



12-15-2020

## *Chevron Abroad*

Kent Barnett

*J. Alton Hosch Associate Professor of Law, University of Georgia School of Law*

Lindsey Vinson

*J.D., B.A. University of Georgia*

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### Recommended Citation

96 Notre Dame L. Rev. 621 (2020)

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# CHEVRON ABROAD

Kent Barnett\* & Lindsey Vinson\*\*

*This Article presents our comparative findings of how courts in five other countries review agency statutory interpretation. These comparisons permit us to understand and participate better in current debates about the increasingly controversial Chevron doctrine in American law, whereby courts defer to reasonable agency interpretations of statutes that an agency administers. Those debates concern, among other things, Chevron’s purported inevitability, functioning, and normative propriety. Our inquiry into judicial review in Germany, Italy, the United Kingdom, Canada, and Australia provides useful and unexpected findings. Chevron, contrary to some scholars’ views, is not inevitable because only one of these countries has something analogous to Chevron. Indeed, one country has expressly rejected Chevron in dicta. Nevertheless, all but one or two of the countries (depending how one counts) have at least some limited space for deference to agency statutory interpretations. We do not call for American law to wholesale adopt any particular country’s form of judicial review. But our comparative study provides useful suggestions for improving Chevron’s overall functioning and for better grounding it on its theoretical foundations.*

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\* J. Alton Hosch Associate Professor of Law, University of Georgia School of Law.

\*\* J.D., B.A. University of Georgia. We appreciate the comments from Philip Anisman, Nathan Chapman, William Gaskins, Jim Maxeiner, Jan Oster, Jeff Pojanowski, Bijal Shah, Jason Sigalos, and Mila Sohani. We are also deeply appreciative of the excellent editorial assistance of the *Notre Dame Law Review* members.

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*[M]uch of the discussion of political development has centered in recent years on the institutions of constraint—the rule of law and democratic accountability. But before governments can be constrained, they have to generate the power to actually do things.*

—Francis Fukuyama<sup>1</sup>

INTRODUCTION

The eminent political scientist Francis Fukuyama noted the inherent tension in ensuring that administrative agencies have freedom to act while maintaining their democratic legitimacy by remaining within their legal strictures. Nearly a century before him, British legal scholar A.V. Dicey resolved the tension by depriving agencies of any small-“c” constitutional space within the British system. At most, agencies exercised some quasi-judicial power that courts kept within strict statutory bounds and reviewed to ensure “judicial fairness and equity.”<sup>2</sup> In contrast, Canadian scholar D.M. Gordon accommodated some agency discretion within Dicey’s rule-of-law paradigm. Gordon argued that courts should only consider whether agencies acted within their statutory jurisdiction—not whether they properly exercised their authority within that jurisdiction.<sup>3</sup> American law professor Walter Gellhorn, a contemporary of Gordon, summarized “the burning question” as “whether and how much a court could review (and, in reviewing, revise) administrative judgments.”<sup>4</sup> At bottom, these scholars sought to strike the appropriate balance between promoting useful, expert agency action and limiting lawless, unaccountable agency behaviors. The story of administrative law in the United States—and elsewhere—is largely a never-ending odyssey to get this balance right.

Indeed, history and some modern practices demonstrate the danger of permitting either judicial control or agency discretion to run riot. For instance, limited judicial review and limitless legislative delegation to the

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1 FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 54 (2014).

2 A.V. Dicey, *The Development of Administrative Law in England*, 31 L.Q. REV. 148, 151 (1915).

3 See Kent Roach, *The Administrative Law Scholarship of D.M. Gordon*, 34 MCGILL L.J. 1, 6–7 (1989).

4 WALTER GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 42–43 (1941).

executive gave foundation to the Nazis' rise to power in 1930s Germany.<sup>5</sup> On the flip side, extreme skepticism of bureaucracy and overbearing judicial review in the Ukraine has stunted the maturation of Ukrainian agencies likely because they have little incentive to do a good job when courts second-guess all agency decisionmaking.<sup>6</sup>

One tool in American administrative law to balance these concerns is the canonical *Chevron* doctrine. *Chevron* requires courts to defer to reasonable agency statutory interpretations when an agency interprets a statute that it administers, instead of having courts themselves decide the best meaning of the statute.<sup>7</sup> Its champions extol its purported virtues: it respects the legislature's delegation of interpretive primacy to expert agencies over policy choices inherent in legal interpretation;<sup>8</sup> it recognizes agencies' superior political accountability over unelected courts via congressional oversight and presidential supervision;<sup>9</sup> it encourages national uniformity and stability in statutory interpretation;<sup>10</sup> and it mitigates partisan judicial decisionmaking.<sup>11</sup> Nevertheless, this established doctrine is under siege. Its detractors decry its putative vices: it violates the Constitution;<sup>12</sup> it permits statutory language to

5 See Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 *YALE L.J.* 1341, 1361–71 (2004) (discussing impact of Weimar-era delegation with Nazi empowerment).

6 See Nicholas R. Bednar & Barbara Marchevsky, *Deferring to the Rule of Law: A Comparative Look at United States Deference Doctrines*, 47 *U. MEM. L. REV.* 1047, 1062–63 (2017) (considering how Ukraine reviews agency interpretations of statutes and regulations).

7 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

8 See, e.g., *id.* at 865; ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* 29–30 (2016).

9 See, e.g., *Chevron*, 467 U.S. at 865; Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *COLUM. L. REV.* 1749, 1751–52, 1791–92 (2007).

10 See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 208 (2006) (“If *Chevron* were not the law and were not followed faithfully, regulatory law—involving, for example, the environment, communications, and labor-management relations—would inevitably be highly variable across the country.”); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *COLUM. L. REV.* 1093, 1112 (1987).

11 See Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 *VAND. L. REV.* 1463, 1468 (2018) (finding, based on empirical analysis of the largest database to date, “that *Chevron* deference significantly curbs (but does not fully constrain) judicial discretion”). Other scholars have found that *Chevron* can affect how panels review agency statutory interpretation. See Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2168 (1998); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 *U. CHI. L. REV.* 823, 870–71 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 *VA. L. REV.* 301, 304–05, 345–46 (2004).

12 See *Michigan v. EPA*, 576 U.S. 743, 760–62 (2015) (Thomas, J., concurring) (arguing that *Chevron* deference presented “serious separation-of-powers questions” because it either violates Article III’s vesting of judicial power in the courts or Article I’s nondelegation doctrine); see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153–54 (10th Cir.

have more than one meaning;<sup>13</sup> its robust use encourages a more expansive and unchecked administrative state;<sup>14</sup> and its reticulated complexity demonstrates its practical unworkability.<sup>15</sup> Accordingly, depending on one's view, either *Chevron* allows agencies a reasonable, but not boundless, space to make policy, or it permits agency lawlessness through judicial abdication.

Out of this debate, scholars and judges have proposed various reforms. Some have called for the courts to reconsider which preconditions must exist for *Chevron* to apply.<sup>16</sup> Some have called for rethinking or simplifying *Chevron*'s two-step analytical process.<sup>17</sup> Some have called for abandoning it alto-

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2016) (Gorsuch, J., concurring); Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1205–14 (2016) (arguing that *Chevron* deference violates constitutional due process by systematically preferring the government's interpretation on judicial review).

13 See *Chevron*, 467 U.S. at 863–64 (noting that changed agency interpretations can help signal that interpretive issue is committed to the agency's discretion); Evan J. Criddle, *Chevron's Consensus*, 88 B.U. L. REV. 1271, 1283 (2008) ("For traditionalists, *Chevron*'s requirement that courts defer to administrative agencies' shifting interpretations of ambiguous statutes on a continuing basis—even in the face of conflicting judicial interpretations—seemed to sweep aside the core rule-of-law values at the heart of judicial statutory interpretation." (first citing David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941–56 (1992); and then citing Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1430 (2005) ("[I]f anything, the manner in which *Chevron* arguably undermines continuity norms suggests that we ought to question—rather than celebrate—its breadth.")).

14 See *City of Arlington*, 569 U.S. at 314–15 (Roberts, C.J., dissenting); see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–48 (1994) (viewing *Chevron*, among other doctrines concerning judicial review and separation of powers, as having expanded administrative agencies' powers beyond the Constitution's original understanding).

15 *Gutierrez-Brizuela*, 834 F.3d at 1157 (Gorsuch, J., concurring) ("*Chevron* has presented its fair share of practical problems in its administration."); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783 (2010).

16 See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("Any resolution of [a statutory] ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable."); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017) (questioning the Court's major-questions exception); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (arguing that courts should consider original congressional statutory conventions for deciphering when Congress has delegated authority for agencies to act with the force of law).

17 See, e.g., *Glob. Tel\*Link v. FCC*, 866 F.3d 397, 419 (D.C. Cir. 2017) (Silberman, J., concurring) (calling for a more "muscular" step two); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253 (1997) (arguing that removal of the second step would eliminate redundancy and improve *Chevron*'s administrability); Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994) (arguing that courts should emphasize the first step on public policy grounds); Matthew C. Stephenson & Adrian Vermeule, *Essay, Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009) (arguing that two-

gether—whether for pragmatic,<sup>18</sup> statutory,<sup>19</sup> or constitutional reasons.<sup>20</sup> Indeed, at least a majority of the Supreme Court Justices has expressed misgivings about *Chevron*'s reach or very existence.<sup>21</sup>

Cutting through the din of this incessant controversy is a growing second-order contention—that, whatever its problems, *Chevron* is, to varying degrees, inevitable in a legal system with a large, complex administrative state. Although some marginal changes can improve the doctrine, *Chevron* reflects a holistic political-judicial settlement over how judicial review of agency statutory interpretations can recognize the limits of judicial prowess, agencies' epistemic advantage, and Congress's preference for administrative action.<sup>22</sup>

To evaluate *Chevron*'s inevitability and its possible mutations, we consider in this Article how other mature legal systems approach judicial review of agency statutory interpretation. (Throughout this Article, references to “judicial review” mean review of agency statutory interpretation, unless otherwise indicated.) Few well-developed, stable governments mirror the United States' structure of government by having three separate branches and a presidential system.<sup>23</sup> Accordingly, we have concentrated on countries that share some of our governmental features: Germany, Italy, the United Kingdom, Canada, and Australia. All of the selected countries have parliamentary systems, and all but the UK have separation of powers enshrined in a written constitution. Germany and Italy provide civil-law examples, while the UK

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step analysis should be collapsed to avoid a conceptual problem harmful to administrative law doctrine).

18 See Beer mann, *supra* note 15, at 782 (“*Chevron* . . . has proven to be a complete and total failure, and thus the Supreme Court should overrule it at the first possible opportunity.”).

19 See *id.* at 788–94 (arguing that *Chevron* is not consistent with the Administrative Procedure Act); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998) (same).

20 See *infra* notes 79–81 and accompanying text.

21 See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (noting his concern over the difficulty of deciphering whether a statute is clear or ambiguous, as required under *Chevron*'s step one); Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE BLOG (June 21, 2018), <https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference> (“Before this Term, *Chevron* was already under siege. Chief Justice Roberts, as well as Justices Thomas, Scalia, Alito, and Gorsuch, had assailed and narrowed the doctrine in published opinions, concurrences, and dissents.”). Justice Breyer has long advanced a more contextual approach to judicial review. See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 308–09 (2013) (Breyer, J., concurring in part and concurring in the judgment); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

22 See *infra* Section I.C.

23 Cf. Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597, 604–12 (noting that, although the U.S. Constitution has indirect influence, countries rarely adopt the U.S. constitutional model without fundamental modifications).

provides the common-law source for the American, Canadian, and Australian common-law systems. These comparisons permit us to determine whether civil-law and common-law systems have taken similar paths within and outside of each system. Moreover, it helps us consider whether positive constitutional separation of powers might affect judicial review.

In brief, we found that all of the compared countries face the same never-ending struggle between judicial review and agency discretion, although some of the countries struggle in only a narrow category of cases. But our theoretical and doctrinal comparative study indicates that these countries approach judicial review, to varying degrees, in different ways, limiting our ability to draw any relationship between governmental structure and deference.

*Germany:* Influenced by its conscious concern over the relationship between judicial abdication and its Nazi past, Germany has its own two-step deference doctrine that has a much more limited domain than *Chevron*. Deference in Germany is significantly limited to certain technical, scientific, or economic matters that the legislature has delegated to the agency.

*Italy:* Despite not subjecting rulemakings to judicial review, Italy, after tumultuous doctrinal shifts in the past few decades, has rejected judicial deference to agency statutory interpretations altogether for agency adjudication.

*United Kingdom:* The UK also generally rejects judicial deference, although it defers in some instances for “special” matters decided by entities that would be characterized as agencies under U.S. law.

*Canada:* Canadian judicial review comes the closest to *Chevron* with a default reasonableness review grounded on a legislative delegation theory whose domain has recently narrowed as the Supreme Court of Canada has adopted a more categorical approach. The nature of reasonableness review is highly faceted with procedural and substantive considerations.

*Australia:* Finally, although Australia is the only one of our studied countries to reject *Chevron* expressly, its High Court did so in dicta in a case that did not implicate agency legal interpretation. Moreover, Australia continues to have a very limited doctrine somewhat similar to *Chevron* when statutes expressly give agencies exclusive jurisdiction and limit judicial review, although it rarely applies in practice.<sup>24</sup>

After considering these foreign legal systems, we conclude that *Chevron* is not inevitable if we understand *Chevron* to mean either its current two-step formation or a judicial deference regime that fills a similar space. Italy and the UK, despite some indications to the contrary, are best thought of as having eschewed *Chevron* deference. Two countries with something similar to *Chevron*—Germany and Australia—give their deference doctrines significantly smaller domains than *Chevron*. Canada was the only country that we studied that had a similar form of deference. Moreover, *Chevron*’s focus on agency authority to act with the force of law and statutory ambiguity is nearly always absent in other countries’ deference doctrines.

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24 See *infra* Part II.

Yet, our inquiry demonstrates that our compared countries, except for Italy (and perhaps Britain), leave some remaining place for deference. If *Chevron* is thought of as a metaphor for some kind of deferential space (even if significantly limited) for the area between law and policy, *Chevron* is more ubiquitous, if not inevitable. Canada likely has a similar place for deference as American courts, although the Supreme Court of Canada, unlike the U.S. Supreme Court, has recently reaffirmed reasonableness review's accepted place in Canadian jurisprudence. Germany, however, has created a limited domain for deference: technical, special, or legislatively delegated matters. Even Italy—which has clearly forsaken all deference for agency legal interpretation—still uses deferential rhetoric, and its recent doctrinal instability does not provide confidence that deference will not return. The space for deference across most of our compared countries suggests that Dicey's call for strict separation between law and policy proves difficult to establish in fact—even if *Chevron* commands no monopoly over judicial review abroad.

Regardless of how one goes about assessing *Chevron*'s inevitability, our study provides insights on how to improve *Chevron* deference by grounding it in its theoretical bases. For example, the German experience provides an example of how to provide clearer guidelines of when a legislative delegation occurs by limiting delegation to matters within a narrower understanding of, and more focused search for, agency expertise. Likewise, the Australian experience provides guidance on courts requiring express indications from the legislature that it has delegated interpretive, not only policymaking authority, to agencies. Requiring that the legislature provide more direct signaling of delegation mitigates concerns over *Chevron*'s current multifaceted, oblique search for inferred legislative delegation. If adequately defined and limited, *Chevron* provides a way of easing the ever-present tension between courts and agencies. If courts focus on expertise and express delegation and thus unite doctrine and theory, *Chevron* gains additional legitimacy. Of course, a search for expertise and delegation can prove indeterminate if courts do not clarify the boundaries of each inquiry; the foreign approaches give American courts, at the very least, a useful place to start.

Part I of this Article begins by briefly describing *Chevron* and its theoretical foundations. Part I continues by examining the development of American judicial-review doctrines concerning agency statutory interpretation and leading scholarly responses. Part II considers how Germany, Italy, the UK, Canada, and Australia approach judicial deference to agency statutory interpretation. Part III compares the various approaches to *Chevron* and identifies lessons for understanding and reforming *Chevron*. Ultimately, we conclude that our findings should give comfort to both those who promote and attack *Chevron*: the variation that we found suggests that *Chevron*'s presence or absence does not lead to authoritarian or failed governments, respectively.

## I. BECOMING, MAINTAINING, AND CHANGING *CHEVRON*

To compare other systems' forms of judicial review and glean implications for *Chevron*, one need not know every twist and turn in the doctrine's



development or the most arcane scholarly criticisms. Instead, we provide here a brief summary of the doctrinal developments, scholarly responses, and judicial debates that are most germane to other jurisdictions' versions of judicial review. We shall introduce more nuanced or esoteric approaches as necessary to inform our comparative analysis.

### A. *Chevron and Its Theoretical Foundations*

In *Chevron*, Congress required certain states under the amended Clean Air Act (CAA) to establish permitting programs for “new or modified major stationary sources” of air pollution.<sup>25</sup> An Environmental Protection Agency (EPA) regulation had defined “stationary source” broadly to apply to all pollution-emitting devices within a manufacturing plant, not individual pollution-emitting devices. By doing so, the regulation required polluting entities to obtain a permit only when modifications to emitting devices increased pollution plantwide, not when a specific emitting device increased pollution in isolation.<sup>26</sup> When environmentalists challenged the EPA’s definition, the Supreme Court first asked “whether Congress has directly spoken to the precise question at issue”—that is, the meaning of “stationary source.”<sup>27</sup> If it had, the Court would have enforced Congress’s clear meaning.<sup>28</sup> Because Congress had not done so, the Court asked second whether the EPA’s interpretation was “permissible.”<sup>29</sup> The Court decided that it was because it was “a reasonable accommodation of manifestly competing interests.”<sup>30</sup> Thus, the Court deferred to the EPA’s interpretation, regardless of whether the Court thought that the EPA’s interpretation was the best one.<sup>31</sup>

Step one of *Chevron* allows reviewing courts to retain their traditional de novo review over determining statutory meaning by using the “traditional tools of statutory construction,”<sup>32</sup> while step two leaves policymaking space to the agency to resolve a statutory ambiguity reasonably.<sup>33</sup> In *Chevron* itself, the Court considered the statute’s text, scheme, purpose, and legislative history at step one.<sup>34</sup> Over time, however, the Supreme Court has generally

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25 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984) (quoting Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. § 7502(b) (2018))).

26 *Id.*

27 *Id.* at 842.

28 Applying the two-step inquiry specifically to the *Chevron* facts, the Court concluded that the statutory text in the CAA was broad, granting the EPA significant “power to regulate particular sources in order to effectuate the policies of the Act.” *Id.* at 862. The Court next looked to the legislative history of the CAA, finding that the ambiguous legislative history was “consistent with the view that the EPA should have broad discretion in implementing the policies of” the CAA. *Id.*

29 *Id.* at 843.

