

**FEDERALIST SOCIETY FOR LAW & PUBLIC
POLICY STUDIES:
2013 NATIONAL LAWYERS CONVENTION**

**SHOWCASE PANEL III: FORMALISM AND
DEFERENCE IN ADMINISTRATIVE LAW**

*Panelists: Kristin Hickman, Jide O. Nzelibe, Thomas W. Merrill,¹
Philip A. Hamburger²*

Moderator: Hon. Jennifer Walker Elrod³

9:00 a.m. to 10:30 a.m.

Saturday, November 16, 2013

Mayflower Hotel, Washington, D.C.

DEAN A. REUTER: All right. Well, let's get started, if we could. Good morning, and welcome. My name is Dean Reuter. I am the Director of Practice Groups and a Vice President here at the Federalist Society. Thank you all for being here this morning, especially at this early hour.

I mentioned yesterday morning—and I'll repeat it very briefly today—as Director of the Practice Groups, we do an awful lot at the Federalist Society. Most of what we do, we accomplish through the use of our volunteers, and we have what I would describe as a tight group of core volunteers. I would like to loosen that group and expand it to include people who are in the audience today. So, several of you have taken me up on my invitation yesterday to approach me, but if you are interested, please see me after class. We'd love to have more volunteers.

We have an unusually tight schedule today, especially this afternoon, but I blame that on the audience. We keep getting feedback from

¹ Panelists: Kristin Hickman, University of Minnesota Law School; Jide O. Nzelibe, Northwestern University School of Law; Thomas W. Merrill, Charles Evans Hughes Professor of Law, Columbia Law School.

² Philip A. Hamburger participated in Showcase Panel III, however his remarks do not appear in this transcript.

³ Moderator: Hon. Jennifer Walker Elrod, United States Court of Appeals for the Fifth Circuit.

folks like you that we want more and more programming, so we've tried to accommodate you by squeezing more and more into the schedule, so that accounts for the tight schedule this afternoon.

I hope everybody has had a good time at the convention. This is the best day of the convention today, so thank you for being here. We heard from Judge Gorsuch last night. I thought he was extraordinary, and of course, Governor Walker was really something. And as he talked about public sector jobs and governance and so forth, I was reminded of a very quick joke that I will tell, and it concerns a public sector employee, who is talking to his private sector friend. And he is bemoaning the fact that his pension is changing, and his retirement benefits are changing. His health care is changing. It's just all terrible the way he is being treated in his job, and his private sector friend looks at him and says, "Well, what's a job?"

[Laughter.]

DEAN A. REUTER: So it could be worse, and it is worse for some people.

But let's get right to the program today. Our third Showcase Panel, this one is discussing deference in the administrative law, and I am very pleased to welcome back a repeat offender to our moderator slot, our Fifth Circuit Court of Appeals Judge, Jennifer Elrod. Thank you for doing this.

[Applause.]

JUDGE JENNIFER WALKER ELROD: Thank you, Dean. I think you have been calling all of the Fifth Circuit Judges who are here "repeat offenders." I hope we're not in big trouble, and he does say that every day is the best day. I heard him say that yesterday, but I'm so glad that today is truly the best day.

It is a privilege to be with you here this morning. As someone who has been a member of the Federalist Society since law school, it is always gratifying to come to D.C. and see so many students, the next generation of lawyers, eager to learn from the leading scholars in the field about the Constitution, the separation of powers, and limited government.

Speaking of leading scholars, we have a very distinguished panel here today. First is Professor Kristin Hickman. Professor Kristin Hickman is the Harlan Albert Rogers Professor of Law at the University of Minnesota Law School. She also taught at Harvard Law School and Northwestern University School of Law. In fact, I believe all of our panelists here today have a Northwestern connection. Professor Hickman teaches and writes primarily in the areas of tax law, administrative law, and statutory

interpretation, and her articles have appeared in numerous journals.⁴ Her work on *Chevron's Domain* with Professor Merrill was cited by the United States Supreme Court in *United States v. Mead*, and several of Professor Hickman's articles have been cited in judicial opinions and other briefs.⁵ She also co-authors the *Administrative Law Treatise* and a case book on federal administrative law.⁶ She received her B.S. degree in business administration, with a concentration in accounting and a secondary major in history, from Trinity University in San Antonio, Texas, and after practicing several years as a CPA, Professor Hickman then earned her J.D. degree *magna cum laude* from Northwestern, where she was awarded the Raoul Berger Prize for her work on *Chevron's Domain*. Following law school, Professor Hickman clerked for the Honorable David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit. We're glad to have Professor Hickman with us here today.

Our next panelist, Professor Jide Nzelibe, is a professor of law and an associate dean for faculty and Research at Northwestern University Law School. He has been teaching at Northwestern since 2004, and his research interests are in international trade, foreign relations, international law, the administrative state, international humanitarian law, and the separation of powers. He has been a visiting professor at the law schools of the University of Chicago, Tel Aviv University, Harvard University, and New York University. He received his law degree from Yale Law School and clerked for the Honorable Stephen F. Williams on the United States Court of Appeals for the District of Columbia Circuit. He worked at a law firm here in Washington, D.C. for a few years before joining the legal academy. Welcome, Professor Nzelibe.

Professor Tom Merrill is the Charles Evans Hughes Professor of Law at Columbia Law School, where he writes widely in the fields of property and administrative law. He has written a number of works about the history of administrative law and about judicial review of agency interpretations of law.⁷ Professor Merrill is a graduate of Grinnell College and Oxford University, where he was a Rhodes Scholar. He is also a graduate of the University of Chicago Law School. He clerked for the D.C. Circuit and then for Justice Harry A. Blackmun of the U.S. Supreme Court.

⁴ See generally Kristin E. Hickman, *Coloring Outside the Lines: Examining the Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006).

⁵ *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); Brief for Respondents at 50, *United States of America v. Home Concrete & Supply, LLC, et al.*, 132 S. Ct. 1836 (2012) (No. 11-139). See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

⁶ KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (5th ed. Supp. 2014); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW* (2010).

⁷ See, e.g., *Chevron's Domain*, *supra* note 3; see generally Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001).

From 1987 to 1990, he was Deputy Solicitor General in the U.S. Department of Justice. Professor Merrill has previously taught at Northwestern Law School and at Yale Law School, and he is a member of the American Academy of Arts and Sciences.

We welcome our very distinguished panelists.

[Applause.]

JUDGE JENNIFER WALKER ELROD: You should be familiar with our format by now. The format for today is as follows. Each panelist will speak for a few minutes, and then the panelists will have an opportunity to respond to each other's remarks, and then we will conclude with questions from the audience. The topic for discussion—

Do you think we're going to conclude?

[Laughter.]

JUDGE JENNIFER WALKER ELROD: See, we're already having a lively interchange between the panelists.

