Beyond *Chevron’s* Domain:
Agency Interpretations of
Statutory Procedural Provisions

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Every new tribunal, erected for the decision of facts, without the intervention of jury, . . . is a step towards establishing . . . the most oppressive of absolute governments.¹

I. INTRODUCTION

Trial of facts by jury is a deep-seated principle in American jurisprudence.² Enshrined in the Constitution,³ it was considered by many as “the very palladium of free government.”⁴ In the administrative context, however, the right to a jury trial has been greatly curtailed.⁵ Federal

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1. WILLIAM BLACKSTONE, 3 COMMENTARIES 380 (1765-69).
3. The Seventh Amendment provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .” U.S. CONST. amend. VII.
4. THE FEDERALIST NO. 83 (Alexander Hamilton).
5. The Seventh Amendment does not apply to administrative adjudications. See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm’n, 430 U.S. 442, 450 (1977) (holding that “the Seventh Amendment does not prohibit Congress from assigning the fact finding function and initial adjudication to an administrative forum with which the jury would be incompatible,” even
administrative agencies can essentially conduct trials without a jury or
the protection of an Article III judge, and their decisions are afforded
great deference on judicial review. Agencies also can directly impact
individual rights through much less formal, so-called informal, adjudica-
tions, accompanied by only minimal procedures that pale in comparison
to a trial. Because procedural protections are critical to protect substan-
tive rights, we must closely monitor agency adjudications to ensure that
these rights, and the general public, are properly protected.

Indeed, the "[m]ultiplication of federal administrative agencies and
expansion of their functions to include adjudications which have serious
impact[s] on private rights" was one of the developments of the modern
administrative state that prompted Congress to enact the Administrative
Procedure Act (APA). The APA, which governs all federal agencies,

where fines can be levied; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48–49 (1937) (re-
jecting the argument that the Seventh Amendment applied to the NLRB’s order of reinstatement and
back pay in an unfair labor practice proceeding under the National Labor Relations Act).
6. See infra Parts II and IV.
7. See infra Part II.
8. The power of procedural protections must not be underestimated: "Assuming that the sub-
stance of the law is not subject to attack, procedural safeguards are the individual’s only protections
if [the government] contends that the individual has not complied with the statutory requirements or
conditions.” John Sandberg, Special Project, Fair Treatment for the Licensed Professional: The
R. Howarth, Jr., Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be
Used?, 37 ADMIN. L. REV. 317, 318–20 (1985). Undeniably, “[t]he nature and extent of these pro-
ducial safeguards may very well determine whether or not the individual can realistically assert his
claim or defense and thus protect his livelihood.” Id. at 411. Moreover, in the administrative law
context, procedures protect not only the individuals involved in the adjudication but also the general
"[t]he panoply of protections provided by the APA is necessary not only to protect the rights of an
applicant for less stringent pollutant discharge limits, but is also needed to protect the public for
whose benefit the very strict limitations have been enacted”).
"Agency" means each authority of the Government of the United States, whether or not it
is within or subject to review by another, but does not include—
(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;
or, except as to the requirements of section 552 of this title—
(E) agencies composed of representatives of the parties or of representatives of organi-
izations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of
title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50,
appendix . . . .
Id. § 551(1).
provides procedures for the two primary activities in which agencies engage: adjudication and rulemaking.\textsuperscript{11} These activities are further categorized by the level of procedural formality: formal and informal.\textsuperscript{12} Together, the type of activity and the level of formality determine the set of accompanying procedures that must be followed.\textsuperscript{13} Formal procedures provide protections that are generally comparable to those available in a civil judicial trial.\textsuperscript{14} By contrast, informal procedures require far fewer protections for individuals; although the APA specifies procedures for informal rulemaking, it does not mandate any particular procedures for informal adjudications.\textsuperscript{15}

An agency must follow the APA’s formal procedures when an agency adjudication is “required by statute to be determined on the record after opportunity for an agency hearing.”\textsuperscript{16} Accordingly, Congress, through an agency’s organic or enabling act, dictates when an agency must follow formal procedures. An enabling statute can explicitly call for formal or informal procedures under the APA,\textsuperscript{17} but when the statute is