30 *Id.* at 865.

31 *See id.* at 843 n.11.

32 *Id.* at 843 n.9.

33 *See id.* at 865.

34 *See id.* at 854–64.

come to limit step one to a textual inquiry.<sup>35</sup> Step two has evolved in a more opaque fashion. The Court has recently indicated that step two is similar to run-of-the-mill arbitrary-and-capricious review.<sup>36</sup> Yet, when rejecting agency interpretations at step two, the Court has engaged in a textualist and structural inquiry, akin to a more thorough step-one analysis.<sup>37</sup> Lower courts, when rejecting agency interpretations at step two, have been inconsistent, although more often eschewing textualism in favor of arbitrary or purposive review.<sup>38</sup>

The Court gave three reasons for deferring to the EPA. First, *Chevron* respects congressional delegation of interpretive authority to agencies.<sup>39</sup> This delegation theory has become the leading justification.<sup>40</sup> Second, agencies have expertise and institutional advantage when resolving policy battles, such as how best to fulfill the purposes of the statute.<sup>41</sup> Finally, the constitutional separation of powers militates in favor of leaving policy matters to agencies because they are more politically accountable than courts.<sup>42</sup>

In the decades after *Chevron*'s decision, the Court and scholars have provided an additional rationale. Evoking Peter Strauss's view,<sup>43</sup> the Court in *City of Arlington v. FCC* identified national interpretive uniformity as support for *Chevron* deference: "Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."<sup>44</sup> One of us, along with two other coauthors, has conducted the largest empirical examination of *Chevron* in the federal circuit courts over an eleven-year period.<sup>45</sup> We found that *Chevron*, as compared to other standards of judicial review for

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35 See generally Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (arguing that Court has moved from an intentionalist to a textualist inquiry at step one). Recently, the Court suggested that step one should also include purposive and historical inquiries. See *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016).

36 See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1455 (2018).

37 See *id.* at 1451–53.

38 See *id.* at 1466 fig.5.

39 See *Chevron*, 467 U.S. at 843–44.

40 See Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1, 15 (2015) (noting that the "delegation theory reigns supreme," despite the Court's referring to other values from time to time); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006) (describing how Justices Breyer and Scalia, despite their opposing views of *Chevron* analysis, had independently come to the same understanding that "roots the decision in a theory of implicit congressional delegation of law-interpreting power to administrative agencies").

41 See *Chevron*, 467 U.S. at 864. The Court reasoned that the EPA was more equipped than judges to make policy choices because those choices accommodated "manifestly competing interests" within a "technical and complex" regulatory scheme. *Id.* at 865.

42 See *id.* at 865–66.

43 See Strauss, *supra* note 10, at 1121.

44 569 U.S. 290, 307 (2013).

45 See Barnett et al., *supra* note 11, at 1467.

agency statutory interpretation, mutes partisan decisionmaking and thereby provides more nationwide judicial uniformity.<sup>46</sup>

### B. *The Deference Trinity*

Despite a significant historical provenance, *Chevron's* current established place in administrative law was not obvious. *Chevron* emerged victorious by the late twentieth century as one of three lines of judicial-review doctrine. But several Supreme Court Justices and scholars have sought to reconsider *Chevron's* status. In response to these challenges, another group of scholars has argued, to varying degrees, that *Chevron*—or something like—it is inevitable.

Before the birth of *Chevron's* two-step formulation in 1984, the Supreme Court had developed three lines of judicial-review cases. The first line applied de novo review of agency statutory interpretations.<sup>47</sup> The second line—exemplified by 1944's *Skidmore v. Swift & Co.*<sup>48</sup>—had courts evaluate the thoroughness, reasoning, and consistency of the agency's interpretation while having courts retain interpretive primacy over statutory interpretation.<sup>49</sup>

The third line was the proto-*Chevron* line, requiring courts to defer to reasonable agency statutory interpretations. As part of this third line, epitomized by *NLRB v. Hearst Publications*,<sup>50</sup> the Court relied upon the delegation theory<sup>51</sup> and stated that it was unnecessary “to make a completely definitive limitation around the term” at issue.<sup>52</sup> Ultimately, like *Chevron*, *Hearst* created standards that “permit[ted] de novo review of pure questions of law, but require[d] deferential rational basis review of mixed questions of law and fact.”<sup>53</sup>

The *Hearst* line had significant pedigree, even if its family tree did not clearly identify its judicial ancestors. The Court has in two ways long deferred to agencies' legal interpretations. First, courts would grant writs of

46 See *id.* at 1468.

47 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1, at 157 (5th ed. 2010) (listing de novo review decisions before *Chevron*).

48 323 U.S. 134 (1944).

49 See *id.* at 139–40.

50 *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 131 (1944) (“[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. . . . [T]he Board's determination that specified persons are ‘employees’ under this Act is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”); see also PIERCE, *supra* note 47, § 3.1, at 156–57 (describing pre-*Chevron* precursors).

51 *Hearst*, 322 U.S. at 130 (“[The task to interpret the statute] has been assigned primarily to the agency created by Congress to administer the Act. Determination of ‘where all the conditions of the relation require protection’ involves inquiries for the Board charged with this duty.”).

52 *Id.*

53 Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1068 (1995).

mandamus only for ministerial, not discretionary, matters.<sup>54</sup> Indeed, foreshadowing *Chevron's* delegation theory, the Court in *Marbury v. Madison* stated that the writ was improper for “[q]uestions . . . which are, by the constitution and laws, submitted to the executive.”<sup>55</sup> Likewise, the Court in *Decatur v. Paulding* explained that the executive’s “exercise [of] judgment and discretion” when “expounding the laws . . . of Congress” were not “ministerial duties.”<sup>56</sup> That said, Aditya Bamzai argues that when the agency was not a party to the litigation, courts only considered the consistency and contemporaneity of an agency’s interpretation.<sup>57</sup> Second, Ilan Wurman argues that agencies from the Founding had the “specification” or “completion” power to fill in statutory gaps.<sup>58</sup> These discretionary spaces may be for legal interpretation or perhaps what modern minds might think of as mixed questions or policy questions.<sup>59</sup>

The 1946 Administrative Procedure Act (APA) could have picked a winner in the three-horse race over proper judicial review, but its choice—if there was one—only created more uncertainty.<sup>60</sup> As relevant here, the APA stated that “the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions.”<sup>61</sup> This provision, as Bamzai has argued, is best read as requiring de novo judicial review of agency statutory interpretation with or without *Skidmore* considerations.<sup>62</sup> But Cass Sunstein has recently argued that the legislative history and lack of any objection to the Court’s continued use of the *Hearst* standard right after the APA’s enactment demonstrates the contrary.<sup>63</sup> Some scholars and courts have argued that the APA permits *Chevron* review because step two reasonableness review is or should be coextensive with APA § 706(2)(A) arbitrary-and-capricious review that courts use for policy-based decisions.<sup>64</sup> Perhaps given the

54 See PIERCE, *supra* note 47, § 3.3, at 162–63.

55 5 U.S. (1 Cranch) 137, 170 (1803).

56 39 U.S. (14 Pet.) 497, 515 (1840).

57 See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 941–47 (2017).

58 See Ilan Wurman, *The Specification Power*, 168 U. PENN. L. REV. 689, 709–11 (2020).

59 See *id.* at 732.

60 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2018).

61 *Id.* § 706.

62 Bamzai, *supra* note 57, at 985–94; see also Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (2016) (Gorsuch, J., concurring).

63 See Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1652–57 (2019).

64 See Levin, *supra* note 17, at 1254 (arguing that the arbitrary-and-capricious test found in the APA and *Chevron* step two “should be deemed not just overlapping, but identical”); see also M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES § 3.03, at 85 (John F. Duffy & Michael Herz eds., 2005); *supra* note 36 and accompanying text (referring to Supreme Court’s recent expressed views). Others disagree. See, e.g., Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 326–27 (1996); Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 n.15 (2009) (“[T]his Article proceeds under the under-

APA's unclear charge, the Supreme Court has applied all three lines of cases in a manner that bedeviled lower courts and scholars.<sup>65</sup>

Without mentioning the APA, the *Chevron* Court gave the *Hearst* line a prominent place in judicial review.<sup>66</sup> Lower courts, especially the influential D.C. Circuit, construed *Chevron* as adopting the *Hearst* standard for reviewing agency statutory interpretations.<sup>67</sup> Contrary to Justice Scalia's view that *Chevron* displaced *Skidmore* and de novo review for statutes that an agency administers,<sup>68</sup> later Court decisions confirmed that even if *Chevron* had a principal role in judicial review of agency statutory interpretation, *Skidmore*<sup>69</sup> and de novo review<sup>70</sup> had supporting parts.

To determine which standard of review applies, the Court created *Chevron* "step zero."<sup>71</sup> As most relevant to our discussion, the Court applies *Chevron* when agencies have used congressionally bestowed authority to act under the statute at issue with the "force of law."<sup>72</sup> Actions with the force of law generally include notice-and-comment rulemaking, formal "on the record" adjudication, and less common formal "on the record" rulemaking, but it may also include less formal actions from time to time.<sup>73</sup> The Court has confirmed that *Chevron*'s applicability does not distinguish between so-called "jurisdictional" and "nonjurisdictional" statutory questions.<sup>74</sup> Indeed, the Court clarified that it would not apply *Chevron* to only "humdrum, run-of-the-mill" matters but not "big, important ones."<sup>75</sup> Two years later, however, the Court seemed to do just that in *King v. Burwell*.<sup>76</sup> Under what is referred to as the "major-questions" doctrine,<sup>77</sup> the Court refused to infer congressional delegation under *Chevron* for agencies to answer a "question of deep 'economic and political significance,'" especially if the agency lacked expertise in the subject matter at issue.<sup>78</sup>

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standing that arbitrary and capricious review and Step Two of *Chevron* deference are distinct in what they require . . .").

65 PIERCE, *supra* note 47, § 3.1, at 156.

66 See Bamzai, *supra* note 57, at 997–98.

67 See Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 49–50 (2013).

68 See *United States v. Mead Corp.*, 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

69 See *id.* at 235, 237 (majority opinion).

70 *King v. Burwell*, 576 U.S. 473, 486 (2015).

71 Sunstein, *supra* note 40, at 207–11.

72 See *Mead*, 533 U.S. at 229.

73 See *id.* at 230–31.

74 *City of Arlington v. FCC*, 569 U.S. 290, 296–97 (2013).

75 *Id.* at 297.

76 576 U.S. 473 (2015).

77 See, e.g., Coenen & Davis, *supra* note 16, at 779.

78 *King*, 576 U.S. at 486 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

### C. Chevron's Inevitability

In recent years, *Chevron* has come under attack. Some—including U.S. Supreme Court Justices Clarence Thomas and Neil Gorsuch—contend that the doctrine violates the Constitution. *Chevron* may violate Article III because courts no longer say “what the law is,”<sup>79</sup> Article I because Congress has unconstitutionally delegated authority to agencies,<sup>80</sup> or Due Process because the court favors the government’s interpretation.<sup>81</sup> Others have asserted *Chevron* violates statutory law<sup>82</sup>—namely, the APA’s call for “the reviewing court [to] decide all relevant questions of law.”<sup>83</sup> Still others have questioned whether *Chevron* as a matter of administrative common law has simply proved too complicated and uncertain to be useful<sup>84</sup> or, more minimally, whether it needs further modification.<sup>85</sup>

Regardless of *Chevron*’s constitutional, statutory, or pragmatic propriety, is strong judicial deference to expert agencies nonetheless inevitable? Certain leading scholars, to varying degrees, think so.

Jeff Pojanowski, for one, has suggested that courts without *Chevron* will still distinguish legal from policy issues, possibly moving and better clarifying the boundary between them. He engaged in a thought experiment of replacing *Chevron* deference with de novo review of agency statutory interpretations.<sup>86</sup> Under de novo review, courts would have to distinguish more consciously between legal interpretation and policymaking, instead of using *Chevron*’s second step to smooth over how courts should categorize questions on the borderline.<sup>87</sup> Courts might decide more interpretive matters as legal

79 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see *Michigan v. EPA*, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment) (“*Chevron* . . . [is] contrary to the roles assigned to the separate branches of government . . . .”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153–54 (10th Cir. 2016) (Gorsuch, J., concurring).

80 See *Michigan*, 576 U.S. at 762 (Thomas, J., concurring); *Egan*, 851 F.3d at 279 (Jordan, J., concurring in the judgment). Although leading scholar Cass Sunstein once argued that *Chevron* was “in tension with the nondelegation doctrine,” he has since disavowed this view. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 927 n.140 (2003).

81 See Hamburger, *supra* note 12, at 1189 (arguing that *Chevron* is a form of systemic bias in favor of the government that offends due process).

82 See Bamzai, *supra* note 57, at 985–94.

83 5 U.S.C. § 706 (2018).

84 See *Gutierrez-Brizuela*, 834 F.3d at 1157 (Gorsuch, J., concurring) (“*Chevron* has presented its fair share of practical problems in its administration.”); Beermann, *supra* note 15, at 783.

85 See, e.g., Kavanaugh, *supra* note 21, at 2150–54 (“*Chevron* encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”).

86 See Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1076 (2016).

87 See *id.* at 1087. By doing away with *Chevron*, courts could treat questions of agency statutory interpretation as they treat other difficult questions of statutory interpretation and treat questions of policy under the standard arbitrary-and-capricious review prescribed by the APA. *Id.* Pojanowski argues that litigation should be simpler without *Chevron*

ones than they currently do, especially if they robustly use tools of interpretation, as Justice Scalia had advocated.<sup>88</sup> Nonetheless, courts would still have to leave a policymaking space for expert agencies when lawyerly skill did not produce a correct answer to the interpretive issue.<sup>89</sup> *Chevron* and its current boundaries might not be inevitable, but *Chevron*'s key concern over distinguishing legal interpretation from policy is.

Kristin Hickman and Nicholas Bednar go further than Pojanowski by contending that *Chevron* deference, or something close to it, is inevitable as a standard of review in an administrative state.<sup>90</sup> As a standard of review, *Chevron* "facilitat[es] the organization of legal arguments and help[s] judges to think about their role" in reviewing agency work product.<sup>91</sup> *Chevron*, or its ilk, is necessary to keep courts from intruding into delegated policymaking space.<sup>92</sup> *Chevron* is simply candid in admitting that not all legal questions have clear answers. Hickman and Bednar echo Pojanowski by arguing that some statutory questions lack answers that can be found through "traditional common law reasoning."<sup>93</sup> Indeed, Hickman and Bednar note that review without *Chevron* leads to perverse incentives:

When faced with two competing, seemingly reasonable interpretations of a statute, and when traditional tools of statutory construction fail to provide a clear answer, many judges will be inclined simply to side with the agency . . . . With *Chevron* deference as an option, courts . . . are free to say so as the basis for their decision. Without that alternative, courts . . . may very well still side with the agency but with less transparency . . . .<sup>94</sup>

*Chevron* is inevitable because courts, without lawyerly tools to pick a correct answer, will likely rely upon agencies one way or the other.

Adrian Vermeule agrees that judicial deference doctrines in general, including *Chevron*, are inevitable because lawyers and judges have recognized the limits of the judiciary and lawyerly institutional advantage over expert agencies.<sup>95</sup> Law provides value by keeping agencies from the folly of extreme unreasonableness,<sup>96</sup> but it provides marginal returns when it seeks to dis-

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because parties will not have to litigate which standard of review applies, *see id.* at 1081–82, or whether the statute, at step one, "really, really means something," *see id.* at 1083. Yet, parties will still have to debate—even under his theory—whether *de novo*, *Skidmore*, or arbitrary-and-capricious review is the appropriate standard of review.

88 *See id.* at 1086–89.

89 *See id.* at 1086.

90 Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398, 1444 (2017) ("With all of the debates and complaints about *Chevron* deference, it is easy to lose sight of the fact that *Chevron* is, primarily, just a standard of review rather than a rule of decision.").

91 *Id.* at 1444.

92 *See id.* at 1398.

93 *Id.* at 1447.

94 *Id.* at 1460.

95 *See* VERMEULE, *supra* note 8, at 21–22; *see also id.* at 212–13.

96 *See id.* at 7.

place nonlegal, policy-based decisionmaking.<sup>97</sup> Courts' recognition of their own limits arose not by the force of the administrative state or Congress but, he asserts, "by a considered, deliberate, voluntary, and unilateral surrender."<sup>98</sup> Indeed, along with Cass Sunstein, Vermeule contends that courts have turned to institutional competence to resolve how courts should oversee the administrative state because constitutional, separation-of-powers questions are devoid of clear answers.<sup>99</sup>

When considering *Chevron* specifically, Vermeule concludes that judicial review would not meaningfully change even in *Chevron's* absence. "Judicial deference to administrative interpretations of law, in various forms and with varying weights, preceded *Chevron* by decades, in a kind of twilight between *de jure* and *de facto* . . ." <sup>100</sup> In fact, he argues that the Supreme Court's recognition of the dichotomy between jurisdictional and nonjurisdictional questions as incoherent served as a rejection of one of the common law's key assumptions.<sup>101</sup> On a more pragmatic level, Vermeule is much less sanguine than Pojanowski that factfinding, policymaking, and legal interpretation can be easily distinguished and reviewed differently.<sup>102</sup>

Similar to Vermeule, Canadian legal scholar Matthew Lewans contends that reasonableness review of agency action—in its various forms—has a normative foundation. He notes that common-law systems have struggled with the administrative state's location between the two competing powers—legislative power and judicial common-law power.<sup>103</sup> Influential British constitutional scholar A.V. Dicey recommended that judicial common-law authority had to prevail over legislative autonomy and thus treat challenges to government action the same as those against individuals with *de novo* review. Lewans criticizes Dicey for failing to acknowledge that the common law had long distinguished between government and other action by deferring to government action.<sup>104</sup> Lewans argues that reasonableness review—by keeping agencies within statutory parameters while granting them policymaking space—is the answer for this longstanding power struggle and has (common-law style) constitutional foundation.<sup>105</sup> Indeed, Michael Herz has suggested that *Chevron* deference—with a more searching step one or step zero—may

97 See *id.* at 22.

98 *Id.* at 6.

99 Sunstein & Vermeule, *supra* note 80, at 909.

100 VERMEULE, *supra* note 8, at 31 (footnote omitted). Similarly, Peter Strauss has argued that *Chevron* is one of many devices that the Supreme Court uses to account for "management dilemmas" in overseeing a large federal judiciary. See Strauss, *supra* note 10, at 1095, 1121–22. *Chevron*, thus, results from courts recognizing that their resources are better used elsewhere.

