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CODIFYING CHEVMORE

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This Article considers the significance and promise of Congress's unprecedented codification of the well-known Chevron and Skidmore judicial-deference doctrines (to which I refer collectively as "Chevmore"). Congress did so in the Dodd-Frank Act by instructing courts to apply the Skidmore deference factors when reviewing certain agency-preemption decisions and by referring to Chevron throughout.

This codification is meaningful because it informs the delegation theory that undergirds Chevmore (i.e., that Congress intends to delegate interpretive primacy over statutory interpretation to agencies under Chevron or courts under Skidmore). Scholars and at least three Supreme Court Justices have decried the judicial inquiry into congressional intent as "fictional" or "fraudulent," arguing that Congress doesn't think about interpretive primacy, courts don't really try to divine congressional intent, and courts rely upon overbroad assumptions as to congressional intent.

Dodd-Frank provides the best direct evidence to date as to congressional intent. Dodd-Frank reveals that Congress knows of Chevmore, legislates with it in mind, and acquiesces to its principles. But Dodd-Frank's preemption provisions—which give an agency rulemaking power subject to Skidmore review—undermine the Supreme Court's recent suggestion that Congress intends agencies to receive interpretive primacy (via Chevron's more deferential review) whenever they have rulemaking authority. These insights support earlier precedents that did not treat rulemaking as a talisman. If courts apply these earlier precedents, Chevmore is neither fiction nor fraud.

Dodd-Frank also demonstrates Chevmore codification's promise for addressing longstanding administrative-law issues. With "Chevron rewards" and "Skidmore

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penalties,” Congress can—as it did in Dodd-Frank—clarify how agencies must act to obtain Chevron deference, balance “hard look” judicial review with regulatory ossification, and respond to regulatory capture. Chevmore codification can thereby become a key legislative tool for overseeing the administrative state.

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INTRODUCTION

The *Chevron* and *Skidmore* judicial-review doctrines—to which I collectively refer as “*Chevmore*”—are two of the most fascinating and

confusing tenets of federal administrative law.¹ Most scholars and courts agree on the following broad outlines of each doctrine. When the more deferential *Chevron* doctrine applies, courts defer to reasonable, formalized agency interpretations of ambiguous statutory provisions that the agency administers.² In contrast, when the less deferential *Skidmore* doctrine applies, courts defer only to the extent that the thoroughness, validity, consistency, and overall persuasiveness of an agency's interpretation convinces them to do so.³ But beyond these broad descriptions, scholars and Supreme Court Justices continue to dispute numerous foundational and practical issues concerning these judicially-crafted doctrines, such as their origin, applicability, contours, and practical effect.⁴

¹ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). I use the portmanteau *Chevmore* to distinguish the judicially-created *Chevron* and *Skidmore* judicial-review doctrines from others, such as those in the Administrative Procedure Act.

² See *Chevron*, 467 U.S. at 842–43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” (footnotes omitted)).

³ See *Skidmore*, 323 U.S. at 140 (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of [a judgment] . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”). That said, Justice Scalia has argued that *Skidmore* deference is not deference at all. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1340 n.6 (2011) (Scalia, J., dissenting) (“To defer is to subordinate one’s own judgment to another’s. If one has been persuaded by another, so that one’s judgment accords with the other’s, there is no room for deferral—only for agreement. Speaking of ‘*Skidmore* deference’ to a persuasive agency position does nothing but confuse.”).

⁴ See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (referring to *Chevron*’s delegation theory as a “legal fiction”); Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1273 (2008) (arguing that *Chevron*’s methodology is pluralistic and conciliatory because all leading theories of the administrative state support deference); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1238 (2007) (considering how the federal appellate courts apply *Skidmore*); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Mislplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 737 (2002) (arguing that expertise should inform judicial deference, not implied delegations of interpretive primacy); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 835 (2001) (addressing the question of which types of statutes and agency interpretations call for application of *Chevron*’s mandatory-deference doctrine); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (arguing that *Chevron*’s delegation theory is a fiction that serves as a background rule for legislative drafting); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95

After having mostly ignored the (sometimes tedious) *Chevmore* debates and longstanding calls to provide guidance,⁵ Congress has tentatively entered the fray.⁶ In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress included detailed substantive and procedural provisions governing the Office of Comptroller of the Currency's (OCC) ability to preempt state consumer-financial laws.⁷ As part of those provisions, Congress instructed courts to review an agency's "regulation or order"⁸ that preempts state law under both a "substantial evidence" standard (found in the Administrative Procedure Act or APA)⁹ and, for the first time, according to the four *Skidmore* factors.¹⁰ In a savings clause, Congress clarified that limited judicial deference for preemption decisions did not affect deference to

VA. L. REV. 597, 597 (2009) (arguing that *Chevron* should be understood as having one step that considers the reasonableness of agency interpretation). Indeed, some dispute whether *Chevron* deference is really any more deferential than the regimes that preceded it. See, e.g., 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, 829 (2010) ("The most striking objective measure of the failure of *Chevron* is that it does not appear to have succeeded in substantially increasing the level of deference to agency statutory interpretation."). And others have debated whether *Skidmore* and *Chevron* are likely to lead to significantly different outcomes, either compared to one another or compared to instances in which the Court purports to provide no deference. See, e.g., Hickman & Krueger, *supra*, at 1276–79 (considering empirical findings concerning federal appellate courts' treatment of *Skidmore* and comparing those findings to past empirical analyses of *Chevron*, *Skidmore*, and deference more generally); Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (presenting ranges of agency affirmance rates under a variety of doctrinal approaches and finding that doctrinally-based differences in outcome are "barely detectable," with the exception of the *Auer* doctrine).

⁵ See, e.g., William Funk, *Legislating for Nonlegislative Rules*, 56 ADMIN. L. REV. 1023, 1034 (2004) (proposing a congressional bill concerning nonlegislative rules and codifying *Skidmore* concepts); Elizabeth Garrett, *Legislating Chevron*, 101 MICH. L. REV. 2637, 2640–41 (2003) (suggesting that Congress could periodically clarify via statute when it delegates lawmaking power to agencies); Ronald M. Levin, *Scope of Review Legislation: The Lessons of 1995*, 31 WAKE FOREST L. REV. 647, 653–58 (1996) (detailing a failed congressional attempt to codify judicial review over administrative decisions). Congress has provided certain instructions to courts, such as savings clauses, severability clauses, and preemption clauses. 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, 1025 n.469 (2013) (providing examples of the Court's reliance on savings clauses, severability clauses, and preemption clauses). But these did not concern *Chevmore*.

⁶ Cf. Levin, *supra* note 5, at 665 ("The diversity of judicial and academic approaches to review of legal issues may be one reason why legislatures have so uniformly remained silent about that subject . . .").

⁷ 12 U.S.C. § 25b (2012).

⁸ *Id.* § 25b(b)(1)(B).

⁹ *Id.* § 25b(c).

¹⁰ *Id.* § 25b(b)(5)(A).

the OCC's other statutory interpretations.¹¹ Congress also addressed, for the first time, *Chevron's* applicability to several preexisting statutory schemes.¹² This Article is the first to explain how Congress's unprecedented *Chevmore* codification (1) informs *Chevmore's* (and particularly *Chevron's*) theoretical foundation and (2) suggests how *Chevmore* codification can improve administrative law in the future.

Dodd-Frank informs the much-debated delegation theory¹³ upon which *Chevron* rests.¹⁴ Under that theory, courts defer to agencies when Congress expressly or implicitly intends agencies to have interpretive primacy over courts as to particular ambiguities or "gaps" in a statutory scheme that the agency administers.¹⁵ To divine congressional intent, the Supreme Court has looked primarily to whether Congress gave agencies (and whether agencies used) the power to act through formalized procedures, such as notice-and-comment rulemaking or formal adjudications under the APA.¹⁶ But the Court has also looked to other values, such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"¹⁷—factors reminiscent of *Skidmore's*.

¹¹ *Id.* § 25b(b)(5)(B).

¹² See *infra* Part II.B.2 (discussing how Congress allocated interpretive primacy in Dodd-Frank).

¹³ See Merrill & Hickman, *supra* note 4, at 863–72 (discussing key theories for the legal foundations of *Chevron*). *Skidmore* also relies on delegation as a secondary value. See *infra* Part I.A (discussing *Skidmore*).

¹⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”); *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (affirming *Mead*); Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1525 (“[T]he Supreme Court has been fairly consistent . . . in maintaining that congressional delegation is the basis for according [*Chevron*] deference . . .”).

¹⁵ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974))).

¹⁶ See *Mead*, 533 U.S. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.” (footnotes and citations omitted)).

¹⁷ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Chevron's delegation theory has come under broad attack. First, many scholars—and three Supreme Court Justices—have referred to the inquiry as “fictional” because they insist that Congress has no intent at all as to interpretive primacy.¹⁸ Second, some have referred to the *Chevron* inquiry as “fraudulent,” based on, among other things, the Court’s overbroad assumptions as to when Congress delegates interpretive primacy, the Court’s failure to reconcile the *Chevmore* doctrines (the *Chevron* doctrine in particular) with seemingly inconsistent provisions in the APA, and the Court’s limited inquiry into congressional intent.¹⁹ Indeed, the Supreme Court has recently suggested a less nuanced approach to gleaning Congress’s intent from its bestowal of agency rulemaking authority. In *United States v. Mead*, the Supreme Court indicated that an agency’s use of rulemaking authority generally suggests that Congress delegated interpretive primacy to agencies.²⁰ But over four Justices’ contrary view,²¹ the Court, in *City of Arlington v. FCC*, recently appeared to go further. The Court said there, in deciding whether *Chevron* deference applies to agencies’ interpretations of their own regulatory jurisdiction, that an agency’s use of general rulemaking authority always indicates a congressional delegation that warrants *Chevron* deference without a further particularized inquiry.²² Dodd-Frank informs these debates, both supporting and undermining the Court’s formulation of the delegation theory.

Dodd-Frank supports the delegation theory by suggesting that congressional delegation is not fictional and that Congress has acquiesced to the *Chevmore* doctrines. More specifically, Dodd-Frank suggests that Congress does in fact have intent as to interpretive primacy, generally accepts judicial deference to agency interpretations and the

¹⁸ See *infra* Part I.B.1 (assessing congressional intent as to interpretive primacy).

¹⁹ See *infra* Part I.B.2 (discussing scholarly concerns on these topics).

²⁰ See *Mead*, 533 U.S. at 230 (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure . . .”).

²¹ See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875–77 (2013) (Breyer, J., concurring) (considering several factors, in addition to rulemaking authority, when deciding that *Chevron* deference applies); *id.* at 1880–86 (Roberts, C.J., dissenting) (arguing that courts must look at whether Congress intended to delegate interpretive primacy as to the statutory provision at issue, but not explaining how courts should determine whether Congress delegated primacy on a particular matter).

²² See *id.* at 1874 (majority opinion) (“[W]e differ from the dissent[’s] . . . view that a general conferral of rulemaking authority does not validate rules for all the matters the agency is charged with administering.” (emphasis omitted)); *id.* (“[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”).

Chevmore regimes, and uses *Chevron* as a background norm when drafting. Dodd-Frank does so by codifying *Skidmore*'s factors, using a *Chevron* savings clause for the OCC's nonpreemption decisions, discussing its views in legislative history, and relying on other statutory provisions that render certain agencies eligible for *Chevron* deference when multiple agencies administer the same statutory scheme. Relatedly, regardless of *Chevron*'s questionable propriety as an original matter,²³ Dodd-Frank also suggests that Congress has acquiesced to its general framework and the courts' *Chevmore* doctrines. Aside from the foregoing indicia, Congress's combined use of *Skidmore* deference, the APA's substantial-evidence standard, and oblique references to *Chevron* in the same statutory section suggest that Congress—at least since 2010—is not troubled by *Chevron*'s apparent inconsistency with the APA.²⁴ Congress's awareness of and acquiescence to *Chevmore* ultimately undermine the conventional belief²⁵ that the delegation theory rests on a legal fiction that fails to reflect congressional intent.²⁶

Dodd-Frank, nevertheless, likely undermines the Supreme Court's apparent assumption in *City of Arlington* that Congress always intends to delegate interpretative primacy whenever agencies exercise (or have) general rulemaking authority. Despite giving the OCC general and specific power to promulgate preemption regula-

²³ See Merrill & Hickman, *supra* note 4, at 871 (noting that when “*Chevron* was decided, there was no established background understanding that a decision by Congress to confer general rulemaking or adjudicatory authority on an agency would be deemed a decision to transfer primary interpretational authority to the agency”).

²⁴ See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–99 (1998) (arguing that *Chevron* is inconsistent with the APA); Merrill & Hickman, *supra* note 4, at 868 (noting that if *Chevron* is federal common law, it does not coexist well with the APA's judicial-review provisions).

²⁵ See, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (“Because Congress so rarely makes its intentions about deference clear, *Chevron* doctrine at most can rely on a fictionalized statement of legislative desire, which in the end must rest on the Court's view of how best to allocate interpretive authority.”); Hickman & Krueger, *supra* note 4, at 1249 (“*Chevron* relies on an admittedly fictional presumption that Congress chose an agency rather than the courts to be the primary interpreter of a given statutory scheme.”); Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 278 (2011) (“By most accounts, Congress does not directly address the question of which institution—agency or court—is authorized to fill gaps or resolve ambiguities in the vast majority of regulatory statutes. In that sense, congressional intent about interpretive primacy is a fiction.” (footnotes omitted)); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 192 (2006) (“Both Justices [Breyer and Scalia] explicitly recognized that any understanding of legislative instructions is a ‘legal fiction.’” (footnote omitted)).

²⁶ See Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2014–15 (2011) (arguing that Congress does think about the delegation of interpretive primacy and that the *Mead* and *Chevron* “fictions” are consistent with legislative interests).

tions, Congress indicated that *Chevron* should not apply. Instead, Congress mandated mere *Skidmore* deference in light of the OCC's history of controversial preemption decisions based on conflict-of-interest and regulatory-capture concerns.²⁷ Dodd-Frank thus suggests that, when faced with congressional silence, courts should look beyond *how* an agency acts (e.g., through notice-and-comment rules) and determine *why* it acts (e.g., whether the action resulted from the agency using its expertise or something improper) when deciding which deference regime should apply. I recognize that Dodd-Frank might reflect Congress's concern about one particular kind of decision (preemption) by one particular agency (the OCC). But I contend that the expertise and anticapture values that drove Congress in Dodd-Frank have broad application across the federal administrative state, and thus they provide insight into congressional intent when Congress fails to state expressly whether agencies have interpretive primacy. Because Congress has indicated that agency structure and expertise are relevant to whether *Chevron* applies, Dodd-Frank suggests that the *City of Arlington* majority's rulemaking-is-dispositive approach goes too far if it seeks to reflect congressional intent.²⁸ Instead, the more nuanced position in *Mead* (and the concurring and dissenting opinions in *City of Arlington*) is more faithful to congressional intent and ultimately provides a better default principle. If this is true, the *Chevron* inquiry into congressional delegation as understood before *City of Arlington* is not fraudulent because, consistent with congressional intent, it respectfully considers, but does not genuflect to, an agency's rulemaking authority.

Chevmore codification also holds promise for addressing longstanding administrative-law issues. Depending on agency behavior, Congress can reward agencies with *Chevron* deference (i.e., offer a "*Chevron* reward") or penalize them with *Skidmore* deference (i.e., give a "*Skidmore* penalty") when neither regime would otherwise apply. In doing so, Congress can first use *Chevmore* codification to clarify which forms of agency action it intends to receive *Chevron* def-

²⁷ See *infra* Part II.B (discussing the OCC and capture).

²⁸ *City of Arlington*'s treatment of *Skidmore* and *Mead* in other ways has already come to scholars' attention. See, e.g., Patrick J. Smith, *Chevron Step Zero After City of Arlington*, 140 TAX NOTES 713, 720 (2013) (highlighting how *City of Arlington* should be viewed as abrogating *Mead*'s open-ended inquiry into whether *Chevron* applies); Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789, 792, 796–98 (2014) (arguing that *City of Arlington* may presage the end of *Skidmore* because, without referencing *Skidmore* at all, the majority sought to give *Chevron* deference and the dissent sought to give no deference at all).

erence²⁹ and thereby resolve questions lingering after *Mead* as to how an agency must act to receive *Chevron* deference. Second, Congress can also domesticate the vague and often criticized “hard look” review. Hard look review signifies intensive judicial review into an agency’s explanation, its inquiry into a particular issue, and its response to all material comments.³⁰ Although its advocates argue that it encourages rational (not politicized) decisionmaking,³¹ its critics assert that it “ossifies” agency action because agencies must provide voluminous explanations and administrative records to prevail on judicial review.³² Congress can determine that more intensive review is better for some questions than others without resolving the debate. To that end, Congress can require *Skidmore* deference when it wants courts to take a close look at agency action, and, conversely, it can use *Chevron* deference to limit hard look review and allow agencies more autonomy.³³ Third, Congress can use *Chevmore* codification to mitigate regulatory capture by mandating *Skidmore* deference for suspect agencies, such as the OCC.³⁴ Ultimately, *Chevmore* codification gives Congress an additional tool for agency oversight.

²⁹ See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (leaving unresolved which agency actions entitle an agency to *Chevron* deference); *id.* at 244 (Scalia, J., dissenting) (criticizing the majority’s focus on the formality of agency action); 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.”).

³⁰ See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 397 (2000) (“[T]he essence of hard look review is a requirement that agencies fully explain their actions, taking into account all relevant factors, and responding to all material comments.”).

³¹ See William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1528 (2009) (“Hard look review serves as a powerful antidote to politicized agency decisionmaking”); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490–91 (1997) (arguing that hard look review should not be discarded because it better ensures that agencies act in a deliberative way that furthers proper public interests).

³² See Jordan, *supra* note 30, at 395 (describing critics’ views); see also Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1419 (1992) (“The predictable result of stringent ‘hard look’ judicial review of complex rulemaking is ossification.”); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 750 n.85 (2011) (listing proponents and detractors of the theory that hard look review causes ossification).

³³ See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 72 (1995) (suggesting *Chevron* can limit ossification).

³⁴ See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 26 (2010) (“[J]udicial review may help to police the original

Three key caveats apply. First, to be sure, divining a multi-member body's collective intent is a difficult and contested enterprise.³⁵ Nevertheless, the Supreme Court has founded *Chevron* and its delegation theory on congressional intent.³⁶ For purposes of this Article, I accept the delegation theory and consider how Congress, in Dodd-Frank, revealed its likely intent as to *Chevmore* through text, legislative history, and context. Second, to be sure, Congress's first (and only) codification of the *Chevmore* doctrines is merely a single data point. But it is an extremely significant one, informed by historical context, legislative history, and statutory design. Indeed, because this codification is unprecedented³⁷ and concerns the largest overhaul to the administrative state in decades, Dodd-Frank provides especially important insight. To ignore *Chevmore*'s codification would undermine *Chevmore*'s doctrinal and theoretical basis by overlooking Congress's most direct participation in the *Chevmore* debates and relying instead on silence or political theory.³⁸ And third, to be sure, Congress could attack outstanding administrative-law issues in other ways. But its failure to do so and its recent use of *Chevmore* as a legislative tool suggest that *Chevmore* codification provides a pragmatic approach worth considering.

This Article proceeds as follows. Part I describes, as relevant to Dodd-Frank, the primary theoretical and doctrinal bases for *Chevmore* deference, and key issues that surround *Chevmore* (and *Chevron* in particular). Part II considers how and why Congress codified *Chevmore* in Dodd-Frank. Part III argues that *Chevmore* codification provides evidence that Congress knows of and has acquiesced to the judicially created *Chevmore* doctrines. This Part also argues that Dodd-Frank reveals that Congress considers more than rulemaking authority necessary for *Chevron* deference. Part IV then considers how Congress can use *Chevmore* codification to mitigate

substantive framework of the statute, so it, too, can be a line of defense against capture to the extent that the original standard itself has those aims.”)

³⁵ See Bressman, *supra* note 26, at 2047 (discussing legal realists' criticism of judicial attempts to discover legislative intent).

³⁶ See *id.* at 2016 (“The [*Chevron*] Court justified judicial deference primarily on a theory of congressional delegation: Congress intends to delegate interpretive authority to the agency whenever it fails to resolve the meaning of particular statutory language.”); see also *infra* Part I.B (describing how the Court relied on congressional intent).

³⁷ Cf. Garrett, *supra* note 5, at 2640 (“To the extent that anyone mentions the possibility of greater congressional involvement [in legislating *Chevron*], it is quickly dismissed because Congress seldom provides explicit instructions allocating this sort of policymaking authority. In addition, it is seen as unrealistic to expect that Congress will improve its performance.” (footnote omitted)).

³⁸ See Bressman, *supra* note 26, at 2028–29, 2041–43 (noting scholars' criticism of judicial reliance on congressional silence and turning instead to political theory).

lingering administrative-law issues. Ultimately, this Article joins the recent, growing recognition of Congress's useful role in refining and validating *Chevmore*³⁹ and concludes that, in light of Dodd-Frank, Congress has recognized—even if not fully realized—its important role, too.

I

CHEVMORE'S THEORETICAL BASIS

Chevron and *Skidmore* affect whether agencies or courts have interpretive primacy over statutory ambiguities and rest upon different, yet overlapping, bases. When courts apply *Skidmore*, they maintain interpretive primacy but consider agency views. Courts do so because of agencies' administrative expertise and notions of congressional intent. *Chevron*, for its part, applies when Congress has delegated interpretive primacy to an agency. Administrative expertise informs the likelihood of congressional delegation. Despite the importance of congressional intent to *Chevron*'s delegation theory, Congress has rarely provided any guidance. In light of legislative silence, courts generally consider what a reasonable legislator would do. As I discuss *infra* in Part I.B., several scholars have questioned whether Congress has any intent as to interpretive primacy, whether the Court has correctly interpreted congressional intent, and whether the courts' underlying assumptions (including which indicia are relevant to gleaning congressional intent) are accurate.