The topic for discussion is formalism and deference in administrative law. As we know, the landmark case of *Chevron v. Natural Resources Defense Council* has changed the face of modern administrative law.⁸ The panel will address the rightness and limitations of *Chevron* deference, especially in the context of agency decisions on the scope of the agencies' jurisdictional mandates. Should the federal courts defer, or should they not defer in this context? We need guidance. Justices Scalia and Thomas recently differed from Chief Justice Roberts and Justices Kennedy and Alito on these issues.⁹ Who is right, and why? Does the answer depend in any measure on the growth of the administrative state, and are there larger issues of jurisprudential philosophy at stake? It may just come down to what you are really afraid of in this fundamental disagreement that the Justices are having. Chief Justice Roberts describes it as a "fundamental disagreement."¹⁰ Are you afraid, as Justice Scalia discusses, of a lack of stability and chaos, of unaccountable federal judges running muckety-muck, deciding numerous issues in sundry ways,¹¹ or as the Chief Justice recounts, are you afraid, in the words of Madison, of the "accumulation of all powers, legislative, executive, and judiciary, in the same hands" in a vast and ever-growing administrative state?¹²

⁸ See generally *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that courts must utilize a two-part test to determine whether a governmental agency's interpretation of a statute is given deference over the interpretation by Congress).

⁹ See generally *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

¹⁰ *Id.* at 1877 (Roberts, C.J., dissenting).

¹¹ *City of Arlington*, 133 S. Ct. at 1868–75.

¹² *Id.* at 1877 (Roberts, C.J., dissenting) (citation omitted).

We look forward to a lively discussion on this topic. Thank you. Professor Hickman?

[Applause.]

KRISTIN HICKMAN:¹³ Good morning. Is this working? Okay, good.

I'm going to talk mostly about the *Mead* case, actually.¹⁴ The panel is about *Chevron*, but rather than talking about *Chevron*, I'm going to talk about *Mead* because, to me, that is where the action is. Judges may apply *Chevron* differently, particularly at *Chevron* step one where some judges would find ambiguity in a stop sign and other judges will pull every tool out of the statutory interpretation toolbox, but not a single one of the Justices of the Supreme Court is willing to come out and say, "Hey, let's rethink this whole *Chevron* thing."

I think there are good reasons for that. There are just some questions that can't be effectively answered using traditional tools of statutory construction, and in those instances, agencies are simply in a better position to fill the gaps. They're better equipped than the courts because of their expertise.

But once you accept that *Chevron* is here to stay, then it seems to me that the focus really has to shift over to *Mead*. Now, since I am first on this panel, I am going to start with just a little bit of background to make sure that everyone here knows what we're talking about. Then I am going to offer a vision or really three competing visions of *Mead* and *Chevron* that I draw from the text and jurisprudence of the Supreme Court. And finally, to the extent that I have time, then I am going to talk about why these competing visions explain the outcome in the recent *City of Arlington* case and also make future close cases hard to predict, including one facing the Supreme Court this term, the *Quality Stores* case, in which the Court may have to decide the standard of review for IRS revenue rulings.¹⁵

For several years now, the Court has recognized two competing standards of review for evaluating the substantive validity of agency interpretations of statutes. One is the two-step test of *Chevron*.¹⁶ First, the court assesses the clarity of the relevant statute, and if the statute's meaning is clear, then that's the end of the inquiry, because both agencies and courts must defer to and respect the clearly expressed intent of Congress.¹⁷ But if

¹³ See Kristin E. Hickman, *The Three Phases of Mead*, 83 Fordham L. Rev. 527 (2014) (discussing these remarks in a more developed manner).

¹⁴ See generally *United States v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁵ See generally *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395 (2014); see also Brief of Professor Kristin E. Hickman as Amicus Curiae in Support of Neither Party, *Quality Stores*, 131 S. Ct. 704 (No. 12-1408), 2013 WL 6114794 (calling the Court's attention to the *Mead* issue raised by the case).

¹⁶ *Chevron*, 467 U.S. at 842-43.

¹⁷ *Id.*

the statute is ambiguous, then the *Chevron's* second step calls upon a reviewing court to defer to any permissible interpretation of the statute.¹⁸

Skidmore is the second available standard that the Court uses to evaluate agency interpretations of statutes.¹⁹ *Skidmore* and related cases call upon reviewing courts to consider various factors in determining the degree of deference that is appropriate for a given agency legal interpretation, including but not limited to the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.²⁰

In *Mead*, the Court adopted another two-part test for deciding whether *Chevron* or *Skidmore* provides the appropriate evaluative standard for a particular agency interpretation of a statute.²¹ The *Mead* test asks whether Congress has given the agency in question the authority to bind regulated parties with the force of law, and whether the agency action in question is an exercise of that congressionally delegated power to act with the force of law.²² Where the answers to both of *Mead's* questions are affirmative, then *Chevron* provides the standard of review.²³ If the answer to either of *Mead's* questions is negative, then *Skidmore* offers the appropriate evaluative standard.²⁴

Now, as with *Chevron*, the rhetoric the justices use in talking about *Mead* is not always consistent. In large part, I think that is because, as I read the jurisprudence, notwithstanding that *Mead* was an 8-to-1 decision, with only Justice Scalia dissenting, we really see three rather than two distinct visions of the relationship among *Mead*, *Chevron*, and *Skidmore* in the Court's jurisprudence. Those three versions are best exemplified, I think, by the three opinions by Justice Thomas, Justice Scalia, and Justice Breyer in a case called *Christensen v. Harris County*, which predates *Mead* by about a year and foreshadows *Mead*.²⁵ And you see the themes of those opinions—the Justices' opinions in *Christensen*—throughout the Court's post-*Mead* jurisprudence. So to me, *Christensen* is really the Rosetta Stone for figuring out that post-*Mead* jurisprudence.

Justice Thomas' opinions, particularly in *Christensen*, but later in *Brand X* as well, reflect what I call the "decision tree model."²⁶ *Mead* has

¹⁸ *Id.* at 843.

¹⁹ *See generally* *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

²⁰ *Id.* at 140.

²¹ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 234–35.

²⁵ *See generally* *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

²⁶ *Id.* at 588; *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 1000–03 (2005).

two steps: yes or no questions.²⁷ They in turn lead to either *Chevron* or *Skidmore*, which are two distinct standards of review. And if you go to *Chevron*, then you have its two steps, and you take them in turn;²⁸ whereas, if you go to *Skidmore*, then you take *Skidmore*'s contextual factors, which can also be applied somewhat formalistically by looking at the individual factors.²⁹ And while you don't precisely add them up—as in, we've got three factors on one side and two on the other—nevertheless, you look to see whether they are present or absent. We can quibble over whether *Mead* is a step zero or a step one-and-a-half, as some scholars have talked about;³⁰ but either way, each step on the decision tree asks its own discrete question, and you have to hit each step of the inquiry one at a time. And this model, as it sounds, is a fairly formalistic approach to *Mead*, *Chevron*, and *Skidmore* and the question of deference.