101 See VERMEULE, *supra* note 8, at 35–36.

102 See *id.* at 28.

103 See, e.g., MATTHEW LEWANS, ADMINISTRATIVE LAW AND JUDICIAL DEFERENCE 10–11 (2018).

104 See *id.* at 16–25.

105 See *id.* at 13.



have achieved the appropriate balance of judicial oversight and agency policymaking space.<sup>106</sup>

Although Pojanowski, Hickman and Bednar, Vermeule, and Lewans approach *Chevron* and larger questions of judicial review in different ways, they share one key view: separating legal questions from policymaking is necessary at some level, even if often difficult. Moreover, they agree generally that legal questions are for courts and policy decisions are appropriately for agencies. They may not agree that *Chevron* in its current state is the perfect way of reconciling these competing forces. But they all recognize that courts have to find a way to balance judicial authority and appropriate delegation.

## II. FOREIGN APPROACHES TO JUDICIAL DEFERENCE

Our purpose in this project was to determine whether major foreign jurisdictions' approaches to judicial review provide insight on *Chevron*'s design and inevitability. In this Part, we describe the governmental structure of five countries and how they approach reviewing agency legal interpretations. Notably, these countries provide a range of examples in governmental structure and in their approaches to deference.

In choosing among jurisdictions, we first had to limit our study to a handful of countries because of space constraints in the law review format. We sought to consider both civil-law and common-law countries to ascertain whether the differing legal traditions treated deference to agency statutory interpretations differently. For civil-law countries, we studied Germany and Italy based on our desire to study influential legal systems and, pragmatically, the ease of locating sources and translations. As for common-law countries, which share legal traditions with the United States, we settled on the United Kingdom, Canada, and Australia. Each of the three common-law countries has a substantial body of scholarship on judicial review. They also allowed us to review two legal systems with positive, constitutional separation of powers and federalist systems (Canada and Australia), and one without either positive separation of powers or federalism (the UK). All our selected countries have parliamentary systems, and all but one (the UK) have some form of positive, constitutional separation of powers. Although we considered studying a legal system that more closely tracked the American presidential and federalist model, few countries have followed the American design. The most obvious subject was perhaps Brazil,<sup>107</sup> but our review of translated materials convinced us that our inquiry would prove too limited.

Although we shall save the insights of our comparative inquiry concerning *Chevron* for Part III, one thing becomes apparent by the end of this Part. Courts in all legal systems, despite differing governmental structures and legal traditions, face the same challenge that Fukuyama, Dicey, Gordon, and

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106 See Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1871, 1909 (2015).

107 See generally Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839 (2009) (comparing Brazil's governmental system with the United States').

Gellhorn identified—if and how courts should defer to agency statutory interpretations as they seek to balance legal constraint with expert discretion. Yet, they approach the difficulty, to varying degrees, in different ways.

Before proceeding, we issue four caveats. First, our discussion is necessarily limited in scope to comparative doctrines or practices that are most similar to *Chevron*, not all forms of judicial review of agency action. As is the case with American judicial review, the line between statutory interpretation and policymaking can be difficult to discern and can lead observers to categorize one kind of agency action in different ways. Likewise, our brief summaries of each country’s governmental structure are necessarily truncated. But even limited summaries permit us to consider whether American legal characteristics help or fail to explain *Chevron*’s existence and controversy. Second, for non-English-speaking countries, we rely only upon materials available in English. Thankfully, these sources were sufficiently numerous and consistent with one another to provide us confidence in our review. Third, our purpose here is not to critique any system of judicial review. Instead, we seek to compare standards of review and discern whether standards similar to *Chevron* have become inevitable in other legal systems. Finally, although we provide some discussion of standards of review concerning both legal interpretations and other agency actions, our limited focus here precludes us from determining if judicial discretion to agencies may work its way into *de novo* review or the review of other agency actions, whether expressly or implicitly.<sup>108</sup>

#### A. *Civil-Law Countries*

We begin with two civil-law countries (Germany and Italy) and continue with three common-law countries (the UK, Canada, and Australia). Given the necessarily limited number of examined countries as part of our comparative case studies, we are not in a position to establish any kind of definitive relationships between legal structure and the intensity of judicial review. And at any rate, even our limited inquiries indicate that such relationships are unlikely. The countries that we study here have meaningfully different forms of judicial review, even if they share similar legal systems and similar theoretical concerns over judicial review.

##### 1. The Limited German “Two-Step”

The German Constitution or “Basic Law” (*Grundgesetz*) creates a federal government with a federal authority (*Bund*) and state authorities (*Länder*).<sup>109</sup> The American and German federations share certain similari-

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108 For instance, Australian courts may either reframe disputes as factual or policy matters or invoke a tribunal’s expertise to limit judicial intervention. See Fleur Kingham, *Deference to the Administration in Judicial Review in Australia*, in DEFERENCE TO THE ADMINISTRATION IN JUDICIAL REVIEW: COMPARATIVE PERSPECTIVES 39, 53 (Guobin Zhu ed., 2019).

109 Jürgen Adam & Christoph Möllers, *Unification of Laws in the Federal System of Germany*, in FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF

ties, for instance: the states largely exercise general police powers,<sup>110</sup> the states have powers that are not expressly granted to the federal government (similar to the Tenth Amendment in the U.S. Constitution),<sup>111</sup> and the federal government has exclusive and concurrent powers that displace any contrary state law.<sup>112</sup>

The German Constitution also provides significant separation of powers, although that separation deviates in key ways from the American model.<sup>113</sup> Because of its parliamentary system, the separation between the executive and legislative branches is less strict than in American government.<sup>114</sup> Nonetheless, checks on the government come from the parliamentary opposition and minority rights in the German Constitution.<sup>115</sup> Checks, too, come from the German courts and the civil service, both of which have significant independence.<sup>116</sup> Moreover, the German system has stricter separation of functions than the United States, whereby in nearly all instances only the legislature can make law, only the executive can execute law, and only the judiciary can adjudicate.<sup>117</sup> Indeed, unlike the deference that American agencies receive as to fact and certain law when adjudicating disputes under the APA between private parties, German agencies' factual determinations are subject to plenary *de novo* judicial review, although courts treat discre-

TWENTY SYSTEMS § 9.1, at 237 (Daniel Halberstam & Mathias Reimann eds., *Ius Gentium: Compar. Persps. on L. & Just.* Vol. 28, 2014).

110 See *id.* § 9.2.2.1, at 241–42.

111 See *id.* (“Article 30 and Article 70 sec. 1 [of the *Grundgesetz*] formulate as a general principle that all residual powers not mentioned in the federal constitution are vested exclusively in the component states.”).

112 See *id.*

113 See David P. Currie, *Separation of Powers in the Federal Republic of Germany*, 41 AM. J. COMPAR. L. 201, 202 (1993). Notably, as most relevant here, Germany and Italy modified parliamentary supremacy by imposing separation of powers guarantees. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 635–40 (2000).

114 See Currie, *supra* note 113, at 202.

115 See, e.g., GRUNDESETZ [GG] [BASIC LAW], arts. 44, 45a(2), 93(1) (Ger.), *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

116 See Currie, *supra* note 113, at 202–03 (“[I]n some respects [German judges] are better protected from executive or legislative influence than their counterparts in the United States.”); see also *id.* at 233–34 (discussing civil service); *id.* at 242–47 (discussing courts); FUKUYAMA, *supra* note 1, at 77–79 (discussing resilient autonomy of German civil service since the early 1800s). As most relevant here, Germany has courts for civil and criminal matters (*Bundesgerichtshof*), administrative courts (*Bundesverwaltungsgericht*), labor (*Bundesarbeitsgericht*), and social security courts (*Bundessozialgericht*). Trial and appellate courts for each of these categories are at the state level, and a federal appellate court can hear important cases from these state courts. See Adam & Möllers, *supra* note 109, § 9.4.1, at 247; Currie, *supra* note 113, at 239–40. Germany’s courts do not have formally binding precedent, but federal caselaw largely has informal binding effect. See Adam & Möllers, *supra* note 109, § 9.4.1, at 248. The states and the federal government all have separate constitutional courts. See *id.* at 249.

117 See Currie, *supra* note 113, at 203; see also *id.* at 243–44 (discussing separation of functions (*besondere Organe*)).

tionary matters (as discussed below) differently.<sup>118</sup> That said, German law expressly permits Parliament to grant agencies authority to promulgate regulations with the force of law, but it has a more robust nondelegation doctrine.<sup>119</sup> Like their American counterparts, German agencies lack inherent authority and instead derive their authority only from statute.<sup>120</sup>

Germany's stricter nondelegation doctrine and separation of powers are a response to Germany's Nazi past.<sup>121</sup> A wealth of overbroad delegations to the executive in the 1920s, culminating in the Nazi's Enabling Act of 1933 (*Ermächtigungsgesetz*), diminished the German parliamentary system in favor of executive dictatorial authority and provided the Nazis with the legal authority necessary to implement their policies with little judicial oversight.<sup>122</sup> The post-World War II German Constitution reflected a fear of repeating history if agencies were again given broad enabling laws. The Constitution (adopted in 1949) "clearly required the legislature to specify the 'content, purpose, and extent' . . . of the legislative authorization in the statutes."<sup>123</sup> Moreover, the Constitution focuses on protecting human dignity and ensuring that "all law has to be made in conformity with the procedural

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118 See *id.* at 203; see also *id.* at 250–52, 252 n.281 ("The highest administrative court (Bundesverwaltungsgericht) has been even more explicit: 'If two or more lawful decisions are possible, Art. 19(4) does not require that the choice among them be made on the ultimate responsibility of the court.'" (quoting Bundesverwaltungsgericht [Federal Administrative Court], 39 BVerwGE 197, 205 (1971)); see also Yutaka Arai-Takahashi, *Discretion in German Administrative Law: Doctrinal Discourse Revisited*, 6 EUROPEAN PUB. L. 69, 71 (2000).

119 While GG Article 80(1) allows federal legislation "to empower any federal minister, or the federal or state government as a whole, to promulgate regulations ('Rechtsverordnungen') having the force of law," the statute must specify the "content, purpose, and extent . . . of the authorization." See Currie, *supra* note 113, at 218.

120 See *id.* at 209, 214; see also GG art. 20(3) ("The legislature shall be bound by the constitutional order, the executive, and the judiciary by law and justice."). Germany, like the United States, also has a somewhat controversial use of independent agencies, whose constitutional pedigree is far from settled. See Currie, *supra* note 113, at 237–38. German independent agencies, however, unlike their American counterparts, are tribunals that lack rulemaking authority. See Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMPAR. L. 859, 882 (2011) ("[I]n many countries (France, Germany, the United Kingdom), the powers of independent agencies were limited to prosecutorial and adjudicatory powers and did not include rulemaking powers, which were retained by government ministries.").

121 See Currie, *supra* note 113, at 217–18.

122 See Cheng-Yi Huang, *Judicial Deference to Legislative Delegation and Administrative Discretion in New Democracies: Recent Evidence from Poland, Taiwan, and South Africa*, in COMPARATIVE ADMINISTRATIVE LAW 466, 466 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Lindseth, *supra* note 5, at 1361–71 (discussing impact of Weimar-era delegation with Nazi empowerment); see also Florian Becker, *The Development of German Administrative Law*, 24 GEO. MASON L. REV. 453, 454 (2017) ("Administrative law was not, and maybe had never been, just a tool to deal with everyday problems but also a sharp instrument of the new rulers to shape Germany to their liking.").

123 Huang, *supra* note 122, at 466 & n.1 (describing this idea as the German "intelligible principle" (quoting DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 126 (1994))).

and substantive rules of the constitution.”<sup>124</sup> To further these objectives, Germany codified its administrative law (*Verwaltungsverfahrensgesetz* (“VwVfG”)) in 1976.<sup>125</sup>

Consistent with its desire to limit agency power, Germany has developed strong judicial review of administrative action.<sup>126</sup> In fact, Article 19(4) of the Basic Law creates a constitutional right to review of administrative acts, providing that “[s]hould any person’s rights be violated by public authority, he may have recourse to the courts.”<sup>127</sup> Because the VwVfG generally excuses or permits the subsequent cure of procedural errors,<sup>128</sup> substantive review is the more important form of judicial review (when permitted). Within this strict substantive review, however, Germany has carved out areas for agency discretionary decisionmaking.<sup>129</sup> Judicial review is informed by two fairly robust principles of judicial deference to agency action: “administrative discretion” (*Ermessen*) and “margin of appreciation” (*Beurteilungsspielraum*).<sup>130</sup> These two categories attempt to distinguish, as American law does, between discretionary decisions that courts review for arbitrary action and legal interpretations that courts review under *Chevron* (or other forms of review).

When Parliament has explicitly bestowed authority by statute to agencies to select “alternative courses of action that may follow from an applicable norm (the so-called *Rechtsfolgende*),” courts will not review their “administrative discretion.”<sup>131</sup> Words such as “can” or “may” in the statute trigger administrative discretion<sup>132</sup> and signal to courts that the agency has nonreviewable substantive decision-making authority.<sup>133</sup> As long as the agency acted within its legislative grant of authority and relied upon proper reasons,

124 Becker, *supra* note 122, at 454–55.

125 *Id.* at 471.

126 See William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 321 (2010).

127 GG art. 19(4). Although the German Constitution seems to strongly favor judicial review for rights violations, it does not define “rights” (or clearly indicate whether they refer to more than the “Basic Rights” listed in the “Basic Rights” part of the Constitution, Articles 1 through 19). It also does not define the nature of judicial review. See *id.*

128 See, e.g., *Verwaltungsverfahrensgesetz* [VwVfG] [Administrative Procedure Act], May 25, 1976, BUNDESGESETZBLATT [BGBl I] §§ 45–46, as amended *Viertes Gesetz zur Änderung verwaltungsverfahrenrechtlicher Vorschriften*—4 [VwVfÄndG], Dec. 11, 2008, <https://germanlawarchive.iuscomp.org/?p=289> (discussing permissible curing of defects and a harmless-error review).

129 See Burke-White & von Staden, *supra* note 126, at 321. Although early-twentieth-century leading German administrative scholar Otto Mayer advocated providing limited judicial review when the state had certain “close” relationships with individuals (such as students or prisoners), Germany’s Federal Constitutional Court rejected the relationship-based distinction in the 1970s. See Becker, *supra* note 122, at 466.

130 Francesca Bignami, *Formal Versus Functional Method in Comparative Constitutional Law*, 53 OSGOODE HALL L.J. 442, 463 (2016).

131 Burke-White & von Staden, *supra* note 126, at 319.

132 *Id.*; Jan S. Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, 9 GERMAN L.J. 1267, 1269 (2008).

133 Burke-White & von Staden, *supra* note 126, at 319.

then the agency decision to take action and to remedy the regulatory violation will stand and courts will not consider arguments that better choices were available.<sup>134</sup> The courts, however, will continue to decide statutory definitions and factual matters *de novo* (except as described below).<sup>135</sup>

The margin-of-appreciation doctrine is similar, but theoretically different from agency discretion. Margin of appreciation focuses on judicial deference to agency interpretations of “indeterminate legal terms.”<sup>136</sup> The theory for the doctrine is that the legislature can delegate to agencies the power to interpret indefinite legal concepts.<sup>137</sup> Scholars and judges have both recognized that the margin-of-appreciation doctrine is only for exceptional circumstances<sup>138</sup> (usually matters of risk<sup>139</sup> or valuation<sup>140</sup>) and requires explicit or implicit legislative authorization.<sup>141</sup> The doctrine has proven controversial, much like *Chevron*, with some arguing that the decisionmaker is bound “to one correct solution just as [with] any other legal concept even if the difficulty of identifying that solution may give the decision maker a certain room or judgment *de facto*.”<sup>142</sup>

The margin-of-appreciation doctrine’s resemblance to *Chevron* is readily apparent and grows stronger upon closer study.<sup>143</sup> Both are grounded in legislative delegation theory, whether explicit or implicit. Both also attempt to discern legislative delegation by considering the agency’s expertise. *Chevron* expressly referred to expertise,<sup>144</sup> and later *King v. Burwell* refused to grant an agency deference when, among other things, the interpretation at issue was not within the agency’s expertise.<sup>145</sup> The German inquiry is more

134 *Id.* at 319–20; see Arai-Takahashi, *supra* note 118, at 74–75.

135 See Arai-Takahashi, *supra* note 118, at 72–74.

136 Burke-White & von Staden, *supra* note 126, at 320; see also Arai-Takahashi, *supra* note 118, at 75.

137 Arai-Takahashi, *supra* note 118, at 75. That limited review is similar in nature to American judicial review under APA § 706 for discretionary decisions. *Cf.* Oster, *supra* note 132, at 1271 (listing the matters for judicial review, including that the agency followed proper procedure and did not consider irrelevant matters).

138 Burke-White & von Staden, *supra* note 126, at 320; see also Arai-Takahashi, *supra* note 118, at 76 (“Both the Federal Administrative Court and the Federal Constitutional Court follow the policy of scrupulously examining indefinite legal concepts, limiting the recognition of *Beurteilungsspielraum* to a small number of cases.”). Oster provides some examples: the definitions of markets that the agency can regulate or the meaning of “dangerous” as to air pollution. See Oster, *supra* note 132, at 1272.

139 See Richard L. Williamson Jr. & Monika Böhm, *Dirty Water: Lessons for Comparative Public Law and International Governance from Wastewater Regulation in the United States and Germany*, 43 ENV’T L. REP. 10237, 10245 n.68 (2013).

140 See Oster, *supra* note 132, at 1272 (“Indefinite legal terms (*unbestimmte Rechtsbegriffe*) are terms that require a valuation.”).