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\item \textbf{11.} The APA defines “adjudication” as the “agency process for the formulation of an order,” \textit{id.} § 551(7), and defines “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” \textit{id.} § 551(6). “Rule making” is defined as the “agency process for formulating, amending, or repealing a rule.” \textit{id.} § 551(5). Consequently, the distinction between adjudication and rulemaking hinges largely on the definition of “rule”:
\begin{itemize}
\item the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing. \textit{id.} § 551(4).
\end{itemize}
\item \textbf{12.} See \textit{id.} § 553 (prescribing procedures for informal rulemaking); \textit{id.} § 554 (relating to adjudications); \textit{id.} §§ 556–557 (prescribing procedures for formal rulemakings and formal adjudications). These provisions are described in detail \textit{infra} Part II.A–B.
\item \textbf{13.} Congress can also substitute another set of procedures in an enabling act for those in the APA, or require more procedures than are mandated by the APA. In this sense, APA procedures act as a default set of procedures for agencies to follow absent more explicit instructions from Congress.
\item \textbf{14.} See \textbf{5 U.S.C.} §§ 556–557 (2006). These requirements are discussed in detail \textit{infra} in Part II.A. \textit{See also} Richard E. Levy & Sidney A. Shapiro, \textit{Administrative Procedure and the Decline of the Trial}, 51 U. KAN. L. REV. 473, 495 (2003). The APA’s formal procedures are not, however, always those guaranteed in a civil trial. For instance, APA procedures do not always require cross-examination; the agency must allow for cross-examination only “as may be required for a full and true disclosure of the facts.” \textbf{5 U.S.C.} § 556(d) (2006).
\item \textbf{15.} \textit{Compare} \textbf{5 U.S.C.} § 553 (2006) (specifying procedures for informal rulemaking) \textit{with id.} § 554 (not specifying procedures for informal adjudication). \textit{See also} § 555, which applies to all agency actions under the APA, not to only informal adjudications. These provisions are discussed further \textit{infra} Part II.A.
\item \textbf{17.} Congress can also call for “hybrid” procedures that require more than the minimum informal procedures but fall short of the APA’s full formal procedures. \textit{See, e.g.}, Clean Air Act Amend-
not explicit, agencies and courts end up determining which procedures are required. This Article will address whether agencies or courts are best suited for this task.

Given the opportunity, agencies will usually choose informal procedures over formal ones. Not surprisingly, "the trend is toward the elimination of procedural formality in favor of procedural efficiency." The Supreme Court first encouraged this trend in the 1970s by severely limiting the application of the APA's formal rulemaking procedures and by denying courts the power to supplement the APA's informal rulemaking procedures with additional procedural protections. Even in the adjudicative setting, where procedural protections are more rigorous, the Court's current constitutional prescription for procedural rights under the Due Process Clauses of the Fifth and Fourteenth Amendments is an informal hearing: "something less than an evidentiary hearing is sufficient prior to adverse administrative action."

The Court's approach to judicial review of agency statutory interpretation has also followed this trend toward efficiency. Its 1984 decision in Chevron U.S.A. v. Natural Resources Defense Council expanded the circumstances in which courts must defer to agency interpretations of regulatory statutes. Under Chevron, a court must first ask whether Congress has directly spoken to the precise question at issue. If not, the court must defer to the agency's reasonable interpretation. The adoption of the "Chevron doctrine," as it is commonly known, has spawned a vast range of issues for litigation and scholarly commentary.


19. Howarth, supra note 8, at 320. See also, e.g., Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 18–19 (1st Cir. 2006) (upholding a new agency interpretation changing procedures from formal to informal for the permitting process under the Clean Water Act).

20. See United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 235 (1973) (holding that an administrative agency could reach a decision through means other than a trial-type hearing).

21. See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978) (holding that judicial hybrid rulemaking is not permissible; courts can only compel agencies to follow procedures that are required by the Constitution or "extremely compelling circumstances").