Justice Breyer's opinions, particularly in *Christensen* and then later on in *Barnhart v. Walton* and a few other cases, reflect what I call the "impressionist painting model" of *Mead*, *Chevron*, and *Skidmore*.³¹ Justice Breyer views all three of those cases as one big happy standard with a whole bunch of factors that we look at together. Like Justice Thomas, he's happy to emphasize delegation as very, very important.³² That's what *Mead* talks about and a lot of its progeny talk about, but in the end, Justice Breyer just sort of throws delegation, traditional tools of statutory construction, and *Skidmore*'s contextual factors all at the canvas together to see what picture emerges.³³ The delegation factor that is so central to *Mead* operates as kind of a super-factor, really like kind of a bright color that pops out of the canvas a little more than some of the other hues. But at the end of the day, I don't really think that Justice Breyer considers delegation absolutely essential for *Chevron* deference. It's just another factor.

Justice Scalia, more or less, stands alone when it comes to *Mead*, *Chevron*, and *Skidmore*.³⁴ He hates *Mead*. He thinks *Skidmore* is completely anachronistic, and deference for him is a matter of *Chevron* or no deference at all.³⁵ He really focuses on those tools of statutory construction. Any authoritative agency interpretation that gets past those

²⁷ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

²⁸ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²⁹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

³⁰ Patrick J. Smith, *Chevron Step Zero After City of Arlington*, 140 *TAX NOTES* 713, 714 n.12 (2013) (discussing the argument within the legal community over naming this portion of the test step zero or step one and a half).

³¹ See generally *Barnhart v. Walton*, 535 U.S. 212 (2002); *Christensen v. Harris Cnty.*, 529 U.S. 576, 592 (2000) (Breyer, J., dissenting).

³² See, e.g., *Christensen*, 529 U.S. at 596–97.

³³ See *Barnhart*, 535 U.S. at 225.

³⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 239–61 (2001) (Scalia, J., dissenting); *Christensen*, 529 U.S. at 589–91 (Scalia, J., concurring).

³⁵ *Christensen*, 529 U.S. at 589 (Scalia, J., concurring) ("*Skidmore* deference to authoritative agency views is an anachronism[.]").

and reflects agency expertise is eligible for *Chevron* deference.³⁶ In his own way, Justice Scalia's approach is just as impressionistic, I think, as Justice Breyer's. He just uses fewer factors, emphasizing expertise and leaving out delegation from among *Skidmore*'s contextual factors.

It seems to me, then, taking those different views, if you go look at what the circuit courts are doing, they overwhelmingly seem to apply the decision tree model of *Mead*, *Chevron*, and *Skidmore*. And I think this is a really great model, because in most cases, it yields very clear answers about whether *Chevron* or *Skidmore* provides the right standard of review, largely based on the format that the agency uses to articulate its interpretation of the law. So notice-and-comment rulemaking and formal adjudication get *Chevron*. Informal guidance and most informal adjudications get *Skidmore*. There are a few close cases, but most of the cases can fall into one of those two groups.

At the Supreme Court, Justice Scalia notwithstanding, Justice Thomas's decision tree and Justice Breyer's impressionist painting use the same language, usually yield the same results in terms of whether *Chevron* or *Skidmore* provides the right evaluative standard, but when you get to some of the closer cases like *City of Arlington*, that agreement starts to fall apart.

So *City of Arlington* asks whether *Chevron* deference is appropriate when the interpretive question at issue goes to the heart of an agency's jurisdiction.³⁷ Using the decision tree model, the argument really came down to whether *Mead*'s first step asks courts to consider delegation statute-by-statute or provision-by-provision, and the Court in the past has seemed to treat *Mead* as a statute-by-statute kind of an inquiry.³⁸ For *Chevron* not to apply in the context of jurisdictional questions, *Mead*'s first step would have to go to a provision-by-provision inquiry, looking at individual provisions of the statute in delegation terms. The problem with taking *Mead* to the individual provision level is it leaves you with very little or nothing left to do as you go down the decision tree and get to *Chevron* step one. In other words, the sheer awkwardness of fitting that jurisdictional question exception from *Chevron* into the decision tree model dooms that argument.

With a more impressionist approach to *Mead* and *Chevron*, remember we're looking at delegation, traditional tools of statutory construction, and contextual factors altogether, or in Justice Scalia's view, fewer factors than that, but we're still looking at everything kind of together

³⁶ *Id.* at 590.

³⁷ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1867–68 (2013) (quoting Brief for Petitioners, *City of Arlington*, 133 S. Ct. 1863 (No. 11-1545)).

³⁸ *E.g.*, *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 473–74 (2002).

at a *Chevron* step one level.³⁹ Once you approach things with that impressionist model, there's really no room to pull out an independent jurisdictional check. It just gets thrown into the mush, and anything that takes you outside that impressionistic bubble is going to get rejected.

I think at this point in time at the Supreme Court, we have more impressionists than we have decision tree people, and that's really how it ends up breaking down and why *City of Arlington* came out the way that it did.

I'm about out of time.

Quality Stores, which is coming up this term, yields a similar, but slightly different problem.⁴⁰ IRS revenue rulings are informal guidance documents in the sense that they don't go through notice-and-comment rulemaking, but they are legally formal in the sense that you can be penalized for failing to comply with them.⁴¹ So when you start with the decision tree model, you are looking at *Mead* and saying, "Well, Congress has clearly delegated the power to the agency to act with the force of law." They decided as much in a case called *Mayo* a couple years ago, talking about the Treasury and the IRS.⁴² And clearly, because of the penalties, it seems like revenue rulings carry the force of law, no matter how you want to slice and dice that term, which takes you to *Chevron*. But these rulings don't have notice and comment, which is really troubling if you are going to apply *Chevron*.

I filed an amicus brief yesterday in which I say, well, maybe we can get to *Chevron* step two and just declare the rulings all unreasonable. But the decision tree model doesn't work very well with revenue rulings.⁴³ With the impressionistic model, on the other hand, we're just throwing everything in together, and I don't know whether we'll come out *Chevron* or *Skidmore* on that one. Probably *Skidmore*. We'll have to wait and see. But I'm really curious to see how it comes out. I don't know what's going to happen, but keep an eye out for that one, and we'll see if my impressionist painting versus decision tree model ends up holding steady with that case as well.

Thank you very much.

³⁹ See *Barnhart v. Walton*, 535 U.S. 212, 225 (2002) (discussing the use of delegation, statutory construction, and contextual factors); *Christensen*, 529 U.S. at 589–91 (Scalia, J., concurring).

⁴⁰ See generally *United States v. Quality Stores, Inc.* 134 S. Ct. 1395 (2014).

⁴¹ *Understanding IRS Guidance – A Brief Primer*, INTERNAL REVENUE SERVICE (Feb. 12, 2014), <http://www.irs.gov/uac/Understanding-IRS-Guidance-A-Brief-Primer>; see also Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 526-29 (2013) (discussing the legal force of revenue rulings).

⁴² See *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713–14 (2011) (stating that "[t]his case falls squarely within the bounds of, and is properly analyzed under, *Chevron* and *Mead*.").

⁴³ Brief of Professor Kristin E. Hickman as Amicus Curiae in Support of Neither Party at *4, *Quality Stores*, 131 S. Ct. 704 (No. 12-1408), 2013 WL 6114794.

[Applause.]

