 1020 n.83.

60. See *id.* at 1019 fig.1 (depicting knowledge of interpretive tools by name).

believed it applies uniformly whenever there is an ambiguity in a statute the agency administers. The following Parts turn to those findings on how not all statutory ambiguities are created equal – findings that echo the Chief Justice’s context-specific approach to *Chevron* deference in *King v. Burwell* and *City of Arlington*.

FIGURE 1. Agency Rule Drafters’ Use of Interpretive Tools



A. Findings on Major Questions Doctrine

Similar to the responses from congressional drafters in the Bressman and Gluck study,⁶¹ the agency rule drafters surveyed for this study emphasized that not every type of ambiguity in a statute is intended to delegate lawmaking authority to federal agencies. To assess the rule drafters’ understanding about which ambiguities signal delegation, the survey asked about ten types of ambiguity relating to the ongoing judicial and scholarly debates regarding the scope of lawmaking delegation under *Chevron* Step Zero. Figure 2 presents the findings as to both the agency rule drafter and congressional drafter respondents.⁶²

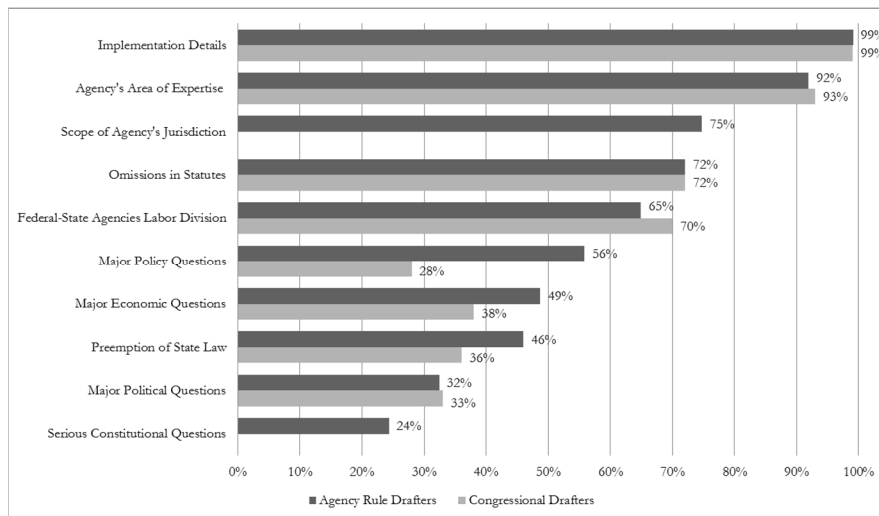
As Figure 2 details, the responses from both the congressional and agency drafters surveyed provide some support for the Chief Justice’s major questions doctrine in *King v. Burwell*. Both studies predated *King v. Burwell*,

61. See Gluck & Bressman, *Part I*, *supra* note 13, at 1003–06.

62. Figure 2 is reproduced from Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1053 fig.10 (citing Gluck & Bressman, *Part I*, *supra* note 13, at 1005 fig.11). Two of these types of ambiguities – those relating to the agency’s own jurisdiction or regulatory authority, and those implicating serious constitutional questions – were not included in the Bressman and Gluck study. See *id.* at 1054.

so neither framed the major questions doctrine as triggered by “a question of deep economic and political significance that is central to this statutory scheme.”⁶³ Instead, the studies framed the major questions doctrine in three different ways – one as “major policy questions,” another as “questions of major economic significance,” and the final as “questions of major political significance.” With respect to major policy questions, 56% of agency rule drafters and 28% of congressional drafters indicated that Congress intends for agencies to resolve those ambiguities. The results were similar with respect to questions of major economic significance, with 49% of agency rule drafters and 38% of congressional drafters so indicating. With respect to questions of major political significance, by contrast, roughly one in three agency rule drafters (32%) and congressional drafters (33%) believed that Congress intends for agencies to resolve those ambiguities.⁶⁴

FIGURE 2. Types of Statutory Ambiguities Congress Intends for Federal Agencies to Resolve



To put these findings in perspective, compare them with the findings regarding the more traditional types of ambiguities that are eligible for deference under *Chevron*. The top vote-getter in both populations was ambiguities relating to the details of implementation, with 99% of congressional and agency respondents agreeing that Congress intends for agencies to resolve such ambiguities.⁶⁵ Most agency rule drafters and congressional drafters also

63. King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

64. Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1055 (citing Gluck & Bressman, *Part I*, *supra* note 13, at 1003).