24. Id. at 842.

25. Id. at 843–44.

26. Articles about Chevron are too numerous to list completely here. See Jerry L. Mashaw, Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Ac-
This Article does not seek to critique *Chevron* as an administrative or constitutional law doctrine. Rather, taking *Chevron* and its progeny as the current state of the law, it argues that agency interpretations of their enabling statutes’ procedural provisions should lie beyond “*Chevron’s domain.*”27 The Article specifically focuses on provisions that dictate whether formal adjudicatory procedures are required and how the type of procedures impacts individual rights.

Today, no uniform approach exists to determine what statutory language triggers the APA’s formal adjudicatory procedures. Historically, courts have taken three divergent approaches when a statute is not clear. The first approach is a presumption in favor of informal procedures.28 The second approach employs the opposite presumption; it requires formal procedures absent evidence of congressional intent to the contrary.29 The third approach grants *Chevron* deference to the agency’s reasonable interpretation.30 This third and most recent approach appears to be a growing trend, one that in 2006 caused a federal circuit court to abandon its longstanding precedent calling for a presumption in favor of formal

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27. I borrow this term from one of the most significant articles about *Chevron*, Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833 (2001). While I was a student at Northwestern University School of Law, I had the honor of serving as a research assistant for Professor Merrill. A long overdue thank you to him for introducing me to the wonderful world of administrative law.

28. See City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). For a detailed discussion of this case, see infra Part III.A.

29. Until recently, the First Circuit followed this approach. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 (1st Cir. 1978) (creating a presumption in favor of formal procedures, rebuttable by evidence of clear congressional intent). But see Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 18–19 (1st Cir. 2006) (abandoning the Seacoast approach in favor of *Chevron* deference). For a detailed discussion of these cases, see infra Part III.

30. The D.C. Circuit takes this approach. See Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989). The First Circuit now follows this approach. See Dominion Energy, 443 F.3d at 12. For a detailed discussion of these cases, see infra Part III.
procedures and to defer to an agency’s reinterpretation of statutory language in the name of efficiency.31

This Article is critical of this trend toward granting deference to agency interpretations of whether their enabling statutes require formal adjudicatory procedures. It argues that, in determining whether APA formal procedures are required, neither Chevron deference nor presumptions are the proper solution.32 Instead, a case-by-case, de novo review is necessary, leaving courts, not agencies, to have the final word on such interpretations.33

Part II of the Article outlines the procedures required by the APA for agency adjudications. Part III discusses the three primary approaches that courts have followed to determine what triggers formal adjudicatory procedures and introduces the Chevron doctrine. Part IV examines how courts review agency interpretations of statutory provisions under

31. See Dominion Energy, 443 F.3d at 12 (abandoning precedent of twenty-eight years in response to a new EPA interpretation of the Clean Water Act).


33. While some scholars and the American Bar Association (ABA) have argued for legislative change to the APA to resolve this circuit split, legislative action is likely to be neither politically achievable nor normatively desirable. Just over a year before the First Circuit’s flip in Dominion Energy, the ABA House of Delegates adopted a resolution that urged Congress to codify in the APA a presumption favoring formal proceedings. See American Bar Association, Federal Administrative Adjudication in the 21st Century Act, A Bill, adopted by the House of Delegates, Feb. 14, 2005, available at http://www.abanet.org/jd/ncaj/pdf/res114_apa.pdf (arguing Congress “to modernize the adjudication provisions of the Administrative Procedure Act and to extend certain fundamental fair hearing provisions to additional hearings required by statute”). The ABA recently reiterated this position to the House Judiciary Subcommittee. Letter from Eleanor D. Kinney, Chair, ABA Section of Administrative Law and Regulatory Practice, to the Honorable Chris Cannon, Chair of the U.S. House of Representatives Judiciary Subcommittee on Commercial and Administrative Law (July 25, 2006), available at http://www.abanet.org/poladv/letters/109th/adminlaw/apa72506.pdf. Several scholars have individually advocated this view as well. See Michael Asimow, The Spreading Umbrella: Extending the APA’s Adjudicatory Provisions to All Evidentiary Hearings Required by Statute, 56 ADMIN. L. REV. 1003, 1004–05 (2004) (arguing for legislative change); Howarth, supra note 32, at 1043 (supporting the ABA’s proposal for codifying a presumption in favor of formal adjudicatory procedures). But Congress has rarely amended the APA since its enactment in 1946, despite debate by courts and commentators on a number of issues. See Alan B. Morrison, The Administrative Procedure Act: A Living and Responsive Law, 72 VA. L. REV. 253, 253 (1986). It therefore seems unlikely that Congress will adopt the ABA’s proposal, especially in light of the First Circuit’s decision to reject the presumption and instead apply Chevron deference. Even if legislative change is politically achievable, it will take time, and courts do not have control over when the issue will appear on their dockets. Accordingly, a judicial solution is essential.
Chevron and its progeny and explores two issues on the fringes of Chevron's domain—interpretations of agency jurisdiction and judicial review provisions—and the concerns that they raise. Next, using lessons from these analogous issues, Part V analyzes similar concerns about congressional intent, institutional competency, agency self-interest, and fairness in the procedural provision context. It then advocates for a contextual approach to judicial review, which rejects mandatory deference, and proposes an analytical framework for such review based on factors related to the goals served by procedural formalities. Part V argues that this is the best approach available to provide long-needed guidance to the courts. In Part VI, the Article concludes that courts, not agencies, should be the final interpreters of procedural provisions in enabling statutes.