JIDE O. NZELIBE: Good morning. I have a little confession to make. I'm sort of a stranger in the mix here. I am not really, in many ways, an administrative law person. I encounter administrative law on occasion when I teach international trade and we get to antidumping stuff in the course, and it has to do with calculating antidumping margins and how Department of Commerce and Court of International Trade deal with it. And usually, what I do in that context is that I bribe the class with Girl Scout cookies to make it through, until we get to the fun WTO stuff that they are waiting for.

[Laughter.]

JIDE O. NZELIBE: In any event, there is something about this that I think may be helpful, which is when I come in and read *City of Arlington* and I say to myself: "Who am I rooting for here?" What I am going to present here is sort of a realist perspective of *City of Arlington*. Who are you rooting for if you like limited government? Should you—or if you desire limited government, should you be rooting for Scalia, or should you be rooting for Roberts?

Now, look at what Scalia is concerned about in *City of Arlington*, the typical motive of Scalia, right?⁴⁴ Clarity.⁴⁵ There has to be a clear line here. If you upset the cart of *Chevron* you are opening up multiple ways in which courts can go in different directions, right? Much of this will result in more confusion and less clarity. So Scalia is saying let us have one deference rule here. Let's call it *Chevron*, and let's work with it, right? All this new stuff that you're putting in, there has to be a different standard when you come to jurisdiction and something else. It is just going to blur the lines. Lawyers are very, very clever. They will throw in and claim something as jurisdiction when it isn't, and we won't be able to sort it out.

Now, let us look at Justice Roberts.⁴⁶ I don't know if people have seen the dissent. The beginning of the dissent reads like an anti-Leviathan's screed: the administrative state is growing, it's getting out of control, the administrative bureaucracy has its hand in everything.⁴⁷ And here is one suggestion: if you want to fight the Leviathan, I don't think having courts not deferring on whether something is an interpretive authority or jurisdiction will get you much traction. Many of the cases where this has come up have not to do with efforts to limit an agency in a pure sense, and the devices in which the agency expands probably have very little to do with whether or not you are using *Chevron* deference or some other form of deference.

⁴⁴ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874–75 (2013).

⁴⁵ *Id.* (noting that "[w]here Congress has established a clear line, the agency cannot go beyond it[.]").

⁴⁶ *Id.* at 1877–86 (Roberts, C.J., dissenting).

⁴⁷ *See id.* at 1878–79.

To get some bit of historical perspective on this issue, think about Scalia's longevity of the court. He is one of these people who has seen it all, and he was one of the people who was actually serving on a court when *Chevron* was decided. He was on the D.C. Circuit, and by the way, he wrote an article about it.⁴⁸ He wrote an article about it. So did, by the way, his fellow then-D.C. Circuit judge, a gentleman by the name of Kenneth Starr.⁴⁹ They both wrote articles praising *Chevron*. They were very happy that *Chevron* arrived on the scene, because they knew what the world was like pre-*Chevron*, and it wasn't a very pretty world.

And one of the reasons why *Chevron* was admirable to them is one of the reasons that I don't think we appreciate it much in the modern environment. But the executive branch back then was in a deregulatory phase. And there was a fear that courts would get in the way of agencies that were trying to scale back the scope of their regulatory activities. This was at a time when there was an effort for agencies to cut back because there are constituencies that wanted deregulation, and because Reagan won on an electoral platform that says, "I will break the growth of government." And one of the things he did was try to get some of these agencies to scale back, but federal judges were looking at this development saying that there was something wrong here. There was a statute passed some time ago. At the time, the agency said that it meant one thing (probably more regulation), and now a couple of years later, you are saying that you interpret it to mean that you can deregulate. You are pulling away from your pro-regulation mandate. Something is wrong. We ought not to let you do that. But when *Chevron* was decided, it was considered a very nice device, because agencies could change course, even if it's under political pressure, and they could decide to deregulate. And courts won't be able to come up and say, "I insist in the name of the law that you regulate."

[Laughter.]

JIDE O. NZELIBE: The agency can say, "Well, you know, I'm under pressure. There's sixteen different interest groups and powerful politicians that are on my head who don't want me to regulate. I may have to back off." And maybe the agency will give a sort of very, very nice-sounding reason why it wasn't doing it, and maybe somebody like Breyer will say, "I can smell through that. I know it, because the Republicans came into town that you're trying to pull back," and what Scalia is going to say to him is, "So be it. That's how the political system works." You like something. A new administration comes in. They don't like it so much. They can pull back. And by the way, that is how often you fight the Leviathan. You don't

⁴⁸ See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

⁴⁹ See generally Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283 (1986).

fight the Leviathan by asking courts who, according to my own definition and according to what last I saw—excuse me, Judge Elrod—are actually part of the state. You don't say to the state, "Hey, you're growing. You're getting more power. Please stop yourself."

[Laughter.]

JIDE O. NZELIBE: "Go in and ask another anchor of your state to collaborate and stop yourself." No. What happens is that usually some interest group, some faction, some constituency says, "I don't like the state growing into my affairs. I want it to back off." Then they campaign. Then they win. Then they tell the agency, "Back off," and that is how you can sometimes trim down on the Leviathan.

The idea that courts will serve this role, I think is a little bit problematic, because whenever you have a vision of what you want a court to do and you believe it will lead to certain consequences and it's predicated on a certain notion—and I say, "What is that notion?" You say, "Well, I would like the court to do this," and I would say, "Depending on what? What is it contingent on?" "Contingent upon them having these people serve on the court, people like Judge Elrod." And I might ask, "What if you don't have those people? What if you don't get the libertarian on the bench? What if it's a different set of judges?" If you like the courts, the way I would say it as an institutional actor, imagine the judge that you dislike the most and say, "Imagine nine of them are serving on the Supreme Court. Would I feel comfortable having them impose their jurisdiction over this kind of activity?" And if you say, "Yes," then I would say go ahead. But if it is contingent on who is appointed to the Court, then I would say it's probably not a good idea, because that is a very peripheral and myopic view. One day, the course will shift on the Court, and when it shifts, you will be left alone.

By the way, beyond that, there is another problem with all of this, which is even if you strip away what courts do—and I do think there's something about what courts do, a certain kind of integrity. Most of us may feel that if we want something like consistency or impartiality, going through a judge and saying, "Look, here is this license. It has been awarded to some company, because there was a Republican legislator in their district," most people agree that whether or not the judge is left-leaning or right-leaning, they may strike that down. That kind of arbitrariness that is sheer politics, courts don't like.

But the problem is that the kind of decisional consistency by agencies that you value in courts can come back and haunt you if you're interested in having what I would call "policy variation" in what agencies do, because what happens—and this you see this in Breyer—is that again and again, the court will say, "Why did you, the agency, tell me this

seventeen years ago, and now you are telling me something different? Why? I want you to be consistent.” But if you want to trim back the Leviathan, sometimes I think it behooves you that the agency is not consistent, that it could say, “I don’t want to follow this path anymore.” And that, I think, is something that Scalia might have seen. That, I think is a lesson. He remembers an era when *Chevron* wasn’t in the picture, and he saw what courts were doing. And he saw how they could act, and he knew that courts could sometimes go to an agency and say, “I want you to do more,” and somebody could bring a claim and say that an agency was not regulating enough. The court could say to the agency, “I want you to do more.” He’s seen all of that. He’s been around the block, and therefore, I would say if you’re rooting for limiting the Leviathan, I do think that Scalia has a better take on this than Roberts. And I’ll leave it at that.