A. *Skidmore and the APA*

Skidmore is grounded in notions of expert agency decision-making.⁴⁰ In 1944, the Court considered standards for defining working time under the Fair Labor Standards Act in *Skidmore v. Swift & Co.*⁴¹ The Labor Department encouraged a “flexible” analysis concerning an employee's duty to determine when overtime pay was due.⁴² The Court held that deference to the agency was appropriate if the agency's interpretation represented a “body of experience and

³⁹ See, e.g., Gluck & Bressman, *supra* note 5, at 993–98 (describing results and implications of a survey of legislative drafters about their awareness of and agreement with administrative-law doctrines); cf. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2129–31 (2002) (discussing Congress's ability to enact interpretive statutes).

⁴⁰ See Hickman & Krueger, *supra* note 4, at 1293 (noting that “comparative agency expertise and the potential for arbitrariness in the exercise of that expertise” are central to *Skidmore* review).

⁴¹ *Skidmore v. Swift & Co.*, 323 U.S. 134, 135–36 (1944).

⁴² *Id.* at 138.

informed judgment.”⁴³ Later, the Supreme Court in *United States v. Mead* held that expertise is necessary for *Skidmore* to apply because deference is appropriate only when “the regulatory scheme is highly detailed, and [the agency] can bring the benefit of specialized experience to bear.”⁴⁴

Not only must the agency have expertise, but it must apply it. In interpreting a statute, the Court evaluates the agency’s use of expertise by considering certain factors: “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”⁴⁵ Thorough decisions suggest that the agency weighed (and discussed) various factors and alternatives,⁴⁶ and the decision’s reasoning lends itself to an evaluation of the agency’s argument for why it weighed the factors or alternatives as it did. Consistent decision-making suggests that agency interpretations do not change with the political winds but are, instead, based on data and experience.⁴⁷ In short, the use of agency expertise is central to *Skidmore* deference’s applicability and effect.⁴⁸

Merely two years after *Skidmore*, in 1946, Congress enacted the APA. The APA has judicial-review provisions that, among other things, call for a “reviewing court [to] decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”⁴⁹ The APA directs courts to set aside agency action or findings that are, among other things, “arbitrary, capricious, an abuse of discretion, or

⁴³ *Id.* at 140.

⁴⁴ *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

⁴⁵ *Skidmore*, 323 U.S. at 140.

⁴⁶ Courts have looked at how the agency acts in two ways: either the extensiveness of the inquiry or the formality of the agency’s process. *See Hickman & Krueger, supra* note 4, at 1281–82 (describing these approaches).

⁴⁷ Of course, agency interpretations could change based on new data or experiences, but presumably the agency would discuss the new information that leads to a different interpretation. *See generally FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009) (holding that the APA does not require more substantial explanations for changes in agency position than it does for initial actions, although agencies must ordinarily display awareness that they are changing position and provide a reasoned explanation for the change).

⁴⁸ *See A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 169 (4th Cir. 2006) (denying *Skidmore* deference because the agency had “developed virtually no experience that might be considered a ‘body of experience and informed judgment’”); *Hickman & Krueger, supra* note 4, at 1293 (noting the emphasis on agency expertise in *Skidmore* review); *Merrill & Hickman, supra* note 4, at 855 (“Under *Skidmore*, however, it does not matter whether Congress has delegated authority to an agency to administer the statute as long as the agency has relevant expertise.”).

⁴⁹ 5 U.S.C. § 706 (2012).

otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations . . . ; [or] unsupported by substantial evidence” for certain formal agency actions.⁵⁰ Despite the APA’s failure to refer to deference, scholars have generally been comfortable with *Skidmore*’s application to judicial review of statutory interpretation.⁵¹ Even when *Skidmore* deference applies, courts retain interpretive primacy—and thereby decide “all relevant questions of law”—by being able to reject agencies’ interpretations if they fail to persuade as products of agency expertise.⁵²

Although courts retain interpretive primacy under *Skidmore* review, Congress’s intent as to an agency’s role in interpretation is relevant. *Skidmore* deference relies upon express or implied congressional delegation because Congress, unless it says otherwise, very likely intends courts to rely upon agency expertise, where evident, in interpreting statutes. After all, when Congress instructs courts not to defer to agency interpretations,⁵³ the Fourth Circuit has suggested that *Skidmore* deference should not apply.⁵⁴ Because Congress signals

⁵⁰ *Id.* § 706(2).

⁵¹ See, e.g., William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1464 (2008) (“Consistent with the APA and the traditional role of judges when interpreting statutes, *Skidmore* suggests that judges should take into consideration agency inputs, especially when they reflect the agency’s expert judgment and longstanding practice.”); Cooley R. Howarth, Jr., *United States v. Mead Corp.: More Pieces for the Chevron/Skidmore Deference Puzzle*, 54 ADMIN. L. REV. 699, 714 (2002) (“[E]ven where a court is entitled or required to exercise de novo review of an agency’s interpretation of a statute [as under the APA], the court would be hard pressed *not* to consider the agency’s interpretation, or use the *Skidmore* factors, in arriving at what it considered the correct interpretation.”); Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1155–56 (2012) (arguing that “*Skidmore* weight” is permissible under the APA’s review provisions). *But see* Merrill & Hickman, *supra* note 4, at 840 n.32 (noting that deference is inappropriate when a statute calls for de novo review).

⁵² See Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1998 (2008) (“[U]nder *Skidmore v. Swift & Co.*, and its progeny, the agency can opt for procedurally simpler enactment but surrenders interpretive primacy to courts.” (footnote omitted)); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1554 (2006) (“[B]y bringing *Skidmore* back into the deference lexicon, *Mead* appropriately precludes *Chevron* deference from impermissibly encroaching upon the function that Congress, through the APA, intended courts to serve.”); Strauss, *supra* note 51, at 1155–56 (noting that courts can accord *Skidmore* weight to agency views when deciding matters of statutory interpretation).

⁵³ See, e.g., 15 U.S.C. § 8302(c)(3) (2012) (instructing the D.C. Circuit not to defer to certain agencies when deciding whether a challenged rule or order conflicts with certain statutory provisions).

⁵⁴ See *Cline v. Hawke*, 51 F. App’x 392, 396 (4th Cir. 2002) (applying *Skidmore* deference to an OCC insurance-preemption decision because it predated enactment of a statutory provision instructing review “without unequal deference” to questions of state and federal law).

when agencies should not receive deference (including even *Skidmore* deference) and because courts appear receptive to these signals, *Skidmore* deference is also founded upon congressional intent.

B. Chevron

Chevron deference has proved more problematic than *Skidmore* deference, both in terms of its foundation and its consistency with the APA. The Court in *Chevron* deferred to the Environmental Protection Agency's reasonable interpretation of an ambiguous statutory term in the Clean Air Act.⁵⁵ The Court relied primarily upon a delegation theory, i.e., that Congress delegated the responsibility of interpreting ambiguous terms under the Act to the EPA.⁵⁶ This delegation can be express or implicit.⁵⁷ The Court examined the context surrounding the Clean Air Act's passage, the Act itself, and its legislative history, and determined that none of these provided clear guidance about congressional intent as to the meaning of the term at issue.⁵⁸ The Court provided little guidance on how courts should infer congressional intent going forward or exactly what role legislative history and context played in its analysis.⁵⁹ The Court also did not directly discuss the normative basis for its delegation theory, but it suggested that certain values—such as agency expertise and political accountability—supported the Court's inference that Congress intended agencies, not courts, to have interpretive primacy over ambiguous statutory provisions.⁶⁰

Since *Chevron*, the Supreme Court has consistently relied on this delegation theory. For instance, in 1990 the Court relied on delegation as a "precondition" to *Chevron* deference in *Adams Fruit Co. v. Barrett*.⁶¹ A decade later, the Court relied only on the delegation theory in *United States v. Mead* for *Chevron* deference,⁶² and it has

⁵⁵ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

⁵⁶ *Id.* at 843–44, 865.

⁵⁷ *Id.*

⁵⁸ *Id.* at 845–64.

⁵⁹ See Beermann, *supra* note 4, at 815 ("Another problem with the *Chevron* doctrine is that the Court is unclear about the relevance of legislative history and policy to judicial review of interpretive decisions.").

⁶⁰ See *Chevron*, 467 U.S. at 865–86 (discussing why agencies are better placed than the judiciary to make policy choices in the context of resolving a statutory ambiguity); Duffy, *supra* note 24, at 191 ("[T]he Court ultimately supported its deference principle [in *Chevron*] with two intertwined policy reasons—agency expertise and democratic accountability.").

⁶¹ *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), *superseded by statute on other grounds*, Act of Nov. 15, 1995, Pub. L. No. 104-49, 109 Stat. 432.

⁶² *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

continued to rely on the delegation rationale in subsequent cases.⁶³ But even though delegation theory reigns supreme, the Court has referred to other values, such as expertise and deliberative process.⁶⁴ Indeed, the Tenth Circuit has relied on agency expertise in extending *Chevron* to agencies' interpretations of contractual (as opposed to statutory) language.⁶⁵ The Court has been silent, however, about whether these other values are meaningful by themselves or merely inform congressional intent to delegate interpretive primacy.

That the Supreme Court relies (at least in part) on the delegation theory is not contested.⁶⁶ Instead, as I describe below, the main points of debate are whether Congress has any intent as to interpretive primacy to divine, whether the Court accurately deciphered Congress's intent, and whether clear rules or flexible standards should inform how courts ascertain congressional intent going forward. As I discuss *infra* in Part III, Dodd-Frank informs each point of debate.

1. Does Congress Have Any Intent as to Interpretive Primacy?

First, some scholars contend that the Supreme Court's inquiry attempts to do the impossible—glean legislative intent from a legislature that has no view on interpretive primacy.⁶⁷ Jack Beermann has challenged the view that “Congress actually considers the particulars of the *Chevron* doctrine when it writes statutes.”⁶⁸ Likewise, now-Judge David Barron and now-Justice Elena Kagan noted that

⁶³ See, e.g., *Astrue v. Capato ex rel.* B.N.C., 132 S. Ct. 2021, 2033–34 (2012) (holding that the Court should defer to the Social Security Administration's interpretation of the statute because Congress had delegated rulemaking authority to the agency on the issue); *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (explaining that congressional intent to delegate controls the deference inquiry); cf. *United States v. Home Concrete & Supply, L.L.C.*, 132 S. Ct. 1836, 1843–44 (2012) (plurality opinion) (finding that Congress had not left a gap to be filled so the agency interpretation was not entitled to deference).

⁶⁴ See Criddle, *supra* note 4, at 1308–10 (discussing the Court's reliance on deliberative process and expertise in deciding whether *Chevron* deference was appropriate in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), and *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

⁶⁵ *Sternberg v. Sec'y, Dep't of Health & Human Servs.*, 299 F.3d 1201, 1205 (10th Cir. 2002). My thanks to Emily Hammond for noting this extension of *Chevron* to new contexts and the appellate court's reliance on expertise.

⁶⁶ See Criddle, *supra* note 4, at 1274–75 (noting the Supreme Court's reliance on the delegation theory in terms of both fact and rhetoric, but arguing that other factors matter as well).

⁶⁷ Cf. 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.”); Bressman, *supra* note 26, at 2010 & n.8 (identifying scholars who have challenged the courts' inquiry into congressional intent as fraudulent, fictional, etc.).

⁶⁸ Beermann, *supra* note 4, at 842.

“Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical and a conclusion regarding that intent fraudulent in the mine run of cases.”⁶⁹ Two of Justice Kagan’s colleagues, Justices Scalia and Breyer, have conceded that *Chevron*’s inquiry is fictional,⁷⁰ and Justice Scalia has concluded that “[i]n the vast majority of cases . . . Congress . . . didn’t think about the matter at all.”⁷¹ Indeed, since *Chevron* was decided, Congress has rarely said anything about interpretive primacy⁷² and, until Dodd-Frank, has never (to the best of my knowledge) said anything about the *Chevmore* doctrines.⁷³

2. Was Chevron Correct as an Original Matter?

If Congress has no intent as to *Chevmore*, then it is not surprising that, as Evan Criddle has summarized,⁷⁴ some scholars argue that *Chevron* was incorrect as an original matter. Clark Byse argued that the Supreme Court “fails to distinguish between statutory ambiguities on the one hand and legislative delegations of law-interpreting power to agencies on the other.”⁷⁵ Tom Merrill has noted that Congress’s use of express delegations of lawmaking power to agencies in certain contexts suggests that Congress does not intend that agencies gain interpretive primacy by default (or, in *Chevron*’s terminology, by implication).⁷⁶ Not only was there “no established background understanding that a decision by Congress to confer general rulemaking or adjudicatory authority on an agency would be deemed a decision to transfer primary interpretational authority to the agency,”⁷⁷ but the

⁶⁹ Barron & Kagan, *supra* note 25, at 203.

⁷⁰ See Breyer, *supra* note 4, at 370 (referring to *Chevron*’s delegation theory as a “legal fiction”); Scalia, *supra* note 4, at 517 (arguing that *Chevron*’s delegation theory is a fiction that provides a backdrop for legislative drafting).

⁷¹ Scalia, *supra* note 4, at 517.

⁷² See *infra* note 156 (discussing no-deference provisions).

⁷³ See Garrett, *supra* note 5, at 2640 (“To the extent that anyone mentions the possibility of greater congressional involvement [in establishing an interpretive regime], it is quickly dismissed because Congress seldom provides explicit instructions allocating this sort of policymaking authority.” (footnote omitted)).

⁷⁴ See Criddle, *supra* note 4, at 1285–86 (discussing critiques of *Chevron*’s propriety as an original matter).

⁷⁵ Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron’s Step Two*, 2 ADMIN. L.J. 255, 261 (1988) (quoting Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 466 (1987)).

⁷⁶ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995 (1992) (arguing that the presence of explicit congressional-delegation provisions in some statutes weakens *Chevron*’s presumption of implicit delegation in all statutes).

⁷⁷ Merrill & Hickman, *supra* note 4, at 871.

APA, which *Chevron* never mentioned,⁷⁸ appeared to reveal Congress's intent for the courts to retain interpretive primacy over statutory interpretation. After all, section 706 states that "the reviewing court shall decide all relevant questions of law," and section 558(b) states that agencies may act only "within jurisdiction delegated to the agency and as authorized by law."⁷⁹

3. *How Should the Court Glean Congress's Intent?*

Third, given Congress's prolonged silence and the ongoing disagreement over *Chevron*'s propriety as an original matter, it is unsurprising that the Supreme Court and scholars debate how the Court should go about inferring congressional intent as to interpretive primacy. The Court considers two key factors. *Chevron* first appeared to look at only the ambiguities or "gaps" as evidence of congressional delegations.⁸⁰ Deciding whether an ambiguity exists became a limited, textual inquiry.⁸¹ But then in *United States v. Mead*, the Court also evaluated the procedural formality of the agency action at issue.⁸² The *Mead* Court recognized that "Congress contemplates administrative action with the effect of law [and thus interpretive primacy for the agency] when it provides for a relatively formal administrative procedure tending to foster . . . fairness and deliberation."⁸³ The Court also

⁷⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("There is some question whether *Chevron* was faithful to the text of the Administrative Procedure Act (APA), which it did not even bother to cite.").

⁷⁹ 5 U.S.C. § 706 (2012); *id.* § 558(b) (2012); see Duffy, *supra* note 24, at 197–98 (quoting § 706 and § 558(b) to argue that the APA confines agency discretion and that *Chevron* deference is in conflict with this statutory command); Merrill & Hickman, *supra* note 4, at 868 (noting that if *Chevron* is a common-law rule, this status would seem to subordinate the *Chevron* doctrine to the statutory APA command).

⁸⁰ Bressman, *supra* note 26, at 2012 (explaining that before *Mead*, the Court used statutory ambiguities to impute congressional intent).

⁸¹ See Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 730 (2007) (arguing that the Court's determination of whether the statute is ambiguous has turned from a purposive inquiry to one that is "textually based"); see also Gluck & Bressman, *supra* note 5, at 994 ("The Court currently looks only to textual cues for evidence of congressional intent to delegate and considers the 'traditional tools of statutory construction' in construing such cues. Our study suggests that Congress often uses extratextual signals as well."). This limited textual inquiry suggests that the *Skidmore* factors may no longer be relevant to step one. See Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 208–09 (1992) (arguing that *Skidmore* may be superfluous in *Chevron* step one because congressional intent is gleaned from the language of the statute itself).

⁸² See Beermann, *supra* note 4, at 825 ("After *Mead*, the presumption regarding congressional intent is not valid unless Congress provides an additional indication, such as authority to issue legislative rules, that it intends to confer lawmaking power on the agency.").

⁸³ *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

noted that the “overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”⁸⁴ Despite contrary suggestions,⁸⁵ *Mead* did not go so far as to say that *Chevron* applies to all products of informal rulemaking or formal adjudication or that no other considerations were relevant to the judicial inquiry.

The Supreme Court has since offered standard-based and rule-based approaches to *Mead*’s inquiry.⁸⁶ In certain decisions, the Court appeared to consider various factors or values other than procedural formality to determine whether Congress had entrusted the interpretation of ambiguous terms to agencies. For instance, the Court in *Barnhart v. Walton* (decided only one year after *Mead*) considered the Social Security Administration’s interpretation of the duration of “inability” under the Social Security Act.⁸⁷ Notwithstanding Justice Scalia’s contrary view (provided in a concurring opinion),⁸⁸ the Court’s opinion by Justice Breyer considered more than the manner in which the agency acted when determining if *Chevron* applied. After stating that the “presence or absence of notice-and-comment rulemaking [was not] dispositive,”⁸⁹ the Court considered “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time”⁹⁰—factors similar to *Skidmore*’s.

More recently, the Supreme Court appears to have suggested a bright-line, rule-based approach. In considering the FCC’s interpretation of its regulatory jurisdiction under the Communications Act of 1934, the majority in *City of Arlington v. FCC* rejected the dissent’s “view that a general conferral of rulemaking authority does not vali-

⁸⁴ *Id.*

⁸⁵ See, e.g., Stuart Minor Benjamin & Arti K. Rai, *Who’s Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 312 (2007) (“As cabined by *Mead*, however, *Chevron* deference clearly applies to legal interpretations made in informal rulemakings or formal adjudications.”); William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is Chevron Step Two, Not Christensen or Mead*, 54 ADMIN. L. REV. 719, 726 (2002) (“*Mead* is clear enough in confirming that interpretations reached through informal rulemaking or formal adjudication are entitled to *Chevron* deference.”).

⁸⁶ See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382–83 (1985) (discussing difference between rule- and standard-based approaches).

⁸⁷ *Barnhart v. Walton*, 535 U.S. 212, 214–15 (2002).

⁸⁸ See *id.* at 227 (Scalia, J., concurring) (“The SSA’s recently enacted regulations emerged from notice-and-comment rulemaking and merit deference. No more need be said.”).

⁸⁹ *Id.* at 222.

⁹⁰ *Id.*

date rules for *all* the matters the agency is charged with administering.”⁹¹ Instead, “the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.”⁹² The majority opinion, if it means what it says,⁹³ indicates that an agency’s general rulemaking power alone evidences Congress’s delegation to the agency of interpretive primacy for matters over which it may promulgate rules, rendering any additional inquiry into agency expertise unnecessary. Despite its failure to discuss contrary decisions, the majority’s position appeared to confirm conventional wisdom.⁹⁴ But Justice Breyer continued to endorse his standard-based approach from *Barnhart*.⁹⁵ And Chief Justice Roberts, joined in dissent by Justices Kennedy and Alito, appeared to agree with Justice Breyer that whether *Chevron* applies is a matter for which courts must “consider[] the language, structure, policy, and legislative history of the

⁹¹ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

⁹² *Id.*

⁹³ Some may question the Court’s sincerity because two members of the *City of Arlington* majority joined the Court’s opinion in *Mead*. Justice Scalia dissented alone in *Mead*, criticizing the Court’s nuanced view of how courts should determine delegation of interpretive primacy. See generally *United States v. Mead Corp.*, 533 U.S. 216, 239 (2001) (Scalia, J., dissenting). The *City of Arlington* opinion may be read as significantly undermining *Mead* by focusing only on the agency’s rulemaking authority as a precondition for *Chevron* deference. See *supra* note 28 and accompanying text (arguing that *City of Arlington* shows how the Court is moving away from both *Mead* and *Skidmore*). Perhaps Justices Thomas and Ginsburg, who joined the Court’s opinion in *Mead*, signed onto the Court’s opinion in *City of Arlington* without intending to signal *Mead*’s demise and would be faithful to *Mead* if the issue were presented directly. Moreover, the Court accepted only one question for review: “Whether . . . a court should apply *Chevron* to . . . an agency’s determination of its own jurisdiction.” *City of Arlington*, 133 S. Ct. at 1867–68 (alteration in original). This question may have suggested that the Court would assume that any formality requirements under *Mead* were sufficient for *Chevron* deference in the particular case at issue.

⁹⁴ See *Merrill & Hickman*, *supra* note 4, at 874 (“We know that a decision by Congress to give an agency authority to promulgate legislative rules implementing a statute is enough to charge the agency with administration of the statute.”); see also Benjamin & Rai, *supra* note 85, at 312 (“As cabined by *Mead*, however, *Chevron* deference clearly applies to legal interpretations made in informal rulemakings or formal adjudications.”); Jordan, *supra* note 85, at 726 (“*Mead* is clear enough in confirming that interpretations reached through informal rulemaking or formal adjudication are entitled to *Chevron* deference.”).

⁹⁵ See *City of Arlington*, 133 S. Ct. at 1875–76 (Breyer, J., concurring) (arguing that determining the boundaries of interpretive authority is not a simple inquiry and requires consideration of many factors).