141 See Arai-Takahashi, *supra* note 118, at 75.

142 JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW: A COMPARATIVE STUDY 42 (1986).

143 See, e.g., Oster, *supra* note 132, at 1268, 1273.

144 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

145 See *King v. Burwell*, 576 U.S. 473, 486 (2015).

pointed because it limits delegations under the margin-of-appreciation doctrine to a category of “indefinite legal terms” (*unbestimmte Rechtsbegriffe*). Under this categorical approach, indefinite legal terms refer to statutory terms from natural, economic, or other science<sup>146</sup>—matters for which agency expertise is useful.<sup>147</sup> Save one detour in the 1970s when Germany’s Federal Administrative Court appeared to look for statutory ambiguity as the trigger for deference, the courts have limited deference “to a small number of cases.”<sup>148</sup> Indeed, consistent with this much smaller place for deference in German than American law, two authors have reported that German judges “were simply dumbfounded” when they learned of *Chevron*.<sup>149</sup> At the same time, German legal scholars’ support for the margin-of-appreciation doctrine sounds much like American scholarly support for *Chevron*: the doctrine recognizes agencies’ better democratic accountability, agencies have more expertise than courts, more than one interpretation may be possible (unlike with *de novo* or *Skidmore* review under American law), and additional legislative specificity may stultify administrative effectiveness.<sup>150</sup>

Like *Chevron*, the Germany margin-of-appreciation inquiry has two steps. But the German steps overlap with each other significantly and differ from *Chevron*’s: (1) there must be an indefinite legal term, and (2) the legislature must have granted deference to the agency to define that legal term.<sup>151</sup> Both steps focus on notions of expertise. The former looks for the right kind of term at issue—one that is scientific or technical for which the agency has expertise. The latter has proven more difficult. To decide when implicit delegations exist, courts consider whether the agency has more comparative expertise than courts. Given the difficulty in the latter inquiry, courts have generally refused to give deference.<sup>152</sup>

Despite some similarity between *Chevron* and the German doctrine’s step one, their second steps differ in focus. At step one, both inquiries focus on the nature of the statutory term at issue. Yet the German doctrine is more limited and easier to administer by focusing on whether the term is of a particular type (scientific, etc.), not whether it is sufficiently clear.<sup>153</sup> *Chevron* step two considers the reasonableness of the agency’s interpretation to ensure that the agency stayed within the bounds of its delegated authority,

146 See Oster, *supra* note 132, at 1272.

147 Interestingly, the U.S. Supreme Court, in a decision concerning a different deference doctrine, indicated that agencies should not receive deference for their interpretation of common-law terms or other matters on which they lack comparative-expertise-based advantage over courts. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019).

148 Arai-Takahashi, *supra* note 118, at 76 (footnote omitted).

149 Williamson & Böhm, *supra* note 139, at 10245.

150 See Arai-Takahashi, *supra* note 118, at 77 (first citing Fritz Ossenbühl, *Rechtsquellen und Rechtsbindungen der Verwaltung*, in ALLEGMEINES VERWALTUNGSRECHT 112, 202 (Hans-Uwe Erichsen ed., 1995); and then citing JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 276 (1992)).

151 See Oster, *supra* note 132, at 1272.

152 See *id.* at 1275.

153 See *id.* at 1272, 1284.

while the German second step is most analogous to *Chevron* step zero by focusing on delegation. The key difference between these delegation-based inquiries is that the presumptions as to the legislature's intent differ—pro-delegation under *Chevron* and anti-delegation in the German doctrine. Notably, the German inquiry does not proceed to review the agency interpretation for reasonableness in a distinct step if courts decide that the agency has delegated authority, but the overall reasonableness and agency explanation likely figure into judicial review of the agency action under the margin-of-appreciation doctrine.<sup>154</sup>

One final aspect of the German approach is functionally similar to the American “major-questions” doctrine.<sup>155</sup> Germany's comparatively stronger nondelegation doctrine, as compared to its American counterpart, requires the legislature to decide “basic questions itself” and “not delegate them to the executive.”<sup>156</sup> Together, strong nondelegation principles and the basic-questions doctrine limit when an agency can lawfully create its own interpretation. The American “major-questions” doctrine, although not framed as a nondelegation doctrine,<sup>157</sup> creates a strong presumption that Congress would not delegate matters of “deep ‘economic and political’” significance to agencies, whether or not it can do so.<sup>158</sup> The major difference between the German and American versions is that the former would require the legislature to decide the great matters in the first instance, while the American version would allow the courts to interpret the statute at issue without *Chevron* deference.

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154 See Arai-Takahashi, *supra* note 118, at 75; *id.* at 77 (noting that the German legislature cannot give agencies the “conclusive” decisional authority).

155 See *supra* notes 77–78 and accompanying text. The major-questions doctrine is an amalgamation of several Supreme Court cases suggesting that the Court will not defer to an agency's interpretation if that interpretation involves questions of “such economic and political magnitude” that Congress likely did not implicitly delegate authority to the agency to resolve the issue. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); see also VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., LSB10204, DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*? 2–3 (2018) (“The major questions doctrine, while never endorsed by name by the Supreme Court, has been distilled from a number of cases in which the Supreme Court suggested that it would not defer to an agency's interpretation under *Chevron* . . .”).

156 Oster, *supra* note 132, at 1290.

157 In a recent dissent, Justice Gorsuch identified the major-questions doctrine as a tool for enforcing “the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.” *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). Justice Kavanaugh has indicated that he supports a form of the major-questions doctrine that requires Congress either to decide major questions or delegate them to agencies expressly. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

158 *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).



## 2. Angst Italian Style

Italy provides an example of a nonfederal, civil-law constitutional republic.<sup>159</sup> Similar to Germany, it has a parliamentary system with express separation-of-powers principles in its Constitution.<sup>160</sup> Indeed, Professor John Merryman noted decades ago that separation of powers is “more sharply conceived in Italy than in common-law countries,”<sup>161</sup> at least as between the judicial and executive.<sup>162</sup> This separation encourages Italian courts to refrain from ordering specific policy mandates in the face of unlawful administrative conduct,<sup>163</sup> similar in nature to American *Chenery I* doctrine.<sup>164</sup> The Italian Constitution also provides constitutional authority to two identified agencies (the Council of State (*Consiglio di Stato*) and the Court of Auditors (*Corte dei conti*)),<sup>165</sup> and the country has created other independent regulatory agencies.<sup>166</sup>

Italy’s judges have protection from at-will removal through removal proceedings from within the judiciary for most judges.<sup>167</sup> The Italian administrative review via administrative courts terminates in the *Consiglio di Stato*, a council that is both an administrative court and government advisor.<sup>168</sup> The

159 Although Italy does not have a formal federalist system, it has a long history of regional autonomy, especially for five particular regions, and “has delineated a system characterized by the decentralization of the power more similar to the United States model than the German one.” Nerio Marino, *The New Institutional Italian Organization: The Federalism: The Experience of Other European States and the U.S. System*, 15 ST. THOMAS L. REV. 353, 354 (2002); see also COSTITUZIONE [COST.] art. 5 (It.) (“The Republic . . . recognises and promotes local autonomies, and shall implement the fullest measure of administrative decentralisation in the services which depend on the State. The Republic shall adapt the principles and methods of law-making to the requirements of autonomy and decentralisation.”); *id.* art. 117(s). See generally, Carlo Dapelo, *The Trends Towards Federalism in Italy*, 15 ST. THOMAS L. REV. 345 (2002) (discussing increased desire for a more federalist system within Italy).

160 See, e.g., COST. arts. 104, 135, 136.

161 John Henry Merryman, *The Italian Style I: Doctrine*, 18 STAN. L. REV. 39, 47 (1965).

162 The separation between the executive and legislative branches is weaker. See Christopher L. Henry, *Italy, Mexico, and the Legal Framework for Clientelism*, 15 CHI-KENT J. INT’L & COMPAR. L. 1, 14 (2015).

163 See Vera Parisio, *The Italian Administrative Procedure Act and Public Authorities’ Silence*, 36 HAMLINE L. REV. 3, 14 (2013).

164 SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 94–95 (1943) (requiring courts to uphold agency action only on the grounds upon which the agency based its action).

165 See COST. art. 100.

166 See Eduardo Jordão & Susan Rose-Ackerman, *Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review*, 66 ADMIN. L. REV. 1, 70 (2014). Italian law requires independent agencies only to engage in notice and comment proceedings, as a way to compensate for the lack of independent agencies’ political accountability. See *id.* at 71.

167 See COST. art. 107.

168 See Marco D’Alberti, *Transformations of Administrative Law: Italy from a Comparative Perspective*, in COMPARATIVE ADMINISTRATIVE LAW 102, 109 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2017) (“The judicial functions of the Italian Council of State had a weak start, but since the first decade of the twentieth century its judicial review

Council's advisory arm opines on administrative regulations and functions somewhat like the United States Office of Management and Budget.<sup>169</sup> Its judicial wing houses administrative courts that are responsible for much of the caselaw that deals with judicial review of administrative action.<sup>170</sup> Unlike American courts, Italian courts will virtually never review agency rules. But they do review agency adjudications.<sup>171</sup>

Over the recent past, judicial review of agency statutory interpretation in Italy has fluctuated wildly.<sup>172</sup> Historically, Italian courts provided more limited review for discretionary agency decisions and more intensive review for nondiscretionary agency decisions.<sup>173</sup> Discretionary decisions (*discrezionalità amministrativa*) are those that require the agency to evaluate competing interests, including the agency's primary purpose and secondary public and private interests.<sup>174</sup> For discretionary decisions, the courts' limited review is for reasonableness and proportionality.<sup>175</sup> Two notable commentators likened the review of discretionary decisions to *Chevron's* second step,<sup>176</sup> which in turn is often similar to arbitrary-and-capricious review under the APA that considers whether agencies weighed appropriate considerations in their decisionmaking. If no comparative evaluation exists as part of an agency deci-

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gained more intensity . . ."); Jordão & Rose-Ackerman, *supra* note 166, at 23 & n.69; see also Douglas L. Parker, *Standing to Litigate "Abstract Social Interests" in the United States and Italy: Reexamining "Injury in Fact,"* 33 COLUM. J. TRANSNAT'L L. 259, 273 (1995) ("The Italian courts can generally be divided into two types: administrative and ordinary courts. The administrative courts, acting through Regional Administrative Tribunals (*tribunali amministrativi regionali*, or 'TARs') and an appellate tribunal, the Council of State (*consiglio di stato*), have jurisdiction over cases seeking nullification of governmental actions alleged to be unlawful. The 'ordinary' courts have jurisdiction over most other cases, including those in which a monetary remedy against the government is sought." (footnote omitted)).

169 See Ruggero J. Aldisert, Essay, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 989 (1982).

170 See *id.* Historically, administrative courts had a role only when agencies invaded individual rights. If agencies had discretion, however, the courts viewed the agencies as having rights, usually to the exclusion of individuals. See Franco Gaetano Scoca, *Administrative Justice in Italy: Origins and Evolution*, 2 ITALIAN J. PUB. L. 118, 124–25 (2009). Current doctrine recognizes the ability for administrative courts to declare when an administrative action violates law or exceeds the agency's authority. See *id.* at 125.

171 See Jordão & Rose-Ackerman, *supra* note 166, at 23. In what may seem strange to American eyes, Italy's constitutional court can review statutes, but not regulations. See *id.* at 24. The absence of review over regulations seems especially problematic in light of Italy's longstanding concern over bureaucratic corruption, which the government has only partially mitigated. See FUKUYAMA, *supra* note 1, at 65.

172 See Jordão & Rose-Ackerman, *supra* note 166, at 23.

173 *Id.* at 24.

174 See *id.* at 27; Daria de Pretis, *Italian Administrative Law Under the Influence of European Law*, 1 ITALIAN J. PUB. L. 6, 41 (2010); see also D'Alberti, *supra* note 168, at 109 ("In many cases the Council of State annulled administrative measures that do not pursue the public purpose provided for by the law.").

175 See de Pretis, *supra* note 174, at 41.

176 Jordão & Rose-Ackerman, *supra* note 166, at 27 n.91.

sion, courts will impose some form of stronger review for agencies' "fixed powers" (or "nondiscretionary powers").<sup>177</sup>

But Italian deference became significantly more complicated and confusing once courts recognized that certain agency decisions did not fit within the existing discretionary/nondiscretionary binary framework.<sup>178</sup> The Italian courts responded to this new category of agency decisions in a manner reminiscent of *Chevron*. Traditionally, Italian courts afforded no deference to agency construction of "ambiguous statutory terms."<sup>179</sup> However, courts developed the concept of "technical discretion" (*discrezionalità tecnica*) toward the end of the twentieth century to describe when an agency was interpreting ambiguous legislative terms.<sup>180</sup> Cases involving this technical discretion were subject to a limited judicial review "on the basis that the administration has a reserved power of technical evaluation."<sup>181</sup> For example, the *Consiglio di Stato* deferred to agency determinations of whether certain buildings were of "particular historical or artistic interest"<sup>182</sup> and whether an advertisement was "dangerous."<sup>183</sup> When reviewing matters of technical discretion, administrative courts originally could not call for expert assistance from the agency and thus could not meaningfully review the technical basis for the agency's choices.<sup>184</sup> Although the restriction on calling experts was later lifted,<sup>185</sup> scholars had long been critical of the concept of technical discretion because those agency decisions did not involve the comparative evaluation of interests. Instead, those decisions concerned only the evaluation of one interest—e.g., historical interest or dangerousness.<sup>186</sup> Toward the end of the twentieth century, the *Consiglio* recognized that it had acted inconsistently, only sometimes applying deferential review to matters of technical discretion.<sup>187</sup>

In cases from 2001 and 2002, the *Consiglio* sought to clarify its confusing jurisprudence. Courts were to use "weak review" (*sindacato debole*)—that is,

177 See de Pretis, *supra* note 174, at 41.

178 See *id.* at 42.

179 See Jordão & Rose-Ackerman, *supra* note 166, at 25; see also Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 518 (1996) (reviewing INTERPRETING STATUTES (D. Neil MacCormick & Robert S. Summers eds., 1991)) (noting that Italy gives "no deference at all" to an agency's interpretation of a statute).

180 See Jordão & Rose-Ackerman, *supra* note 166, at 25 (describing this shift from no deference to technical discretion).

181 de Pretis, *supra* note 174, at 42.

182 See Jordão & Rose-Ackerman, *supra* note 166, at 25 (citing Cons. Stato, sez. iv, 12 dicembre 1992, n. 1055).

183 See *id.* (citing Cons. Stato, sez. iv, 30 novembre 1992, n. 986).

184 See de Pretis, *supra* note 174, at 42.

185 *Id.*

186 See Jordão & Rose-Ackerman, *supra* note 166, at 25 (citing Paolo Lazzara, *Discrezionalità tecnica' e situazioni giuridiche soggettive*, 2000 DIRITTO PROCESSUALE AMMINISTRATIVO 182, 212–15).

187 See *id.* (noting that the *Consiglio di Stato* recognized its departure from deferential review in a decision from 1999 but shortly thereafter returned to only limited review).

consider the reasonableness and coherence of the agency's decision—when agencies intertwined technical decisions with “*real* administrative discretion,” meaning the comparative evaluation of interests.<sup>188</sup> Under this regime, courts could use strong review for pure technical discretion, but reverted to the traditional “weak review” when technical and administrative discretion were mixed together, a concept termed “complex technical assessments” (*valutazione tecniche complesse*).<sup>189</sup> (The concept of complex technical discretion echoes the German concept of margin of appreciation.)<sup>190</sup> Notably, the courts' inquiry in determining in which category—technical discretion or complex technical discretion—an agency decision belonged recalled *Chevron's* step-zero focus on delegation and expertise.<sup>191</sup>

Only a couple of years later, in 2004, the *Consiglio* changed course once again. Claiming that its reference to weak review had become misconstrued, it stopped using weak review and turned to “full and particularly penetrating” review in cases concerning complex technical assessments (also called “indeterminate legal concepts”).<sup>192</sup> In other words, agency interpretations or decisions that previously received deference now call for nondeferential review. The agencies' institutional, expert advantage previously justified judicial deference, but now Italian courts view agencies' positions as insulated from the political arena and thus deserving of stringent review.<sup>193</sup> But why this insulation exists (or has just come to exist) is unclear. Two scholars have criticized the *Consiglio* for providing “no justification for its new stringent review” or even acknowledging that it was changing course.<sup>194</sup> Regardless of the current doctrine's normative support, Italian administrative law has come to rest in an interesting place: agency interpretations of “intermediate legal concepts” via rulemaking are essentially immune from judicial review, while similar agency interpretations via adjudication are subject to strong judicial review.<sup>195</sup>

Italian judicial review's hesitant development demonstrates angst over the appropriate nature of judicial review similar to the angst that has come to pervade American judicial review. In two recent periods of Italian judicial

188 *Id.* at 26 (quoting Cons. Stato, sez. vi, 23 aprile 2002, n. 2199, item 1.3.1) (emphasis in original).

189 *Id.* (“Examples are the evaluations performed by the antitrust agency when it interpreted and applied indeterminate legal concepts, such as ‘relevant market’ and ‘abuse of dominant position.’”).

190 See *supra* notes 136–141 and accompanying text.

191 Cf. Jordão & Rose-Ackerman, *supra* note 166, at 27 (“Italian law [came] closer to American and Canadian practice.”).

192 *Id.* at 26 (citing Cons. Stato, sez. vi, 3 febbraio 2005, n. 280; Cons. Stato, sez. iv, 8 febbraio 2007, n. 515; Cons. Stato, sez. vi, 17 dicembre 2007, n. 6469).

193 See Jordão & Rose-Ackerman, *supra* note 166, at 26–27 (“Whereas the Consiglio di Stato previously highlighted the agencies' institutional positions to suggest the need for judicial deference, it now states that a full review is needed because independent agencies are insulated from the political arena (*fuori del circuito dell'indirizzo politico*).”).

194 See *id.* at 27.

195 See *id.* at 29.

review, the courts acknowledged the apparent need for deference, justified by the agency's expertise in interpreting indefinite legal terms. The Italian deference regime during those periods was significantly similar to *Chevron*, except that the Italian version relied more explicitly on expertise and had a narrower domain than *Chevron*. The subsequent frustration with this weak review system and reversion to stronger review mirrors the current debates in American law over both keeping agencies within the bounds of their statutory charge with a stronger step one and allowing institutions with technical and policy expertise a policymaking space. Although *Chevron* has continued to maintain a place in American judicial review, Italian courts have eschewed its analogue, adopting the position that is closer to that of *Chevron*'s detractors. Nevertheless, confusion remains. The *Consiglio* continues to use terms associated with deference (at least nominally) in its strong review.<sup>196</sup> If recent history is any guide, the *Consiglio*'s deference-based rhetoric indicates that the debate over Italian judicial review of agencies' legal interpretations is far from settled.

### B. Common-Law Countries

Although our investigation of two major civil-law countries is informative, our study of three common-law countries may prove more instructive for debates surrounding *Chevron* because of the United States' common-law system and heritage. Perhaps the most interesting discovery from our study is that the common-law countries evidence more diversity than the civil-law countries. Canada takes an approach similar to *Chevron*, while the United Kingdom and Australia eschew it, save in limited contexts.