[Applause.]

THOMAS W. MERRILL: Well, two very thoughtful takes on *Arlington*. First, a disclaimer or a confession of sorts. I did an amicus brief on *Arlington* on behalf of the state and local governments.⁵⁰ It reads a lot like Chief Justice Roberts’s dissent, although not as eloquently put as his dissent, so at least you know where I’m coming from here.⁵¹

I think it’s appropriate to step back a little bit from the intricacies of the jurisprudence of the *Chevron* doctrine, although I’ll get back to that eventually, and ask why we have judicial review of agency action in the first place. Maybe we shouldn’t. Maybe the Supreme Court and the federal courts should just confine themselves to issues of individual constitutional rights and statutory interpretation and diversity cases and so forth, but why do we have a judicial review of agency action? Well, one argument classically is that it helps ensure fairness to individuals—that individuals get caught up in the administrative state. Frequently, agencies misunderstand their circumstances, and courts could act as a corrective in terms of making sure that individuals are not treated on the basis of improper understandings of the facts that pertain to their particular case.

And I think this is still an important function of judicial review. If you look at what happens in the federal district courts, for example, I think you would see this going forward. At the jurisprudential level, however, both Congress and the Supreme Court have largely ceded authority to agencies to engage in fact-finding in individual cases. Courts provide very deferential review of agency fact-finding, and so judicial review acts as a backstop, but it applies rather weakly. And deference, the thing of our

⁵⁰ See generally Amici Curiae Brief of the Nat’l Governors Ass’n et al. in Support of Petitioners, *City of Arlington v. FCC*, 133 S. Ct. 1863 (2012) (Nos. 11-1545, 11-1547), 2012 WL 5982593.

⁵¹ Compare *City of Arlington*, 133 S. Ct. at 1877–86 (Roberts, C.J., dissenting) with Amici Curiae Brief of the Nat’l Governors Ass’n, *supra* note 48.

panel, has sort of taken over in terms of protecting individuals against unfair treatment.

Another rationale might be to monitor the policymaking of agencies, to make sure that agencies are acting in a reasonable or rational fashion when they articulate policy. The Hard Look Doctrine that became very fashionable in the 1970s seems to point toward this being a rationale for judicial review, and again, we still have that on the books.⁵² There are still occasions when courts will question the reasoned decision-making or lack thereof of agencies and will send cases back for further elaboration, but the trend here also seems toward increasing deference.

A few terms ago in a case called *FCC v. Fox Broadcasting*, the court seemed to cut back sharply on the degree of reasoning that is needed in order to justify an agency change in policy.⁵³ So again, deference seems to be washing over that particular function of judicial review of agency policymaking.

The last great rationale is what my colleague, Henry Monaghan, calls “boundary maintenance,” and here, the purpose of judicial review is to make sure that the allocation of powers in our society between government agencies, different branches of government, different levels of government, and between government and individuals is maintained.⁵⁴ It is partly a function of protecting the individual against Leviathan, but it goes much beyond that. It is also making sure that the checks and balances that operate within our government are maintained and that one branch of government does not usurp the authority properly given to another branch of government.

If I ask myself the question of how we are going to maintain the boundaries between different agencies, between agencies and courts, between the federal government and the states, between the government and individuals, which branch of government has the best case for having a competency to do that, I don’t think any branch has a clear outstanding competence to do this. But I think that the judiciary, particularly the federal judiciary, has the best claim to be able to engage in this boundary maintenance function, because they have more understanding of constitutional as well as statutory law. They have some sense of history. They have some sense of our evolved traditions. They have some sense of the competencies, the strengths and weaknesses of different levels and branches of government. They’re experienced, and they have shown to be

⁵² See, e.g., Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507, 525–35 (1985).

⁵³ *FCC v. Fox Telev. Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012).

⁵⁴ See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33–34 (1983).

impartial and to exercise judgment.

Agencies, I don't think are nearly as well suited to engage in boundary maintenance. Agencies usually have fairly narrow missions. The people who work at agencies usually identify very strongly with those missions. They are not overly fond of sharing their power with other agencies or entities of government, and they tend to be rather narrow-gauged and not terribly conversant with broader constitutional traditions or historical understandings. So I think if we were designing a system from scratch, boundary maintenance would be given to the courts and would not be given to the agencies.

Arlington says the opposite. *Arlington* was a boundary maintenance case. It involved conflicts between both the courts and of the FCC as to who was going to decide how rapidly wireless towers were going to be built up, what was a reasonable period of time for deciding local land use decisions, and a conflict between the states and the federal government because decisions about local land use are classically handled by state land use planning boards and are reviewed by state courts, not by federal courts.⁵⁵

So it was a boundary maintenance case, and the Court, five to four, said that unless Congress speaks with clarity in a statute prescribing a boundary, the agency can decide through statutory interpretation what the boundary means, and the courts under *Chevron* will defer to the agency's decision.⁵⁶

How did this possibly happen? How did the Court seemingly cast its last unique rationale for engaging in judicial review of agency action into the deference pile along with fairness to individuals and agency policymaking? I think the explanation is provided if you listen to or read the transcript of the oral argument. Solicitor General Verrilli, who has had some rough days at oral argument, had a very good day in the *Arlington* case. His basic pitch was, "All you need is *Mead*."⁵⁷

[Laughter.]

THOMAS W. MERRILL: And this picks up on some of Kristin's very able comments.

His argument was, "Look, you've got this *Mead* case which has got this two-part test for when *Chevron* should apply or something else like *Skidmore* should apply, and that's kind of complicated. Courts have been sort of struggling with figuring this out, and don't complicate it anymore. Don't worry yourselves or instruct the lower courts to worry themselves

⁵⁵ *City of Arlington*, 133 S. Ct. at 1874–75.

⁵⁶ *Id.* at 1874.

⁵⁷ See Oral Argument at 30:8–13, 16–21, *City of Arlington*, 133 S. Ct. 1863 (No. 11-1545), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-1545.pdf

about whether the agency has authority over this area or not. That's asking too much. Let's just keep it as simple as we've already got it, and all you need is *Mead*.”⁵⁸ And I think that explains the extremely odd makeup of the *Arlington* decision. You had Justice Scalia, who is a fanatic on this question. He's not an impressionist; he's a fanatic. He thinks that *Chevron* should apply to everything, and that's the end of the matter. It's not pointillism; it's bright line drawing. And he got Justice Thomas, unfortunately—who previously, as Kristin has described has been a rather able exponent of *Chevron*—and what some wag called the “three chicks” to join him in this decision.

[Laughter.]

THOMAS W. MERRILL: And I think the motivation was that Verrilli caught the mood of the day, which is we don't need more complexity, and so in the interest of avoiding more complexity in *Chevron*-land, we have essentially, apparently tossed out judicial boundary maintenance over the structure of the federal government.