Act,”⁹⁶ not just whether the agency has general rulemaking authority.⁹⁷

Both the rule- and standard-based approaches have their virtues and vices. The rule-based approach is preferable because it permits Congress to legislate on a predictable backdrop (by knowing that *Chevron* will apply when agencies have general rulemaking power),⁹⁸ is easier for courts to apply, and keeps the insulated judicial branch out of the policy-laden decision of deciding to whom Congress has (or should have) delegated interpretive primacy.⁹⁹ This rule also may reasonably reflect rational legislators’ intent to delegate to agencies whose administrative procedures permit congressional monitoring.¹⁰⁰ Yet the rule-based approach’s concern for predictability can cause courts to sacrifice “getting the delegation question right.”¹⁰¹ It is, at the very least, debatable what Congress intends to signify when granting an agency general rulemaking authority. Congress may intend, as some have argued, to demonstrate that the agency has interpretive primacy because the agency can act with the force of law¹⁰² or because Congress can more easily monitor formal agency actions.¹⁰³ But general rulemaking authority may be less significant—something that is only “relevant” to the inquiry and fails to resolve it in all instances.¹⁰⁴ For instance, Congress may intend an agency to have the power to make substantive law—through rulemaking that requires

⁹⁶ *Id.* at 1884 (Roberts, C.J., dissenting).

⁹⁷ *See id.* at 1883 (arguing that courts should not look to congressional delegation of interpretive authority generally but rather consider whether that delegation applies to the specific statutory ambiguity in question).

⁹⁸ *See* Beermann, *supra* note 4, at 825 (“The greatest problem with the *Mead* opinion is that it does not provide any certainty regarding what additional indications are required.”).

⁹⁹ *See* *United States v. Mead Corp.*, 533 U.S. 218, 241–50 (2001) (Scalia, J., dissenting) (arguing that the majority’s approach will lead to ossification because it takes matters out of the hands of the agency); Garrett, *supra* note 5, at 2644 (noting that *Chevron* can further democratic values by giving interpretive primacy to the elected executive branch as opposed to the judiciary).

¹⁰⁰ *See* Bressman, *supra* note 26, at 2044 (explaining how administrative procedures rely on constituents to monitor agencies and call on legislators to intervene prior to agencies’ final actions).

¹⁰¹ Garrett, *supra* note 5, at 2648.

¹⁰² *See* Merrill & Hickman, *supra* note 4, at 836–37 (discussing the relationship between congressional delegation of the power to interpret and the power to act with the “force of law”).

¹⁰³ *See supra* note 100 and accompanying text (discussing congressional monitoring).

¹⁰⁴ *See* Barron & Kagan, *supra* note 25, at 219 (“Congress might desire the converse: to give interpretive authority to an agency separate and apart from the power to issue rules or orders with independent legal effect on parties.”); Garrett, *supra* note 5, at 2648 (“*Mead*’s safe harbor is not necessarily an accurate proxy for congressional delegation to agencies, although perhaps it is a tighter fit than the broader *Chevron* rule because it affects a smaller subset of agency decisions and considers one factor that is surely relevant to discovering actual intent.”).

notice, an opportunity for public participation, and an explanation—but only with intensive judicial monitoring.¹⁰⁵ Indeed, legislative drafters in a recent survey approved a standard-based approach similar to those in *Mead* and *Barnhart* that looks beyond formality to, among other things, the longstanding nature of the agency's interpretation, the subject matter, and the nature of the particular issue.¹⁰⁶ In short, by relying so heavily on an ambiguous signal from Congress, courts fail to acknowledge other values and considerations—such as expertise, the duration of the agency's position, legislative history, and context—that may better capture congressional intent.¹⁰⁷

Prominent scholars have argued that the Court's two-part inquiry into congressional intent supports their contention that the Court's inquiry is fictional or fraudulent.¹⁰⁸ Some have deemed it “fictional” because Congress is unlikely to delegate interpretive primacy to agencies based on statutory ambiguity¹⁰⁹ or because how an agency acts does not necessarily relate to delegation of interpretive primacy.¹¹⁰ Some have characterized the inquiry as “fraudulent” because the Supreme Court does not care about what Congress actually intended but instead relies on across-the-board presumptions.¹¹¹ Lisa Schultz Bressman has responded to these criticisms by arguing that the inquiry into imputed congressional intent—which considers statutory text, context, procedural formality, regulatory authority, and legislative history—is simply the familiar way that courts, under a Legal Process School Model, divine what a reasonable multimember body would intend.¹¹² If the more nuanced inquiry of *Barnhart* controls, she

¹⁰⁵ See Barron & Kagan, *supra* note 25, at 218 (“The power to make binding substantive law, after all, involves much more than the power to make controlling interpretations of ambiguous statutory terms”); see also *id.* at 218–19 n.64 (noting that before *Chevron* the Court had rarely applied the equivalent of *Chevron* deference to agency interpretations provided through binding rules or adjudications).

¹⁰⁶ See Gluck & Bressman, *supra* note 5, at 992–97 (discussing empirical findings of a study of legislative drafters' views on doctrines and assumptions about the delegation of interpretive authority).

¹⁰⁷ See Bressman, *supra* note 26, at 2043–46 (noting how legislative drafters rely on different signals and contextual clues to signal delegation); Krotoszynski, *supra* note 4, at 751 n.72 (“[I]f the true test is congressional intent, a careful search of floor statements and committee reports seems a more useful source of relevant information than the agency's behavior in enforcing a particular statutory provision.”).

¹⁰⁸ See *supra* Part I.B. (summarizing the viewpoints of these scholars).

¹⁰⁹ See Bressman, *supra* note 26, at 2009–10 (presenting critics' claim that Congress is more likely to want courts to exercise independent judgment in the face of statutory ambiguity).

¹¹⁰ See Barron & Kagan, *supra* note 25, at 218 (noting how delegation and interpretive authority are not necessarily coterminous issues).

¹¹¹ See Bressman, *supra* note 26, at 2009–11 (discussing assertions that *Chevron* relies upon a fraudulent inquiry).

¹¹² *Id.* at 2046–47.

is likely right.¹¹³ But if the Court applies a rule-based approach that relies on questionable assumptions that eschew typical evidence of congressional intent, the criticisms gain force.

II

CHEVMORE'S CODIFICATION

As will be discussed in Part III, Dodd-Frank offers insight into these three lingering questions concerning *Chevron's* delegation theory. But before considering *Chevmore* codification's implications, let us turn to a descriptive account of *Chevmore's* codification in Dodd-Frank to inform both discussions. This Part considers how Dodd-Frank's historical context, legislative history, statutory text, and statutory scheme reveal that *Chevmore's* first codification was part of both a narrow and grand undertaking. From a narrow perspective, Congress codified *Skidmore* deference and included what is almost certainly a *Chevron* savings clause to govern one particular kind of decision: the OCC's preemption of state consumer-protection laws. The OCC's preemption decisions were controversial because of conflict-of-interest and regulatory-capture concerns, both of which suggested that the OCC's preemption decisions were not products of administrative expertise.¹¹⁴ But from a broader perspective, Dodd-Frank, of course, was a substantial piece of legislation. Among other things, it created the newest federal independent agency, the Consumer Financial Protection Bureau (CFPB), and reassigned consumer-protection authority throughout the administrative state. From either vantage point, Congress provided clues about its view of *Chevmore*.

A. *The OCC's Preemption History*

The OCC administers the National Bank Act (NBA) and provides federal banking charters. The NBA's purpose is to establish fed-

¹¹³ See *id.* at 2047–48 (“The Court often imputes legislative intent when determining the meaning of statutory language, relying on statutory text, statutory context, and legislative history. Functionally, the Court is attributing collective intent to determine the delegation of interpretative authority in much the same way under *Mead/Barnhart* and *Brown & Williamson/Gonzales*.”).

¹¹⁴ Instead of considering *Chevmore's* broader meaning and promise after Dodd-Frank, I focused in an earlier symposium essay on the narrower issue of the relationship between agency preemption, *Skidmore's* codification in Dodd-Frank, and how Congress can improve agencies' agency-preemption expertise with *Chevmore* codification and other means. See generally Kent Barnett, *Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 *FORDHAM L. REV.* 587 (2014).

eral banks that will maintain a national currency.¹¹⁵ To that end, the OCC has two missions: to promote national banks' safety and soundness and to prevent national banks from engaging in unfair practices.¹¹⁶ Largely based on its aggressive preemption of state law before Dodd-Frank, the OCC was criticized for prioritizing the former mission over the latter.¹¹⁷

The Supreme Court had provided significant guidance on the scope of NBA preemption. In *Barnett Bank of Marion County, N.A. v. Nelson*, the Court held that the NBA preempted a Florida law that prevented federal banks from selling insurance products because it "st[ood] as an obstacle" to federal objectives, such as ensuring national banks' safety and soundness by denying banks the ability to sell certain products.¹¹⁸ Later, when preempting certain Michigan registration and inspection requirements for banks in *Watters v. Wachovia Bank, N.A.*, the Court added that the NBA preempts state laws that "significantly burden,"¹¹⁹ "interfere with,"¹²⁰ or "impair [] or impede []"¹²¹ the NBA. In light of *Barnett Bank*, the OCC issued numerous preemption opinions and interpretive letters.¹²²

¹¹⁵ See *Twin City Bank v. Nebeker*, 167 U.S. 196, 203 (1897) (construing the purpose of the National Bank Act).

¹¹⁶ See *About the OCC*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <http://www.occ.gov/about/what-we-do/mission/index-about.html> (last visited Sept. 19, 2014) ("Our goal in supervising banks and federal savings associations is to ensure that they operate in a safe and sound manner and in compliance with laws requiring fair treatment of their customers and fair access to credit and financial products.").

¹¹⁷ See, e.g., Brief for AARP et al. as Amici Curiae Supporting Petitioner at 11–12, *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007) (No. 05-1342) (discussing strong state enforcement and weak OCC enforcement of consumer-protection laws); Amanda Quester & Kathleen Keest, *Looking Ahead After Watters v. Wachovia Bank: Challenges for Lower Courts, Congress, and the Comptroller of the Currency*, 27 REV. BANKING & FIN. L. 187, 195–97 (2008) (noting a "thin" record of OCC enforcement action); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. REV. 2274, 2304 (2004) ("The OCC is manifestly not a consumer protection agency; it is rather a regulatory body concerned with ensuring the safety and soundness of the national banking system."). For its part, the OCC denies that it has ignored consumer protection in favor of safety and soundness. See Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 673 n.50 (2008) ("Comptroller John Dugan denies that the OCC is concerned only with safety and soundness to the exclusion of consumer protection.").

¹¹⁸ *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 31 (1996).

¹¹⁹ *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007).

¹²⁰ *Id.* at 12.

¹²¹ *Id.* at 21.

¹²² See Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 318–20 (2012) (identifying preemption concerning banking branches, offices, ATM locations, loan products, and fees).

OCC preemption did not attract significant controversy until years later when critics argued that the OCC had exceeded *Barnett Bank's* preemption standards. In 2003, the OCC preempted many provisions of the Georgia Fair Lending Act, which sought to prevent predatory mortgage-lending practices.¹²³ At about the same time, the OCC promulgated an expansive rule that preempted state laws that “obstruct, impair or condition a national bank’s ability to fully exercise its Federally authorized powers” in lending, taking deposits, and other “operations.”¹²⁴ The OCC proceeded despite certain congressional members’ request for delay.¹²⁵ The House and the Senate responded by conducting hearings to determine whether the OCC had acted contrary to congressional intent.¹²⁶ Consumer advocates (and congressional members) argued that, despite the OCC’s suggestion otherwise,¹²⁷ the regulation’s preemption formulation—especially with the “condition” concept—was broader than *Barnett Bank*.¹²⁸

These controversies revealed fundamental concerns that the OCC was a conflicted and captured agency whose preemption activities were not guided by agency expertise and statutory interpretation. First, as Congress recognized, the OCC has a conflict of interest in preempting state law.¹²⁹ Almost all of the OCC’s funding comes from

¹²³ *Id.* at 320. Although consumer advocates decried the preemptive effect on similar predatory-lending laws in twenty-eight other states, *id.* at 324, the OCC contended that it had little evidence that national banks were engaged in predatory practices and, at any rate, many of the same prohibitions existed under federal regulations, *id.* at 320.

¹²⁴ Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 553–54 (2012) (internal citations omitted).

¹²⁵ *Id.* at 554.

¹²⁶ *Id.*

¹²⁷ See Natter & Wechsler, *supra* note 122, at 322–23 (describing the OCC’s position that their regulation was drawn from, and consistent with, applicable Supreme Court precedents on preemption constructs).

¹²⁸ See *id.* at 322 (discussing objections to “condition” language); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act’s Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 936 (2011) [hereinafter Wilmarth, *Expansion of State Authority*] (“Notwithstanding the OCC’s claims, its 2004 preemption test is plainly incompatible with the preemption standard adopted by Congress in Section 5136C(b)(1)(B).”). The House Financial Services Committee had worried that the OCC’s assertion of exclusive authority over consumer protection would “weaken” its ability to “carry out its primary mission of ensuring the safety and soundness of the national banking system” *Views and Estimates of the Comm. on Fin. Servs. on Matters to Be Set Forth in the Con. Res. on the Budget for Fiscal Year 2005*, 108th Cong., 2d Sess. (Comm. Print, Feb. 25, 2004) at 15–16 (cited in Arthur E. Wilmarth, Jr., *The OCC’s Preemption Rules Exceed the Agency’s Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 352 (2004) [hereinafter Wilmarth, *The OCC’s Preemption Rules*]).

¹²⁹ See S. REP. NO. 111-176, at 16 (2010) (“At a hearing on the OCC’s preemption rule, Comptroller Hawke acknowledged, in response to questioning from Senator Sarbanes, that

fees paid by OCC-chartered entities.¹³⁰ Former Comptroller John Hawke, Jr., acknowledged in congressional testimony that the OCC used preemption to increase its funding by attracting and retaining chartering entities (from competitors such as the Office of Thrift Supervision (OTS) and state prudential regulators).¹³¹ Second, perhaps because of the OCC's need to retain chartered entities, regulated parties reputedly have captured the OCC and have used it to limit their liability under various state laws.¹³² Regulatory capture is problematic because it undermines expert decisionmaking as the agency becomes persistently biased in favor of its regulated industry in executing its mission.¹³³ The OCC's conflict of interest and regulatory capture appeared to lead the OCC to focus on preemption as a "tool for conducting nationwide business"¹³⁴ and to ignore the need to generate and rely upon data. For example, as Catherine Sharkey has noted, the OCC's revision to its 2004 Visitorial Powers Rule and notice of proposed rulemaking contained "no factual findings . . . explaining why preemption was necessary in the specific case or what conflicts between state authorities and federal banks justified preemption."¹³⁵ Likewise, the OCC's focus led it to ignore other values that are germane to preemption, such as corrective justice, regulatory efficiency,¹³⁶ and states' authority, dignity, and policy experimentation.¹³⁷

one reason Hawke issued the preemption rule was to attract additional charters, which helps to bolster the budget of the OCC.").

¹³⁰ See Quester & Keest, *supra* note 117, at 200 ("Roughly 97% of the OCC's operating budget comes from semi-annual assessments on national banks."); Wilmarth, *The OCC's Preemption Rules*, *supra* note 128, at 232 (arguing that the OCC has a conflict of interest in deciding preemption questions because it relies on fees from nationally chartered banks).

¹³¹ See *supra* note 129 and accompanying text; see also FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT, at xxiii (2011) ("[T]he [OCC] and the [OTS], caught up in turf wars, preempted state regulators from reining in abuses.").

¹³² See, e.g., Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 27 n.122 (2011) (summarizing arguments from scholars and amici in *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009), that the OCC was dependent on, and controlled by, chartered banks).

¹³³ See Barkow, *supra* note 34, at 21–22 (documenting the tendency toward and causes of agency capture).

¹³⁴ Sharkey, *supra* note 124, at 555 (quoting OCC officials).

¹³⁵ *Id.* at 581. The OCC had engaged in some factual discussion concerning whether depository institutions engaged in predatory lending when preempting Georgia's Fair Lending Act. Preemption Determination and Order, 68 Fed. Reg. 46,264, 46,271–72 (Aug. 5, 2003).

¹³⁶ See Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 227–28 (2011) (discussing values that are relevant to preemption decisions, including corrective justice and regulatory efficiency).

¹³⁷ See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 781–82 (2004) (discussing the significance of these federalism values when agencies consider state-law preemption).

Indeed, the OCC failed to engage in any significant discussion of federalism values when it preempted Georgia's Fair Lending Act.¹³⁸

By 2009, the Supreme Court joined Congress's and consumer advocates' apprehension over the OCC's broad preemption rulings. In *Cuomo v. Clearing House Ass'n*, the Supreme Court considered the OCC's notice-and-comment rule that preempted state visitorial powers over national banks (e.g., the power to conduct examinations or inspect corporate or financial books).¹³⁹ Without referring to the underlying conflict and capture concerns to which amici had alerted the Court,¹⁴⁰ the Court rejected the rule so far as it applied to state attorneys general seeking to enforce state laws that were not otherwise preempted¹⁴¹ because such broad preemption was contrary to congressional intent.¹⁴²

B. Congress's Response in Dodd-Frank

Congress responded to the OCC's actions in two ways that inform *Chevmore*. First, it limited the OCC's preemption authority and expressly addressed how courts should defer to the OCC's rulings. Second, it created a new independent agency, the CFPB, to oversee federal regulation of consumer-financial products.

1. The OCC

In Dodd-Frank, Congress established substantive and procedural guidance for the OCC's preemption decisions. Congress first abrogated what it considered the OCC's broader preemption standards¹⁴³ by expressly codifying the narrower *Barnett Bank* standard for the

¹³⁸ See Preemption Determination and Order, 68 Fed. Reg. 46,264.

¹³⁹ *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 523–24 (2009).

¹⁴⁰ See Metzger, *supra* note 132, at 27 (“Federal agency failure loomed particularly large in the background of *Cuomo*, with the OCC repeatedly characterized as an agency captured by the entities it was charged with regulating . . . Interestingly, the Court did not invoke these allegations or . . . expressly criticize the agency’s overall performance as it did in [a prior preemption decision].”).

¹⁴¹ *Cuomo*, 557 U.S. at 536 (“When, however, a state attorney general brings suit to enforce state law against a national bank, he is . . . acting in the role of . . . sovereign-as-law-enforcer. Such a lawsuit is not an exercise of ‘visitorial powers,’ and thus the Comptroller erred . . .”).

¹⁴² See *id.* at 530 (“Channeling state attorneys general into judicial law-enforcement proceedings (rather than allowing them to exercise ‘visitorial’ oversight) would preserve a regime of exclusive administrative oversight by the Comptroller while honoring in fact rather than merely in theory Congress’s decision not to pre-empt substantive state law.”).

¹⁴³ See S. REP. NO. 111-176, at 175 (2010) (noting that Section 1044 of Dodd-Frank would “undo[] broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004”); see also 156 CONG. REC. S3870 (May 18, 2010) (statement of Sen. Christopher Dodd) (discussing how the Carper Amendment would reinstate the standard under *Barnett Bank*).

preemption of state laws that directly regulate consumer-financial transactions.¹⁴⁴ The preemption determination may be made by a court or “by regulation or order of the Comptroller . . . on a case-by-case basis.”¹⁴⁵ The OCC must limit its inquiry to “a particular State consumer financial law . . . or the law of any other State with substantively equivalent terms.”¹⁴⁶ “[S]ubstantial evidence, made on the record of the proceeding” must support the regulation or order.¹⁴⁷ Every five years after preempting a state consumer-financial law, the OCC must reconsider, through notice-and-comment proceedings, whether preemption is still necessary and provide a report to Congress.¹⁴⁸ The OCC must also publish quarterly a list of preemption determinations, identifying affected activities and practices.¹⁴⁹

Despite these unique and detailed preemption provisions in Dodd-Frank, the most novel agency-preemption provisions are those that concern judicial review. When reviewing the OCC’s preemption determinations, courts shall “assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.”¹⁵⁰ These factors, as others have noted,¹⁵¹ correspond almost verbatim to *Skidmore*’s.¹⁵² A savings clause clarifies that the codified *Skidmore* standard for preemption rulings does not “affect the deference that a court may afford” the OCC’s other interpretations of the NBA.¹⁵³ Together, these statutory provisions are, to the best of my knowledge, the first that expressly instruct or allow courts to defer to an agency’s statutory interpretations.¹⁵⁴

¹⁴⁴ 12 U.S.C. § 25b(a)(2), (b)(1)(B) (2012).

¹⁴⁵ *Id.* § 25b(b)(1)(B). The rule or order must be made “in accordance with applicable law,” presumably including the APA. *Id.* Section 25b(b)(6) provides that “[a]ny regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable.” *Id.* § 25b(b)(6).

¹⁴⁶ *Id.* § 25b(b)(3)(A).

¹⁴⁷ *Id.* § 25b(c).

¹⁴⁸ *Id.* § 25b(d)(1)–(2).

¹⁴⁹ *Id.* § 25b(g).

¹⁵⁰ *Id.* § 25b(b)(5)(A). More specifically, *Skidmore* deference extends to “any determinations made by the Comptroller regarding preemption of a *State law* by title 62 of the Revised Statutes or [12 U.S.C. § 371],” not merely state consumer-financial laws. *Id.* (emphasis added).

¹⁵¹ *E.g.*, Natter & Wechsler, *supra* note 122, at 359; Sharkey, *supra* note 124, at 581; Sharpe, *supra* note 136, at 193.

¹⁵² *See supra* note 3 (quoting *Skidmore*’s factors).

¹⁵³ 12 U.S.C. § 25b(5)(B).