#### 1. United Kingdom and De Novo Review

Like the German and Italian governments, the United Kingdom has a parliamentary system.<sup>197</sup> But the UK, lacking a written constitution,<sup>198</sup> does not have the strong separation of powers protections or federal system that exists within the United States and Germany. The UK does have longstanding informal separation of powers norms, as Lord Mustill discussed when dissenting in *R v. Secretary of State for the Home Department, Ex parte Fire Brigades Union*:

Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The

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196 Cf. *id.* at 28 n.93 (describing how even in the current era of more stringent review, courts still use "the discourse of the deferential era").

197 Goldsmith, *Keynote Address*, 59 STAN. L. REV. 1155, 1156–57 (2007).

198 See *id.* at 1155. The only two other countries without a written constitution are Israel and New Zealand. See *The Justice System and the Constitution*, CTS. & TRIBS. JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/justice-sys-and-constitution/> (last visited Oct. 8, 2020).

courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended.<sup>199</sup>

Lord Mustill recognized that the lack of a written constitution has required the branches to be sensitive to one another to maintain a delicate, albeit successful, equilibrium.<sup>200</sup> Of course, as a parliamentary system without a written constitution, no formal separation exists between the executive and the legislature,<sup>201</sup> even if the executive branch is a “principal organ[ ] of the state.”<sup>202</sup> UK ministers have no executive or administrative authority outside of that provided by statute.<sup>203</sup> But, as in the United States and Germany, independent commissions or agencies do exist.<sup>204</sup>

Judges have the independent authority to interpret law and enforce compliance with the law.<sup>205</sup> To provide more separation between Parliament and the judiciary than had existed for centuries, Parliament created the Supreme Court of the United Kingdom in 2005 and transferred authority from the Lord Chancellor (who is a member of the House of Lords and member of the cabinet) to the Chief Justice, who is not in the House of Lords.<sup>206</sup> The judges on the Supreme Court of the United Kingdom, the

199 [1995] 2 AC 513 (HL) 567 (appeal taken from Eng.) (Lord Mustill).

200 *Id.*

201 See Bignami, *supra* note 120, at 880–81.

202 René Reyes, Essay, *Nondelegation Doctrine in Comparative Context: Britain’s Great Repeal Bill and the Shadow of Henry VIII*, 166 U. PA. L. REV. ONLINE 71, 74 (2017) (quoting *R (Miller) v. Sec’y of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 (appeal taken from N. Ir.)). That said, although no formal nondelegation doctrine exists in the UK, the government has expressed concern over legislative delegation via secondary legislation. See generally Reyes, *supra*, at 74–75; Mark Tushnet, *Constitution-Making: An Introduction*, 91 TEX. L. REV. 1983, 2010 (2013) (noting British term of “secondary legislation”).

203 See Reyes, *supra* note 202, at 74.

204 See Michael S. Barr, *Who’s in Charge of Global Finance?*, 45 GEO. J. INT’L L. 971, 1002 (2014) (discussing the UK’s independent agencies that govern financial regulation); Bignami, *supra* note 120, at 882; Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 706 (1986) (“Tribunals are the United Kingdom equivalent to United States administrative agencies or, more precisely, to United States independent agencies.”).

205 *R v. Sec’y of State for the Home Dep’t, Ex parte Fire Brigades Union*, [1995] 2 AC 513 (HL) 567 (Lord Mustill) (appeal taken from Eng.). Although the notion of parliamentary supremacy prohibits UK courts from invalidating laws of Parliament, see Monica A. Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 TEMP. INT’L & COMPAR. L.J. 279, 295 (2008), the lack of constitutional review under the UK’s legal system is not a meaningful difference from the American system for our purposes here (to consider courts’ review of agency interpretations of statutes or regulations).

206 See Fennell, *supra* note 205, at 281–82; Constitutional Reform Act 2005, c. 4 (transferring authority from Lord Chancellor to Chief Justice and establishing the Supreme Court of the United Kingdom); *The Justice System and the Constitution*, *supra* note 198.

Court of Appeal, the High Court, and the Crown Courts hold their positions “during good behaviour,” are subject to removal only by impeachment,<sup>207</sup> and cannot have their salaries reduced by Parliament.<sup>208</sup> Similar to Congress’s authority within the American system,<sup>209</sup> Parliament can preclude judicial review of agency action through what are referred to as “privative clauses,” although courts have often read them extremely narrowly.<sup>210</sup> In short, the UK has separation of powers traditions whose strength is growing, but they do not have the positive constitutional status of the American, German, and Italian versions.

British courts use their discretionary power, derived from the common law, to review administrative action for legal errors, including statutory interpretation.<sup>211</sup> Prior to the late 1960s, courts, however, would substitute their judgment for only jurisdictional errors of law (often through mandamus or other writs),<sup>212</sup> not nonjurisdictional ones, unless obvious on the face of the record.<sup>213</sup> Similar to *Chevron*, agencies had interpretative leeway to interpret certain matters as long as those matters were nonjurisdictional.<sup>214</sup> Yet instead of grounding deference in notions of statutory clarity as *Chevron* does, British deference distinguished between the nature of the agency action—whether it concerned the agency’s ability to act in the first instance, as compared to how the agency acted within its defined regulatory space. The seemingly strict jurisdictional/nonjurisdictional dichotomy obscured

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207 Senior Courts Act 1981, c. 54, pt. I, § 11(3) (concerning the Court of Appeal, the High Court, and the Crown Courts); Constitutional Reform Act 2005, c. 4, pt. 3, § 33 (concerning Supreme Court of the United Kingdom). The Act also contains provisions for removing judges for medical disabilities, and that removal requires the assent of certain other judges, depending on the judge whose removal is at issue. See Senior Courts Act 1981, c. 54, pt. I, §§ 11(8)–(9).

208 See Senior Courts Act 1981, c. 54, pt. I, § 12(3) (“Any salary payable under this section may be increased, but not reduced, by a determination or further determination under this section.”); Constitutional Reform Act 2005, c. 4, pt. 3, § 34(3).

209 See 5 U.S.C. § 701(a) (2018).

210 See Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMPAR. L. 67, 73–80 (2009).

211 Michael C. Tolley, *Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective*, 31 POLY STUD. J. 421, 428 (2003) (“Error of law is the classic ground of judicial review of administrative action.”). Although the APA recognizes jurisdictional errors as a ground for setting aside agency action, see 5 U.S.C. § 706(2)(C), the Supreme Court rejected the distinction in *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013).

212 See *Anisminic Ltd. v. Foreign Comp. Comm’n* [1969] 2 AC 147 (HL) 198–99 (appeal taken from Eng.) (Lord Pearce).

213 See Paul Craig, *Comparative Administrative Law and Political Structure*, 37 OXFORD J. LEGAL STUD. 946, 957 (2017).

214 See *id.* at 957–58 (describing how the jurisdictional/nonjurisdictional dichotomy allowed courts to maintain control over the administration while recognizing that some issues were properly left to the administration).

two competing lines of cases that called for narrower or broader understandings, respectively, of jurisdictional errors subject to judicial review.<sup>215</sup>

A new paradigm emerged in 1969 in *Anisminic Ltd. v. Foreign Compensation Commission* (*Anisminic*), where the question concerned how to interpret the statutory term “successor in title.”<sup>216</sup> Widely understood as adopting the broader understanding of judicial review in one of the competing lines of cases,<sup>217</sup> *Anisminic* established that British courts are “the conclusive arbiters on all questions of law.”<sup>218</sup> The House of Lords in *Anisminic* extended jurisdictional error from earlier caselaw to include all legal errors.<sup>219</sup> To preserve legislative and democratic supremacy over government action, governing statutes must bind agency decisionmakers.<sup>220</sup> Decades later, *R (Lumba) v. Secretary of State for the Home Department* confirmed the importance of *Anisminic* by holding “that there [is] a single category of errors of law, all of which render a decision *ultra vires*.”<sup>221</sup> The *Anisminic* doctrine, accordingly, creates a paradigm under which any error of law is subject to judicial review *de novo*.<sup>222</sup>

Nonetheless, Lewans has noted how context can continue to limit judicial review of law, whereby review extends to “ordinary” matters but not “special” or “domestic” tribunals within a charitable institution for which they are the “sole judge[s]” of the law.<sup>223</sup> For instance, in *R v. Hull University Visitor*,

215 See LEWANS, *supra* note 103, at 49–58 (discussing “[d]eference as [s]ubmission” and “correctness review” lines of caselaw and scholarship).

216 *Anisminic*, 2 AC 147.

217 See LEWANS, *supra* note 103, at 58 (noting, but questioning, the received view). In comparison, leading scholars understood *Chevron* to adopt the narrower of two competing forms of judicial review—*Hearst’s* reasonableness review over *de novo* review. See, e.g., Richard J. Pierce, Jr., Essay, *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 311 (1988); Strauss, *supra* note 10, at 1120–21.

218 Tolley, *supra* note 211, at 428.

219 See *id.* at 429. The legal issue in *Anisminic* was whether the former company owners seeking compensation in a British tribunal for foreign sequestration of the company’s ore had to demonstrate that they had no “successors in title” under the relevant international agreement. See *Anisminic*, 2 AC at 173–74 (Lord Reid).

220 See *id.* at 194 (Lord Pearce) (“[T]ribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decide as set out in the Act of Parliament.”); see also James Kane, *Anisminic Error and Discretion in Judicial Review*, 16 HIBERNIAN L.J. 1, 7–8 (2017) (describing the importance of Lord Pearce’s argument).

221 *R (Lumba) v. Sec’y of State for the Home Dep’t* [2011] UKSC 12, [66], [2012] 1 AC 245 (citing *Boddington v. British Transp. Police* [1999] 2 AC 143 (HL) 158D-E).

222 *Anisminic* is similar to *City of Arlington* in that both the House of Lords and the U.S. Supreme Court, respectively, rejected the jurisdictional/nonjurisdictional dichotomy. But the rejection led to robust *de novo* review in the UK, while it led to robust *Chevron* space in the United States. Our thanks to Jeff Pojanowski for this insight.

223 LEWANS, *supra* note 103, at 65 (quoting *R v. Hull Univ. Visitor*, *Ex parte Page* [1993] AC 682 (HL) 702–03 (appeal taken from Eng.) (Lord Browne-Wilkinson) (holding that



*Ex parte Page*, a university fired a senior lecturer for “redundancy.” When the lecturer challenged his removal for lacking the statutorily required “good cause,” the House of Lords refused to review the decision. Relying on precedent concerning judicial review of decisions by charities and of matters delegated to local courts (and not administrative agencies), the Lords understood Parliament to have made the university the sole judge of whether “good cause” existed.<sup>224</sup> However, in Lord Browne-Wilkinson’s conclusion, he stated that “[j]udicial review does lie . . . in cases where [the special or domestic tribunal] has acted outside [its] jurisdiction (in the narrow sense) or abused [its] powers or acted in breach of the rules of natural justice,” suggesting some form of a revitalized jurisdictional/nonjurisdictional distinction when reviewing adjudications within charities, if not agencies more broadly.<sup>225</sup>

In contrast to judicial review of legal issues, British courts are more deferential to agency policy decisions. Depending on the subject matter, courts will use different degrees of deference.<sup>226</sup> The default *Wednesbury* standard calls for British courts to set aside agency determinations only when they are “so unreasonable that no reasonable authority [after considering appropriate factors] could ever have come to it.”<sup>227</sup> But certain matters—such as those that implicate human rights—receive more probing “proportionality” review,<sup>228</sup> while others—such as those dealing with state security—receive

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university visitor could determine the “domestic” laws under which the university was organized, including its laws for firing employees)).

224 *Page*, AC 682 at 702–03. Lord Browne-Wilkinson stated that the general rule “that decisions affected by errors of law made by tribunals or inferior courts can be quashed” does not apply in the case of visitors because the visitor “is applying not the general law of the land but a peculiar, domestic law of which he is the sole arbiter and of which the courts have no cognisance.” If a visitor is acting within this narrow jurisdiction, then “he cannot err in law in reaching this decision since the general law is not the applicable law” and thus cannot be found to be acting *ultra vires*. *Id.* at 702.

225 *Id.* at 704.

226 See Robert C. Dolehide, Note, *A Comparative “Hard Look” at Chevron: What the United Kingdom and Australia Reveal About American Administrative Law*, 88 TEX. L. REV. 1381, 1390 (2010) (“With respect to judicial review of administrative policy decisions in the United Kingdom, the degree of deference differs based on the subject matter involved.”); see also Tolley, *supra* note 211, at 430 (“In Britain, the scope of review that courts may exercise over administrative action is broad and the intensity of review varies with subject matter.”).

227 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1947] 1 KB 223, 234 (Lord Greene MR).

228 See LEWANS, *supra* note 103, at 76–77 (referring to *R (Daly) v. Sec’y of State for the Home Dep’t* [2001] UKHL 26, [2001] 2 AC (HL) 532 (appeal taken from Eng.)). In our view, the individual rights cases are often a mix of what American courts would frame as statutory, constitutional, and policy questions. For instance, in *Daly* the House of Lords held that an agency’s policy of excluding prisoners from the search of their privileged legal communications violated their common-law right to confidential legal communications. See *Daly*, 2 AC 532, 542. This would likely implicate the Sixth Amendment under American law and thus be treated as a legal issue.

nearly no review.<sup>229</sup> Indeed, Lewans argues that British judicial review altogether has been “erratic,”<sup>230</sup> yet has been moving “towards a contextual approach.”<sup>231</sup>

With this summary of British law in mind, how does judicial review in Britain compare to that in the United States? Instead of the American practice of giving agencies room to define ambiguous statutory terms reasonably, the *Anisminic* decision treats all legal errors—whether or not they concern an agency’s jurisdiction—the same and as subject to de novo review. As *Page* (the decision concerning “good cause” removal of a lecturer) demonstrates, British courts in practice exclude certain legal questions from their review. Yet, even if American state and federal law might treat universities as agencies, one should not read too much into *Page* because the House of Lords treated that case as one for its line of cases concerning charities or inferior courts, not administrative agencies.<sup>232</sup> Together *Page* and *Anisminic* ignore ambiguity and reasonableness in favor of emphasizing judicial review or its preclusion altogether.

Britain’s attempt to cleave legal questions from policy matters—with no liminal space between those poles, à la *Chevron* step two—is consistent with the Dicey dichotomy. By doing so, it creates judicial review that is similar to the one that Justices Thomas and Gorsuch have suggested in which all legal questions are for judicial review (with de novo or perhaps shaded by *Skidmore* review).<sup>233</sup> But even under this dichotomous approach, courts have left certain legal matters to agencies—those that include an individual’s rights in adjudication concerning state security and (reminiscent of *Chevron*) even statutory interpretation of “good cause” removal of university employees based on parliamentary delegation to the university.

From a theoretical perspective, British judicial review is grounded in notions that Parliament has delegated legal questions to the judiciary.<sup>234</sup> The courts strongly presume that Parliament, despite having authority to preclude all judicial review, intends courts to keep agencies within their statutory

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229 See generally *R v. Sec’y of State for the Home Dep’t, Ex parte Hosenball* [1977] 1 WLR 766 (noting that deportee’s right to respond to allegations had to cede to state’s security interest).

230 LEWANS, *supra* note 103, at 86.

231 *Id.* at 87.

232 See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 273–74 (8th ed. 2000) (“In its latest decision [*Page*] the House of Lords has adopted Lord Diplock’s earlier view, so that inferior courts must be distinguished from tribunals and other administrative authorities. An error of law by an inferior court, therefore, may still give rise to an argument whether it is jurisdictional or not, and in the latter case it may be immune from review.”).

233 See *supra* note 79 and accompanying text.

234 See LEWANS, *supra* note 103, at 54, 70–71 (discussing scholarly views of judicial review before and after *Anisminic*).

strictures by ensuring that they comply with all legal requirements.<sup>235</sup> Notions of expertise or uniformity have little-to-no place.<sup>236</sup> Notably, under the proposed Gorsuch-Thomas model for American law, legislative delegation would explain review of *policy* matters that Congress has delegated to agencies. But it would not explain judicial review of *legal* issues because, under their view, Article III compels judicial review, thereby not leaving any discretion for legislative delegation to courts or agencies over legal matters. Accordingly, the differences in governmental structure can lead to theoretical differences even with models that work similarly.

## 2. Canada—Ever More American, Ever Less British

Although set within a common-law jurisdiction, Canada's governmental structure closely resembles Germany's. Like Germany, it is a federation with a written constitution.<sup>237</sup> Its Constitution expressly creates legislative, executive, and judicial branches.<sup>238</sup> Its separation of powers feels similar to, if perhaps a bit weaker than, that in the United States. For instance, the Canadian Parliament has significant authority to delegate legislative-like authority to agencies,<sup>239</sup> but the executive cannot exceed its delegated authority.<sup>240</sup> While the legislature can confer certain nonjudicial functions on the judiciary and adjudicative functions on the executive, it similarly cannot delegate the "core powers" of the superior courts to inferior courts or administrative tribunals.<sup>241</sup> Finally, Canada, similar to the United States, has independent agencies to assist Parliament in overseeing the executive.<sup>242</sup>

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235 See Tolley, *supra* note 211, at 428 ("[T]he fundamental principle is that the courts will intervene to ensure that the powers of administrative bodies are executed lawfully, that is, on a correct legal interpretation of the statute.").

236 For instance, "expertise" is mentioned only once in passing in all of the opinions in *Anisminic*. See *Anisminic Ltd. v. Foreign Comp. Comm'n* [1969] 2 AC 147 (HL) 207 (appeal taken from Eng.) (Lord Wilberforce).

237 See David Fontana, *Comparative Originalism*, 88 TEX. L. REV. SEE ALSO 189, 195 (2010); Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). As compared to the United States or Germany, Canada's federation is the most decentralized, allowing the provinces independent authority in commerce, labor, and immigration. See Peter H. Schuck, *Citizenship in Federal Systems*, 48 AM. J. COMPAR. L. 195, 214 (2000).

238 See Constitution Act, 1867, 30 & 31 Vict., c 3, pts. III, IV, VII (U.K.).

239 See Mark P. Mancini, *Two Myths of Administrative Law*, 9 W.J. LEGAL STUD. 1, no. 1, 2019, at 6; *id.* at 11 n.63 (noting that "an unexplored area of Canadian administrative law" is whether there are limits on legislative delegation).

240 See John D. Richard, *Separation of Powers: The Canadian Experience*, 47 DUQ. L. REV. 731, 741 (2009).

241 *Id.* at 744.

242 See Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMPAR. L. 531, 536 (2009). Canada also reformed its civil service to mix political accountability and nonpartisan expertise. See Thomas S. Axworthy & Herman B. Leonard, *The Long March in Hong Kong: Continuing Steps in the Transition from Colony to Democracy*, 33 WM. MITCHELL L. REV. 533, 555 (2007) (describing how Hong Kong has been moving closer to the Canadian civil-service model).