Now, what's the solution, or what can we do here going forward? I think there is perhaps a way out of this problem going forward, and it has to do again with good old *Mead*, as Kristin has described it to you. Justice Scalia previously has had virtually an aneurysm whenever the *Mead* case was mentioned. He would fulminate endlessly about the case and about the good old all- things-considered approach and so forth, and he hates *Mead* because it “complexifies” what he thought was relatively simple.⁵⁹

The untold story of *Arlington*—or the dirty little secret of *Arlington*—is that in order to get four other Justices to join him, Justice Scalia had to swallow a very bitter *Mead* pill. So when you read toward the end of the opinion by Justice Scalia, you will find the following interesting passages. The first, it says, “The dissent is correct that *United States v. Mead Corp.* requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue and the particular manner adopted. No one disputes that.”⁶⁰ And then later, he says, “It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”⁶¹ That is a direct paraphrase of *Mead*, or at least the parts of *Mead* that are clear, the parts that Kristin and I in our law review article advocated.

⁵⁸ *Id.* at 32:25; 33: 1–5, 23–25; 34:1–9.

⁵⁹ *United States v. Mead Corp.*, 533 U.S. 218, 245 (2001) (Scalia, J., dissenting).

⁶⁰ *City of Arlington*, 133 S. Ct. at 1874.

⁶¹ *Id.*

So Justice Scalia has apparently embraced *Mead*. Now, why is that significant? I think it's significant because, as Kristin briefly mentioned, the issue going forward then boils down to how broad or how narrow the delegation of authority to act with the force of law has to be. Justice Scalia seems to write in *Arlington* that all you need is some general grant of rulemaking out there, the organic statute that establishes the agency, plus something that kind of looks like a rule or has some kind of force-of-law aspect to it, and bingo, *Chevron* will apply.⁶²

Justice Roberts argues that in fact, a better reading of *Chevron* and of the cases that follow *Chevron* is that the court has always asked whether the particular issue before the Court was one as to which Congress has delegated authority to act with the force of law.⁶³

Justice Scalia in future cases will no doubt argue that *Arlington* settles this in favor of the "one rulemaking grant is enough" approach. But I think, I hope at least, that Justice Roberts's conception will ultimately prevail here. I'm not sure that the Justices that joined Justice Scalia in the interest of "All you need is *Mead*" will necessarily agree that what *Mead* means is that one grant of rulemaking is enough. And if in the future, the court decides that we are going to look provision-by-provision to see whether the Congress has granted authority to act with the force of law, what do you get? Well, you simply get judicial monitoring of the boundaries of the agency's action, because through the *Mead* inquiry, the court can now say either that the agency is or is not acting within the scope of its delegated authority, which is really the issue in *Arlington* whether or not courts will engage in that inquiry and will exercise independent judgment in engaging that inquiry.

Everyone agrees that the *Mead* inquiry is done without deference to the agency, and so if you just take Roberts's little variation on *Mead*, that we're going to do it provision-by-provision rather than statute-by-statute, I think the courts are back in the business of monitoring boundaries, which I think is the last remaining robust argument in favor of the judicial review of agency action.

Thank you.

[Applause.]

JUDGE JENNIFER WALKER ELROD: Well, is it time to move along and just accept this, or should the courts push back? Professor, do you have any other comments that you want to make?

KRISTIN HICKMAN: Well, I will say, as much as I am sympathetic to

⁶² *See id.* at 1871.

⁶³ *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

the idea that we should continue to protest the idea of deference to agencies on some level, I do think the horse is out of the barn, at which point it becomes a matter of curtailing by increment rather than curtailing wholesale. I suppose there's an extent to which the rest of us are talking about the extent to which we curtail by increment.

JUDGE JENNIFER WALKER ELROD: Professor Nzelibe?

JIDE O. NZELIBE: Just one follow-up point. Again, going back, if you take a consequentialist view about what you think courts will want to do—and whenever I hear the word “rule of law” and courts being involved, I think there is always sometimes a presumption behind that, depending on whatever your philosophical and your ideological point of view is, that there is some affinity between what you think the rule of law is and some substantive policy, like the Leviathan will be checked or something like that. And the reality is in American history, if you are a very good student, there is very, very little record that the courts have ever played a role in checking the Leviathan. They are in most cases the prime facilitator of the Leviathan. If you took them away from the picture, you'd probably have a much different state and different variety. You'd probably have much more open conflict, much more lack of resolution between the federal and state governments about what the boundaries of authorities are, much more like a resolution between boundaries between agencies.

When the courts come in, what they usually do is they say this is where the boundary is drawn, and a lot of time, they favor decentralization of power.⁶⁴ They've said to the President, “You win.” They said to the federal government, “The states lose.” They said to the other agency, “You can expand,” and that's the rule of law.

So you have to be very careful as to what you think that means, because it may not mean substantively what you think it means. It's just a court speaking. It's a resolution. It doesn't necessarily mean that they're going to check it. So I just want to leave it at that.

THOMAS W. MERRILL: So one interesting thing about *Arlington* was that there was a discussion in the opinions of whether or not *Chevron* deference is consistent with the idea that judges have this duty to uphold the law.⁶⁵ The Administrative Procedure Act in fact instructs judges to decide independently all questions of law, and the answer given by Chief Justice Roberts at least was that *Chevron*-style deference is consistent with that, because it rests on the understanding that Congress has directed the agency to decide—when Congress creates an ambiguity and gives an agency

⁶⁴ See, e.g., Maria Dinzeo, *Los Angeles Courts Favor Decentralization*, COURTHOUSE NEWS SERVICE (Apr. 20, 2011, 7:24 AM), <http://www.courthousenews.com/2011/04/20/35969.htm>.

⁶⁵ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting).

authority to administer a particular statute, that that is Congress' decision to have the agency decide the meaning of the statute and resolve the ambiguity, and so that's consistent with the rule of law.⁶⁶ You're sort of tracing Congress' directions through a delegation to the agency.

What's not consistent with the duty to enforce the law is for courts to defer to the agency's understanding that it has been given authority to decide this question. That is to allow the whole structure of government to be bootstrapped into deference to agencies and really throws the rule of law out the window. So there is a distinction between agencies' resolutions of ambiguities where Congress has clearly delegated authority to them and where Congress has not.

With respect to good old King James, the prerogative was when the king acted based on his own inherent authority. The stuff we talk about today is where Congress has by majoritarian democratic processes decided to delegate authority to the executive branch, and the executive branch then exercises that delegated authority. So there is in my mind at least a distinction between claims of inherent power by the executive, which I think are deeply troubling and threatening to our liberties and delegated authority within the scope of that delegated authority. Of course, to make sure that the latter doesn't sort of bleed over into the former, courts have to decide whether or not agencies are acting within the scope of their authority.

JUDGE JENNIFER WALKER ELROD: We have a number of people who have lined up to ask the distinguished panel some questions. We'll start with a question from this side of the room.

ATTENDEE: I'd like to direct my question to Professor Merrill, though.