¹⁵⁴ *See Levin, supra* note 5, at 657 (noting that if proposed revisions to the APA in 1995 that called for judicial deference to agency interpretations had passed, they “would

Skidmore's codification was no oversight. The revisions to the judicial-review provisions were dramatic. The House Financial Services Committee's original bill instructed courts to provide no deference for preemption determinations whatsoever.¹⁵⁵ Indeed, Dodd-Frank ultimately included a similar provision that called for no deference during the D.C. Circuit's review of certain determinations by the Securities and Exchange Commission and the Commodity Futures Trading Commission.¹⁵⁶ But the revised bill that the House sent the Senate codified *Skidmore* deference for judicial review of OCC-preemption decisions.¹⁵⁷ Like the enacted version of Dodd-Frank, both versions of the bill also contained a savings clause to preserve current judicial deference to other OCC determinations.¹⁵⁸

The legislative history reveals that Congress understood that codifying *Skidmore* would lead to less deference than under *Chevron*. The germane Senate Report recognized that the Dodd-Frank provisions reduced judicial deference normally provided under *Chevron*. The Report noted that the OCC might receive "*Chevron* [deference] when interpreting Federal laws administered by th[e] agency" but not when making preemption decisions.¹⁵⁹ Notably, the Report also suggested that the Senate understood that the savings clause would likely lead courts to apply *Chevron* deference to nonpreemption rulings, despite the clause's silence on how courts should defer to these matters.¹⁶⁰ The only meaningful floor remarks from the House reveal that

probably have been the first scope of review [provisions] in the history of administrative law to have *expressly* required reviewing courts to display *any* deference to administrators on issues of law").

¹⁵⁵ See H.R. 4173, 111th Cong. § 5136C(b)(4) (2009) (as introduced in the House of Representatives) ("A court shall review any claim that a State law is preempted by this Act as a matter of law and without deference to any agency claim that a state law is preempted under this Act.").

¹⁵⁶ 15 U.S.C. § 8302(c)(3) (2012). Congress had provided a no-deference provision in 1999 for federal preemption of insurance regulation. *Id.* § 6714(e). But its standard—that courts should decide the matter "without unequal deference"—is more obscure. *Id.* Nonetheless, courts have suggested that this standard precludes application of *Skidmore* deference. See *Cline v. Hawke*, 51 F. App'x 392, 396 (4th Cir. 2002) (applying *Skidmore* deference to OCC insurance-preemption decision because it predated enactment of the "without unequal deference" provision in 15 U.S.C. § 6714(e)).

¹⁵⁷ H.R. 4173, 111th Cong. § 5136C(b)(5)(A) (2009) (as passed by the House of Representatives).

¹⁵⁸ H.R. 4173, 111th Cong. § 5136C(b)(5)(A)–(B) (2009) (as passed by the House of Representatives); H.R. 4173, 111th Cong. § 5136C(b)(4) (2009) (as introduced in the House of Representatives).

¹⁵⁹ S. REP. NO. 111-176, at 176 (2010).

¹⁶⁰ See 12 U.S.C. § 25b(b)(5)(B) ("[N]othing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of [the NBA] or other Federal laws.").

the House was aware of the significance of *Chevron* deference.¹⁶¹ Dissenting senators did not dispute the nature of the preemption provisions or the interpretation of them by others. Instead, they criticized their effect, fearing that the bill would “effectively eliminate[] preemption and . . . create significant legal uncertainty.”¹⁶²

The legislative history also suggests that Congress codified *Skidmore* and drafted detailed preemption provisions to mitigate the OCC’s conflict of interest. The Senate Report refers to its concern over the OCC’s conflict of interest in preempting state law, former Comptroller Hawke’s testimony that state-law preemption was a tool to attract new entities, and preemption’s negative impact on responsible lending practices.¹⁶³ The House Financial Services Committee, for its part, had earlier heard testimony from the Iowa Attorney General who had advocated for lesser deference to the OTS and the OCC because they used preemption as a means of attracting chartered entities.¹⁶⁴ Likewise, Illinois Attorney General Lisa Madigan had testified before that committee that lenders’ ability to choose their regulators led them to select those that were most business-friendly.¹⁶⁵

The Dodd-Frank provisions themselves suggest that Congress intended to counter conflict and capture concerns. The procedural requirements render it more likely that the OCC’s preemption decisions—whether derived from notice-and-comment rulemaking or less formal means—are products of administrative expertise that rely on data, not improper considerations. Indeed, Sharkey has called for just such an approach, which she refers to as the “agency reference model,” and identified Congress’s treatment of the OCC as an impor-

¹⁶¹ See 155 CONG. REC. E3029 (daily ed. Dec. 17, 2009) (Statement of Rep. Melissa Bean) (“[W]hen a court is reviewing an OCC determination concerning the proper interpretation of the [NBA] or other Federal law that the OCC is charged with administering, the court is to apply the traditional deference accorded to an agency, often referred to as ‘Chevron’ deference.”).

¹⁶² S. REP. NO. 111-176, at 247 (2010) (minority views of Sens. Shelby, Bennett, Bunning & Vitter).

¹⁶³ *Id.* at 16.

¹⁶⁴ See *Improving Federal Consumer Protection in Financial Services: Hearing Before the Comm. on Fin. Servs.*, 110th Cong. 51 (2007) (testimony of Thomas J. Miller, Iowa Attorney General) (“[T]he OCC and the OTS . . . are competing with the States for bank charters . . . [and] then [they] put a different hat on and say, okay, we preempt the States. . . . [B]ecause of the existence of that situation, the deference to those two agencies should be diminished or indeed eliminated.”).

¹⁶⁵ See LARRY KIRSCH & ROBERT N. MAYER, FINANCIAL JUSTICE: THE PEOPLE’S CAMPAIGN TO STOP LENDER ABUSE 124 (2013) (“Lisa Madigan testified in the House Financial Services Committee that Illinois’ efforts to stop deceptive lending had been inhibited by federal preemption policies and by rules that allowed lenders to select their own regulators . . .”).

tant example.¹⁶⁶ For instance, Dodd-Frank requires the OCC to develop a factual record because it must have “substantial evidence” made “on the record” of the proceeding.¹⁶⁷ The use of the APA’s “substantial evidence” standard is telling because it primarily focuses on factual findings and their implications, as opposed to discretionary policy judgments.¹⁶⁸ What is more, the OCC must place its substantial evidence in a record from some kind of administrative proceeding, indicating that the OCC must provide interested parties an opportunity to respond to the agency’s position and provide comments and evidence to expand the administrative record. Because the Comptroller must consider each preemption decision on a case-by-case basis, the data must relate to the particular effects of the law at issue. The OCC must then revisit its preemption decisions at least once every five years and consider their implications quarterly.¹⁶⁹ These reevaluations require the agency, after notice and comment, to determine whether new data or experiences undermine the original preemption determination. Finally, by codifying *Skidmore* deference, Congress incentivizes agencies to develop and rely upon their technical and administrative expertise when engaging in agency preemption. After all, courts defer under *Skidmore* only if the agency evidences “a body of experience and informed judgment.”¹⁷⁰ Without developing and relying upon expertise, in short, the agency is entitled to no deference at all. Indeed, after Dodd-Frank, OCC officials have stated that they are “aware that proffering evidence in support of preemption enhances the likelihood that a court will adopt its preemption conclusions.”¹⁷¹

2. *The CFPB and General Capture Concerns*

Aside from addressing the OCC’s preemption in Dodd-Frank, Congress sought, among other things, to mitigate broader regulatory-capture concerns by creating the CFPB. To that end, Congress reorganized much of the federal administrative state as it related to con-

¹⁶⁶ See Sharkey, *supra* note 124, at 578, 580–82 (illustrating the discussion of the agency reference model with an analysis of the revisions to the 2004 OCC Visitorial Powers Rule).

¹⁶⁷ *Id.* at 581 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1044(a) (2010)).

¹⁶⁸ See Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239, 253–54, 273–76 (1986) (comparing review of policy judgments under the arbitrary-and-capricious standard with review of factual findings under the substantial-evidence standard).

¹⁶⁹ 12 U.S.C. §§ 25b(d)(1) & (g) (2012).

¹⁷⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (referring to the “rulings, interpretations and opinions” of the Administrator of the Wage and Hour Division, U.S. Department of Labor).

¹⁷¹ Sharkey, *supra* note 124, at 582.

sumer-financial protection. As part of its efforts, Congress revealed its awareness and acceptance of *Chevmore* (and *Chevron* in particular) by tinkering with several existing federal consumer-protection statutes.

To address capture and conflict-of-interest concerns, Congress established the CFPB.¹⁷² Although the OCC continues to have a consumer-protection mission, the CFPB has power to protect consumers generally when the OCC fails to do so (and vice versa).¹⁷³ Indeed, Rachel Barkow has argued that Congress used several mechanisms to protect the CFPB itself from capture, including protecting the CFPB director from removal from office, granting the CFPB an independent source of funding, allowing competing sovereigns and agencies to enforce consumer-protection law, and providing tools for the CFPB to gain political support.¹⁷⁴ The CFPB, thereby, serves as one of several backstops to ensure that powerful interest groups do not stymie consumer protection.¹⁷⁵

Congress provided a specific role for the CFPB in the OCC's preemption decisionmaking. The Comptroller must consult with and consider the views of the CFPB.¹⁷⁶ The CFPB's participation renders it more likely that the OCC has the input of an agency with a charge focused on consumers, as opposed to national banks' safety, that can provide (or alert consumer-protection advocates to provide) the OCC with additional germane data to help the OCC make a more informed preemption decision.¹⁷⁷ More cynically, the CFPB's presence and ability to alert Congress may also help focus the agency on the admin-

¹⁷² See, e.g., Barkow, *supra* note 34, at 72–73 (“Consumer groups wanted a new agency to protect consumer interests because the existing banking regulators with consumer protection responsibilities largely had ignored those interests and focused instead on their duties to ensure the safety and soundness of financial institutions.”); Wilmarth, *Expansion of State Authority*, *supra* note 128, at 951 (“Congress designed CFPB to be especially resistant to capture by the financial services industry, because members of Congress and analysts agreed that the industry had exercised excessive influence over bank regulators during the period leading up to the financial crisis.”).

¹⁷³ See Barkow, *supra* note 34, at 76–77 (noting that the CFPB has primary enforcement responsibility but that other agencies can act if the CFPB declines to bring enforcement actions).

¹⁷⁴ See Barkow, *supra* note 34, at 72–78 (describing the measures taken to insulate the CFPB).

¹⁷⁵ See *id.* (discussing how interagency and intersovereign competition can limit regulatory capture).

¹⁷⁶ 12 U.S.C. § 25b(b)(3)(B) (2012).

¹⁷⁷ See Barkow, *supra* note 34, at 52 (“Consultation may bring more experts into the process and improve decision making by presenting competing viewpoints.”).

istrative record and thus temper the significant bias and capture concerns that can undermine expert decisionmaking.¹⁷⁸

In establishing the CFPB, Congress also reorganized agencies' regulatory authority under various federal statutory schemes that implicate consumer finance and, in the process, considered the reorganization's effects on judicial deference. Congress transferred "consumer financial protection functions" over several statutory schemes, including the Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), and the Equal Credit Opportunity Act (ECOA), to the CFPB from other federal agencies.¹⁷⁹ Congress gave the CFPB exclusive authority to prescribe rules regarding federal consumer-financial laws.¹⁸⁰ But Congress continued to permit other agencies to enforce these and other statutes. For instance, the Federal Trade Commission (FTC) continues to have the power to enforce the FCRA, and the CFPB can enforce the FTC's rules that concern unfair and deceptive trade practices under the FTCA.¹⁸¹

While establishing federal agencies' concurrent jurisdiction over multiple statutory schemes, Congress considered which agencies would have interpretive primacy. Whether any agency can receive *Chevron* deference when more than one agency administers a statute is a perennial issue in administrative law.¹⁸² Congress addressed this

¹⁷⁸ See *id.* at 21–22 (discussing how capture impedes expert decisionmaking); *id.* at 62 (noting that interagency lobbying can neutralize interest-group influence).

¹⁷⁹ 12 U.S.C. § 5581(b) (transferring power from the Federal Reserve Bank Board of Governors, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Trade Commission to the CFPB); see also Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1145–46 (2012) (discussing redistribution of administrative power in light of the CFPB's establishment). The Federal Trade Commission's implementation powers under the FCRA were transferred by § 1088(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1367, 2086 (2010) (codified at 15 U.S.C. 1681s(e)(7)). The Federal Reserve Board's enforcement authority over TILA and ECOA were transferred by § 1100A (codified in scattered sections of 15 U.S.C.) and § 1085 (codified at 15 U.S.C. 1691(c)(a)(9)), respectively. *Id.*

¹⁸⁰ 12 U.S.C. § 5512(b)(4)(A).

¹⁸¹ Mercedes Kelley Tunstall, *How the CFPB and the FTC Interact (Part 1)*, CFPB MONITOR (July 7, 2011), <http://www.cfpbmonitor.com/2011/07/07/how-the-cfpb-and-the-ftc-interact-part-i/>.

¹⁸² See, e.g., Duffy, *supra* note 24, at 207–09 (discussing the "multiple agency exception"); Merrill & Hickman, *supra* note 4, at 849 n.85 (collecting cases indicating the Supreme Court has not resolved whether *Chevron* applies when multiple agencies administer the same statute); see also *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 146–47, 152–53 (1991) (holding that, because of the Secretary of Labor's expertise, courts should defer to the Secretary, not OSHRC, when both proffer reasonable, but conflicting, regulatory interpretations); Abbe Gluck, *Tax Subsidies Upheld on ObamaCare Exchanges—Judge Friedman Finds the ACA "Clear"*, BALKINIZATION

issue several times in Dodd-Frank and provided different instructions. To do so, it relied upon what I call “sole-authority provisions,” i.e., provisions that instruct courts how to treat multiple administering agencies for purposes of judicial deference. These novel provisions instruct the courts to treat one or more agencies as having sole authority to enforce a statute, thereby rendering them eligible for *Chevron* deference. For instance, Congress directed courts to defer to the CFPB’s interpretations concerning federal consumer-financial protection laws and TILA as if it were the only agency authorized to “apply, enforce, interpret, or administer the provisions of such Federal consumer financial law”¹⁸³ and TILA.¹⁸⁴ In contrast, Congress instructed courts to treat *any* federal agency that Congress authorized to “apply, enforce, interpret, or administer the provisions of” the FCRA or the ECOA as the sole administering agency, meaning that many agencies are eligible for *Chevron* deference under these statutes.¹⁸⁵ As another example, despite giving both the CFPB and the Federal Reserve Board the power to administer the Electronic Fund Transfers Act, Congress clarified that the statutory provisions were not intended to alter judicial deference as to the provisions of the Act for which each agency can prescribe regulations.¹⁸⁶

III

WHAT *CHEVMORE* CODIFICATION MEANS

Dodd-Frank’s history, context, *Skidmore* codification, and other judicial-deference provisions inform the delegation theory that undergirds *Chevron*. First, contrary to some scholars’ views, Dodd-Frank offers significant evidence that Congress is aware of *Chevmore* and considers it when drafting. Second, Dodd-Frank provides some evidence that Congress has acquiesced to *Chevmore*. Third, Dodd-Frank suggests that Congress thinks, contrary to the Supreme Court’s recent declaration, that more than rulemaking authority should be necessary for *Chevron* deference.

BLOG (Jan. 15, 2014, 1:48 PM), <http://balkin.blogspot.com/2014/01/tax-subsidies-upheld-obamacare.html> (noting the ongoing debate over deference when more than one agency administers a statutory scheme and discussing the significance of a recent district court’s conclusion that Congress intended to delegate the implementation of the Affordable Care Act to both the IRS and HHS).

¹⁸³ 12 U.S.C. § 5512(b)(4)(B).

¹⁸⁴ 15 U.S.C. § 1604(h).

¹⁸⁵ 15 U.S.C. § 1681s(e)(2); *id.* § 1691b(g).

¹⁸⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1084, 124 Stat. 1367, 2082 (2010) (codified as amended at 15 U.S.C. § 1693b(e)).

A. Awareness of and Reliance upon *Chevmore*

Contrary to some scholars' suggestion that Congress does not think of *Chevmore* when it drafts legislation,¹⁸⁷ Dodd-Frank reveals that Congress knew of *Chevmore* and relied upon it as a background norm when drafting. Although this conclusion is consistent with empirical studies of congressional drafters' views,¹⁸⁸ Dodd-Frank is important because it provides an example of congressional awareness in enacted legislation. Congress's awareness of *Chevmore* is perhaps most evident through its codification of *Skidmore's* factors for judicial review of OCC-preemption.¹⁸⁹ But Congress revealed its awareness in other ways, too. It instructed courts to apply their normal deference regimes when reviewing the OCC's other interpretations of the NBA.¹⁹⁰ Legislative history indicates that Congress expected *Chevron* to apply to the OCC's nonpreemption decisions and that *Skidmore's* codification was intended to alter what Congress understood as the default deference regime.¹⁹¹ And in creating the CFPB and reassigning administrative responsibility throughout the federal administrative state, Congress specifically stated which agencies were to be treated as having sole administrative authority (and thereby become eligible for *Chevron* deference) under various federal statutes, including some that predated Dodd-Frank.¹⁹² With these sole-authority provisions, Congress not only showed its general awareness of *Chevron*, but it also revealed its understanding of relatively arcane triggering conditions for *Chevron's* application.

¹⁸⁷ See *supra* Part I.B.1 (discussing the scholarly view that Congress has no intent as to interpretive primacy); see also Bressman, *supra* note 26, at 208 (“Writing in response to *Mead*, [some scholars] asserted that Congress probably does not think about the delegation of interpretive authority at all . . .”).

¹⁸⁸ See Gluck & Bressman, *supra* note 5, at 995–96 (noting that congressional staffers were very familiar with *Chevron*, which influenced drafting precision); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 601 (2002) (“[I]ndeed, respondents [staffers for the Senate Judiciary Committee] volunteered several interpretive principles: the rule of lenity, the avoidance of constitutional questions, and the *Chevron* doctrine, for example.”).

¹⁸⁹ See *supra* notes 150–53 and accompanying text (noting that the factors to be considered under *Skidmore* are almost identical to those codified by Congress in 12 U.S.C. § 25(b)(5)(A)).

¹⁹⁰ 12 U.S.C. § 25(b)(5)(B).

¹⁹¹ See *supra* notes 159–62 and accompanying text (discussing text included in the relevant Senate committee report indicating that the standard of review for preemption decisions should conform to the lesser *Skidmore* standard, while other types of decisions should be evaluated under the prevailing *Chevron* doctrine).

¹⁹² See *supra* notes 183–86 and accompanying text (explaining the challenge of determining interpretive primacy and offering, as an example, statutory language in 12 U.S.C. § 5512(b)(4)(B) directing courts to treat the CFPB as if it had sole authority to enforce the Truth in Lending Act).

Yet, should one assume that Congress drafts with *Chevmore* as the background principle “[i]n the vast majority of cases”?¹⁹³ The answer depends on when Congress enacted other statutes. Dodd-Frank does not provide insight on Congress’s state of mind before 2010. And, except as described below, Dodd-Frank does not tell us—in response to Beermann’s criticism that Congress may not think about the “particulars of the *Chevron* doctrine”¹⁹⁴—what Congress thinks about any specific delegation issue in any run-of-the-mill statute. But the legislative history and sole-authority provisions demonstrate that Congress now recognizes *Chevmore* as a legislative backdrop, and no reason exists to think that Congress would apply that backdrop only to Dodd-Frank or financial regulation. Nor is there any good reason to think that Congress forgot about *Chevmore* immediately after Dodd-Frank’s enactment. Congress’s knowledge of *Chevron* and use as a background drafting principle in Dodd-Frank weakens the argument that Congress does not think about *Chevmore* at all and, ultimately, makes it more difficult to dismiss the delegation theory out of hand.¹⁹⁵

B. Acquiescence to *Chevmore*

Dodd-Frank suggests that whatever its intent when *Skidmore* and *Chevron* were decided, Congress has accepted *Chevmore*. First, Congress codified *Skidmore*, blessing that doctrine’s four-factor deference regime in the OCC-preemption context. Second and more importantly, Congress went out of its way to preserve judicial-deference regimes for nonpreemption decisions in the savings clause in 12 U.S.C. § 25b(b)(5)(B). Indeed, the savings clause applies broadly to “the meaning and interpretation [of the NBA] or other Federal laws”¹⁹⁶ and does not undermine *Chevron*’s inference of implied delegations based on ambiguities and gaps. Although the statutory provisions did not tell courts specifically how to defer to agency action, Dodd-Frank’s legislative history reveals that Congress understood that *Chevron* was the default regime and did not intend to alter its applicability in nonpreemption contexts. Nothing in the legislative history, including the dissenting statements from the Senate, reveals any displeasure with the *Skidmore* or *Chevron* regimes themselves. Instead, the dissenting senators would have merely preferred *Chevron*

¹⁹³ Scalia, *supra* note 4, at 517.

¹⁹⁴ Beermann, *supra* note 4, at 842.

¹⁹⁵ See Bressman, *supra* note 26, at 2049 (arguing that delegation critics have felt unduly “free to disregard the fiction of congressional delegation” because they have not appreciated how its inquiry is similar to other inquiries into congressional intent).

¹⁹⁶ 12 U.S.C. § 25b(b)(5)(B).

to apply to all of the OCC's decisions, including preemption decisions.¹⁹⁷ Third, when establishing the CFPB, Congress considered judicial deference in the context of new and existing consumer-protection laws. By indicating multiple times whether courts should deem one or more agencies as the only administering agency for purposes of judicial deference, Congress addressed a condition for *Chevron* deference. In doing so, Congress demonstrated that it intended, in each instance, for at least one agency (and sometimes several) to be eligible for judicially created *Chevron* deference. In none of those instances did it deprive all agencies of *Chevron* deference. Dodd-Frank's provisions suggest that Congress generally accepts judicial deference to agency interpretations, approves of *Skidmore's* factors, and uses *Chevron* as a background norm when drafting.