II. ADJUDICATIONS UNDER THE ADMINISTRATIVE PROCEDURE ACT

The interpretive issue that is the subject of this Article is grounded in the APA, and thus the APA is the starting point for any analysis. This Part outlines the APA's procedures for agency rulemaking and adjudication. It then discusses the question of what statutory language triggers the APA's requirement for formal procedures.

A. Procedural Packages Under the APA

Distinguishing adjudication from rulemaking is one of the most critical distinctions in administrative law. Adjudications require the agency to act like a trial court resolving a dispute, whereas in rulemaking, the agency acts more like a legislature. The most important distinction, however, is that rulemaking "affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity." Because adjudications involve individual substantive rights that are concretely and immediately affected by an agency's action, agencies must comply with constitutional due process in addition to the APA and other statutory procedures.

35. See id. at 11. See also Alan B. Morrison, Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not, 59 Admin. L. Rev. 79, 80 (2007) (analyzing the difference between agencies engaged in these activities and courts and legislatures).
37. The constitutional distinction between rulemaking and adjudication was set out in two pre-APA Supreme Court decisions, Londoner v. Denver, 210 U.S. 373, 386 (1908) (holding that an
The APA sets up a "feast or famine" paradigm for adjudicatory procedures. Under the APA, formal adjudications are governed by §§ 556 and 557, which together contain a set of trial-type procedures that apply to only formal adjudications and formal rulemakings. These formal procedures provide a host of procedural protections.

For example, the agency is required to provide notice of the hearing and afford an opportunity to participate in that hearing. A qualified presiding officer is to conduct the hearing in a fair and impartial manner and is given the administrative powers to do so. The APA also places the burden of proof on the proponent of an adjudicatory order and requires that such orders be supported by reliable, probative, and substantial evidence appearing in the hearing record. At the hearing, a party is given the opportunity to present his case or defense by oral or documentary

adjudicatory hearing was required to satisfy constitutional due process under the Fourteenth Amendment), and Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (distinguishing Londoner and holding that no hearing was constitutionally required for a matter "in which all are equally concerned"). These cases stand for the general principle that constitutional due process requirements apply to adjudications but not to rulemaking. See infra Part V.A.4 for a discussion of due process.