The judges of the Canadian Supreme Court<sup>243</sup> and of lower superior courts<sup>244</sup> hold their offices during “good behaviour.” (Implicit constitutional principles extend judicial independence—both actual and perceived—to all Canadian judges.)<sup>245</sup> The Supreme Court Justices also cannot hold any other office or receive any other emolument during their tenure.<sup>246</sup> The Canadian courts have judicial review to declare acts of Parliament unconstitutional.<sup>247</sup> The Federal Courts of Canada review federal administrative tribunals.<sup>248</sup> Parliament cannot preclude all judicial review via privative (or ouster) clauses, but their presence can limit judicial review to reasonableness review.<sup>249</sup>

In 2008, the Canadian Supreme Court in *Dunsmuir v. New Brunswick* provided a refined and detailed restatement to standards of review of agency statutory interpretations. The Court was sensitive to balancing what are by now two familiar values: preserving the rule of law and not overstepping into the agencies’ delegated authority.<sup>250</sup> To assume their proper role, Canadian courts were to consider several factors, many of which echo the contextual approach of the U.S. Supreme Court in *King v. Burwell*: the existence of a privative clause, the agency’s purpose and expertise, and the nature of the question at bar.<sup>251</sup> Faced with a privative clause, courts were likely to apply reasonableness review, instead of precluding review altogether.<sup>252</sup> The more discretely policy-oriented the agency’s mission and the more policy-oriented the question at issue, the more likely the courts were to defer to the agency.<sup>253</sup> Even with questions of law, courts were likely to provide reasonableness review for those concerning the enabling or organic act. But for legal issues that were “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise,” courts would review *de novo*.<sup>254</sup> Similar to the U.S. Supreme Court’s recent statement in the context of reviewing agencies’ interpretations of their own regulations,<sup>255</sup> the Canadian Supreme Court reaffirmed that courts review

243 See Supreme Court Act, R.S.C. 1985, c S-26, § 9.1.

244 See Constitution Act, 1867, pt. VII, § 99, 30 & 31 Vict., c 3 (U.K.).

245 See Richard, *supra* note 240, at 743.

246 See Supreme Court Act, R.S.C. 1985, c S-26, § 7.

247 See Richard, *supra* note 240, at 737.

248 See *id.* at 742.

249 See *id.* at 756.

250 *Dunsmuir v. New Brunswick* (Bd. of Mgmt.), [2008] 1 S.C.R. 190, para. 27 (Can.) (“Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.”).

251 See Richard, *supra* note 240, at 756 (listing the factors that courts will consider in determining the applicable degree of deference (citing *Dunsmuir*, [2008] 1 S.C.R. para. 461)).

252 See *id.*

253 See *id.*

254 See *id.* at 756–57 (quoting *Dunsmuir*, [2008] 1 S.C.R. para. 60).

255 See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019).

questions concerning the common law de novo.<sup>256</sup> Unlike UK courts, *Dunsmuir* continued to engage in a jurisdiction/nonjurisdictional inquiry. The Canadian Supreme Court clarified that jurisdictional questions are limited in nature to whether or not the agency has “authority to decide a particular matter.”<sup>257</sup> In fact, the Court went out of its way to say that it did not seek to return to the more capacious jurisdictional inquiries in its older jurisprudence.<sup>258</sup> Later, the Court noted that jurisdictional questions “are narrow and will be exceptional.”<sup>259</sup> Instead of getting lost in nomenclature, the Court instructed the lower courts that contextual inquiries determine standards of review.<sup>260</sup>

After *Dunsmuir*, the Supreme Court of Canada had sent mixed signals about standards of review. As Lewans has discussed,<sup>261</sup> the Court had pushed for deference to apply to matters that *Dunsmuir* had indicated were inappropriate: matters related to common-law doctrines and even interpretations that implicated constitutional rights, such as freedom of speech. For example, arbitrators in a labor-relations dispute had sufficient expertise to apply common-law principles.<sup>262</sup> And agency officials were institutionally superior to courts in assessing contextual matters related to the legal interpretation in the course of lawyer disciplinary proceedings concerning the lawyer’s communications with a judge.<sup>263</sup> Nonetheless, in a decision concerning the interpretation of an agency’s enabling act, and thus an area that appeared to call for reasonableness review, the Court engaged in intensive statutory interpretation to rule, similar to *Chevron*, that the agency’s interpretation was unreasonable because it was inconsistent with legislative intent.<sup>264</sup>

In 2019, the Supreme Court of Canada sought to provide more guidance and consistency to judicial review in *Canada v. Vavilov*.<sup>265</sup> In so doing, it overruled strands of precedent. It clarified that reasonableness review applies by default when the legislature has entrusted an agency to administer a statute<sup>266</sup>—much like the seemingly broad domain for deferential review

256 See *Dunsmuir*, [2008] 1 S.C.R. para. 60.

257 See *id.* para. 59.

258 See *id.* The Court has recognized, however, that it has not identified a jurisdictional question since it decided *Dunsmuir*. See *Canada (Canadian Hum. Rts. Comm’n) v. Canada (AG)*, [2018] 2 S.C.R. 230, paras. 35–37.

259 See *Alberta (Info. & Privacy Comm’n) v. Alberta Tchrs.’ Ass’n*, [2011] 3 S.C.R. 654, para. 39.

260 See *Dunsmuir*, [2008] 1 S.C.R. para. 64.

261 LEWANS, *supra* note 103, at 180–83.

262 See *id.* at 180–81 (citing *Nor-Man Reg’l Health Auth. v. Manitoba Ass’n of Health Care Pros.*, [2011] 3 S.C.R. 616, para. 44).

263 See *id.* at 181–82 (citing *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, paras. 47, 54).

264 See *id.* at 182 (citing *Canada (Canadian Hum. Rts. Comm’n) v. Canada (AG)*, [2011] 3 S.C.R. 471, paras. 33, 64).

265 See *Canada (Minister of Citizenship & Immigr.) v. Vavilov*, 2019 SCC 65, para. 10.

266 See *id.* para. 7.

that *Chevron* announced.<sup>267</sup> The presumption is now clearly grounded solely on notions of legislative delegation,<sup>268</sup> and expertise is now germane only to the reasonableness review itself, not the question of whether the presumption applies at all.<sup>269</sup> The presumption can be overcome, however, in the following circumstances. First, de novo review applies when the legislature has indicated that it wants another standard of review to apply by either saying so or expressly granting judicial review of administrative decisions.<sup>270</sup> Second, de novo review is required for certain questions, including constitutional questions, questions of “central importance to the legal system as a whole” whose answers require consistent answers, and questions concerning the jurisdictional boundaries between agencies.<sup>271</sup> The Court confirmed that it “depart[ed] from [its] recent jurisprudence” by inferring that an express statutory right of judicial review indicates a legislative preference for de novo review.<sup>272</sup> The Court, favorably quoting *City of Arlington*, also rejected the distinction between jurisdictional and nonjurisdictional questions (at least when not considering the jurisdictional disputes between agencies) that it had narrowly preserved in *Dunsmuir*.<sup>273</sup>

Canada’s reasonableness review asks whether the agency’s interpretation “falls within a range of possible, acceptable outcomes.”<sup>274</sup> But it also concerns itself with the agency’s “justification, transparency and intelligibility.”<sup>275</sup> The Canadian Supreme Court has stated that reasonableness review, like *Chevron*, recognizes that a statutory provision may have more than one valid interpretation.<sup>276</sup> And, like *Chevron*, the Canadian Supreme Court has recognized that legal and factual matters are often intertwined.<sup>277</sup> Finally, the Canadian Supreme Court’s focus on substantive reasonableness and transparent reason-giving echo the U.S. Supreme Court’s professed collapse of *Chevron* step two with APA arbitrary-and-capricious review.<sup>278</sup>

The Canadian version of reasonableness review, with its numerous considerations,<sup>279</sup> does not lack complexity. Nevertheless, Canada’s use of one

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267 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (stating that *Chevron* steps apply “[w]hen a court reviews an agency’s construction of the statute which it administers”).

268 See *Vavilov*, 2019 SCC 65 para. 17.

269 *Id.* paras. 30–31.

270 *Id.* para. 17.

271 *Id.*

272 *Id.* paras. 38–39.

273 *Id.* paras. 67–68 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013)).

274 See *Dunsmuir v. New Brunswick (Bd. of Mgmt.)*, [2008] 1 S.C.R. 190, para. 47.

275 See *id.*

276 See *id.* para. 41.

277 See *id.* para. 54.

278 See *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

279 See *Canada (Minister of Citizenship & Immigr.) v. Vavilov*, 2019 SCC 65, paras. 99–142 (describing various considerations for reasonableness review, including coherent reasoning, legal and factual restraints, precedent, reason-giving, and procedural fairness).

reasonableness review standard provides some simplicity over the competing American versions.<sup>280</sup> The *Dunsmuir* Court treated factual, legal, and policy matters as all equally worthy of the same kind of reasonableness review,<sup>281</sup> despite a concurring opinion that called for stricter separation.<sup>282</sup> American standards of review under the APA, in contrast, differ based on the nature of the issue and the agency's method of deciding the matter under review.<sup>283</sup> Moreover, *Dunsmuir* also reduced reasonableness review, as a matter of doctrine, to one intensity of analysis (reasonableness *simpliciter*), although the Supreme Court's review may differ *sub silentio* based on the reviewed issue.<sup>284</sup> The American version in the context of discretionary policy decisions vacillates between "hard look" and "soft glance" review, depending on context.<sup>285</sup>

Canada's standards of review for legal issues are similar in part to American forms. Like its American counterpart, Canadian jurisprudence recognizes a *de novo* and deferential review. Like *Chevron* deference, too, reasonableness review in Canada is primarily premised on legislative delegation.<sup>286</sup> Moreover, both jurisdictions carve out *de novo* review for matters that do not implicate expertise (such as "major questions" for *Chevron*, or widely applicable legal issues under Canadian practice). Both also have a "step zero" to determine what kind of deference applies, and both have inquiries that have grown increasingly categorical by considering the nature of agency action or major questions in the United States, on the one hand, or the presence of a statutory right of review in Canada, on the other hand. Moreover, with the Canadian Supreme Court's doctrinal change that recognizes statutory rights of review as signaling *de novo* review, reasonable review's domain has diminished, much like *Chevron's* after *Mead*. That said, *Chevron* has a pronounced role for determining whether ambiguity exists and the manner by which the agency provides its interpretation. The Canadian

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280 *Id.* para. 89 ("Despite this diversity [of decisions in which policy or law could predominate], reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court.").

281 *See Dunsmuir*, [2008] 1 S.C.R. para. 53.

282 *See id.* para. 158 (Deschamps, J., concurring) ("Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law.").

283 *See, e.g.*, 5 U.S.C. § 706 (2018) (providing different forms of judicial review); *see also, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 474–92 (1951) (discussing use of "substantial evidence" inquiry in context of factual determinations in "on the record" adjudications); Herz, *supra* note 106, at 1884 (noting that *Chevron* applies to statutory interpretation, while arbitrary-and-capricious review applies to other matters).

284 LEWANS, *supra* note 103, at 182 (citing *Alberta (Info. & Privacy Comm'n) v. Alberta Tchrs.' Ass'n*, [2011] 3 S.C.R. 654, for the proposition that the court instructed lower courts to consider reasons that the agency did not offer under deferential review, despite *Dunsmuir's* focus on agency transparency and reason-giving).

285 *See Barnett*, *supra* note 40, at 61–62 (discussing difference uses of "hard look" and "soft glance" review).

286 *See Canada (Minister of Citizenship & Immigr.) v. Vavilov*, 2019 SCC 65, paras. 29–30 (noting proffered rationales—including expertise, efficiency, responsiveness to stakeholders—but concluding that delegation is the reason for reasonableness review).

approach, however, has no express inquiry into ambiguity or manner of agency action. Instead, it focuses on reason-giving,<sup>287</sup> substantive reasonableness,<sup>288</sup> and the overall context surrounding the decision.<sup>289</sup> Finally, although American doctrine has been moving away from reasonableness review, Canadian doctrine has reaffirmed reasonableness review while narrowing its domain.

### 3. Australia and Anti-Chevron

For our final country in our tour of the world in eighty paragraphs or so, we conclude with Australia. The Australian governmental model follows the federal, parliamentary system with constitutional separation of powers that we have encountered in Germany and Canada.<sup>290</sup> Similar to those countries, the Australian judiciary stands as a distinct branch, despite the blurred line between the parliamentary executive and legislature.<sup>291</sup> Section 71 of the Constitution vests the judicial power in the High Court of Australia, federal courts that the Federal Parliament creates, and “such other courts as it invests with federal jurisdiction.”<sup>292</sup> Section 75(v) confers on the High Court original jurisdiction to undertake judicial review of executive action, through hearing claims for mandamus, prohibition, or injunctions against Commonwealth Officers.<sup>293</sup> The judges of the High Court and other federal courts are constitutionally protected by the guarantee of security of tenure and remuneration.<sup>294</sup> When interpreting statutes, the High Court adheres to the principle set out in *Marbury v. Madison*, that it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>295</sup> Based on the *Marbury* standard, Australian courts have found that the duty of the judiciary extends to “judicial review of administrative action alleged to go beyond the

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287 See *id.* paras. 77–81

288 See *id.* para. 83.

289 See *id.* para. 89.

290 *Infosheet 20—The Australian System of Government*, PARLIAMENT OF AUSTRALIA, [https://www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_20\\_-\\_The\\_Australian\\_system\\_of\\_government](https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government) (last visited Oct. 29, 2020).

291 See Bednar & Marchevsky, *supra* note 6, at 1065; *Infosheet 20—The Australian System of Government*, *supra* note 290 (describing the Westminster-style of government).

292 *Australian Constitution* s 71.

293 *Id.* s 75(v). This constitutional provision of original jurisdiction is entrenched in Australia and, as discussed below, has greatly influenced the lack of deference within the country. See Mark Aronson, *Between Form and Substance: Minimising Judicial Scrutiny of Executive Action*, 45 FED. L. REV. 519, 519 (2017) (describing judicial review by the High Court as “here to stay” and a “self-evident” truth); Jacob Waller, *Gone but Not Forgotten: In Defence of Hickman*, 46 FED. L. REV. 259, 259 (2018).

294 *Australian Constitution* s 72(ii)–(iii); see also H.P. Lee & Michael Adams, *Defining Characteristics of ‘Judicial Power’ and ‘Court’—Global Lessons from Australia*, 21 ASIA PAC. L. REV. 167, 171 (2013) (describing the Australian separation of powers and the judiciary).

295 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also Bednar & Marchevsky, *supra* note 6, at 1063.



power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.”<sup>296</sup>

When reviewing agency policy choices, Australian courts review only for legality and do not generally extend their gaze to the merits.<sup>297</sup> Australian High Court Justice Ronald Sackville has noted that “it is for the courts and not the executive to interpret and apply the law, including the statutes governing the power of the executive.”<sup>298</sup> Although “executive decision-makers must ascertain the law insofar as it bears on the particular [executive] decision,” the decisionmakers’ “view as to the meaning of the legislation governing their powers and functions counts for nothing as far as the courts are concerned.”<sup>299</sup> De novo judicial review applies even to interpretations that concern technical or economic considerations and even when agencies have an institutional advantage in interpreting the language at issue.<sup>300</sup>

Given the Australian courts’ Dicean dichotomy between legal interpretations and policy decisions, it is not surprising that the Australian High Court explicitly rejected *Chevron* in dicta in *City of Enfield v. Development Assessment Commission*.<sup>301</sup> In that case, a waste-management company applied to the Development Assessment Commission (DAC) in South Australia for approval to alter a waste-treatment plant located within the city of Enfield. The legal question concerned whether the plant was a “special industry” that would produce noxious fumes.<sup>302</sup> If so, certain city-council consent was required. But if it were a “general industry,” it would not require city-council consent. The DAC found that the plant was a general industry. But a reviewing court originally heard evidence and reversed the DAC’s determination.<sup>303</sup> The full court on review, however, reinstated the DAC’s decision, holding that it could not reach the merits.<sup>304</sup> On further appeal, the High Court of Australia agreed with the original judicial decision that the plant was “special indus-

296 *A-G (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan, J., concurring).

297 *See Dolehide, supra* note 226, at 1390 (“With respect to administrators’ policy choices, review by Australian courts does not extend to the ‘merits’ of the administrators’ decisions.”); Ronald Sackville, *The Limits of Judicial Review of Executive Action—Some Comparisons Between Australia and the United States*, 28 *FED. L. REV.* 315, 321 (2000) (“[C]ourts are not concerned with the merits of administrative decisions, but only with their legality.”). Courts will narrowly review for unreasonableness or extreme lack of proportionality. *See id.* at 322; *see also* Margaret Allars, *Chevron in Australia: A Duplicious Rejection*, 54 *ADMIN. L. REV.* 569, 576 (2002) (discussing very limited forms of merits review). Parliament has used privative clauses to limit judicial review, most notably in for matters concerning migration. *See id.* at 579.

298 Sackville, *supra* note 297, at 315–16.

299 *Id.* at 322.

300 *See id.* at 322–23.

301 *City of Enfield v. Dev. Assessment Comm’n* (2000) 199 CLR 135.

302 *See id.* at 139–42.

303 *Id.* at 143.

304 *Id.* at 147–48.

try” and held that the plant’s status was a jurisdictional fact for the court to review.<sup>305</sup>

In its opinion, the High Court rejected *Chevron* deference in dicta. The court reiterated U.S. Supreme Court Justice Breyer’s fear that *Chevron* would result in “a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective.”<sup>306</sup> Australian Professor Margaret Allars describes the reasons for Australia’s rejection of *Chevron* as “threefold.”<sup>307</sup> First, *Chevron* was not necessarily applicable to the issue in *City of Enfield*, as it concerned “the role of the court in determining the existence of a jurisdictional fact which was a precondition to the jurisdiction of the agency,” similar to the analysis used by UK courts, not the reasonableness of an interpretation of an ambiguous statutory provision.<sup>308</sup> Second, the High Court was concerned that *Chevron* may encourage agencies to interpret the statutory provision to reach desired outcomes, not interpret provisions with neutral interpretive tools.<sup>309</sup> Third, *Chevron* stood in stark contrast to the notions of Australian judicial review noted above, that it is the role of the court to declare and enforce the law.<sup>310</sup>

Although Australia is the only country in our comparative study to reject *Chevron* explicitly (albeit in dicta), the High Court in *City of Enfield* nonetheless noted the difficulty in determining whether a question at issue is one of law or fact.<sup>311</sup> In what Allars has dubbed the “expertise test,” the High Court will “attach great weight” to agency determinations of whether facts fall within a settled legal interpretation.<sup>312</sup> What has thus resulted in Australia in the wake of *City of Enfield* is akin to *Skidmore* deference in the United States—a case that concerned an agency’s determination of whether certain circumstances of employment entitled employees to overtime.<sup>313</sup> Australian High

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305 See *id.* at 154–55; see also Allars, *supra* note 297, at 581–83 (describing facts and procedural posture).