This apparent acquiescence is important to the delegation theory. The delegation theory rests on congressional intent. Because Congress has remained silent as to its intent for interpretive primacy since *Chevron*,¹⁹⁸ the theory has rested primarily on inferences from that silence¹⁹⁹ or from political theory.²⁰⁰ Dodd-Frank moves us one step closer to realizing "actual" congressional intent by relying on inferences from enacted judicial-review provisions and their legislative history. Although such inferences are not as certain as enacted legislation, they are the best evidence that courts have. The inferences here do not address whether *Chevron* or *Skidmore* were correct understandings of congressional intent as an original matter,²⁰¹ but they do suggest that judicial deference to agency interpretations largely corresponds to current congressional intent, even if Congress's acceptance comes by acquiescing to what it knows the Court is likely to do.²⁰² If so, the delegation theory has a stronger theoretical foundation going forward, and, as Abbe Gluck and Lisa Schultz Bressman have noted, congressional awareness of *Chevron* "might be important if the Court desires to tweak those doctrines based on communi-

¹⁹⁷ See *supra* note 162 and accompanying text (explaining that the senators opposing Dodd-Frank believed the lesser *Skidmore* standard would create legal uncertainty with respect to preemption decisions).

¹⁹⁸ See, e.g., Barron & Kagan, *supra* note 25, at 220 (discussing the "unreliability of attempting to define *Chevron* doctrine through a search for congressional intent").

¹⁹⁹ See Merrill & Hickman, *supra* note 4, at 870–72 (assessing the theory of *Chevron* as "implied congressional intent").

²⁰⁰ See Bressman, *supra* note 26, at 2011–12 & n.11 (referencing political scientists' theories of delegation to agencies).

²⁰¹ See *supra* Part I.B.2 (discussing criticism of *Chevron* as an original matter).

²⁰² See Gluck & Bressman, *supra* note 5, *passim* (referring to "feedback loops" between Congress and the courts); *id.* at 995–96 (noting *Chevron* presents a partial feedback loop because of how it affects congressional drafting).

cation with Congress.”²⁰³ Ultimately, congressional acquiescence suggests that *Chevron* is not the fiction that some have assumed.²⁰⁴

Congress’s joint use of the APA’s “substantial evidence” standard and *Skidmore* provides further, yet limited, support for congressional acquiescence. A key challenge to *Chevmore*, and to *Chevron* in particular, is that these judicially created doctrines are inconsistent with either the APA’s call for courts to “decide all relevant questions of law”²⁰⁵ or prohibition on agencies issuing “substantive rule[s] . . . except within jurisdiction delegated to the agency and as authorized by law.”²⁰⁶ Cass Sunstein and Jack Beermann have argued that judicial interpretive primacy in the APA makes sense because of Congress’s concerns over agency bias and the powers of what Congress views as “competing entities.”²⁰⁷ Moreover, scholars have debated how (if at all) to reconcile the APA’s “substantial evidence” or “arbitrary and capricious” review with *Chevron*’s second step (review of agency interpretations for reasonableness).²⁰⁸ The OCC-preemption provisions suggest that, despite concern over the relationship between the APA and *Chevmore*, Congress does not find the purported tension meaningful. In the same section of Dodd-Frank, Congress instructed courts to apply one of the *Chevmore* standards and one of the APA standards when reviewing the same administrative decision, all without altering judicial-deference regimes (such as *Chevron*, as Dodd-Frank’s legislative history indicates). Congress appears to find *Chevmore* and the APA judicial-review provisions complementary because both provide judicial oversight of agency decisionmaking.

But one shouldn’t read too much into Congress’s use of both standards of review. *Skidmore*’s codification likely removes any doubt over whether *Skidmore* is consistent with the later-enacted APA

²⁰³ *Id.* at 1012.

²⁰⁴ See *supra* Part I.B.1 (pointing to critics who view congressional consideration of *Chevron* as illusory).

²⁰⁵ 5 U.S.C. § 706 (2012).

²⁰⁶ *Id.* § 558(b); see Bressman, *supra* note 26, at 207–28 (discussing scholarly debate over *Chevron*’s consistency with the preexisting APA); Duffy, *supra* note 24, at 197–98 (discussing APA provisions’ consistency with *Chevron* deference).

²⁰⁷ Beermann, *supra* note 4, at 799; see Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2090–91 (1990) (“Congress has often believed that the pressures imposed on administrators lead them to regulate with insufficient vigor.”).

²⁰⁸ See, e.g., Melissa M. Berry, *Beyond Chevron’s Domain: Agency Interpretations of Statutory Procedural Provisions*, 30 SEATTLE U. L. REV. 541, 565 n.170 (2007) (presenting scholarly and judicial debates on the relationship between step two of *Chevron* and the APA’s arbitrary-and-capricious standard); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 325–26 (1996) (arguing *Chevron* and APA provisions are “analogous” because both evaluate outcomes).

because Congress instructed courts to apply *Skidmore* and the APA's standard of review to the same issue. This result is not surprising because under both the APA and *Skidmore*, courts retain interpretive primacy.²⁰⁹ Moreover, Congress's reference to *Chevron* and an APA standard in the same statutory section suggests that Congress also does not find the tensions between *Chevron* and the APA meaningful. But Congress's actions do not reveal how *Chevron* and the seemingly inconsistent APA provisions that call for courts to review issues of law are concordant.²¹⁰ And it does not reveal whether *Chevron* and the APA standards of review are distinct analyses to be considered individually or rather overlapping inquiries (in which, for instance *Chevron*'s step-two reasonableness inquiry might simply be arbitrary-and-capricious review).²¹¹ But these limitations do not undermine the central claim that Congress does not appear troubled by *Chevron*'s perceived inconsistencies with the APA and has generally acquiesced to the judicially created *Chevron* doctrines.

C. More than Formality for Congressional Delegation

Rulemaking does not appear to be the delegation talisman that some had hoped. The Supreme Court, despite its prior decisions to the contrary, recently suggested in *City of Arlington v. FCC* that an agency's general rulemaking power is sufficient to establish that Congress intended the agency to address all ambiguities within the statute that it administers (including matters concerning the agency's jurisdiction) and to justify *Chevron* deference.²¹² But Dodd-Frank undermines this rule—whether *City of Arlington* intentionally or negligently suggested such a rule. In Dodd-Frank, Congress divorced express delegation of authority to make a particular decision (even through formalized proceedings, such as notice-and-comment rulemaking) from *Chevron* deference. In fact, Congress may have required the most formal agency procedures under the APA—formal adjudication or rulemaking—for preemption decisions because it

²⁰⁹ See *supra* note 52 and accompanying text.

²¹⁰ See *supra* note 79 and accompanying text (arguing that Congress, through the APA, revealed its preference for interpretive primacy to remain with the courts).

²¹¹ Judge Harry Edwards argues, for example, that arbitrary-and-capricious review is an additional inquiry after *Chevron*'s two steps. Beermann, *supra* note 4, at 806 & nn.105–06 (citing *Int'l Bhd. of Elec. Workers v. ICC*, 862 F.2d 330, 338 (D.C. Cir. 1988)). Ron Levin, on the other hand, views *Chevron*'s step two as encompassing arbitrary-and-capricious review. Beermann, *supra* note 4, at 806–07 & n.107 (citing Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1276 (1997)).

²¹² *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013); see also Duffy, *supra* note 24, at 202 (arguing that *Chevron* should apply as a corollary of delegated rulemaking power).

called for proceedings “on the record.”²¹³ It expressly delegated the preemption question to the OCC²¹⁴ and bestowed general rulemaking power upon it.²¹⁵ Yet, by providing less deferential judicial review than would otherwise apply, Congress gave courts interpretative primacy.²¹⁶ Dodd-Frank suggests that delegation to administer a statute generally or to address a particular regulatory issue, even through rulemaking or other formal procedures, should not by itself be understood as Congress bestowing interpretive primacy upon agencies.

Dodd-Frank’s context, legislative history, and statutory text all suggest that Congress delegates interpretive primacy only when the agency is not captured or subject to meaningful conflicts of interest. Congress stripped the OCC’s preemption decisions of *Chevron* deference after years of questionable rulings during which the banking industry had captured the agency and the agency conceded its conflict of interest. The legislative history referred to this troubling behavior as grounds for the preemption provisions.²¹⁷ The preemption provisions’ text—through its use of administrative procedures, substantial-evidence review, and consultation requirements—also reveals that Congress sought to ensure that agency-preemption decisions are

²¹³ Sections 553 and 554 of the APA require formal proceedings when Congress requires agency action “on the record after opportunity for an agency hearing.” 5 U.S.C. §§ 553(c), 554(a) (2012). Dodd-Frank requires findings “on the record of the proceeding.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1044, 124 Stat. 1376, 2104–06 (2010). Because the Supreme Court has strictly interpreted the APA triggering language for formal proceedings, it is not certain whether Dodd-Frank requires the OCC to proceed through formal proceedings. See *United States v. Fla. E. Coast Ry.*, 410 U.S. 224, 238 (1973) (holding that a statutory requirement for action “after hearing” did not require formal proceedings). But the Court has indicated that “on the record”—the phrase used in Dodd-Frank—is a sufficient signal to reveal Congress’s intent for formal proceedings. See *United States v. Allegheny-Ludlum Steel Co.*, 406 U.S. 742, 757 (1972) (“Sections 556 and 557 need be applied only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be ‘on the record.’” (internal quotation marks omitted)). I have uncovered no illuminating legislative history.

²¹⁴ 12 U.S.C. § 25b(B)(3)(A) (2012). Section 25b(B) also expressly allows courts, too, to provide preemption rulings. *Id.* § 25b(B)(5). Although this provision suggests that the doctrine of primary jurisdiction should not apply to preemption, it is not meaningful to interpretive primacy because the provision of *Skidmore* deference necessarily gave the courts interpretive primacy.

²¹⁵ *Id.* § 93a.

²¹⁶ See Sharpe, *supra* note 136, at 225 (discussing the meaning of *Skidmore*’s codification). The Senate Report demonstrates that the Senate understood that it had lowered what it perceived to be the normal deference regime. See S. REP. NO. 111-176, at 176 (2010) (noting first that “[s]ection 1044 clarifies that nothing affects the deference that a court may afford to the OCC under the *Chevron* doctrine when interpreting Federal laws administered by that agency,” and then describing a less deferential standard for preemption decisions).

²¹⁷ See *supra* notes 163–64 and accompanying text (discussing Congress’s grounds for the relaxed deference standard).

based on germane factors and expertise, not on improper considerations that derive from capture and conflicts of interest.²¹⁸ Moreover, one of Dodd-Frank's key objectives was to overcome regulatory capture as to consumer-financial protection generally, as the creation of the CFPB as an independent agency and the reorganization of federal administrative powers attest. Thus, Congress denied the OCC interpretive primacy as to preemption matters, despite express delegation of rulemaking authority to address a specified question, because of capture-and-conflict concerns that undermined agency expertise.

Yet three related questions emerge. First, should Congress's action in Dodd-Frank have meaning for *Chevron* in other statutory contexts or merely serve as an express exception to a default rule? Second, even if Congress's action in Dodd-Frank has broader significance, is the *Mead* standard likely to honor congressional intent in more instances than the *City of Arlington* rule? And third, are courts competent to inquire into regulatory capture? I conclude, respectively, that Dodd-Frank's *Chevron* codification has broader significance; that, despite the difficulty of the issue, *Mead* is preferable; and that courts are competent to consider regulatory capture, even if they are not always more competent than Congress.

1. *Dodd-Frank's Broader Application as to Chevron*

The argument that Dodd-Frank's treatment of rulemaking and interpretive primacy is nothing more than a fluke is significant. Congress was focused on a specific type of decision (preemption) by one particular agency (OCC) after its controversial history as to those decisions. It did not deprive the OCC of *Chevron* deference as to other decisions under the NBA. That Congress only rarely takes similar actions (against the SEC, the CFTC, and the OCC) may reveal that Congress clarifies when it wants to pull agencies away from *Chevron*'s comforting arms. In short, the argument is that Dodd-Frank's codification of *Skidmore* merely proves the existence of a general rule: that Congress, unless it expressly provides otherwise, wants *Chevron* to apply when agencies have rulemaking power.

Despite this reasonable argument, it is better to consider Dodd-Frank as a window into Congress's broader conception of when *Chevron* should apply (in the absence of an express statement from Congress). This is so because, even if Dodd-Frank punished a specific recalcitrant agency, Dodd-Frank provides perhaps the best indication of *why* Congress punished this agency by taking away its interpretive

²¹⁸ See *supra* notes 166–71 and accompanying text (discussing Congress's imposition of more stringent preemption procedures on the OCC).

primacy. In other words, Dodd-Frank provides our best evidence of Congress's "actual" intent as to the propriety of interpretive primacy and thus is highly relevant to *Chevron's* delegation theory. If *Chevron* means what it says about the delegation theory (and is not fraudulent, as some have contended), then courts should "attend carefully to the signals Congress sends about its interpretive wishes [concerning *Chevron*]."219 Even if it is not as clear as a statute of general application,220 Dodd-Frank provides Congress's most pronounced guidance on when it wants *Chevron* to apply and therefore should have more salience than inferences from silence and political theory. Dodd-Frank reveals that Congress does not intend agencies to receive *Chevron* deference when their decisions are unlikely to be products of expertise. This concern for agency expertise makes sense because Congress turns to agencies precisely because of their expertise.221 The capture-and-conflict concerns that surrounded the OCC's preemption decisions are not unique to the OCC or to only a certain category of decisions; instead they apply to the entire federal administrative state and affect all agencies' use of expertise. An agency's consistent use of agency expertise, in other words, should be a necessary condition for *Chevron* deference aside from any inquiry into the procedures by which the agency acts.

Indeed, presuming that rulemaking authority always reveals Congress's intent to bestow interpretive primacy on agencies is inconsistent with other observations. For instance, congressional staffers have indicated that giving agencies rulemaking power is always or often relevant, though not dispositive, to the question of whether Congress intended to grant interpretive primacy.222 It is likewise consistent with Barron and Kagan's insight that congressional delega-

219 Merrill & Hickman, *supra* note 4, at 836.

220 See Garrett, *supra* note 5, at 2661–62 (discussing difficulties in drafting judicial-review statutes of general application).

221 See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 681 (1996) ("Congress's decision to commit lawmaking power to agencies vests substantial regulatory authority in specialized bodies with knowledge, expertise, and experience that generalist courts lack. Agencies may therefore have insights into regulatory history, context, or purpose that may not be readily apparent to even the most seasoned federal judge."); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 174 (2013) ("[O]ne need only recall the reasons why Congress creates administrative agencies . . . in the first place: Congress lacks the time and expertise to make every decision itself . . .").

222 See Gluck & Bressman, *supra* note 5, at 999 (stating that 88% of respondents confirmed that providing notice-and-comment rulemaking power is always or often germane to whether Congress intended an agency to have interpretive power subject to *Chevron* deference).

tion of authority and judicial review are distinct matters.²²³ And it makes sense for Congress to give courts interpretive primacy over decisions tainted by capture. By doing so, Congress can use courts to monitor agencies and reduce principal-agency costs as agencies administer a statutory scheme.²²⁴ In short, there is little reason to think that Congress's concern about capture (and expertise) was or should be a one-time affair.²²⁵

Dodd-Frank's context and legislative history are important in uncovering congressional intent. They allow courts to understand what values and concerns led Congress to deny the OCC interpretive primacy—namely, the importance of agencies using their expertise and the significant conflicts that may lead agencies to act without doing so. These values allow courts to view Dodd-Frank as a manifestation of Congress's likely intent as to interpretive primacy generally. In contrast, courts should not draw any broadly applicable inferences from Congress's disparate use of sole-authority provisions because the statutory text, the legislative history, and the context of those revisions provide no guide as to why Congress acted as it did in awarding interpretive primacy.

To be sure, Dodd-Frank is merely one expression of congressional intent whose broader meaning would benefit from similar expressions. But for the reasons discussed *infra* in Part IV.A, awaiting a statute of general application would likely be in vain. Congress is unlikely and unable to codify the substance of judicial deference with specificity. The best expression that Congress can provide of its intent as to interpretive primacy must come from specific applications. For

²²³ See Barron & Kagan, *supra* note 25, at 238 (“That Congress has delegated power to a named person within an agency does not mean that Congress has instructed courts to defer to that person’s actions”); *id.* at 218 (“The power to make binding substantive law, after all, involves much more than the power to make controlling interpretations of ambiguous statutory terms; to deny the agency the latter is in no way to make meaningless the grant of the former.”); see also Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51, 85 (noting that Congress may separate lawmaking from interpretive power, such as when it intends an agency to have interpretive primacy despite lacking rulemaking authority).

²²⁴ See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1187 (2012) (“[W]henver Congress delegates authority to an agency, the delegation inevitably provides the agency with discretion, which creates a risk of drift away from the preferences of the lawmakers who enacted the delegation.”).

²²⁵ Congress’s unprecedented use of *Skidmore* deference in Dodd-Frank does not necessarily reveal Congress’s intent for *Chevron* to apply in all other instances. Such a construct would not fit well with *Chevron* generally. Although Congress’s express delegations are “rare,” Garrett, *supra* note 5, at 2642, courts, instead of inferring that Congress does not delegate in all other circumstances in which it is silent, search for (and find) implied delegations to which *Chevron* applies.

Chevron to be more than a fraudulent exercise that eschews the best evidence of congressional intent, courts must consider the hints that Congress gives in specific applications and draw larger inferences when possible, as with Dodd-Frank. If Congress provides more dialogue, as I suggest it should *infra* in Part IV.B, courts will have better information from which to glean congressional intent and perhaps reevaluate Dodd-Frank's broader meaning.

2. Mead as a Better Default Regime

The much more difficult question is whether selecting *Mead* or *City of Arlington* as a default regime would more often realize Congress's intent as to *Chevron*. I conclude, on balance, that *Mead* is preferable. Not only is *Mead*'s more nuanced approach consistent with all evidence of congressional intent, but the benefits of *City of Arlington*'s rule-based approach are overstated. Although there is a significant argument that *City of Arlington* would be a better default rule if Congress would be more likely to react if the court gets the delegation question wrong, this result is far from clear.

As a preliminary matter, *City of Arlington*, despite its rule-based approach, will not render the matter of interpretative primacy straightforward. This is because whatever virtue *City of Arlington*'s rule has at *Chevron*'s step zero (i.e., the determination of whether *Chevron* should apply at all) is generally lost during *Chevron*'s latter two steps (i.e., determining whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable). Justice Scalia, the Court's most consistent proponent of rules at step zero, readily concedes that he just moves his searching textual inquiry to step one because he is more likely to find the statute clear.²²⁶ In some cases, he and some of his colleagues also consider context, legislative history, and the nature of the question presented during step one.²²⁷ His colleagues, too, have also repeatedly turned to such considerations and legislative history at step two.²²⁸ In other words, even if *City of*

²²⁶ See Scalia, *supra* note 4, at 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."); cf. HUD v. Rucker, 535 U.S. 125, 132–33 (2002) (noting that courts should not consider legislative history if text is unambiguous); Jellum, *supra* note 81, at 730 (arguing that the Court's determination of whether the statute is ambiguous has turned from a purposive inquiry to one that is "textually based").

²²⁷ See generally FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 141–43, 145–56, 159–60 (2000) (deciding that Congress clearly spoke on the matter at issue after considering text, legislative history, and significance of issue).

²²⁸ See, e.g., Holly Farms Corp. v. NLRB, 517 U.S. 392, 402 n.8 (1996) (considering legislative history at step two).

Arlington renders it easier to tell when *Mead*'s concern over how an agency acts is satisfied, it does not tell us whether an ambiguity exists for which delegation is inferred or whether an agency's interpretation is permissible. A searching inquiry at any of these steps undermines the values of a clear rule when agencies, courts, and Congress cannot easily determine when courts will defer to agency action.

Furthermore, because *Chevron* can apply even when agencies act informally,²²⁹ courts are required to engage in a searching inquiry to determine whether Congress intends an agency to have interpretive primacy in those contexts,²³⁰ revealing that the rulemaking-authority-as-interpretive-primacy rule does not resolve when *Chevron* should apply in all cases anyway.²³¹ Thus, suggesting that courts look at more than an agency's rulemaking authority does not render interpretive primacy any (or at least much) less certain than it would be otherwise. The square footage of "*Chevron* space"²³² is still impossible to determine with certainty.

In fact, some indeterminacy under a standard-based approach should be expected when trying to identify congressional intent as to the numerous provisions under the entire U.S. Code. To be sure, looking beyond an agency's rulemaking power to its expertise will likely present determinacy problems, increase judicial-decision

²²⁹ See *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001) (noting that the absence of rulemaking authority is not dispositive as to whether *Chevron* deference should apply (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995))).

²³⁰ See, e.g., *Durr v. Shinseki*, 638 F.3d 1342, 1347–48 (11th Cir. 2011) (providing extended discussion of whether *Chevron* or *Skidmore* deference applied to certain Department of Veterans Affairs handbooks).