38. This expression is borrowed from LAWSON, supra note 34, at 198.
39. It is conventional to refer to the APA's provisions by their codification in Title 5 of the U.S. Code, rather than by section numbers in the enacted bill. Adjudications are also governed by the procedures set out in 5 U.S.C. § 554 (2006).
41. Id. § 554.
42. The impartial decisionmaker is usually an Administrative Law Judge (ALJ). ALJs perform many of the adjudicative, judge-like functions carried out by agencies. They can:
administer oaths and affirmations;
issue subpoenas authorized by law;
rule on offers of proof and receive relevant evidence;
take depositions or have depositions taken when the ends of justice would be served;
regulate the course of the hearing;
hold conferences for the settlement or simplification of the issues by consent of the parties;
inform the parties regarding the availability of dispute resolution methods and encourage use of such methods;
require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate;
dispose of procedural requests or similar actions;
make or recommend decisions;
take other action authorized by agency rule.
Id. § 556(c). Although they do not enjoy the life tenure of an Article III judge, ALJs are protected in the sense that during their tenure they are removable only for good cause as established by the Merit Systems Protection Board. Id. § 7521 (also requiring a hearing "on the record" before the Board). In addition, the salaries of ALJs are set on a government-wide basis in accordance with regulations set forth by the Office of Personnel Management. Id. § 5372.
43. Id. § 556(d), (e).
evidence, and, in most situations, will be permitted to conduct cross-examination.\(^{44}\) Section 557 outlines the decisionmaking process for the presiding officer and limits the decisionmaker from engaging in ex parte communications regarding the merits during the deliberative process.\(^{45}\) It also entitles parties to submit proposed findings of fact and conclusions of law; to make exceptions to prior rulings; and to provide a statement on the basis for these findings, conclusions, or exceptions.\(^{46}\) Finally, § 557 requires that the record include the rulings on each finding, conclusion, or exception presented and that all decisions include a statement of (1) findings and conclusions of law; (2) supporting reasons for these findings and conclusions; and (3) the appropriate order, rule, sanction, relief, or denial of relief.\(^{47}\)

While these formal procedures generally apply to agency rate-making, licensing, and enforcement actions, they do not apply to many typical agency responsibilities.\(^{48}\) Other than minimum procedures that apply to all agency actions,\(^{49}\) the APA does not specify a set of procedures to follow when formal adjudication is not required.\(^{50}\) Agency procedures in "informal" adjudications,\(^{51}\) therefore, are limited to those procedures adopted by the agency, required by the enabling statute, or required by due process.\(^{52}\)

\(^{44}\) Id. § 556(d). Section 556 requires cross-examination only "as may be required for a full and true disclosure of the facts." Id. Accordingly, whether to allow cross-examination ultimately is left to the decisionmaker's discretion.

\(^{45}\) Id. § 557(d)(1).

\(^{46}\) Id. § 557(c).

\(^{47}\) Id. §§ 557(c)(A)–(B).

\(^{48}\) Levy & Shapiro, supra note 14, at 496. See also 5 U.S.C. § 554(a) (2006). For example, agencies frequently engage in informal rulemaking, informal adjudications, and a variety of non-binding actions, such as investigation, analysis, and planning.

\(^{49}\) Section 555 does provide some protections that apply to all APA proceedings, including limited rights to appear before an agency; limits on agency subpoena power; the right to retain copies of information submitted to an agency; the right to inspect copies of testimony transcripts; and the right to "prompt written notice of the denial of any written petition application or request, including a brief explanation of the reasons for the denial." 5 U.S.C. § 555 (2006).

\(^{50}\) Levy & Shapiro, supra note 14, at 496; Morrison, supra note 35, at 111. As described above, the APA specifically provides procedures for formal adjudications and formal rulemakings in §§ 556–557, and for informal rulemaking in § 553. 5 U.S.C. § 553, 556–557 (2006). There is no corresponding section for informal adjudications.

\(^{51}\) In this sense, informal adjudications, which are not labeled as such in the APA, "constitute a residual category, including 'all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings.'" City of West Chicago v. NRC, 701 F.2d 632, 644 (7th Cir. 1983) (quoting Izaak Walton League v. March, 655 F.2d 346, 361–62 n.37 (D.C. Cir. 1981)).