Do you think that the *Chevron* doctrine has really been used as a political tool in the last 20 years, and the experience has become that this is more a tool of politics than it is a rule of law? And I would point you specifically to the area of climate change in *Massachusetts v. EPA*.⁶⁷ During a Republican administration, we had a determination that CO₂ was not a pollutant under the Clean Air Act and therefore could not be regulated without additional legislation. This area was hotly debated in Congress, and then the Supreme Court reached in over Congress and plucked the entire area of global climate change and gave it to the EPA—it was during a Democratic administration—determining that in fact CO₂ was a pollutant.⁶⁸ Do you think that this refusal to give deference to Republican attempts to restrain the growth of government and giving deference to Democratic administrations who want to grow government really means that *Chevron* is

⁶⁶ *Id.* at 1881.

⁶⁷ See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁶⁸ *Id.* at 534–35.

nothing more than a means for judges to express their personal opinions through judicial decision-making?

THOMAS W. MERRILL: Well, that's an interesting question. I think there is not a strong political valence in the *Chevron* cases. There have been a number of empirical studies, both looking at the Supreme Court itself and also looking at courts of appeals. And it's hard to detect a strong political impact that *Chevron* has had, either in terms of pro-agency or anti-agency.

I would say that *Chevron* is an important decision because it changes the vocabulary, and it changes the conceptual framework in which judges discuss these issues, and in so doing, it sort of highlights certain questions like delegation, and it submerges other questions like the reliance interest that people may have had in particular executive interpretations. So I don't think the decision is trivial by any means, but I don't really see it as having a strong political valence.

Massachusetts v. EPA, don't get me started on this. The Obama administration rescinded the interpretation of pollutants that was rendered by the Bush administration. So if there was to be any deference, it would be to the Obama administration interpretation, which was that carbon dioxide and other greenhouse gases are pollutants.

But Justice Stevens, the author of *Chevron*, wrote a quintessential activist step one *Chevron* decision which gave deference to nobody. In fact, if you are a fan of textualism and plain meaning, you couldn't find a more textualist, plain-meaning decision than *Massachusetts v. EPA*, which just said, "Oh, the statute defines pollutant to mean this, and this, and this. Greenhouse gases include that. Therefore, greenhouse gases are pollutants."⁶⁹ No consideration was given to the structure of the Act, how radically incomprehensible it would be to apply greenhouse gases under the Clean Air Act, given the structure of the Clean Air Act.

So, yes, it was a politically-motivated decision. It was a decision designed to send a shot across the bow of what the Court regarded as foot-dragging on the question of regulating greenhouse gases, but that's something courts can do with or without *Chevron*.

JUDGE JENNIFER WALKER ELROD: Does anyone else want to respond to that, or do we want to move to the next question?

[No audible response.]

ATTENDEE: Thank you. Regarding independent adjudicatory agencies, I would question whether or not the name *Chevron* should be changed to BP, British Petroleum, if you get the humor. The bottom line is if you do a

⁶⁹ See generally *id.*

statistical analysis, when the National Labor Relations Board evaluates cases and comes up with standards to apply, to determine whether the Act has been violated or not, and when in the course of thirty years or twenty years or even four years, the case decision leading to a new standard, the precedent has been flip-flopped anywhere from three times to eight times. There is a direct correlation between the flip-flopping and the jamming of the political majority on the board, and I can assure you that almost every labor lawyer I speak with wants the National Labor Relations Act to be amended to establish all cases go from the administrative law judge to an Article III federal district court.

There is no way to suggest that deference to administrative expertise is appropriate when you get outcomes that are directly correlative to the political majority on the board.

JUDGE JENNIFER WALKER ELROD: So is that your question?

ATTENDEE: My question is, I wanted to make sure that all of you agree, yes or no.

[Laughter.]

JUDGE JENNIFER WALKER ELROD: Any of you?

JIDE O. NZELIBE: I was going to say one thing very quickly with respect to this kind of question. Again, on a very specific narrow issue, on the question of *City of Arlington*, these issues—and I think Justice Scalia makes it clear. There is no judicial abdication here. I mean, apply step two rigorously. Apply step one rigorously. If an agency is doing something that is unreasonable, it will be struck down.⁷⁰

The deference thing there has to do with jurisdiction, and the question is whether or not that poses, if you want to call it, more cost than benefit. So the kinds of issues that you bring up, what I am suggesting is that there may be ways to patrol that, that *Chevron* is not necessarily tampering with, because if it looks like the agency is really behaving in a politically crass way, a court can strike it down based upon either a plain meaning or an arbitrary capricious standard under step two.

JUDGE JENNIFER WALKER ELROD: Professor Merrill, did you have something you needed to add?

THOMAS W. MERRILL: Yeah. I answered the first question erroneously. *Massachusetts v. EPA* was decided before the Obama administration took office.

The general counsel's interpretation had flip-flopped from an earlier

⁷⁰ See *Arlington*, 133 S. Ct. at 1874 (Roberts, C.J., dissenting).

one that say that greenhouse gases were covered during the Clinton administration to the Bush II administration saying they were not covered, but the interpretation was in a counsel opinion letter. It was not in a regulation having the force of law, so it would not have been entitled to *Chevron* deference.

Anyway, the Court didn't talk about deference of any sort in that opinion.

JUDGE JENNIFER WALKER ELROD: I believe we have another question.

ATTENDEE: Yeah. I fear I'm terribly out of my depth on this question, but I'm just wondering if the issues that you've been discussing on this very interesting panel have any relationship to the seemingly very elastic interpretation coming out of HHS with respect to the enforcement of the Affordable Care Act.

JUDGE JENNIFER WALKER ELROD: Any takers?

[Laughter.]

THOMAS W. MERRILL: Well, the most recent interpretation came from a White House press conference.

[Laughter and applause.]

THOMAS W. MERRILL: I don't know where that rates under *Chevron*, but I don't think it rates for that.

[Laughter.]

KRISTIN HICKMAN: Ditto.

[Laughter.]

JUDGE JENNIFER WALKER ELROD: Well, I have a question. What is the diligent, conscientious lower-court judge supposed to do? Is he supposed to be concerned with the fundamental abdication of his duties, or is he supposed to take out his handy-dandy decision tree? Given this painting, this tapestry, these different techniques, given the discussions of the mirages and all of these lovely things, what is the diligent lower-court judge supposed to do?

KRISTIN HICKMAN: Particularly for lower courts, you don't have a whole lot of choice but to live with *Chevron* and *Mead*, et cetera. The real question then becomes how you interpret those cases and apply them, particularly in the hard scenarios.

And when it comes to the impressionist model versus the decision tree model, it is six of one, half dozen of the other, as far as I'm concerned.

Either one of them strikes me as a plausible interpretation of *Chevron* and *Mead*. But stare decisis is what it is. I don't think you can put the horse back in the barn. The Supreme Court may be able to, but lower court judges don't have that luxury.

THOMAS W. MERRILL: I would certainly urge you to read *Arlington* narrowly.

[Laughter.]

THOMAS W. MERRILL: I mean, in terms of boundary maintenance, the law has got a lot of things that are very inconsistent with *Arlington*. For example, preemption has been a very hot issue in the Court in recent years, and in a number of those cases, questions arose as to how much deference the Court should give to federal administrative agencies as to whether or not the statutes they administer preempt certain types of state, tort suits, or other types of state action. In none of those cases was the Court willing to give *Chevron* deference to federal administrative agencies on the question of whether the statute had preemptive effect.