306 *City of Enfield*, 199 CLR at 152 (quoting Breyer, *supra* note 21, at 381).

307 Allars, *supra* note 297, at 583.

308 *Id.* at 583–84. Other Australian legal scholars and Australian High Court Justice Stephen Gageler have agreed that *Chevron* “would not extend” to the question of deference to a factual or mixed fact issue in *City of Enfield*. See Stephen Gageler, *Deference*, 22 AUSTRALIAN J. ADMIN. L. 151, 155 (2015).

309 Allars, *supra* note 297, at 584.

310 *Id.* at 585; see also Tolley, *supra* note 211, at 428 (“Implicit in the Australian approach, reiterated in *Enfield*, is the assumption that courts are responsible for all questions of law.”).

311 *City of Enfield*, 199 CLR at 154; see also Allars, *supra* note 297, at 586 (“The joint judgment focussed upon one vexed area of operation of the distinction: where it is difficult to distinguish between a question of law and a question of fact.”).

312 Allars, *supra* note 297, at 587 (quoting *City of Enfield*, 199 CLR at 154). Note, however, that the High Court has not been consistent in applying the expertise test to jurisdictional facts. Sometimes it has applied the expertise test, but other times it has applied the so-called “accountability test.” As Allars convincingly explains, these two multifactor tests overlap significantly, reducing the meaningfulness of which inquiry applies. See *id.* at 587–90.

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

Court Justice Stephen Gageler has noted that *Skidmore* assists courts in statutory interpretation by “providing a body of expertise and informed judgment to which courts can properly look for guidance.”<sup>314</sup> While *Chevron* deference does not comport with the Australian judicial view that courts independently are responsible for declaring the law, *Skidmore*-style deference allows Australian courts to retain ultimate responsibility for interpretive decisions.<sup>315</sup> Our study does not tell us whether the High Court’s rejection of *Chevron* was a symbolic move to establish judicial supremacy, all the while allowing a space for agencies under *Skidmore* deference that operates similarly to *Chevron*.

Nonetheless, Australia has a doctrine that is *Chevron*-adjacent. The *Hickman* doctrine (from *R v Hickman; Ex parte Fox*)<sup>316</sup> applies when two statutory provisions exist: one that grants limited jurisdiction to an agency or inferior court and a second that limits the jurisdiction of a supervising court to review when the agency or inferior court oversteps its jurisdiction.<sup>317</sup> When these two provisions exist together, courts retain the ability to keep agencies within their jurisdiction and thus say what the law is. But they give the agencies space to interpret a statutory provision, as Justice Gageler has stated, “within the bounds of reasonableness.”<sup>318</sup> This reasonableness review under *Hickman* does not prohibit, on the one hand, judicial review of an agency or tribunal’s “breaches of ‘imperative duties or inviolable limitations or restraints.’”<sup>319</sup> But it permits, on the other hand, only limited judicial review for “cases of bad faith, or [for] decisions or orders wholly unrelated to the governing law’s subject matter or powers.”<sup>320</sup> These limitations on agency discretion and judicial review sound in a combined *Chevron* steps one and two, as opposed to de novo or *Skidmore* review. The justification for *Hickman* deference sounds similar to that for *Chevron* deference: “expert” agencies have institutional superiority over “generalist” judges, and courts must respect the legislature’s delegation to the agency as a matter of constitutional theory.<sup>321</sup> Indeed, *Chevron*’s ancestor (*NLRB v. Hearst*)<sup>322</sup> was the likely inspiration for *Hickman*.<sup>323</sup> *Hickman*, however, has had a limited domain in

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314 Gageler, *supra* note 308, at 153; see also Bednar & Marchevsky, *supra* note 6, at 1064 (describing the use of *Skidmore* deference in Australia).

315 See Bednar & Marchevsky, *supra* note 6, at 1064.

316 (1945) 70 CLR 598.

317 See Gageler, *supra* note 308, at 154. For the varying nomenclature under Australian law for agencies, see Allars, *supra* note 297, at 571 n.6. Those differences are not significant for purposes of this Article’s discussion.

318 Gageler, *supra* 308, at 155 (describing how the *Hickman* doctrine provided a “well-understood basis” for a reviewing court to approach these issues).

319 Aronson, *supra* note 293, at 522.

320 *Id.*

321 Ian Holloway, “A Bona Fide Attempt”: Chief Justice Sir Owen Dixon and the Policy of Deference to Administrative Expertise in the High Court of Australia, 54 ADMIN. L. REV. 687, 691 (2002) (citing *Hickman*, 70 C.L.R. at 617).

322 See *supra* notes 50–53 and accompanying text.

323 Kingham, *supra* note 108, at 51.

practice,<sup>324</sup> with courts often using the doctrine to circumscribe agency authority.<sup>325</sup>

*Hickman* has also likely assumed a more limited doctrinal and theoretical space. Three years after *Enfield's* rejection of *Chevron*, the High Court did not purport to overturn *Hickman* in *Plaintiff S157/2002 v. Commonwealth*.<sup>326</sup> Indeed, the High Court, although not considering the reasonableness of an agency interpretation, relied upon *Hickman* in *Plaintiff S157/2002* to adopt a limited construction of a privative clause.<sup>327</sup> Yet, the High Court sought to place *Hickman* within the context of Australian judicial review and constitutional law<sup>328</sup>: Section 75(v) of the Australian Constitution (which provides the High Court original jurisdiction over executive action and the ability to issue common-law writs and injunctions) constitutes “textual reinforcement” of the rule of law by “entrench[ing] minimum provision of judicial review” for the High Court to correct jurisdictional error.<sup>329</sup> In short, the *Hickman* doctrine appears to continue as an authority for reading privative clauses narrowly, but the more recent caselaw does not expand on the discretion that agencies have when *Hickman* applies. To be sure, *Hickman* has applied for much of the twentieth century and continues today. Nonetheless, its zenith—perhaps like *Chevron's*—may have passed.<sup>330</sup>

### III. APPLYING LESSONS FROM ABROAD

Based on our review of other countries' practices, we conclude that *Chevron* in its narrow form—something akin to a two-step process or with a similar domain to *Chevron*—is not inevitable. But all of the countries exhibit at least some continued anxiety over distinguishing legal matters from policy matters (or sometimes, factual from legal matters) and thus respecting separate judicial and executive functions. Indeed, the reviewed countries have crafted different doctrines to deal with this tension, yet actors within each often seem

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324 See *id.* (“[T]here seems little scope for applying [*Hickman* after *Enfield*], at least openly.”); Aronson, *supra* note 293, at 522 (“*Hickman's* safe haven for privative clauses was even more elusive than that, because it barred entry to cases involving breaches of ‘imperative duties or inviolable limitations or restraints’. As these were in the eye of the judicial beholder, very few flawed administrative decisions ever made it into *Hickman's* protected waters.” (footnote omitted) (quoting *R v Metal Trades Emps.’ Ass’n; Ex parte Amalgamated Eng’g Union* (1951) 82 CLR 208, 248 (Dixon, J.))).

325 See Gageler, *supra* note 308, at 154–55.

326 *Fed. Comm’n of Tax’n v Futuris Corp.* (2008) 237 CLR 146, 168 (Gummow, Hayne, Heydon & Crennan, JJ.) (referring to *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476). In *Futuris Corp.*, the plurality, among other things, held that a party could seek judicial review of claims that the agency did not administer the law in good faith, even if another clause limited the review of certain other agency determinations. See *Futuris Corp.*, 237 CLR at 156–157, 166–167.

327 See *Plaintiff S157/2002*, 211 CLR at 489, 494, 500–501.

328 See *Futuris Corp.*, 237 CLR at 168.

329 *Plaintiff S157/2002*, 211 CLR at 513; see also Aronson, *supra* note 293, at 522 (describing *Plaintiff S157* in the context of the *Hickman* doctrine).

330 See Gageler, *supra* note 308, at 154–55.

dissatisfied with the status quo. Their mostly shared concern over balancing appropriate review of legal and policy questions suggests that these countries will continue to generate caselaw on the appropriate nature of judicial review. Their current and perhaps future approaches can provide guidance on how to improve *Chevron*.

#### A. *Chevron's Evitability*

Gellhorn would be proud. Since the mid-twentieth century, all of our studied legal systems have been working through what he referred to as the “burning question”—how to balance rule of law with expert policymaking.<sup>331</sup> For instance, despite briefly having a judicial review doctrine that permitted deference to agency interpretations of ambiguous statutory provisions in the 1970s, Germany has moved to a more limited domain for agency discretion over certain technical matters. The UK and Italy, for their part, also turned from judicial review that gave agencies more discretion to judicial review that significantly, if not entirely, limits deference. Australia has explicitly rejected *Chevron* but retains (for now) a limited deference regime to respond to competing statutory provisions that together enlarge agency discretion and limit judicial discretion. Canada, in contrast to the others, has a system that most mirrors *Chevron* by providing deference to reasonable agency statutory interpretations if courts find deference suitable after a multifactor, functional inquiry.

Except perhaps in Germany and the UK, none of our studied countries have appeared to settle if, when, and how to defer. Germany appears to have decided upon a narrow margin-of-appreciation doctrine. British courts review all questions of law. Although they continue to defer to certain matters for “special” or “domestic” tribunals within charities (including universities), that exception appears to arise from charity cases, not administrative law. Italy also appears to have ruled out deference at first glance, but commenters have noted that the *Consiglio di Stato* still uses deferential language in its opinions. And given its significant doctrinal convulsions over the past thirty years, Italian courts do not inspire confidence that they have put questions over deference to rest. Australian courts have left their doctrine in a similar spot. They have rejected *Chevron* in dicta, but they have not done so as part of a decision’s holding, and they continue to have, at least officially, the *Hickman* doctrine that defers to agency statutory interpretations. The Canadian courts, unlike the others, appear most likely to expand the domain for deference. But their application of the doctrine has appeared inconsistent: recall that they have deferred in common-law and constitutional matters yet have refused to defer to an agency’s interpretation of its enabling act. Based on our inquiry, American courts can feel relieved that they are not alone afflicted with anxiety over judicial review of agency statutory interpretation. Instead, that anxiety is usually present, albeit in different degrees, in other legal systems.

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331 See *supra* note 4 and accompanying text.

Despite widely shared anxiety over judicial review of agency statutory interpretation, our studied countries have responded to it, to varying degrees, in different ways. On one end of the spectrum rests Italy, which has, for now, banished deference doctrines. Germany, the UK, and Australia have also relied primarily on *de novo* review, while carving out small and often unclear niches for deferential or otherwise precluded review. Their strong presumption in favor of *de novo* review and limited exceptions for deference appear very similar to Pojanowski's call for a stricter divide between law and policy. Their niches, however, differ significantly. Germany's is for narrow technical matters, the UK's is for adjudications within what its law defines as charitable institutions, and Australia's is for statutory schemes that limit judicial review for matters assigned to agencies. At the other end of the spectrum sits Canada with its reaffirmed, default reasonableness review that, despite its new categorical limitations in *Canada v. Vavilov*, continues to have a wide berth.

These studied countries have rested deference (or the lack thereof) on two familiar theoretical concerns that ground *Chevron*. The Supreme Court in *Chevron* grounded deference on legislative delegation and expertise, and *King v. Burwell* connected the two grounds by suggesting that Congress would not delegate interpretive matters to agencies that were outside the agencies' expertise. Germany's two-step margin-of-appreciation doctrine has the same theoretical grounding. Recall that the German step one considers whether the terms are within an agency's expertise and concern certain technical matters like risk, and the German step two concerns explicit or implicit parliamentary delegation. Australia's *Hickman* doctrine also relies on notions of expert institutional advantage and joint statutory provisions to signal legislative delegation. The UK's exception for "special tribunals" rests on only legislative delegation, not expertise. Likewise, Canada now rests deference on only notions of legislative delegation, although the agency's expertise can influence the nature of the court's reasonableness review. Italy, the only studied country to eschew deference altogether as of late, no longer relies upon agency expertise to defer under judicial review, but the *Consiglio di Stato* has not explained why it has changed its mind. Despite these countries' concern with delegation alone or delegation and expertise, two other grounds for *Chevron* deference are noticeably absent: the benefits of political accountability and uniformity.

Based on our comparative study, *Chevron* does not appear inevitable, at least in its current two-step form or in its current scope. It is merely one possible avenue of judicial review, despite that four of our five compared countries have constitutional separation of powers, three have federalist systems, all identified at least one of the theoretical grounds for *Chevron*, and all have confronted the tension between judicial control and agency discretion. Although four of the compared countries have some form of deference, three of those are much more limited in reach. Moreover, none of the four countries use a similar two-step formulation that *Chevron* does. Instead of the

key focus being on ambiguity, the inquiry primarily focuses on delegation (*Chevron's* step zero).

That said, the fact that four countries have some form of deference to agency (or quasi-agency, in the case of British universities) legal interpretation indicates that *Chevron's* concern over the border between law and policy is not an aberration of judicial review that some in the United States or even some in the foreign systems that we studied may suppose. Canada's deference regime, in fact, is substantially similar to *Chevron*, even if the Canadian and American versions differ in their particulars. Although one must do more research and await future developments to determine whether Canada's new categorical approach to deference has a broader domain than *Chevron*, the Canadian courts have appeared to extend deference's domain into areas (such as matters concerning constitutional or common-law rights) in which *Chevron* would not have appeared to apply. Notably, because the UK does not engage in a reasonableness inquiry once it has applied deference (at least directly or as a distinct step), its deference is more powerful despite its small domain. The UK's deference, in other words, is relatively absolute (save other grounds for review, such as proportionality or constitutional review), as opposed to *Chevron's* more limited form of deference. Even Australia, whose High Court has expressly rejected *Chevron*, has a limited doctrine that seeks to accommodate legislative delegations with mere reasonableness review of agency statutory interpretation. The repeated appearance of deference in some form suggests that it is likely to exist in mature judicial-bureaucratic systems, even if its scope is much smaller than *Chevron's*.

In fact, other countries' experiences indicate that Dicey's call for strict separation between policy and law for purposes of judicial review may be only aspirational or rarely achieved. Including the United States, five of the six countries, to varying degrees, have all created some space for deferential review of certain legal interpretations based on notions of legislative delegation and expertise. Only one has eschewed deference altogether for agency statutory interpretation. But even that eschewal was fairly recent, showed some rhetorical and theoretical strain, and arose only after a chaotic doctrinal journey.

Because none of the countries that we reviewed has a presidential system like the United States, we cannot say whether other presidential systems might or might not have deference similar to *Chevron*. Yet, as a theoretical matter, it is not clear to us how the presence of a presidential system cuts. Nicholas Bednar and Barbara Marchevsky, for instance, suggest Australia's de novo review is expected because of the country's more unified executive and legislature. They argue that the branches are less likely to disagree, and the executive is likely to follow legislative preferences.<sup>332</sup> Although Bednar and Marchevsky do not say so expressly, their argument appears to be that de novo review is, accordingly, not disruptive to the administrative state under a parliamentary system. But if the branches are in agreement and the execu-

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332 See Bednar & Marchevsky, *supra* note 6, at 1065–66.

tive is unlikely to exceed legislative preferences, would deference not make the most sense? Why should a court system waste its time with *de novo* review when deviation from legislative intent is rare? At the same time, if America's peculiar brand of governmental branch competition—via separation of powers and checks and balances—leads the executive to jostle against the other branches, should the judiciary push back with *de novo* review to keep the executive in its place or, instead, defer to ensure that the judiciary does not overstep its authority? Under either governmental system, we end up back where Dacey and Gellhorn left us. Neither answer appears logically correct or even more likely to follow as a pragmatic matter than the other.

Other countries' experience suggests perhaps that Hickman and Bednar may have overstated the inevitability of *Chevron*, or something similar to it. Only one country—Canada—regularly employs a similar doctrine. But our study neither speaks directly to Hickman and Bednar's normative arguments for *Chevron* nor undermines their concern that judges with *de novo* review may well defer *sub silentio* to expert agency interpretation. Perhaps, however, Hickman and Bednar should be understood to say that that some kind of deference regime, even if substantially more limited in scope than *Chevron*, is inevitable. If so, our findings indicate that *Chevron*—or something like it—is at least ubiquitous. Of course, to the extent that one defines *Chevron* so broadly as to mean nearly any room—no matter how rare or limited—for deferential review of legal questions, one's claim becomes less meaningful.

Likewise, our findings also do not appear largely consistent with Vermeule's abnegation theory because courts often eschew deference. If anything, the story that we see in every studied country except Canada points in the opposite direction. Indeed, even Canada has very recently taken a more categorical approach to limiting the domain of reasonableness review and thereby appeared to narrow its reach. Nonetheless, as with Hickman and Bednar, we cannot say whether, in the absence of *Chevron* or some other doctrine of similar domain, these other legal systems fill the void by adopting more contextual inquiries or simply reframe legal issues as policy ones, over which judicial review is at its nadir. Moreover, we cannot say whether largely *de novo* review of legal matters leads courts to defer more to factual matters (or for agencies to get more creative in factual findings rather than legal ones) when judicial review is available.<sup>333</sup> We can say only that we have not found a similar phenomenon in judicial review of legal questions in the countries that we have studied. Finally, of course, we cannot predict the future. Many of these countries' continued angst and tinkering may lead all of these countries to adopt some form of *Chevron*-like review. But, based on our review, that conclusion seems as likely as courts moving toward *de novo* review or extremely limited deference domains.

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333 See Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 74–75 (“[W]hatever controls are exercised through judicial review of questions of law can easily be circumvented by carefully contrived findings of fact.”).



### B. *Chevron's Improvement*

Our comparative study also helps us consider how to improve *Chevron* if it continues. Some scholars have grown tired of the energy spent on determining whether *Chevron* applies. Some would end the doctrine altogether because it has failed in its mission and is not worth the trouble of refashioning.<sup>334</sup> One of them would leave the doctrine as it is—warts and all—at least until more empirical evidence informs how those changes would affect judicial review.<sup>335</sup> Should the courts consider further refinements to *Chevron*, our comparative, qualitative study highlights the useful role that *Chevron* can play and suggests certain simplifications to *Chevron* to bolster its theoretical grounding in expertise and delegation.