²³¹ See Bressman, *supra* note 29, at 1445 (discussing difficulties in determining when agencies will receive *Chevron* deference for informal agency interpretations); see also *Katsen v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335–36, 1440 n.5 (2011) (citing, over Justice Scalia's objection, *Mead* for the proposition that deference may be proper in the absence of rulemaking authority); White, *supra* note 223, at 86–87 (noting that the absence of rulemaking powers does not resolve the question of deference). Justice Scalia has argued that the formality of agency proceedings should not matter for *Chevron* deference. *Mead*, 533 U.S. at 243 (Scalia, J., dissenting) (explaining that there is no necessary connection between formality of agency proceeding and the power to resolve questions of law authoritatively). His rule in *City of Arlington* that the mere bestowal (but perhaps not the use) of general rulemaking power opens *Chevron*'s gates is consistent with his prior pronouncements. But given that the other eight Justices rejected his position in *Mead*, one would expect the rest of the Court to care whether an agency uses its delegated rulemaking or formal adjudication authority. *City of Arlington* puts that expectation to the test. The agency had acted through what the Fifth Circuit held were informal adjudications (although with additional notice-and-comment opportunities to a declaratory ruling). *City of Arlington v. FCC*, 668 F.3d 229, 240–41 (5th Cir. 2012), *aff'd*, 130 S. Ct. 1863 (2013). Under *Mead*, the agency would generally not have received *Chevron* deference, see *Mead*, 533 U.S. at 230, because it did not use its rulemaking authority.

²³² Strauss, *supra* note 51, at 1145.

costs,²³³ and perhaps sacrifice some uniformity in the courts of appeals.²³⁴ But divining legislative intent is rarely a tidy affair, especially legislative intent as to disparate administrative interpretations for the entire federal administrative state.²³⁵ If *Chevron* is a product of congressional intent, it is hardly surprising that Congress's intent as to judicial oversight and agency authority may vary and that *Chevron*'s application cannot be reduced to an easy-to-apply rule. Were it otherwise, the hunt for congressional intent would almost certainly be fraudulent.

And the indeterminacy fears may be overstated at any rate. In most instances, rulemaking authority and expertise will go hand-in-hand because agencies usually have expertise to interpret the statute or portions of the statute that they administer. Indeed, with the sole-authority provisions in Dodd-Frank, Congress gave the agency with rulemaking authority (usually the CFPB, which Congress sought to render resistant to regulatory capture²³⁶) the ability to obtain judicial deference in each instance.²³⁷ This typical relationship between rulemaking and expertise permits Congress to signal its delegation of interpretive authority²³⁸ and allows courts to monitor for relatively rare conflict-and-capture concerns that may arise after Congress bestows rulemaking power. Dodd-Frank points to only limited circumstances (e.g., significant financial conflicts of interest,²³⁹ history of

²³³ See Garrett, *supra* note 5, at 2646 (noting that Justice Breyer's multifaceted view of *Chevron* may increase judicial-decision costs).

²³⁴ See Merrill & Hickman, *supra* note 4, at 861 (referring to the uniformity value of *Chevron*).

²³⁵ See Barron & Kagan, *supra* note 25, at 223 ("Congress's view on deference (were Congress to consider the matter) likely would hinge on numerous case-specific and agency-specific variables . . .").

²³⁶ See Barkow, *supra* note 34, at 72–78 (discussing how Congress sought to insulate the CFPB from capture).

²³⁷ See, e.g., 12 U.S.C. § 5512(b)(4)(A) (2012) (granting CFPB rulemaking authority over federal consumer-financial law); 12 U.S.C. § 5512(b)(4)(B) (instructing courts to treat the CFPB as the only administering or enforcing agency over consumer-financial law); 15 U.S.C. § 1604(a) (2012) (granting CFPB rulemaking authority over most of TILA); 15 U.S.C. § 1604(h) (instructing courts to treat CFPB as the only administering or enforcing agency of TILA); 15 U.S.C. § 1681s(e)(1) (granting CFPB rulemaking authority over most of FCRA); 15 U.S.C. § 1681s(e)(2) (instructing courts to apply deference to an enforcing agency as if "that agency were the only agency authorized to apply, enforce, interpret, or administer the provisions of [the] subchapter").

²³⁸ See Garrett, *supra* note 5, at 2659 ("Without a certain interpretive background, Congress does not know where to focus its attention."); see also White, *supra* note 223, at 83–84 (arguing that rulemaking authority should create a rebuttable presumption that Congress gave an agency interpretive primacy).

²³⁹ See *supra* notes 163–64 and accompanying text.

certain questionable rulings,²⁴⁰ and certain “major” questions²⁴¹) that suggest that an agency lacks expertise to decide particular matters that fall within its rulemaking jurisdiction. Because these exceptions should be few when compared to the multitude of quotidian agency decisions (and could be better defined though additional congressional action and case-law development), the number of significant cases would likely be sufficiently small to permit Supreme Court and congressional oversight. In fact, *Mead* and *Barnhart* should calm fears to the contrary. They expressly left open the possibility that rulemaking authority does not necessarily indicate interpretive primacy,²⁴² but still the bureaucratic sky did not fall. These decisions suggest that Dodd-Frank’s clarification of congressional intent will not cause significant disruption.

The last significant argument for *City of Arlington*’s rule-based approach is that, with a clear rule as part of the drafting backdrop, Congress will identify those few instances in which its intent deviates from the rule and thereby ensure that courts understand its intent in all situations. In the words of Einer Elhauge, *City of Arlington* may provide a “preference-eliciting” statutory default rule.²⁴³ A preference-eliciting default rule is appropriate when Congress’s enactable preferences are unclear, there are significant odds that Congress will correct any judicial-interpretive error, and the interim costs associated with the interpretation are acceptable.²⁴⁴ For issues of interpretive primacy and rulemaking, courts could reason as follows: Congress’s enactable preferences are in equipoise (because Dodd-Frank could either reveal Congress’s concern for expertise when delegating interpretive primacy or merely provide an exception to *City of*

²⁴⁰ See Garrett, *supra* note 5, at 2650–51 (arguing that congressional delegation would consider, among other things, an agency’s reputation); *supra* Part II.A (explaining controversial OCC-preemption rulings).

²⁴¹ See Gluck & Bressman, *supra* note 5, at 1002 (“Sixty percent of our respondents agreed . . . that the subject matter of a statute affects whether drafters intend for agencies to have gap-filling authority”); *id.* at 1003 (“More than 60% of our respondents corroborated [the] assumption [that Congress does not intend to delegate major questions to an agency].”); see also *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006) (refusing to apply *Chevron* doctrine because of the Attorney General’s lack of expertise on medical ethics); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (deciding that Congress clearly spoke on the matter at issue by considering text, legislative history, and significance of issue).

²⁴² See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (noting that “the presence or absence of notice-and-comment rulemaking” was not dispositive in *Mead*); *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) (noting that the lack of notice-and-comment rulemaking is not dispositive).

²⁴³ Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002).

²⁴⁴ *Id.* at 2166.

Arlington's rule in one instance); Congress has already shown through Dodd-Frank that it can react to what it understands to be the Court's general rule that rulemaking power leads to interpretive primacy; Congress should be able to respond to the other rare exceptions in future legislation when the Court wrongly attributes interpretive primacy to a rulemaking agency; and the costs of awaiting legislative correction are not onerous.

Despite the strength of this argument, it should not overcome *Mead*'s more accurate encapsulation of congressional intent. First, the preference-eliciting rule applies when "no one interpretive option more likely than not matches enactable preferences."²⁴⁵ But all evidence of which I am aware (including Dodd-Frank and interviews with legislative drafters²⁴⁶) suggests that rulemaking does not *always* evince the bestowal of interpretive primacy. Instead, that evidence is consistent with the more limited principle from *Mead* and *Barnhart* that rulemaking authority *usually* bestows interpretive primacy. Without countervailing evidence to support *City of Arlington*'s pronouncement, a rule of provocation is misplaced because the interpretive options are not in equipoise.

Second, it is far from clear that Congress will respond more often to erroneous interpretations under a *City of Arlington* regime than under a *Mead* regime.²⁴⁷ If courts grant a rulemaking agency interpretive primacy despite expertise or capture concerns, Congress may be unlikely to respond because the groups interested in correcting the mistake (those not sophisticated or organized enough to overcome regulatory capture) are unlikely to have what Elhauge calls "privileged access to the legislative agenda."²⁴⁸ Neither the agency nor the interests that have captured the agency are likely to challenge the courts' bestowal of interpretive primacy, despite their better access to the legislative agenda than public-focused interest groups.²⁴⁹ But if the courts determine that a rulemaking agency should not have interpre-

²⁴⁵ *Id.* at 2038.

²⁴⁶ See *supra* note 222 and accompanying text (noting that surveys of legislative drafters indicate that rulemaking power is often relevant to interpretive primacy).

²⁴⁷ Indeed, Congress may not respond at all, as one empirical study concerning Congress's response to Supreme Court preemption decisions found. See Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612 (2007) (finding that Congress only very rarely overturns the Court's preemption decisions).

²⁴⁸ Elhauge, *supra* note 243, at 2166.

²⁴⁹ See KIRSCH & MAYER, *supra* note 165, at 81 (noting that consumer groups "were accustomed to being outspent 10 to 1 by their opponents"); Breyer, *supra* note 4, at 368 (noting that agencies may assist Congress with drafting and revising legislation). Indeed, Kirsch and Mayer's monograph, *supra*, details the extraordinary unity of numerous consumer, labor, and civil-rights interest groups in championing the CFPB's creation.

tive primacy under *Mead*'s approach, such a rare determination (as the courts' current jurisprudence reveals) is likely to be sufficiently noteworthy to alert Congress to the Court's possible error and allow the agency and their interest groups to access the legislative agenda. Accordingly, *City of Arlington* as a preference-eliciting rule is unwarranted.

Thus, *Mead* is the preferable standard for realizing congressional intent. Its application does not create a fiction but instead, as demonstrated by Dodd-Frank and other evidence, reasonably corresponds with legislative preference. *Chevron*'s codification strengthens the delegation theory and removes any fraudulent patina from *Chevron* and its triggering doctrines.

3. *Judicial Competence to Consider Capture and Conflicts*

Despite *Mead*'s consistency with congressional intent, one set of questions remains: Do courts have the institutional competence to evaluate regulatory capture, at least as compared to Congress? And if so, just how will courts effectively monitor agencies for regulatory capture? These questions need more treatment than I can provide here. But my response, in short, is that courts are competent to make these determinations (even if that competence can be improved) and can do so by relying on processes that they have used before.

As past practice reveals, courts can effectively consider capture and conflicts by relying on third parties. These third parties can alert courts to significant conflicts between the agency's regulatory mission and other influences, such as funding (as with the OCC), personnel, or industry influence. Although these third parties will most likely be beneficiaries under a regulatory scheme whose interests diverge from regulated parties, they may also include certain regulated parties whose interests diverge from a capturing subgroup,²⁵⁰ or competing agencies. Indeed, Barkow has noted that competing agencies may prevent capture under proper circumstances,²⁵¹ and Dodd-Frank itself

²⁵⁰ See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51 (D.C. Cir. 1977) (regarding a dispute among various regulated parties within the television industry).

²⁵¹ See Barkow, *supra* note 34, at 51–53 (discussing various ways in which shared regulatory space can influence capture and interest-group theory). Congress creates many forms of shared regulatory space throughout the regulatory state. See Freeman & Rossi, *supra* note 224, at 1134–38 (discussing how Congress creates overlapping agency missions and its normative implications, especially for purposes of judicial review and interagency coordination).

allows the CFPB to warn Congress or courts of questionable OCC-preemption.²⁵²

Relying on third parties to identify capture and conflict concerns, though rare, is hardly unprecedented. Groups have attempted to do this in amici briefing,²⁵³ sometimes successfully.²⁵⁴ If briefing suggests a significant issue, courts, as the D.C. Circuit has done in a leading case, can request an agency response.²⁵⁵ For instance, courts can consider whether conflicts of interest are influencing a certain kind of agency action or learn of *ex parte* contacts that may be influencing agency policy *sub rosa*. The presence of regulatory capture or conflicts provides a valid reason for casting a skeptical eye over agency action during judicial review and providing less deference than otherwise might apply.²⁵⁶ Under standard APA judicial review, courts evaluate whether the agency's particular decision is undermined by problematic reasoning or process that very well could, among other things, arise from regulatory capture or conflicts. Evaluating the presence of capture or conflict from a broader perspective—as it relates to a category of decisions from the agency at issue—allows the courts to take a broader look at systemic problems within the agency and consider the agency's regulatory history within a certain area. Courts can rely on third-party intervention, as they have in related contexts, to develop better mechanisms for evaluating conflicts and capture as they relate to congressional delegation. Like *Chevmore*, the judicial tools to evaluate capture and conflicts need not be static.

²⁵² See Barnett, *supra* note 114, at 601–02 (noting how the requirement that the OCC consult with the CFPB over preemption encourages the collection of data for decisionmaking and allows the CFPB to raise an alarm over questionable decisions).

²⁵³ See, e.g., Brief of AARP, *supra* note 117, at *11 (discussing OCC capture).

²⁵⁴ See *Home Box Office, Inc.*, 567 F.2d at 54–56 (deeming FCC action arbitrary based on *ex parte* contacts during rulemaking, as disclosed by amicus and FCC's response to court's *sua sponte* order).

²⁵⁵ See *id.* at 52 (requesting a response from the FCC with respect to the agency's *ex parte* communications with regulated parties).

²⁵⁶ In *Home Box Office, Inc.*, the D.C. Circuit invalidated a rule based on *ex parte* communications between industry and agency members. *Id.* at 54–56. That remedy may violate the prohibition on courts mandating procedures and protections beyond those provided in the APA, see *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543–48 (1978) (prohibiting courts from requiring agencies to engage in more procedures than are required under the APA or an agency's organic act), because it prohibited *ex parte* contacts that the APA otherwise permitted, 5 U.S.C. § 556(d) (2012) (applying the prohibition on *ex parte* contacts only in formal proceedings). But the judicial retention of interpretive primacy over statutory interpretation certainly does no violence to the text of the APA's § 706, 5 U.S.C. § 706 (stating that courts decide “all relevant questions of law”), is consistent with congressional intent as to interpretive primacy (if Dodd-Frank means what I suggest it does), and allows courts to consider the issue in light of the existing administrative record.

What is more, the judiciary may be in a better position than Congress to monitor agency capture. As public-choice theorists recognize, Congress often needs industry campaign donations and thereby is in danger of becoming captured itself by coordinating minority groups whose influence can exceed larger, diffuse groups.²⁵⁷ Indeed, Usha Rodrigues has recently completed a case study of how regulated firms likely found it easier and more fruitful to influence Congress (with relatively small contributions) than the SEC over certain disclosure requirements under the Securities Exchange Act, suggesting that public-choice concerns over interest-group capture of a legislature may be more pressing than regulatory capture.²⁵⁸ Courts, much more insulated from interest-group pressure, can have competence in evaluating agency capture that Congress lacks because of its own capture concerns.

This is not to say that Congress has no competence for considering capture issues or that, if the conditions are right, Congress is not more competent than courts to consider capture. Congress, after all, addressed certain capture concerns in Dodd-Frank in several ways (such as creating the CFPB,²⁵⁹ abolishing the OTS,²⁶⁰ and limiting the OCC's preemption actions²⁶¹), and it likely has more time, means, and influence to develop facts that inform the existence and effect of capture and conflict within a particular agency. But Congress's comparative advantage under favorable circumstances does not mean that

²⁵⁷ See David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 651 (1997) ("The central insight of interest group analysis is that concentrated interest groups often benefit at the expense of more widely scattered groups, even if the diffuse group has much more at stake overall." (reviewing MAXWELL L. STEARNS, *PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY* (1997))); see also A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1877–80 (2006) (arguing that Congress amended bankruptcy laws because of significant industry campaign contributions).

²⁵⁸ See Usha Rodrigues, *The Once and Future Irrelevancy of Section 12(G)*, 15 ILL. L. REV. (forthcoming 2015) (manuscript at 24–27) (on file with the *New York University Law Review*) (noting that congressional factfinding stands up better on judicial review than agency factfinding and that interest groups spent very little in the way of campaign contributions to obtain beneficial legislation); Usha Rodrigues, *The Price of Corruption* 12–20 (Univ. of Ga. Sch. of Law Research Paper Series, Paper No. 2014-23, 2014), available at <http://ssrn.com/abstract=2486720> (discussing how alterations to certain securities requirements concerning when companies must file certain disclosures were more easily obtained from Congress than the SEC, because of its notice-and-comment proceedings and judicial review).

²⁵⁹ See *supra* Part II.B.2 (discussing Congress's capture concerns when establishing the CFPB).

²⁶⁰ See *infra* note 284 (referring to the abolition of OTS).

²⁶¹ See *supra* Part II.B.1 (discussing the OCC's history of questionable preemption rulings).

courts cannot serve an important role in monitoring agencies. Moreover, despite any lingering concerns over proof issues or institutional competence, significant issues of capture and conflicts will probably arise only infrequently. For more than ten years, *Mead* left open the possibility that rulemaking authority may not always resolve issues of interpretive primacy without causing a morass of litigation. The rarity of these issues arising suggests that courts and Congress will have sufficient time to respond and consider how to proceed going forward.

All that said, as with almost everything else about the *Chevmore* doctrines, reasonable people will likely disagree about what *Chevmore*'s codification in Dodd-Frank means. But the broader point is that Congress has demonstrated some awareness, acceptance, and interest in the doctrines, and this demonstrated acceptance of and interest in *Chevmore* validates the delegation theory. Any doubts about Congress's intent merely indicate that Congress should clarify when it intends the *Chevmore* doctrines to apply. It is Congress's future use of *Chevmore* to which I now turn.

IV

WHAT *CHEVMORE* CODIFICATION PROMISES

Congress should continue to fulfill its obligation under the delegation theory to identify whether and why courts or agencies have interpretive primacy over particular statutory interpretations. By doing so, Congress helps legitimize the *Chevmore* regime, provide additional certainty as to when Congress delegates interpretive primacy, and augment its own authority. Moreover, if proof issues prove more troubling than I anticipate, Congress may be in a better position than courts to decide when agencies should receive interpretive primacy because of its access to experts, ability to collect evidence of improper decisionmaking on a macro level, and authority to confront and monitor agency officials with congressional hearings and informal oversight.²⁶²

Dodd-Frank provides pragmatic guidance on how Congress can communicate its intent and address outstanding administrative-law issues. By turning to the *Chevmore* doctrines, Congress can provide a "*Chevron* reward" or a "*Skidmore* penalty" in light of agency behavior. As in Dodd-Frank, Congress can address lingering questions about how agencies must act to obtain *Chevron* or *Skidmore* deference, use *Chevmore* codification to adjust the degree of judicial over-

²⁶² See Garrett, *supra* note 5, at 2654 (discussing Congress's institutional and technocratic advantages over courts in assessing whether to bestow interpretive primacy on agencies).

sight over agencies as appropriate, and, relatedly, use *Chevmore* codification to address instances of regulatory capture.

A. How to Codify *Chevmore*

Before considering the benefits of *Chevmore* codification, I shall briefly consider how Congress should go about codification. For instance, although drafting an omnibus statute to govern all matters concerning judicial review would best reflect Congress's intent as to *Chevmore*, history suggests that Congress should not do so. Instead, more targeted application of the *Chevmore* doctrines, as in *Dodd-Frank*, will prove more productive.

Congress's failure to pass a judicial-review statute of general application since the APA in 1946 suggests that an omnibus statutory response is unlikely to succeed. In the 1970s and 1980s, the so-called Bumpers Amendment, named after Senator Dale Bumpers, would have instructed courts to provide little or no deference to agencies' statutory interpretations.²⁶³ This "deeply controversial" bill failed.²⁶⁴ The Senate tried again in the mid-1990s. This time, it sought to revise the APA by appearing to codify, among other things, *Chevron's* two steps.²⁶⁵ But this attempt also failed. This failure was likely for the best because its provisions did not resolve whether Congress intended to alter the judicially created *Chevron* standard.²⁶⁶ In considering the lessons from the failed Senate bill, Ron Levin noted that the numerous issues surrounding *Chevron* and judicial review generally are "abstract, difficult, and constantly evolving" and thus "not the sort of subject[s] that generalist drafters can easily 'clarify.'"²⁶⁷ These issues for *Chevron* include deciding how broadly one should define "interpretation" as opposed to discretionary decisions (which may be reviewed differently), which materials to consult to ascertain congressional intent, how to review an agency determination for reasonableness, and how to balance judicial deference with meaningful judicial review without sending confusing signals.²⁶⁸ Likewise, as Elizabeth Garrett has noted, although general judicial-review statutes may

²⁶³ See Garrett, *supra* note 5, at 2670 (noting that the Bumpers Amendment "favored courts over agencies in all circumstances"); Levin, *supra* note 5, at 654 ("[The Bumpers Amendment] would have directed courts to display little or no deference to administrators' views on legal issues arising during judicial review of any agency action.").

²⁶⁴ Levin, *supra* note 5, at 654.

²⁶⁵ *Id.* at 655 (citing S. 343, 104th Cong. § 706(c) (1995)).

²⁶⁶ See *id.* at 655–58 (discussing the vagueness of the 1995 Senate bill).

²⁶⁷ *Id.* at 665.

²⁶⁸ See *id.* at 659–64 (discussing problems with codifying the still-evolving *Chevron* doctrine and other concerns with the language and structure of the proposed amendment).

suffer less from interest-group influence, they may present unintended consequences and fail to predict applications of a general rule.²⁶⁹

A more targeted approach may prove more realistic. After noting the impracticability of revising all federal regulatory statutes to account for all deference issues,²⁷⁰ Garrett suggests that Congress may be more successful in codifying judicial review in a more systematic fashion: by considering law-making authority on an agency-by-agency basis in periodic reauthorization or appropriations statutes.²⁷¹ Proceeding on an agency-by-agency basis, she argues, permits productive interest-group participation by encouraging the sharing of helpful information while leaving groups behind a veil of ignorance when helping to craft the proper amount of deference for a particular agency.²⁷² Indeed, Dodd-Frank suggests that even less frequent consideration—when rethinking a particular regulatory area (finance), establishing new agencies (the CFPB), or rearranging agency functions (those of the prudential financial regulators, such as the OCC and the FDIC)—provides at least some benefits.²⁷³

Dodd-Frank provides a striking example of how a more targeted approach may better clarify congressional intent. As indicated *supra* in Part III, Congress generally intends courts to defer to agency interpretations of statutes that the agency administers and approves generally of *Chevron* as a background norm for allocating interpretive primacy over ambiguous regulatory statutes. But Dodd-Frank also suggests that the courts do not always realize Congress's intent. By considering both the particular interpretation that the agency has made or will make and the overall success of the agency in pursuing its regulatory mission, Congress can refine the *Chevmore* doctrines to its liking and use them in ways that further other values, such as administrative expertise and independence. This is exactly what Congress did in Dodd-Frank.