65. It is perhaps worth noting that the one rule drafter to dissent chose “[n]one of the above,” indicating that Congress does not intend for agencies to fill any of the types of ambiguities listed. *Id.* at 1054.

agreed that Congress intends to delegate ambiguities relating to the agency's area of expertise (92% and 93%, respectively) and relating to omissions in the statute (72% for both).⁶⁶

Put differently, far fewer congressional drafters and agency rule drafters surveyed believed that Congress intends to delegate ambiguities implicating major questions than the ambiguities about implementation details and agency expertise that are the typical types of ambiguities to which *Chevron* deference applies. This seems consistent with the Chief Justice's *Chevron* Step Zero major questions doctrine in *King v. Burwell*. Indeed, the Chief Justice's focus on the lack of agency expertise⁶⁷ – in addition to the deep political or economic significance of the question – seems to be supported by more than nine in ten congressional and agency officials surveyed.

It is somewhat curious that, compared to congressional respondents, twice as many agency respondents (56% to 28%) believed that Congress intends to delegate ambiguities relating to major policy questions, with a slightly smaller difference (49% to 38%) for questions of major economic significance and virtually no difference for questions of major political significance. In prior work (and with a bit of artistic license), I constructed a dialogue between the congressional staffers and agency rule drafters surveyed, using their comments to open-ended questions that may help explain the disparities as to these findings:

Agency: “Generally major policy, economic, or political decisions should be made by congress unless congress has delegated to the agency on the basis of the agency’s expertise.”

Congress: Completely agree. “[Delegating major questions], never! [We] keep all those to [our]selves.”

Agency: But “[s]ometimes issues of substantial political import are left to agencies.”

Congress: Well, “[w]e *try* not to leave major policy questions to an agency [They] should be resolved here.”

Agency: Trying is different than succeeding. “While members of Congress and their staff would likely answer these questions [about delegating major questions] very differently, the reality is that Congress *often* leaves unanswered decisions to the implementing agency, not because they trust the agency,

66. *Id.* at 1054–55 (citing Gluck & Bressman, *Part I, supra* note 13, at 1004, 1005 fig.11).

67. *King*, 135 S. Ct. at 2489 (“It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”).

1110

MISSOURI LAW REVIEW

[Vol. 81]

but in order to achieve the necessary consensus to move a bill.”

Congress: Fair enough. “*Sometimes* because of controversy, we can’t say what to include – either complexity or controversy.”

Agency: Agreed. In other words, “Congress should make the major policy decisions in a statute, but can leave details of precise implementation to agency regulations. However, Congress sometimes passes laws that leave broad areas to agency discretion in order to achieve a political compromise.”

Congress: Yes, “*sometimes* [we] have to punt.”

Agency: No, “Congress *often* punts on difficult political questions.”

Congress: Okay, it happens “[w]hen we can’t reach agreement.”

Agency: “I think [not delegating major questions to agencies] is what Congress thinks it is doing, but in reality, I think agencies are often left to decide almost all of these – and I think Congress doesn’t understand the types of ambiguities it leaves when it drafts legislation. Congress is producing some pretty terrible stuff to work with.”⁶⁸

As I previously noted, “[T]his dialogue may help explain why the agency rule drafters surveyed were more willing to accept that Congress intends to delegate major policy questions by ambiguity to federal agencies.”⁶⁹ It might also provide further support for the Chief Justice’s call in *King v. Burwell* for courts to more closely patrol agency statutory interpretations that address questions of deep political or economic significance.

B. Findings on Context-Specific Chevron Deference

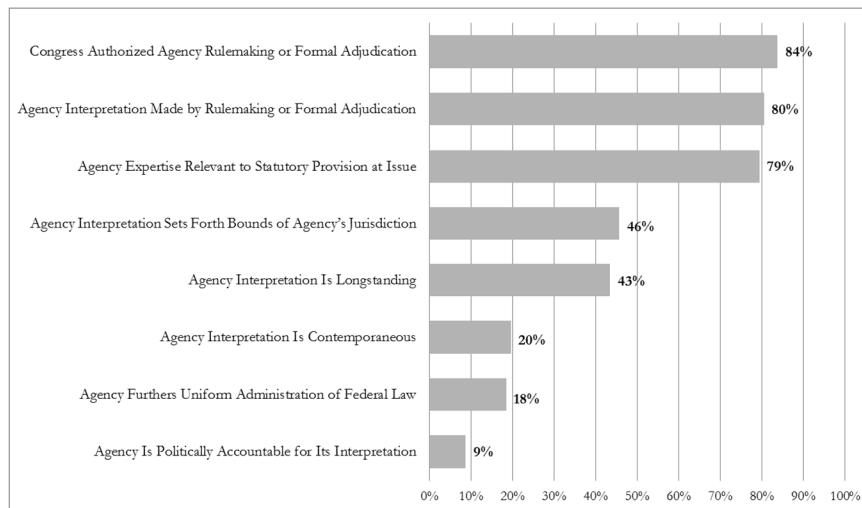
The congressional staffers and agency rule drafters surveyed seemed to agree – at least to some extent – with the Chief Justice’s major questions exception to *Chevron* deference. But what about his more systemic narrowing of *Chevron*’s domain as articulated in his dissent in *City of Arlington*?