#### 1. Expertise

*Chevron* should continue focusing on agency expertise as a necessary ground for deference, but it should also engage in a more probing and simplified inquiry. As our study indicates, expertise is a common basis for deference, even if limited, for good reason. Expertise is a necessary (yet insufficient) ground for deference in a democratic system. As legal philosopher Joseph Raz suggested, one reasonably defers to authority, such as a physician, when one is usually better off taking instruction from one with more knowledge, even if that authority errs occasionally.<sup>336</sup> But if the putative authority lacks expertise, the justification for deference fails.

Germany provides a guide for recognizing expertise's place in deference doctrine by focusing on certain technical terms and risk regulation as one part of its two-step inquiry. Instead of opening up deferential review to nearly all instances of statutory ambiguity, the German model applies deferential legal review only to certain, limited matters concerning economic or natural science in the context of risk management. The American search for ambiguity as to all statutory terms is, at best, an oblique way of discerning legislative delegation. Even if it were an attempt to recognize agency expertise, ambiguity-based inquiries would be a capacious way of doing so. Merely because an ambiguity arises in a statutory scheme that an agency administers tells courts nothing of whether the agency has or uses expertise in its statutory interpretation.<sup>337</sup> The German inquiry targets terms that concern certain scientific or economic concepts to render it more likely that the agency has and uses its expertise as part of its interpretation. The main benefits of the Teutonic approach are to tie judicial deference closely to administrative

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334 See *supra* note 15.

335 See Nicholas R. Bednar, *What to Do About Chevron—Nothing*, 72 VAND. L. REV. EN BANC 151, 174–75 (2019).

336 See Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFFS. 3, 18–19 (1985).

337 Cf. Mancini, *supra* note 239, at 18 (criticizing the Canadian Supreme Court's presumption that an agency has expertise whenever it interprets a matter in its organic or other related statutes).

expertise and to provide a more refined inquiry into comparative institutional competence as between courts and agencies.

Of course, the American model does not rely on ambiguity alone. At *Chevron* step zero, courts consider whether the ambiguity arises under a statute that the agency administers, whether Congress has delegated to agencies the ability to act with the force of law, whether the question concerns major questions of political or economic import, and, occasionally, whether the question concerns common-law interpretations or matters outside the agency's expertise. Notably, however, only the last of these considerations directly concerns expertise. For this final factor, the Supreme Court has provided little guidance on how lower courts are to tell whether a particular matter falls within an agency's expertise. In *King v. Burwell*, for example, the Court simply announced that "the IRS . . . has no expertise in crafting [a] health insurance policy of this sort,"<sup>338</sup> despite one leading tax scholar's skepticism,<sup>339</sup> when determining that Congress would not delegate to the IRS the authority to define "an Exchange established by the State."<sup>340</sup> To the extent that the American inquiry for deference considers expertise, expertise has a small role, and the Court has provided little guidance on how to assess agency expertise.

The German inquiry, to be sure, may have its own problems. The margin-of-appreciation doctrine applies only rarely, suggesting that the German inquiry may be too limited. Relatedly, to the extent that it applies only to scientific matters, it may not capture all of the ways in which agencies can have expertise. Agencies may have expertise by repeated interactions with certain factual scenarios (such as those surrounding tariffs), by administering complicated statutory frameworks (such as tax), or by regulating technologically complex industries (such as telecommunications). Moreover, contrary to some recent scholarly and judicial calls in the United States, some German scholars argue that the margin-of-appreciation doctrine should have a more expansive space.<sup>341</sup> At the same time, Canada's now-rejected open-ended, multi-factor search for expertise likely went too far and provided little certainty to help the legislature know when expertise implied delegation.<sup>342</sup>

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338 *King v. Burwell*, 576 U.S. 473, 486 (2015) (emphasis omitted).

339 See Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 69–70 (discussing numerous areas, including health policy, where the IRS interprets statutory provisions concerning tax expenditures).

340 *King*, 576 U.S. at 486 (quoting 26 U.S.C. § 36B(b)(2)(A) (2012)).

341 See Arai-Takahashi, *supra* note 118, at 77, 80.

342 Canada now considers an agency's expertise as part of its reasonableness review itself, as opposed to whether to review for reasonableness in the first place. See *Canada (Minister of Citizenship & Immigr.) v. Vavilov*, 2019 SCC 65, para. 31 ("We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review."). It is, of course, too early to know whether the agency's interpre-

A *Chevron* step-zero inquiry with a more defined focus on a broad understanding of expertise would not only provide additional clarity but ensure that *Chevron* has a stronger relationship with one of its theoretical foundations. One path forward is to require that the ambiguous term be one of scientific or technological complexity within the agency's charge, or one that rests within a complex statutory framework that the agency administers. To be sure, whether a term concerns "technical complexity" or is of a "scientific" nature is still a standard-based inquiry that will lead reasonable jurists to disagree in some cases. Likewise, adding a more specific expertise-focused inquiry adds yet another step to ascertaining whether deference is appropriate. Yet even with these two limitations, an expertise-focused inquiry strengthens two of *Chevron*'s theoretical foundations: it furthers uniformity by clarifying what role expertise has in triggering *Chevron* deference, and it grounds *Chevron* in expertise.

## 2. Legislative Delegation

*Chevron* should require more evidence of legislative delegation. As with expertise, our comparative study indicated that at least four of our five studied countries (all except Italy, which does not currently use deferential review) relied on notions of legislative delegation in considering whether to defer. The strong showing for delegations is not surprising because agencies exercise legitimate authority in democratic systems only with lawful legislative or constitutional delegation.<sup>343</sup> Although these four countries, along with the United States, have indicated concern over maintaining a meaningful place for courts and judicial review as a whole, they have all permitted some interpretive delegations to agencies. Most—Germany, the United States, Australia, and Canada—generally presume a form of reasonableness review with delegations, while others, like the UK, appear to permit precluded review altogether.

*Chevron*'s inquiry (or lack thereof) for delegation has long been subject to criticism.<sup>344</sup> Because Congress almost never expressly addresses delegation in its statutory handiwork, American courts have turned to oblique ways of deciphering implicit congressional intent. In the face of congressional silence, American courts infer legislative delegation when the agency administers the statute at issue,<sup>345</sup> uses legislatively delegated authority to act with the force of law when interpreting ambiguous statutory language,<sup>346</sup> and interprets something other than a major question of political or economic

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tations will prevail more or less when expertise becomes germane to the reasonableness inquiry, as opposed to the initial question of whether deference applies at all.

343 See LEWANS, *supra* note 103, at 194–96.

344 See, e.g., PAUL DALY, A THEORY OF DEFERENCE IN ADMINISTRATIVE LAW: BASIS, APPLICATION AND SCOPE 69 (2012) (arguing for "a holistic approach" to ascertaining legislative delegation, as opposed to *Chevron*'s "blunt rule").

345 See *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

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

importance.<sup>347</sup> Some of these factors better ascertain delegation than others.

First, consider the relationship between acting with the force of law and interpretive primacy. In past work, one of us has joined those<sup>348</sup> who question the relationship between delegated interpretive authority and delegated authority to act with the force of law.<sup>349</sup> Whether Congress wants an agency to act with the force of law does not necessarily mean that courts should not interpret statutory terms. Indeed, Congress has indicated that it is not the ability to act with the force of law that matters to Congress but whether the agency uses its expertise when interpreting statutory language. In one of the only instances in which Congress has expressly legislated on interpretive delegation, it permitted the agency in question (the Office of the Comptroller of the Currency) to preempt state laws with the force of law, but it required courts to apply *Skidmore*, not *Chevron*, deference to the agency's preemption determinations.<sup>350</sup> Legislative history indicated that Congress did so because it was displeased that regulated entities had captured the agency and thereby led the agency not to use its expertise in preempting state law.<sup>351</sup> Moreover, even if the Supreme Court has properly linked force-of-law authority and interpretive primacy, the determination of whether an agency has force-of-law authority has proven complicated and inconsistent in practice.<sup>352</sup>

Next consider the relationship between interpretive primacy and the interpreted statute. Whether the agency administers the statute at issue is a simple, if not overly broad, way of identifying whether the agency has expertise in the matter. The Court assumes, as a default, that Congress intends agencies to have interpretive authority over ambiguous provisions in the agency's administered statutes. Notably, however, this inquiry really gets at comparative agency expertise by assuming that Congress would intend to delegate all matters within the statute to the expert agency, not the generalist courts or some other nonexpert agency. A corollary proposition—that Congress does not intend to delegate interpretive primacy to an agency when the

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347 See *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

348 See Barnett, *supra* note 40, at 15–16 (discussing how Justices Scalia, Breyer, and Kagan, and Judge David Barron—in speeches or earlier academic work—have all referred to the *Mead* inquiry as a “fictional” or “fraudulent” inquiry into congressional intent as to interpretive primacy); see also Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549, 562 (2009) (“[A] wide range of legal scholars have [sic] characterized the congressional delegation rationale for *Chevron* as a fiction.” (footnote omitted)).

349 See Barnett, *supra* note 40, at 38–40.

350 See *id.* at 26–30 (discussing legislative history and text of 12 U.S.C. § 25b, concerning the Office of the Comptroller of the Currency's ability to preempt certain state consumer-financial laws).

351 See *id.*

352 See generally Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005) (“Years have passed since *Mead* was decided, and we still lack a clear answer to the question when an agency is entitled to *Chevron* deference for procedures other than notice-and-comment rulemaking or formal adjudication.”).

agency interprets a statute that many agencies administer, such as the Administrative Procedure Act—makes this focus on expertise clear. An agency whose interpretation is at issue has no comparative advantage over other agencies in interpreting shared statutes.<sup>353</sup> A more searching inquiry that considers whether an agency has any expertise in interpreting any *particular* statutory provision—as Chief Justice Roberts has advocated<sup>354</sup>—would prove more useful. Our call for limiting *Chevron* deference to matters related to technical, economic, scientific, or complex statutory expertise is a more targeted way of addressing the relationship between expertise and delegation.

Finally, consider how the major-questions doctrine does a better job of ascertaining delegation. The limited empirical evidence on congressional delegation supports the judicial inference that Congress does not intend to delegate major questions of political or economic import to agencies.<sup>355</sup> Perhaps the best theory in support of the doctrine is that major questions should not be open to more than one reasonable interpretation—and thus open to change with different political winds—because certainty is especially beneficial with significant matters.<sup>356</sup> Moreover, as Germany and Canada’s concern with (respectively) “basic”<sup>357</sup> questions or “general questions of law of central importance to the legal system as a whole”<sup>358</sup> suggest, the inquiry for major questions can serve as a backdoor nondelegation doctrine to ensure that the legislature retains accountability for significant policy decisions.<sup>359</sup> Although the Supreme Court (like German and Canadian courts) could do a much better job of providing guidance on how lower courts should go about identifying major questions, the inquiry has sufficient empirical and normative support that we recommend retaining it.

353 See PIERCE, *supra* note 47, § 3.5, at 198–99 (collecting cases).

354 See *City of Arlington v. FCC*, 569 U.S. 290, 322–23 (2013) (Roberts, C.J., dissenting) (“If a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue.”).

355 See 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, 1003 (2013) (finding in their empirical study that only small minorities of congressional drafters thought that Congress intended to delegate major questions of economic or political import to agencies).

356 See Coenen & Davis, *supra* note 16, at 782 n.11 (“By shifting major questions from the executive branch, which changes hands at least every eight years, to the Court, the [major-questions doctrine] might facilitate settlement of regulatory questions that are particularly likely to be politically controversial.”).

357 See *supra* note 156 and accompanying text.

358 See *Canada (Minister of Citizenship & Immigr.) v. Vavilov*, 2019 SCC 65, para. 17.

359 See Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977 (2018) (“[I]n the so-called ‘major questions’ cases—the Court appears to make *Chevron* do the work of nondelegation by finding that statutes clearly and unambiguously preclude certain agency actions that implicate nondelegation concerns, even though the statutes are probably ambiguous and the agency actions probably reasonable.” (footnote omitted)); see *id.* at 987–88 (describing other scholars’ similar views when the Court applied the doctrine to *Chevron* step one).

But, aside from the few times that major questions arise in a legal sense, American courts would do better to engage in an express delegation inquiry. One option would be to tie expertise and delegation together expressly. The courts could declare simply that agencies have presumed interpretive primacy to agency interpretations within an agency's limited forms of expertise. Notably, this kind of expertise-led inquiry would likely retain certain elements of the *Chevron* step-zero inquiry: the statute would still be one that the agency alone administers, and the agency would have space to interpret only when the statute is ambiguous. If expertise has the narrower understanding as we propose (technical, scientific, economic, etc.), *Chevron*'s domain would be smaller than it currently exists and would have a stronger grounding in the delegation theory.

Another option would be to follow the Australian *Hickman* doctrine and require more legislative action to signify delegation. Recall that the *Hickman* doctrine requires that the legislature provide jurisdiction to an agency or court and limit supervisory courts' review.<sup>360</sup> The Australian High Court infers that the legislature intends for courts to subject the interpretation to reasonableness review. Two leading American administrative law scholars, Thomas Merrill and Kathryn Watts, recognized that another convention existed before *Chevron*: Congress signaled that agencies had force-of-law authority (and thus interpretive primacy) when it bundled rulemaking authority with the ability of the agency to impose sanctions in a statute.<sup>361</sup> The exact required legislative action is not important. What is important is that the courts have a purposive inquiry into delegation and require something from Congress more than inaction when deciding who has interpretive primacy in the liminal space between law and policy. One inquiry into expertise and one into delegation help ensure that *Chevron* rests firmly on both of its theoretical haunches.<sup>362</sup>

One significant objection to our suggestion for more legislative signaling is that Congress has historically shown little interest in matters of judicial deference. After all, it has rarely included any express statutory provisions on deference.<sup>363</sup> Suggesting that courts require and look for direct legislative delegation may appear to be a fool's errand. It is hard, though, to determine what Congress would do if courts required more by considering how Congress has behaved when courts have required next to nothing. But we take

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360 See *supra* notes 316–21 and accompanying text.

361 See Merrill & Watts, *supra* note 16, at 472.

362 As a final matter, American courts could do much better in promoting uniformity, the remaining justification for *Chevron* deference. For instance, the U.S. Supreme Court could provide much more guidance on how and when to use the “traditional tools of statutory construction,” especially when more than one is available. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). But our comparative study here did not address matters of statutory interpretation, and our studied countries did not emphasize uniformity as a basis for deference. We leave further consideration for this American justification for another day.

363 See generally Barnett, *supra* note 40 (discussing Congress's first-ever codification of *Skidmore* factors and *Chevron* “savings” clause in 2010).

some comfort in the fact that Congress once had an understood convention of delegating—bundling rulemaking and sanctions together.<sup>364</sup> This convention worked well, and something similar could be used once again. Moreover, if Congress wants a more robust deference doctrine with a wider domain than particularized delegations would provide, it can clearly provide it by a transubstantive statute, such as in the APA, by calling for courts to permit reasonable agency statutory interpretations.<sup>365</sup> Indeed, if *Chevron* accurately reflects congressional preferences over interpretive primacy, enacting the statute should not be especially difficult if courts will not otherwise defer.

By focusing more on step zero, courts would not have to use ambiguity's presence or absence as a badly designed proxy for delegation. Instead, *Chevron's* focus at step one on ambiguity would more forthrightly concern not who should resolve the interpretive dispute (i.e., courts or agencies), but how much room one has to do so. Because none of the countries that we studied used ambiguity as a trigger for deference, our findings do not provide useful insight on how U.S. courts should best engage in their step-one inquiry.

#### CONCLUSION

Neither of us began our research with any particular affinity or aversion to *Chevron*. We had only come to be somewhat exhausted by the debates over *Chevron's* virtues or failings. Following earlier efforts to provide quantitative evidence to these debates, we sought here to engage in a qualitative, comparative study to see how other countries have approached judicial review of agency statutory interpretation to mitigate American administrative law's insular focus. Ultimately, we see that *Chevron* is neither aberrational nor inevitable. Assuming that *Chevron* will continue, our study also convinced us that other countries offer useful guidance on how to improve *Chevron's* functioning and moor it to its theoretical shores.

Whether one agrees with our recommendations, supports *Chevron*, or awaits *Chevron's* fall from grace, our study should confirm that *Chevron's* continued existence or downfall is unlikely to be as important as the American administrative law cognoscenti—both scholars and bar—may think. For proponents of *Chevron*, bureaucracy continues even in no- or limited-deference regimes. Some governments—such as Germany's and Canada's—are even held in high regard by their populations, despite taking very different paths

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364 See *supra* note 361 and accompanying text.

365 One of us has identified the difficulty in codifying *Chevron*. See Barnett, *supra* note 40, at 52–53. But Senator Warren's proposed Anti-Corruption and Public Integrity Act called for just such a revision to the APA with the following language: "If a statute that an agency administers is silent or ambiguous, and an agency has followed the procedures in section 553 or 554 of this title, as applicable, a reviewing court shall defer to the agency's reasonable or permissible interpretation of that statute." S. 3357, 115th Cong. § 311(2) (2018).

for judicial review to agency action.<sup>366</sup> The end of *Chevron* would be highly unlikely to end or significantly hamper the U.S. federal administrative state, even if *Chevron* would provide an optimal judicial-review scheme. On the flip side, the widespread acceptance of some kind of deferential judicial review should lead *Chevron*'s detractors to see that deference does not lead to technocratic states that fail to appreciate separated powers or individual rights, even if these countries could better promote individual liberty and improved bureaucratic decisionmaking. If anything, our study indicates that the uniformity justification—present for *Chevron* but absent for other deference doctrines—needs more attention and may better guide the debate over the effectiveness of deference doctrines. In short, the debate over *Chevron* is still important, but comparative study provides perspective—and maybe, with a lowered rhetorical temperature, improvements.

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366 See, e.g., Keith Neuman, *In Spite of Growing Populist Trends, Canadians' Confidence in Major Public Institutions Has Remained Steady for the Past Decade*, POL'Y OPTIONS (Aug. 2, 2018), <https://policyoptions.irpp.org/magazines/august-2018/canadians-confidence-in-national-institutions-steady/> (discussing Canadians' high and increased confidence in their national government, among other things); *Government at a Glance 2017*, OECDiLIBRARY, [https://www.oecd-ilibrary.org/governance/government-at-a-glance-2017\\_gov\\_glance-2017-en](https://www.oecd-ilibrary.org/governance/government-at-a-glance-2017_gov_glance-2017-en) (last visited Oct. 29, 2020) (discussing Germans' strong and increasing trust in its government from 2007 until 2016).