\(^{52}\) See Levy & Shapiro, supra note 14, at 496–97. Thus, "[t]he APA's procedural provisions are really gap-fillers; they are superseded by specific procedural requirements in an agency's enabling statute, whether the enabling statute provides for greater or lesser procedural formality than would otherwise be required by the APA." Id. at 486 n.59. Courts cannot add procedures unless the
B. Triggering Formal Procedures

Because significant consequences flow from the distinction between formal and informal procedures (for example, the availability of an impartial decisionmaker, oral argument, and cross-examination), understanding what triggers the application of formal procedures is essential. Though the Supreme Court has clearly indicated what triggers the application of formal procedures for rulemaking, it has not answered that question for adjudication.

The APA itself does not dictate when agencies must follow the formal procedures set out in §§ 556 and 557. Rather, agencies must read the APA in conjunction with the relevant agency enabling statute. The APA uses essentially the same language in the sections governing rulemaking (§ 553) and adjudication (§ 554) to “trigger” the use of formal procedures. Section 553 indicates that when an agency is engaged in rulemaking, it must employ formal procedures “[w]hen rules are required by statute to be made on the record after opportunity for agency hearing.” Similarly, § 554 indicates that an agency must employ the formal procedures in §§ 556 and 557, along with certain procedures in § 554, “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.” Agencies thus must consult their enabling statutes to determine if the statute requires a particular agency proceeding to be made “on the record after opportunity for agency hearing.”

Although the APA’s rulemaking and adjudication provisions use identical language to describe the applicability of formal procedures, the same legal standard does not necessarily govern the triggering of such procedures. Some courts have answered the question of what triggers formal procedures differently depending on whether an agency is...
engaged in rulemaking or adjudication. In United States v. Florida East Coast Railway, the Supreme Court created a presumption against formal procedures in rulemakings by holding that the statutory phrase “after hearing” did not trigger formal procedures. While the Court declared that “the actual words ‘on the record’ and ‘after . . . hearing’ used in § 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings,” these words have been considered “magic words” in practice.

The same is not true for formal adjudications, which are more common than formal rulemakings. The Supreme Court has never ruled on the issue of what language triggers formal procedures in the adjudicatory context. As a result, lower courts have developed divergent answers to this question. Some cases are clear. For instance, no one would dispute that formal procedures should be required if the enabling statute

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58. Florida East Coast Railway, 410 U.S. at 238 (citing United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972)).

59. See Stanley, supra note 32, at 1073–74 (“In the context of rulemaking, the Supreme Court addressed this question, and concluded that unless the statute includes the express language ‘on the record,’ or ‘other statutory language having the same meaning,’ formal rulemaking is not required.”). After the Court’s decision in Florida East Coast Railway, lower courts generally treated the presence or absence of “on the record” language as dispositive. See, e.g., Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1498–99 (D.C. Cir. 1984) (holding that a statutory provision calling for a “full hearing” required only informal procedures); Am. Tel. & Tel. Co. v. FCC, 572 F.2d 17, 22 (2d Cir. 1978) (holding that a statutory provision calling for a “full opportunity for hearing” required only informal procedures); Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1250 (D.C. Cir. 1973) (reasoning that Florida East Coast Railway “virtually established [the existence of ‘on the record’ language] as a touchstone test of when section 556 and section 557 proceedings are required”). Because only a few rulemaking statutes contain the express “on the record” language, formal rulemaking has practically vanished as a procedural category. Levy & Shapiro, supra note 14, at 486.

The Court’s decision in Florida East Coast Railway fed into a larger movement during that era, when rulemaking in general was gaining importance as a procedural mode. While adjudication was the most significant form of agency action before 1960, during the 1960s and 1970s, agencies engaged in a “constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.” Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 376. The historical reasons for this flight to rulemaking are fascinating but beyond the scope of this Article. For a good discussion of this issue, see Richard J. Pierce, Jr., Rulemaking and the Administrative Procedure Act, 32 TULSA L.J. 185, 189 (1996); Levy & Shapiro, supra note 14, at 474–94.