68. This dialogue is reproduced from Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1056–57 (footnotes omitted; emphases and alterations in original) (quoting agency rule drafters from the author’s survey and congressional respondents from Gluck & Bressman, *Part I*, *supra* note 13, at 1004 & n.395).

69. *Id.* at 1057.

Although the congressional staffers were not asked about ambiguities relating to the agency's own jurisdiction or regulatory authority,⁷⁰ the agency rule drafters were so questioned. And three in four rule drafters (75%) indicated that Congress intends for federal agencies to resolve those ambiguities. Only ambiguities about implementation details (99%) and relating to the agency's area of expertise (92%) received more responses from the rule drafters. Moreover, in another question asking which factors affect whether *Chevron* deference applies that is depicted in Figure 3, nearly half (46%) indicated that it matters "[w]hether the agency's statutory interpretation sets forth the bounds of the agency's jurisdiction or regulatory authority."⁷¹

FIGURE 3. Which Factors Affect Whether *Chevron* Deference Applies to Agencies' Interpretations of Ambiguous Statutes It Administers?



Those findings seem in tension with the Chief Justice's argument in *City of Arlington* that "[w]e do not leave it to the agency to decide when it is in charge."⁷² They also appear inconsistent with Bressman and Gluck's suspicion "that [their congressional] respondents would emphasize the obligation of Congress, not agencies, to resolve such questions," in part because

70. See Christopher Walker, *Does Congress Really Mean to Delegate Interpretative Authority to Agencies?*, JOTWELL (Aug. 16, 2013), <http://adlaw.jotwell.com/does-congress-really-mean-to-delegate-interpretative-authority-to-agencies> ("The [Bressman and Gluck] survey did not ask whether [congressional] drafters intend to delegate by ambiguity authority for agencies to determine the scope of their own statutory jurisdiction – the question *City of Arlington* answered in the affirmative.").

71. Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1058; see *id.* ("That question, however, did not ask in what way such a factor would matter.").

72. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting).

“[j]urisdictional questions often overlap with or are indistinguishable from ‘major questions.’”⁷³

The significance of these findings should not be overstated, for at least three reasons. First, the agency survey went live in July 2013 – two months *after* the Court issued its *City of Arlington* decision.⁷⁴ Many of those agency respondents were no doubt aware of the Court’s definitive answer. Second, as I have previously noted, “[T]his question about the scope of an agency’s authority to decide its own authority was asked not of congressional drafters but of agency rule drafters. After all, an agent may be naturally inclined to view her role in defining her authority more broadly than would the principal.”⁷⁵ Third, perhaps the agency rule drafters surveyed agreed with the *City of Arlington* majority that “the distinction between ‘jurisdictional’ and ‘non-jurisdictional’ interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*”⁷⁶

Putting aside the specific jurisdictional-nonjurisdictional question at issue in *City of Arlington*, the congressional and agency respondent populations both seemed to view *Chevron* deference much more in the Chief Justice’s (and Justice Breyer’s) context-specific framework than in Justice Scalia’s broad and bright-line *Chevron* rule. As noted above and depicted in Figure 2, the congressional staffers and agency rule drafters surveyed noted a number of types of ambiguities that Congress does not intend for the agency to resolve. For instance, three in four (76%) agency rule drafters indicated that Congress does not intend for agencies to resolve ambiguities concerning serious constitutional questions. More than half of the agency respondents (54%) and nearly two thirds of the congressional respondents (64%) indicated that Congress does not intend for agencies to resolve ambiguities regarding preemption of state law. And, of course, there were doubts about delegation for major questions, as explored in Part III.A. These exceptions to *Chevron* deference based on the type of ambiguity support the Chief Justice’s narrower, context-specific approach.

To be sure, as detailed in Figure 3, the agency rule drafters surveyed indicated that the top two factors that affect whether *Chevron* deference applies are the *Mead* touchstones,⁷⁷ which Justice Scalia reaffirmed in *City of Arling-*

73. Gluck & Bressman, *Part I*, *supra* note 13, at 1005–06.

74. Compare Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1015 (“The data collection took place on a rolling basis by agency over a five-month period from July to November 2013.”), with *City of Arlington*, 133 S. Ct. 1863 (decision dated May 20, 2013).

75. Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1058.

76. *City of Arlington*, 133 S. Ct. at 1868; *accord id.* at 1875 (Breyer, J., concurring in part and concurring in the judgment) (agreeing that, “[i]n this context, ‘the distinction between “jurisdictional” and “non-jurisdictional” interpretations is a mirage”).