The Court in the most elaborate decision of *Wyeth v. Levine* said it was something more like *Skidmore* deference but not *Chevron* deference.⁷¹ But the law in that area very much reflects a resistance to courts going whole hog and just letting the agency decide the preemption question.

When there is a constitutional issue in the case, whether it be a question of federal constitutional power under the Commerce Clause or some kind of individual rights provision, the courts don't defer to agencies on those questions. They exercise independent judgments.

So I think I would not read *Arlington* to say that when boundary maintenance questions come up, just throw up your hands and say, "whatever the agency says, it sounds reasonable, I will go along with." I think that that decision is an outlier in terms of the larger tapestry of the law that we have, and we have to wait for another decision or two before we can read it for all it's worth.

JIDE O. NZELIBE: Just one thing to all of that. I think there's an article by Adrian Vermeule called *Mead in the Trenches*, and what he tries to do is look at how *Mead* has actually been applied in the D.C. Circuit, and he finds that it's all over the map, courts literally on a panel-by-panel basis.⁷² It's not, "We are applying the law, and we reach different outcomes." It's, "They're applying different conceptions of the law." I mean, that's not good. That's not rule of law, and this is what happens in a lot of these situations when you have [inaudible] deference doctrines. I can go over

⁷¹ *Wyeth v. Levine*, 555 U.S. 555, 577 (2009).

⁷² Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003).

there and slip into this deference if the following thing comes up. It's that courts genuinely end up confused.

And I just want to give you an example. We all discuss *City of Arlington* as if we know what it's about. It was granted cert. on the question as to whether or not *Chevron* should apply when you're reviewing the termination of an agency's own jurisdiction. *City of Arlington* decided during oral argument when it's going to file its briefing that it would rather not have that be what it would like to address. It changed it to interpretive authority.

Scalia hammered this issue, saying, "Well, we granted a question about jurisdiction. What's this business about interpretive authority?" The dissent, that is, Justice Roberts, focuses on interpretive authority. Now, if everybody is getting confused about difference between interpretive authority and jurisdiction and why they are fighting these fights, it's a little bit complicated. It's ambiguous. It's confusing. It's not clear. I read it three times, and I know what the boundaries between interpretive authority or what the strategic policy between using an interpretive authority rather than jurisdiction are, and courts will. And in the trenches when these things get litigated, they get all over the place, and you could say, "Oh, the courts are patrolling the boundaries." No. What they do is different people go home, and they say, "You know what, you have different laws you can observe," and in the D.C. Circuit, if Judge Sentelle and Judge Garland are on your panel, you may have a different view of what the deference will be. And if Judge Williams is—Judge Williams is more like Scalia. He tries to apply. He wants a clean *Chevron* deference rule. You will have a different rule.

And I will give you one example. I tried to figure out what the law is in the D.C. Circuit with respect to judicial deference to an agency's interpretation of its own jurisdiction. I came up with what seemed like two or three different opinions from the court on this question that were coexisting at the same time. It seemed to turn on which panel you had. One, that said if there is a split among agencies about what the boundary of jurisdiction is, that is, if there are two agencies or three agencies that had interpretive authority, there shouldn't be any deference. This is strange, because in 1994, when the first case in the D.C. Circuit that discussed this issue came about, it always involved a possible other agency that could have authority. So almost all the cases that I found where they said, "No, you should defer," there was also another agency that could have interpretive authority. It could be a state agency, just as it was in the *City of Arlington*.

So the question is now we have two different deference doctrines about jurisdiction that we're wandering around in the D.C. which—and it depends. One panel may apply it, and the other won't. These are people

who have been working on administrative law. These are “the expert judges” who have been working on administrative law for dozens and dozens of years, and they are having this kind of mess in place. Imagine what it is in district courts and places all over where people have to hit this one at a time. It’s just that clarity is much better, even if it’s not clarity in the angle that you like, and *Chevron*, every person who practices law, it flows right off the top of their tongue. It’s a clear rule that everybody can understand, and it’s probably much better to jam things into that rule however uncomfortably than to have three or four places where they can leak. And that’s sort of my impression of what happens in district courts.

KRISTIN HICKMAN: Well, I do want to respond to that on one level, though, and say that, in talking about *Chevron* as clear, *Chevron* is not clear. Just like we’re talking about having multiple views of the jurisdictional question or multiple views of what *Mead* means, we’ve got multiple views of what *Chevron* means. Just like, for that matter, when it comes down to statutory interpretation in general, we have broad disagreement over whether we should pursue originalist interpretative methods or textualist methods or purposivist methods. We have been suffering through *that* lack of clarity for just as long, if not longer, as we have been suffering through the lack of clarity with *Chevron* and *Mead*. It all comes down to, just as we have different reasonable interpretations of a particular set of statutory terms, we are likewise going to have disagreements over what precedents mean and how they apply in individual cases. Some cases will be clear. It’s the marginal cases that are always hard, no matter what doctrine you’re applying.

JUDGE JENNIFER WALKER ELROD: I believe we have time for one more question, and I think it’s this side of the room’s turn.

ATTENDEE: I want to acknowledge Jide’s stirring appeal to be careful what you wish for in discussing concerns about *Chevron*. I think he’s right in a case that was essentially playing out that factional dispute between big oil and some alphabet soup of environmental groups, which that is, in a way, a political question that could be handled.

But I wonder, Tom, if you too quickly surrendered the area of judicial review for more individualized plaintiffs in this area. When you take a case like *Sackett*, which I don’t think revolved on *Chevron*, but maybe it was a boundary drawing case, where I think the courts can be convinced they ought to perhaps have a different kind of deference depending on the nature of those contending.⁷³

THOMAS W. MERRILL: I think you are exactly right that *Sackett* is an important case, and it underscores the Supreme Court’s understanding that

⁷³ *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

agencies should not be able to coerce individuals.⁷⁴ This was a wetlands regulation case where EPA was arguing that it could issue orders to parties about not filling wetlands and could somehow evade any judicial review of those enforcement orders until various eons had passed, and the Supreme Court said no, this is an adjudicative order, you get judicial review of this under the Administrative Procedure Act.

So you are absolutely right that that's an important boundary maintenance decision, and it sort of underscores that judicial review is still important for protecting individual rights.

My point was that once you get to the actual reviewing of these individual rights where fact issues are particularly important, the courts many years ago said that they will defer to fact-finding by agencies, unless it lacks substantial evidence or is arbitrary and capricious.

And so the one thing that courts are really good at, which is fact-finding, has been handed over to the agencies, and the courts will only interfere if there is some kind of really obvious miscarriage of justice. And that's deference, and that's a kind of weakening of one function of judicial review, which I think suggests that the judicial review is not performing the robust function it might otherwise perform in that area.

JUDGE JENNIFER WALKER ELROD: Do any of our other panelists have final thoughts?

[No audible response.]

JUDGE JENNIFER WALKER ELROD: Well, let's thank our panelists for such a thought-provoking discussion.

[Applause.]

⁷⁴ See generally *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).