Further limits may also prove helpful. Even with targeted codification, Congress will likely prove more successful in identifying when *Chevron* or *Skidmore* should apply, not “clarifying” how the doctrines

²⁶⁹ Garrett, *supra* note 5, at 2661–62. For a prominent example, see § 706 of the APA, 5 U.S.C. § 706 (2012) (setting forth the general standard of review for agency actions).

²⁷⁰ See Garrett, *supra* note 5, at 2662 (discussing institutional and pragmatic limitations to any congressional effort to revise each regulatory statute with respect to delegation decisions).

²⁷¹ *Id.* at 2640–41, 2663.

²⁷² *Id.* at 2664–65.

²⁷³ Unlike Garrett, I do not consider procedural details about how or when Congress should codify *Chevmore*. But I agree that targeted, systematic consideration of interpretive primacy issues, accompanied by explanatory legislative history, has been and likely will be more fruitful.

should function. Drafting precisely how the *Chevmore* doctrines (especially *Chevron*) should function is difficult and perhaps impossible.²⁷⁴ But by simply identifying which *Chevmore* doctrine (if any) should apply, Congress can, as in Dodd-Frank, create an appropriate mood for judicial review²⁷⁵ and leave courts to develop the *Chevmore* doctrines. For instance, by codifying the open-ended fourth *Skidmore* factor, which allows courts to consider “other factors” that tend to persuade,²⁷⁶ courts can continue to look at other variables—such as the longevity of the agency’s interpretation and the nearness in time between the agency interpretation and the statute’s enactment—where relevant.²⁷⁷ Likewise, a *Chevron* savings clause (with useful legislative history) or other provisions, such as the sole-authority provisions for federal consumer-protection laws, does not require Congress to define the doctrine’s contours or describe its application in all scenarios. These *Chevmore* provisions allow Congress to signal *Skidmore*’s application when *Chevron* might otherwise apply (as with the OCC-preemption provisions) and vice versa. Indeed, in a recent bipartisan effort in the Senate to revise the APA’s judicial-review provisions, Congress followed Dodd-Frank’s lead by instructing courts to use the *Skidmore* factors when reviewing an agency’s interpretation of its own rules (instead of the *Chevron*-like deference that the courts normally apply²⁷⁸).²⁷⁹ Ultimately, Dodd-Frank provides not only some

²⁷⁴ See Garrett, *supra* note 5, at 2661–62 (discussing critiques of comprehensive deference statutes); Levin, *supra* note 5, at 665 (cautioning against the codification of standards of judicial review of agency action).

²⁷⁵ See Ronald M. Levin, Mead and the Prospective Exercise of Discretion, 54 ADMIN. L. REV. 771, 783 (2002) (noting *Mead* and other Supreme Court decisions can be understood as instructing lower courts to apply different moods during judicial review depending upon whether *Skidmore* or *Chevron* applies); Peter M. Shane, City of Arlington v. FCC: Boon to the Administrative State or Fodder for Law Nerds?, BLOOMBERG BNA (June 17, 2013), <http://about.bloomberglaw.com/practitioner-contributions/city-of-arlington-v-fcc-boon-to-the-administrative-state-or-fodder-for-law-nerds/> (describing *Chevron* as a “mood-setting” device).

²⁷⁶ 12 U.S.C. § 25b(b)(5)(A) (2012).

²⁷⁷ See Hickman & Krueger, *supra* note 4, at 1259 (noting factors that appellate courts have considered as part of *Skidmore* inquiry). My thanks to Kristin Hickman for this insight.

²⁷⁸ See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (noting that an agency’s interpretation of its own regulations is “controlling unless plainly erroneous or inconsistent with the regulation” (internal quotation marks and citations omitted)). “In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes.” *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J., concurring in part and dissenting in part).

²⁷⁹ See Regulatory Accountability Act of 2013, S. 1029, 113th Cong. § 4 (2013), available at <http://beta.congress.gov/bill/113th/senate-bill/1029> (proposing revisions to 5 U.S.C. § 706 by adding subsection (d): “The weight that a court shall give an interpretation by an agency of its own rule shall depend on the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.”).

evidence of what Congress thinks about the *Chevmore* doctrines but also a practical guide on how Congress can signal its intent in the future.

B. *Chevron Rewards and Skidmore Penalties*

With practical ways of codifying *Chevmore* in hand, Congress can use *Chevmore* to reward or penalize agencies. The idea is straightforward and derives from *Chevmore*'s codification in Dodd-Frank. Congress, by codifying *Chevron*, could give a well-performing agency interpretive primacy when it otherwise would not have such authority. Consider the following example. Congress, as Rebecca White has noted, appears to be pleased with the Equal Employment Opportunity Commission (EEOC) because it has given the agency administrative authority over an increasing number of employment-discrimination statutes.²⁸⁰ But it has not given the EEOC substantive rulemaking authority under Title VII (which prohibits employment discrimination based on race, gender, and national origin, among other things).²⁸¹ The EEOC has thus relied upon interpretive guidelines, which the agency has made subject to notice-and-comment proceedings since the mid-1970s, to interpret Title VII.²⁸² The Supreme Court has refused to apply *Chevron* deference to these interpretive guidelines.²⁸³ Because Congress appears pleased with the EEOC's use of its expertise, it could reward the agency by giving the EEOC an additional power: interpretive primacy over Title VII. On the other hand, Congress could penalize an agency, as it did with the OCC, when the agency habitually decides matters without using its expertise, suggesting that the agency has been captured. Congress need not take the drastic step of completely removing certain substantive power from an agency or abolishing it.²⁸⁴ Instead, Congress can codify

²⁸⁰ See White, *supra* note 223, at 66–70 (reviewing the expansion of EEOC responsibility through various statutes since the late 1970s).

²⁸¹ See *id.* at 60–61 (discussing limits on EEOC rulemaking under Title VII). It is not clear why Congress deprived the EEOC of substantive rulemaking authority. *Id.*

²⁸² *Id.* at 98.

²⁸³ See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–11 n.6 (2002), *superseded in part by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) (“[T]he EEOC’s interpretive guidelines do not receive *Chevron* deference.” (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 224, 257 (1991))).

²⁸⁴ Congress has abolished agencies, such as the Interstate Commerce Commission, that have outlived their usefulness. See, e.g., ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803. Likewise, Congress has abolished agencies that were perceived to have failed in their regulatory mission by insufficiently overseeing regulated entities. For instance, Congress abolished the OTS after three of its largest regulated entities—Washington Mutual, IndyMac, and American International Group (AIG)—failed during the financial crisis of the early 2000s. See, e.g., 12 U.S.C. § 5412 (2012) (transferring OTS

Skidmore to transfer interpretive primacy from the agency to courts. *Chevron* codification, like appropriations, congressional oversight, sunset provisions, and confirmation for agency officers, becomes another tool for congressional oversight of agency action.

In the process of issuing *Chevron* rewards and *Skidmore* penalties, Congress can address, in part, longstanding administrative-law issues. For instance, Congress can help resolve the “*Mead* puzzle” (how agencies must act to gain interpretive primacy) at least as to certain agency actions, help strike the proper balance between hard look judicial review and administrative “ossification,” and address regulatory capture. Indeed, Dodd-Frank, to some extent, served all of these purposes and provides a model for future legislation.

1. Addressing the *Mead* Puzzle

In issuing a *Chevron* reward or *Skidmore* penalty, Congress will often resolve how formally an agency must act to receive deference. In doing so, Congress helps solve the “*Mead* puzzle” as to certain agencies or agency actions. In *Mead*, the Supreme Court recognized that rulemaking and formal adjudicatory authority are “very good indicator[s] of delegation meriting *Chevron* treatment.”²⁸⁵ But the Court has applied *Chevron* deference to an agency’s statutory interpretation during an informal adjudication,²⁸⁶ and *Mead* reaffirmed that *Chevron* deference may apply to informal actions in certain, unspecified cases.²⁸⁷ The courts of appeals have followed *Mead*’s pronounce-

authority to other regulators); Dain C. Donelson & David Zaring, *Requiem for a Regulator: The Office of Thrift Supervision’s Performance During the Financial Crisis*, 89 N.C. L. REV. 1777, 1794–95 (2011) (quoting Congressman Barney Frank: “We are going to abolish, I hope, the Office of Thrift Supervision. . . . AIG and some others that were theoretically regulated by the OTS, that was like being regulated by the meter maid.” (alteration in original) (citing Brady Dennis, *Born in a Previous Crisis, OTS Faces Extinction*, WASH. POST, June 18, 2009, at A15)).

²⁸⁵ United States v. *Mead* Corp., 533 U.S. 218, 229 (2001).

²⁸⁶ See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 255, 257–58 (1995) (accordance an informal adjudication *Chevron* deference). The Court applied *Chevron* deference to the OCC’s statutory interpretation when the agency granted an application for a bank’s subsidiary to sell annuities. Granting a regulated party permission is a form of licensing, which the APA identifies as a kind of adjudication. See 5 U.S.C. § 551(6) (2012) (defining order to include licensing); *id.* § 551(7) (defining adjudication to include the process of formulating orders); *id.* § 551(8) (defining licenses to include agency permission); *id.* § 551(9) (defining licensing as granting or denying licenses).

²⁸⁷ See *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (“And the fact that the Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due.” (internal citation omitted)); *Mead*, 533 U.S. at 230–31 (“[A] significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case.”).

ment and applied *Chevron* deference, at times, to policy statements,²⁸⁸ interpretive rules,²⁸⁹ and agency handbooks that an agency has subjected to notice-and-comment procedures.²⁹⁰ But the appellate courts have not always been consistent.²⁹¹ The question of whether *Chevron* should apply to different agency actions has been a significant subject of scholarly debate and a catalyst for extensive litigation.²⁹²

As *Skidmore* penalties are likely to do, Dodd-Frank's *Skidmore* codification renders *Mead* largely irrelevant for OCC-preemption decisions. No amount of formality can lead to *Chevron* deference to the OCC's agency preemption because Congress has already made clear that it has not delegated interpretive primacy to the agency.²⁹³ On the other hand, *Chevron* rewards, as in the EEOC hypothetical, will provide guidance on which specific kinds of agency action are sufficient for *Chevron* deference and thus better answer lingering *Mead* questions. Congress can use the *Skidmore* factors and, with some tweaking, the *Chevron* savings clause in Dodd-Frank to provide penalties and rewards that address administrative formality in other contexts.²⁹⁴

Suggesting how Congress should go about determining which kind of informal actions should warrant *Chevron* deference in other

²⁸⁸ See, e.g., *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59 (2d Cir. 2004) (concluding that "*Chevron* deference is due to HUD's interpretation" of a subsection of the Real Estate Settlement Procedures Act in a policy statement).

²⁸⁹ See, e.g., *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (applying *Chevron* deference to interpretive rules).

²⁹⁰ See, e.g., *Micosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1273 (11th Cir. 2009) (applying *Chevron* deference to an agency handbook that "was created following the same administrative procedures that official regulations undergo").

²⁹¹ See Bressman, *supra* note 29, at 1459–60 (noting that the Ninth and Seventh Circuits disagreed over whether HUD policy statements were entitled to *Chevron* deference).

²⁹² See, e.g., *Jordan*, *supra* note 85, at 732 (discussing *Chevron*'s application to informal adjudications); *Merrill & Hickman*, *supra* note 4, at 851–52 (focusing on *Chevron*'s applicability to different types of agency action in five of fourteen unresolved questions about *Chevron*'s domain that have arisen in the lower courts).

²⁹³ Scholars had previously called for *Skidmore* to apply to agency-preemption decisionmaking. The Supreme Court has applied both *Chevron* and *Skidmore*. Compare *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (applying *Chevron*), with *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (applying *Skidmore*).

²⁹⁴ For instance, Congress could use that savings clause, 12 U.S.C. § 25b(5)(B) (2012) ("[N]othing in this subsection shall affect the deference that a court may afford . . . in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal Laws."), as a guide to draft something along the following lines: "[The agency's] use of [interpretive rules or general statements of policy, as those terms are used in 5 U.S.C. § 553(b)(3)(A)] shall not affect the deference that a court affords [the agency] in making determinations regarding the meaning or interpretation of any provisions of this [subchapter]." Likewise, Congress could use the codified *Skidmore* factors to indicate its desire for *Skidmore* weight to apply when the agency acts through certain formal methods.

contexts will likely prove more challenging. For example, perhaps Congress should decide that *Chevron* deference is appropriate when the agency has satisfied certain values (such as permitting public participation,²⁹⁵ securing regulated parties' procedural rights,²⁹⁶ or reflecting the use of administrative expertise²⁹⁷) through its procedures established outside of the APA (whether through another statute calling for hybrid procedures or through the agency's own internal guidelines²⁹⁸). Or Congress may identify certain trusted agencies whose missions warrant interpretive primacy when they use more informal methods. For example, Congress might think that the EEOC's interpretive rulings and policy-guidance documents concerning Title VII should receive *Chevron* deference because of the important reliance interests that employers have on the EEOC's guidance and the EEOC's expertise gleaned from handling complaints and bringing enforcement actions under that Title.²⁹⁹ These determinations would be agency-specific but still provide, with legislative history, insight into congressional intent. My point here is not to resolve where the most pressing *Mead* puzzles exist in administrative schemes or which values should prevail; these issues are beyond the scope of this Article. Instead, my point is that Congress can use *Chevron* codification to clarify the relationship between agency action and interpretive primacy.

²⁹⁵ See, e.g., *Micosukee Tribe of Indians of Fla.*, 566 F.3d at 1273 (providing *Chevron* deference to the Fish & Wildlife Service handbook that was subject to notice-and-comment process); Merrill & Hickman, *supra* note 4, at 885 (arguing that force-of-law criterion "preserves the right of public participation in the development of administrative interpretations of statutes").

²⁹⁶ For instance, *Chevron* may be appropriate when hybrid adjudicative proceedings—which require some but not all of the APA's protections—may provide sufficient participatory rights to affected parties. See Stephen H. Legomsky, *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227, 234 (1988) (noting that immigration statutes provide "most of the safeguards afforded by the APA, and administrative practice in recent years has inched deportation procedure even closer to the APA model").

²⁹⁷ See Barnett, *supra* note 114, at 589–95 (defending congressional concern for agency expertise as part of the interpretive-primacy inquiry); Krotoszynski, *supra* note 4, at 754 (arguing that judicial deference is properly justified by agency expertise).

²⁹⁸ See White, *supra* note 223, at 103 (noting since the mid-1970s the EEOC has issued interpretive guidelines "only after following notice and comment procedures and sometimes after public hearings").

²⁹⁹ Cf. *id.* at 57–58 (arguing that Congress implicitly delegated interpretive primacy to the EEOC when interpreting Title VII, despite the EEOC's lack of substantive rulemaking power); *id.* at 61 (noting the immunity that employers received for "good faith . . . reliance" on the EEOC's opinions concerning Title VII (internal quotation marks and citation omitted) (alteration in original)).

2. *Balancing “Hard Look” Review and Ossification*

Codified *Chevmore* doctrines can also help Congress oversee the intensity of judicial review generally by setting the appropriate “mood.” Scholars have long considered how intently courts should review agency action under the APA’s judicial-review provisions³⁰⁰ and under the *Chevmore* doctrines.³⁰¹ This debate over the intensity of judicial review, in addition to considering *Chevmore*, has primarily concerned the propriety of hard look review under the APA and whether it leads to undue ossification of agency regulation.³⁰² Yet, as with the *Chevmore* doctrines generally, Congress has not sought to clarify the intensity of judicial review.³⁰³ Its silence has generally seemed wise because of the difficulty, as described below, in clarifying just how courts should go about reviewing agency decisions for reasonableness. *Chevmore* codification, however, may provide the key for allowing Congress to set different moods for judicial review in specific situations.

Searching reasonableness review, generally referred to as hard look review, has benefits and drawbacks. Hard look review is short-hand for more assertive judicial review (in response to growing suspicion over regulatory capture and the limits of agency expertise) than the APA likely envisioned.³⁰⁴ At its core, the doctrine requires “agen-

³⁰⁰ See, e.g., Meazell, *supra* note 32, at 741–42 (describing the Supreme Court’s different signals as to how intense APA reasonableness review should be).

³⁰¹ See, e.g., Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 95–96, 128–29 (1994) (suggesting that courts “substitute something akin to ‘hard look’ review for the deferential reasonableness standard . . . in *Chevron*’s step two,” instead of their more superficial review).

³⁰² Although some may contend that *Chevmore* applies to statutory interpretation, while the APA standards and hard look review apply to policy judgments or factual findings, see Jan S. Oster, *The Scope of Judicial Review in the German and U.S. Administrative Legal System*, 9 GERMAN L.J. 1267, 1285 (2008) (“*Chevron* is applicable to the legal interpretation of a statute, whereas the arbitrary and capricious test is relevant for agency’s [sic] policy judgment.”), any purported difference between the two kinds of actions is often indeterminate, meaning that *Chevmore*’s bounds are porous and permit the codified doctrines to provide broader signaling, see Beermann, *supra* note 4, at 783 (“It is still not clear whether *Chevron* concerns review of statutory interpretation or review of policy decisions.”); see also Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 180 (John F. Duffy & Michael Herz eds., 2005) (“*Chevron* step two directs courts to defer to ‘reasonable’ agency interpretations of ambiguous statutory provisions. Such ‘interpretations’ constitute policy decisions of the sort to which the arbitrary and capricious test also applies.”).

³⁰³ See Strauss, *supra* note 51, at 1149 n.23 (mentioning that “Congress has shown no sign of repudiating” hard look review).

³⁰⁴ See Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 906 n.32 (2007) (noting that the Supreme Court in 1935 said “that a rule issued by an agency is arbitrary and capricious

cies [to] fully explain their actions, taking into account all relevant factors, and responding to all material comments.”³⁰⁵ The benefit of hard look review is that intensive judicial monitoring should lead agencies to provide reasoned, careful decisionmaking.³⁰⁶ But there is a downside. If hard look review leads courts to give undue attention to minor issues, agency action may become unnecessarily delayed because either judicial proceedings delay regulatory action or agencies, out of an abundance of caution, compile an overly thorough administrative record.³⁰⁷ With heightened review, the argument goes, regulation will ossify because agencies will regulate less frequently and thereby become less responsive to changing circumstances.³⁰⁸ Scholars debate the existence and extent of ossification,³⁰⁹ the benefits of searching judicial review,³¹⁰ and even whether courts still (or at least consistently) engage in hard look review.³¹¹

One need not resolve these debates to appreciate that certain agency actions call for more searching review than others. By intensifying judicial review, Congress can attempt to invest the resources required for in-depth judicial review (and thus agency monitoring³¹²) where Congress views them as most needed. Indeed, Congress used

only if no ‘state of facts reasonably can be conceived that would sustain it’” (citing *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935))).

³⁰⁵ Jordan, *supra* note 30, at 397.

³⁰⁶ See Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 761–62 (2006) (“Defenders of hard look review . . . argue that it ensures the supposedly expert agency really has based its decision on a reasoned analysis of relevant information . . . [because it] correct[s] specific decisionmaking biases to which agencies are thought to be vulnerable . . . [and] encourages agencies to engage in a superior . . . decisionmaking process.” (footnotes omitted)).

³⁰⁷ See Seidenfeld, *supra* note 31, at 484–85 (observing that courts may “demand exacting explanations for agency action,” which creates “great uncertainty” for agencies and causes agencies to “perform detailed analyses even of [peripheral] matters”).

³⁰⁸ See *id.* at 486–87 (arguing that increased burdens on agencies deter rulemaking); see also Jordan, *supra* note 30, at 395 (discussing arguments that ossification leads agencies to ignore their regulatory missions and engage in excessive data-gathering).

³⁰⁹ See, e.g., Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1131 (noting that additional empirical work on ossification would “provide still further avenues for assessing claims that judicial review hampers agency rulemaking”); Jordan, *supra* note 30, at 401–04 (concluding, based on empirical evidence, that ossification is not a significant problem).

³¹⁰ See, e.g., Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1782–83 (2007) (connecting hard look review to congressional oversight of agency action); Jordan, *supra* note 30, at 401–04 (describing the costs and benefits that scholars have argued arise from searching judicial review).

³¹¹ See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1468–69 (2012) (discussing views that hard look review has softened over time).

³¹² See Bressman, *supra* note 310, at 1782–83 (discussing how judicial review of agency action serves to assist Congress in monitoring agencies).

Chevmore codification in Dodd-Frank for this purpose. There, Congress instructed courts to perform a searching inquiry into certain OCC-preemption decisions because of their controversial history and significant federalism implications. To signal its intent, it called for *Skidmore* deference, the APA's slightly more intrusive "substantial evidence" standard, a record after an agency proceeding, and reevaluation every five years after preempting state law.

Conversely, Congress can attempt to prevent ossification by constricting judicial review for purely discretionary decisions, agency actions that are highly likely to be products of proper agency decision-making, or regulatory issues that are more likely to face regular and significant changing conditions. For instance, less searching inquiry (so-called "soft glance" review³¹³) may be appropriate for certain sensitive areas, such as emergency actions and matters, like immigration, for which the Executive Branch has traditionally received broad discretion.³¹⁴ Likewise, soft glances may be appropriate for numerous agency determinations that are policy decisions, made without scientific or technical certainty, but still informed by agency expertise. The purpose here is not to resolve when hard look review is most needed, but to suggest that Congress should continue to consider, as it did in Dodd-Frank, when different levels of deference may be appropriate to different decisions.