77. *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

ton.⁷⁸ These factors are: (1) whether Congress authorized the agency to engage in rulemaking and/or formal adjudication under the statute (84%), and (2) whether the agency promulgated the interpretation via rulemaking and/or formal adjudication (80%).⁷⁹ Congressional respondents had similar responses as to these factors:

Mead was a “big winner” in our study – the canon whose underlying assumption was most validated by our [congressional] respondents after *Chevron*: 88% told us that the authorization of notice-and-comment rulemaking (the signal identified by the Court in *Mead*) is always or often relevant to whether drafters intend for an agency to have gap-filling authority.⁸⁰

But agency expertise also mattered to the agency rule drafters for *Chevron*-eligible agency statutory interpretations. Whereas political accountability (9%) and uniformity in federal administrative law (18%) – factors that have sometimes been mentioned as justifications for *Chevron* deference⁸¹ – barely registered with the agency rule drafters surveyed, nearly four in five (79%) agency respondents indicated that it matters “[w]hether the agency has expertise relevant to interpreting the statutory provisions at issue.”⁸² Aside from the two *Mead* factors, agency expertise was the only factor that mattered to more than half of the agency rule drafters surveyed. These findings are consistent with those reported in Figure 2, in which ambiguities relating to the agency’s area of expertise were the second-most-reported type of ambiguity that congressional staffers (93%) and agency rule drafters (92%) indicated Congress intended for the agency to resolve.

These findings from the agency and congressional respondents support the Chief Justice’s observation that “[a] general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue.”⁸³ But they are also consistent with the Chief Justice’s further observation that it is the re-

78. *City of Arlington*, 133 S. Ct. at 1875 (“[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the [agency] with general authority to administer the [statute] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”).

79. Figure 3 is reproduced from Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1065 tbl.1.

80. Gluck & Bressman, *Part I*, *supra* note 13, at 999.

81. See, e.g., Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1275 (2008) (noting that core justifications for *Chevron* deference include “(1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity”).

82. Walker, *Inside Agency Statutory Interpretation*, *supra* note 12, at 1074 (quoting survey question).

83. *City of Arlington*, 133 S. Ct. at 1884 (2013) (Roberts, C.J., dissenting).

viewing court's "task . . . to fix the boundaries of delegated authority; that is not a task we can delegate to the agency. We do not leave it to the agency to decide when it is in charge."⁸⁴ The agency and congressional respondents would perhaps further suggest that evidence of such congressional intent to delegate includes whether the statutory ambiguity involves implementation details within the agency's expertise, as opposed to those that implicate major political or economic questions, serious constitutional questions, or questions about the preemption of state law – just to name a few. It is fair to conclude that the responses offered by the agency and congressional respondents provide some support for the Chief Justice's narrower, context-specific approach to *Chevron* deference.

IV. CONCLUSION

Although Justice Scalia's passing this year likely closed the door on the possibility that the Supreme Court would get rid of *Chevron* (or *Auer*) deference, it may have opened a window for a distinct type of narrowing of *Chevron* deference that Justice Scalia had expressly opposed. Without Justice Scalia on the Court, the Court may well embrace Chief Justice Roberts's context-specific approach to *Chevron* deference, as articulated in his dissent in *City of Arlington* and rearticulated in his opinion for the Court in *King v. Burwell*. As detailed in this Article, recent empirical studies of statutory and regulatory drafters, moreover, provide some support for such a context-specific *Chevron* doctrine. The wisdom of such a reform lies outside the Article's scope.⁸⁵ Litigants and scholars, however, would be wise to carefully consider the Chief Justice's dissent in *City of Arlington*, as it may well soon become the law of the land.

84. *Id.* (citation omitted).

85. In two separate projects, I explore to some degree the normative implications of this context-specific *Chevron* doctrine and reach conflicting conclusions. On the one hand, this approach could help protect against collusion between federal agencies and members of Congress in light of the fact that federal agencies play a substantial role in drafting legislation. See Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2826146>. On the other, a coauthored study of more than 1500 circuit court decisions that implicate *Chevron* deference reveals that the current bright-line approach to *Chevron* doctrine has provided a fair amount of stability and predictability in the federal courts of appeals. A more context-specific approach could upset that predictability and, in turn, frustrate the Supreme Court's ability to utilize *Chevron* deference as a tool to control the lower courts. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 115 MICH. L. REV. (forthcoming 2017), <http://ssrn.com/abstract=2808848>; see also Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 156–58, 161–62 (2016) (arguing in the context of the Federal Circuit and agency interpretations of substantive patent law that *Chevron* deference may serve to control lower courts and provide greater nationwide uniformity).