Once Congress decides where hard looks and soft glances may be most appropriate, it probably cannot define the review that it seeks without facing unpalatable phrasing or interpretive difficulties. For instance, would Congress really want to say that agency decisions must be "really reasonable," "marginally reasonable," or "minimally reasonable"? And at any rate, would courts have any better understanding of these terms than they do of the APA's "arbitrary," "capricious," or "unsupported by substantial evidence" standards?³¹⁵ After all, the "soft glance" sound of arbitrary-and-capricious review has, at times, morphed into a "hard look,"³¹⁶ and courts and commenters continue to debate whether the APA's "substantial evidence" stan-

³¹³ E.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1409 (2010) (mentioning soft glance review).

³¹⁴ See, e.g., Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1836 n.144 (2010) (noting reluctance to apply hard look review to immigration-related decisions because of longstanding judicial deference to the political branches on such matters).

³¹⁵ 5 U.S.C. § 706(2) (2012).

³¹⁶ See Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1299–1300 (2012) (discussing the evolution of the arbitrary-and-capricious standard).

dard is meaningfully different than its “arbitrary and capricious” review.³¹⁷

Instead of trying to define judicial review, Congress should limit itself to setting what it deems the appropriate judicial mood.³¹⁸ The two APA standards’ evolved equivalence suggests that Congress cannot create different moods by specifying one of the APA standards alone. But as other scholars have noticed, the *Chevron* doctrines may be able to play a supporting role here.³¹⁹ Dodd-Frank suggests that Congress, not just courts, can use them. Congress signaled its intent for searching review of OCC-preemption decisions in Dodd-Frank with several statutory provisions: the APA’s potentially more demanding “substantial evidence” standard, *Skidmore*’s less deferential inquiry, and record and proceeding requirements. Commentators have easily understood the mood that Congress set for judicial review of OCC-preemption decisions.³²⁰ Congress, in contrast, used savings clauses to suggest more deferential judicial review, and Congress could have clarified its intent by providing the potentially more

³¹⁷ See, e.g., *id.* at 1300 n.26 (noting that the arbitrary-and-capricious standard was originally intended to be a less searching form of review but that the two APA standards have become interchangeable); see also *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (“[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.”); Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 24–25 (2011) (noting that the Court has not parsed out the meaning of “arbitrary,” “capricious,” or “abuse of discretion”); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) (suggesting that no meaningful difference exists between arbitrary-and-capricious review and substantial-evidence review).

³¹⁸ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (“Congress [in amending the provisions governing judicial review of NLRB decisions] expressed a mood. . . . As legislation that mood must be respected, even though it can only serve as a standard for judgment”); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 557–58 (1997) (“Congress could make it clear that it expects courts to be especially deferential to agency choices of analytical methodologies and to the agency choices of assumptions and inferences.”).

³¹⁹ See *Hickman & Krueger*, *supra* note 4, at 1249 (“Other evaluative standards such as hard look review, as well as *Skidmore*’s emphasis on factors such as thoroughness and consistency, allow the courts to guard against arbitrariness while simultaneously deferring to administrative interpretations.”); *Pierce*, *supra* note 33, at 72–73 (arguing that *Chevron* can tame, but not cure, ossification). Others have noted that *Chevron* itself sets a mood for judicial review. See, e.g., Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 322 n.114 (1993) (“The importance of *Chevron* is then in the mood or attitude it conveys to reviewing courts . . .”).

³²⁰ See, e.g., Richard P. Hackett & Frank H. Bishop, Jr., *Summary of the Consumer Financial Protection Act of 2010*, 64 CONSUMER FIN. L. Q. REP. 295, 304 n.104 (2010) (“Dodd-Frank calls for substantially more involvement in judicial review than is traditionally afforded under *Chevron* deference.”).

lenient arbitrary-and-capricious review as well. As discussed above, Congress can also signal its intent for *Chevron* to apply without certain formal administrative action, and thereby counter ossification that may arise if agencies, in light of *Mead*, engage in more resource-intensive formats to obtain *Chevron* deference.³²¹ By using *Chevmore* and other review doctrines, Congress can target those agencies or actions that it thinks need either more oversight or flexibility. Doing so will not generally resolve concerns over the appropriate boundaries of agency discretion and ossification altogether,³²² but it can allow Congress to address what it views as significant issues.

To be sure, determining where searching judicial review is most appropriate is a difficult task and warrants much more consideration. The broader point is that Congress can assume a role in addressing purported ossification and sufficient judicial oversight. Although often deemed a contributor to ossification,³²³ Congress is less frequently mentioned as a problem solver for it.³²⁴ Dodd-Frank, however, reveals how *Chevmore* codification—whether through codifying *Skidmore*'s factors or using deference savings clauses—can help Congress establish moods to guide appropriate judicial review. While codifying *Chevmore* does not directly address how courts should review agency decisions that do not implicate ambiguous statutory provisions (such as numerous agency adjudications that apply fact to relatively settled law, including routine Social Security or immigration decisions), *Chevmore* codification may be Congress's best tool for creating a permeating mood to influence the stringency of judicial review outside the statutory-interpretation context.

³²¹ See Barron & Kagan, *supra* note 25, at 231 (“*Mead* inevitably will channel additional agency action into [an] already over-burdened administrative mechanism, as agencies sometimes adopt notice-and-comment procedures for no other reason than to gain *Chevron* deference.”).

³²² See Pierce, *supra* note 33, at 72–73 (arguing *Chevron* can tame, but not cure, ossification).

³²³ See, e.g., Yackee & Yackee, *supra* note 311, at 1417–18 (“Th[e] ‘ossification thesis’ proceeds from the observation that . . . each of the three branches has sought to impose its own conception of good regulation (or of good regulatory process) on the federal bureaucracy . . .”).

³²⁴ See, e.g., McGarity, *supra* note 32, at 1453 (considering judicial modification to hard look review); Seidenfeld, *supra* note 31, at 503–23 (suggesting changes to hard look review to reduce the uncertainty that likely leads to ossification). *But see* Danielle Keats Citron & David Gray, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262, 263 (2013) (noting Congress's role in mitigating ossification after 9/11).

3. Addressing Agency Capture

Setting the mood also helps address the related issue of regulatory capture. Indeed, Dodd-Frank codified *Skidmore* for just this purpose. Although the definition of regulatory capture is hardly precise, one leading scholar defines it “as occurring when agencies consistently adopt regulatory policies favored by regulated entities.”³²⁵ Because regulated parties will usually call for less or no regulation that would inure to the public’s benefit,³²⁶ captured agencies make decisions without using their expertise and fail in their regulatory mission to act in the public interest.³²⁷ Congress can attempt to mitigate regulatory capture in several ways,³²⁸ including by increasing the level of judicial scrutiny over agency decisions.

Having various actors involved in administering a statute is one way of seeking to insulate agencies from capture. Barkow has noted how regulatory and enforcement pluralism can help prevent capture.³²⁹ She argued that Congress’s empowering of other federal agencies or the states to administer or enforce another (primary) agency’s statutory scheme can make it harder for regulated parties to block regulation and enforcement.³³⁰ For instance, states can have the power to regulate by passing laws that are more stringent than federal regulations, and multiple agencies can have enforcement power to render it more difficult (if not impossible) for regulated parties to capture a particular regulatory agenda. Aside from states and federal agencies, the judiciary, with *Skidmore* deference in hand, can be another actor that helps mitigate regulatory capture. Interpretive primacy requires courts to defer to agency action only to the extent that it is founded on agency expertise³³¹ and thereby limits products of agency capture.

³²⁵ Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 224 (2012).

³²⁶ See *id.* at 224–25 (“[I]t is a safe bet that the goal of the regulatory industry is to minimize the degree of stringency of regulations, if not avoid regulation altogether.”).

³²⁷ See *id.* at 251 (noting that civil servants are more likely to be captured when they must turn to industry for information and expertise).

³²⁸ See generally Barkow, *supra* note 34, at 42–64 (describing five “equalizing factors” that can help insulate agencies from regulatory capture).

³²⁹ See *id.* at 49–58 (describing the interrelated roles of various agencies, as well as the federal-state relationship, and how these factors can aid or hinder an agency’s insulation goals).

³³⁰ See *id.* at 55 (“[T]his structure puts more cops on the beat to ensure that an agency’s rules or a statute’s requirements are taken seriously.”). But cf. *id.* at 56 (“[E]nforcement overlap can have potential costs in terms of the zeal of the insulated agency’s enforcement agenda.”).

³³¹ See *supra* Part I.A (discussing *Skidmore*’s foundation on agency expertise).

Dodd-Frank reveals how Congress can use *Chevmore* to address capture. First, Congress can use a *Skidmore* penalty to transfer interpretive primacy from an administering agency to courts when Congress is concerned about regulatory capture. Congress did just this with the OCC and preemption. Second, Congress can use *Chevron* codification to give an insulated agency space to regulate. For instance, after using various mechanisms to insulate the CFPB from regulatory capture,³³² Congress indicated that courts should apply the *Chevron* regime to the CFPB's regulatory actions (notwithstanding other agencies' enforcement or administrative roles).³³³ This *Chevron* reward gave the agency that Congress has designed to be impervious to capture more space to regulate with less judicial interference. But it does more than establish the relationship between the courts and the reviewed agency. When more than one agency administers a statutory scheme, providing an agency a *Chevron* reward can also establish the relationship between the competing administering agencies. In certain instances, Congress gave the CFPB—which may be one of the most insulated agencies ever created—interpretive primacy to the detriment of other agencies that administer federal consumer-protection laws.³³⁴ In this way, Congress rewarded the agency that is perhaps the least likely in federal history to become captured.³³⁵ *Chevmore* codification is certainly no panacea, but it serves as an additional legislative tool for mitigating regulatory capture.

C. Possible Objections to Chevmore's Codification

I conclude by rejecting three possible objections to *Chevmore*'s codification: codification presents separation-of-powers problems, the applicable deference regime is unlikely to affect judicial outcomes, and *Chevmore* codification may exacerbate regulatory capture.

³³² See Barkow, *supra* note 34, at 72–78 (considering the CFPB as a case study on how Congress can insulate agencies from regulatory capture).

³³³ See notes 183–85 and accompanying text (detailing steps taken by Congress to insulate the CFPB).

³³⁴ How Congress's provision of shared administrative interpretive authority will work out is far from clear—whether as to regulatory capture, judicial review, or even regulatory coherence.

³³⁵ To be sure, Congress must consider how to weigh the extent of agency capture in competing agencies, its trust in the judiciary, and whether current political pressures (whether from the Executive or Legislative Branches) should play a role in agency regulation. See Garrett, *supra* note 5, at 2655 (“Yet, it might be the case that, in some circumstances, the enacting Congress will prefer that policymaking through interpretation be more insulated from current political pressures than is possible in the agency environment, even in an independent agency that is somewhat separate from the President.”).

First. Whatever separation-of-powers problems exist in Congress overseeing judicial review, those concerns are misplaced here. Some have suggested that *Chevron* may be required under the Constitution's separation-of-powers principles, thereby limiting Congress's ability to intensify judicial review to the detriment of the Executive Branch (through, for example, *Skidmore* review).³³⁶ On the flip side, others have suggested that Congress may be limited in its efforts to diminish judicial review, thereby limiting Congress's ability to codify *Chevron*.³³⁷ Tom Merrill and Kristin Hickman have persuasively argued that *Chevron* is not founded on constitutional requirements,³³⁸ and I shall not restate their arguments here. More importantly, once one accepts that *Chevron* is founded on a delegation theory,³³⁹ Congress necessarily has the power to decide whether it seeks to delegate interpretive primacy upon courts or agencies by providing *Chevron* deference. The same is true for *Skidmore* deference because it also relies on notions of congressional delegation.³⁴⁰ Moreover, because Congress generally has the greater power to preclude judicial review of administrative action (at least for public-rights cases³⁴¹),³⁴² it should have the lesser power of establishing the intensity of judicial review that it grants, especially when it chooses between standards that the courts themselves created and routinely use.

Second. *Chevron* codification can also provide meaningful guidance, despite some empirical studies' suggestion that the standard of judicial review does not significantly impact whether the agency prevails in court. Although courts affirm agency interpretations more frequently under *Chevron* than *Skidmore*, the ranges of affirmance rates from various studies, to be sure, overlap. For instance, Richard Pierce summarized several studies by noting that courts affirmed

³³⁶ See Merrill & Hickman, *supra* note 4, at 864–67 (discussing the possibility of the Constitution serving as a legal foundation for the *Chevron* doctrine).

³³⁷ Cf. Richard W. Murphy, *The Limits of Legislative Control over the "Hard-Look"*, 56 ADMIN. L. REV. 1125, 1128 (2004) ("Arguably, it is implicit in the courts' core function of blocking arbitrary executive action that *they*, not Congress, must decide for themselves what minimum amount of effort their rationality review should require.").

³³⁸ Merrill & Hickman, *supra* note 4, at 865–67.

³³⁹ See *supra* Part I.B (stating the argument that *Chevron* is founded on a theory of delegation).

³⁴⁰ See *supra* Part I.A (concluding that *Skidmore* deference is also founded upon congressional intent).

³⁴¹ See *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (distinguishing between public and private rights when determining which kind of cases Congress can remove from Article III courts' cognizance).

³⁴² See 5 U.S.C. § 701 (2012) (precluding review of agency action when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law").

agency action under *Chevron* from 60% to 81.3% of the time, while they affirmed under *Skidmore* from 55.1% to 73.5% of the time.³⁴³ He concluded that the difference in affirmance rates is “barely detectable.”³⁴⁴ If this is true, so-called *Skidmore* penalties and *Chevron* rewards lose some force.

One must, however, be careful when comparing the various findings. One of the studies, for example, indicated a lower affirmance rate for *Chevron* than other studies, but it limited its inquiry to only two agencies whose actions are “politically contentious.”³⁴⁵ Likewise, a study that found a lower rate of affirmance under *Skidmore* is likely more probative than prior studies (that tended to show a greater affirmance rate) because it was the only one that considered how courts of appeals have applied *Skidmore* since *Mead* reestablished *Skidmore*’s viability after *Chevron* in 2001.³⁴⁶ Moreover, one of the included studies, William Eskridge and Lauren Baer’s empirical assessment of deference regimes in the Supreme Court, is by its own terms of limited utility in determining whether the *Chevmore* doctrines lead to meaningfully different outcomes in federal courts.³⁴⁷ Eskridge and Baer found that agencies enjoyed a win rate that was only approximately 3% higher under *Chevron* than *Skidmore* in the Supreme Court.³⁴⁸ Not only did their study confine itself to Supreme Court decisions, but one of their key findings was that the Supreme Court applied *Chevron* in only about one-quarter of the cases in which it appeared applicable under *Mead*,³⁴⁹ and that the high agency-win rates were likely attributable to selection bias.³⁵⁰ All of this is not to say that empirical studies are not useful or should be ignored. Instead, the point is that one must be careful before concluding that the *Chevmore* doctrines do not affect outcomes during judicial review.

³⁴³ Pierce, *supra* note 4, at 85.

³⁴⁴ *Id.*

³⁴⁵ See *id.* at 84 (referring to the study by Miles and Sunstein that found a 64% affirmance rate under *Chevron* from 1996 to 2006); accord Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 848 (2006) (noting their study focuses on “two important agencies known for producing politically contentious decisions: the EPA and the NLRB”).

³⁴⁶ Hickman & Krueger, *supra* note 4 at 1235, 1275.

³⁴⁷ William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1125 (2008).

³⁴⁸ *Id.* at 1142.

³⁴⁹ *Id.* at 1124–25.

³⁵⁰ See *id.* at 1122 (concerning high agency-win rates after *Chevron*); *id.* at 1143 (concerning high agency win rates in consultative deference cases, which are similar to *Skidmore* review).

But even if the outcomes have been similar under both regimes, future signaling from Congress may lead to a greater disparity between *Chevron* and *Skidmore* review. This is because Congress, whose intent the courts seek to glean, has suggested that the standards should be different in application and effect. For instance, Congress had three competing OCC-preemption bills, each with a different kind of judicial-review standard (no deference, *Skidmore*, and *Chevron*), and dissenting votes on the basis of *Skidmore*'s codification. These judicial-review debates strongly suggest that Congress thought that the standard of judicial review does or should matter; otherwise, the competing bills and dissent were much ado about nothing. Moreover, a recent Senate bill seeking to replace the *Chevron*-like *Auer* deference with *Skidmore*-like deference for judicial review of agencies' interpretations of their own regulations highlights that Congress views the standards as meaningfully different and likely expects different outcomes.³⁵¹

And even if the ranges remain similar going forward, such a result does not mean that agencies act the same no matter which regime applies. Instead, it could merely reveal that agencies are responding to Congress's concerns and providing better evidence of their expertise when *Skidmore* applies and otherwise limiting the aggressiveness of their interpretations. Indeed, OCC officials recently recognized, after Dodd-Frank, that supporting their positions with evidence improved their odds of success in court.³⁵²

Chris Walker recently conducted a groundbreaking study into the views of 128 agency rule drafters,³⁵³ producing results that indicate that *Chevron* at least somewhat influences agency drafting, although the full extent of that influence is unclear. For instance, nearly all of the respondents agreed to some extent that agency drafters think about judicial review when drafting.³⁵⁴ Relatedly, 81% of the respondents agreed strongly, agreed, or somewhat agreed that "[a]gency expectations about which level of deference (*Chevron*, *Skidmore*, no deference, etc.) courts will apply to its statutory interpretation affect the agency's drafting process."³⁵⁵ More specifically, 83% of the

³⁵¹ See *supra* note 279 and accompanying text (mentioning the Senate's most recent effort to update judicial-review provisions of the APA).

³⁵² See Sharkey, *supra* note 124, at 582 (discussing views of interviewed OCC officials).

³⁵³ See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 703–04 (2014) (providing an empirical analysis of *Chevron* and its impact on federal agency interpretation and administration of statutes).

³⁵⁴ *Id.* at 722 (stating that 46% strongly agreed, 41% agreed, and 11% somewhat agreed).

³⁵⁵ *Id.* at 722–23 (stating that 10% strongly agreed, 36% agreed, and 35% somewhat agreed).

respondents at least somewhat agreed that agencies are willing to be more aggressive in interpretation matters when they know or strongly believe that *Chevron* deference will apply.³⁵⁶ Conversely, Walker's study shows that 83% at least somewhat agreed that the agency would be less willing to advance an aggressive interpretation if *Chevron* does not apply.³⁵⁷

To be sure, Walker cautions readers from generalizing his findings because of the predominance of the "somewhat agree" response for each answer related to the aggressiveness of agency interpretations, the significant number of respondents who indicated that they did not know the answer (approximately 20% of the respondents for each question), and comments volunteered from a few respondents indicating that *Chevmore* does not influence agency interpretation.³⁵⁸ But, despite these limitations, his study provides some evidence that *Chevmore* influences agency action, and it suggests that similar affirmance rates could provide some indication that *Chevmore* codification is working.³⁵⁹ Therefore, even if it is only a myth that *Chevron* and *Skidmore* lead to different results, that myth has purchase on agencies and Congress.

Third. Providing agencies a statutory right to *Chevron* deference could unwittingly encourage regulatory capture as courts limit their review and as industry accumulates more influence over the agency, but this fear does not undermine *Chevmore* codification's utility. Even under *Chevron*, meaningful judicial review exists that will likely prevent the worst excesses of capture. The agencies' decisions must be reasonable, and agencies must do what Congress requires for *Chevron* to apply, such as satisfying procedural or participatory requirements. Repeated reversals may bring the agency's possible capture to Congress's attention. Such fears ultimately only highlight the role that Congress, as architect and manager of the administrative state, must play in overseeing agencies, both before and after codifying *Chevmore*. If the delegation principle underlying *Chevmore* means anything, it must be that Congress has an obligation to monitor agencies and make known its intent as to interpretive primacy.

³⁵⁶ *Id.* at 723 (stating that 10% strongly agreed, 33% agreed, and 40% somewhat agreed with this statement).

³⁵⁷ *Id.* at 724 (stating that 7% strongly agreed, 31% agreed, and 45% somewhat agreed).

³⁵⁸ *Id.* at 724.

³⁵⁹ *See id.* at 725 ("The study's findings provide strong support that agency rule drafters think about judicial review when drafting statutes and understand *Chevron* and *Skidmore* and how their chances in court are better under *Chevron*. Many rule drafters also reported that federal agencies advance more aggressive statutory interpretations if they know *Chevron* applies.").

CONCLUSION

Although properly considered one of the most significant statutes governing finance and consumer protection, Dodd-Frank should be noteworthy, too, for its implications as to administrative law. To my knowledge, it is the first time that Congress has codified *Skidmore*. It is the first time that Congress has indicated in legislative history (and by implication in certain statutory provisions) that it accepts *Chevron*. It is the first time that Congress has suggested that the judicially crafted *Chevmore* doctrines and the APA's statutory review provisions coexist comfortably. It is the first time that Congress has addressed when multiple enforcing agencies should receive *Chevron* deference. By taking these unprecedented actions, Congress legitimizes the delegation theory that undergirds the *Chevmore* doctrines, makes its intent as to interpretive primacy better known, and places those doctrines on firmer ground.

Dodd-Frank is instructive, too, on how *Chevmore* codification can serve as a legislative tool in the future. Congress should continue to use *Chevmore* codification as both a reward and a penalty to clarify its intent as to the *Chevmore* doctrines. In the process, it will help mitigate longstanding administrative-law issues. As Dodd-Frank suggests, Congress will do so when agencies and courts veer too far from congressional policy preferences or intent about the proper relationship between courts and the agency at issue. By relying on *Chevmore* codification going forward, Congress accepts the responsibility that accompanies the privilege of *Chevmore*'s delegation theory.