60. This is not for lack of opportunity, as the Court denied the petition for certiorari in Seacoast. At that time, however, only the First and Ninth Circuits had considered this issue, and they were in agreement about favoring formal procedures. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1st Cir. 1978), cert. denied sub nom. Public Serv. Co. v. Seacoast Anti-Pollution League, 439 U.S. 824 (1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) (holding that formal procedures apply, even absent “on the record language,” when the “substantive character of the proceedings involved” was such that “special procedural safeguards” were needed).
includes “on the record” language or a specific reference to the APA’s formal procedures. Conversely, if the statute includes no references to hearings, then almost certainly formal procedures should not be required. But many statutes require some sort of a “hearing” without expressly providing that the hearing must be “on the record.” Thus, it is these cases between the extremes that have presented a difficult issue for judicial review, one that has not yielded a consensus approach.

III. DUELING PRESUMPTIONS AND DEFERENCE IN THE COURTS OF APPEALS

The question of what triggers formal procedures for adjudications has generated three distinct answers. This Part examines the three approaches taken by the courts of appeal when they were confronted with ambiguous statutory language. Until 1984, courts generally followed one of two presumptions: either a presumption against formal procedures or one in favor of them. The Supreme Court’s 1984 decision in Chevron produced a third approach, which requires deference to an agency’s reasonable interpretation of procedural provisions in its enabling statute. The background of these three approaches provides the necessary context for Part V’s argument in favor of a fourth, more appropriate approach.

A. The Original Circuit Split: Dueling Presumptions

The earliest two approaches created by the courts reflect a system of presumptions. The first approach followed the Supreme Court’s lead in Florida East Coast Railway, implicitly creating a presumption against formal procedures if the statute lacks the magic “on the record” language. The second approach, most prominently adopted by the First Circuit, distinguished Florida East Coast Railway and instead favored formal procedures.

61. See Lawrence, supra note 34, at 221–22.
64. See City of West Chicago v. NRC, 701 F.2d 632, 641 (7th Cir. 1983). The D.C. Circuit also endorsed this position at one point in time. See U.S. Lines, Inc. v. Fed. Mar. Comm’n, 584 F.2d 519, 536 (D.C. Cir. 1978). The D.C. Circuit held that formal procedures were not required because [w]hile the exact phrase “on the record” is not an absolute prerequisite to application of the formal hearing requirements, the Supreme Court has made clear that these provisions do not apply unless Congress has clearly indicated that the “hearing” required by statute must be a trial-type hearing on the record.
65. See Seacoast, 572 F.2d at 878.
1. The Seventh Circuit: *City of West Chicago v. U.S. Nuclear Regulatory Commission*

In *City of West Chicago v. U.S. Nuclear Regulatory Commission*, the Seventh Circuit addressed whether an order of the Nuclear Regulatory Commission (NRC) complied with the procedural requirements in the Atomic Energy Act (the Act) and constitutional due process. The court held that the NRC had complied because the APA’s formal procedures were not required.

The NRC had granted an order amending a nuclear facility license. The City of West Chicago subsequently challenged this order in federal district court, along with the NRC’s delay in adopting the final decommissioning plan for the site. Pursuant to the court’s temporary injunction order, the NRC gave notice to the City and considered the City’s request for a formal hearing, which the NRC ultimately denied.

On appeal, the Seventh Circuit held that the NRC’s order could not be set aside on procedural grounds because an informal hearing was sufficient. While the court noted that the magic words “on the record” were not essential to a finding that formal procedures were required, it nonetheless declared that, absent this language, there must be clear congressional “intent to trigger the formal, on-the-record hearing provisions of the APA.” The statutory language at issue, contained in § 189(a), provided that the “Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall

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66. 701 F.2d 632 (7th Cir. 1983).
67. Id. at 638. The City also alleged that the order violated the NRC’s own regulations; it was not supported by substantial evidence in the record; and it was arbitrary or capricious. Id. It further alleged that the NRC violated the National Environmental Policy Act of 1970 (NEPA). Id.
68. Id.
69. Id. at 637. The license amendment authorized the facility to demolish certain buildings and to accept contaminated soil from off-site locations for on-site storage. Id. Before this amendment, the facility produced thorium and thorium compounds under a source material license, which authorized it to possess thorium ores. Id.
70. Id. The City also challenged, under NEPA, the agency’s delay in issuing an Environmental Impact Statement for the plan. Id.
71. Id.
72. Id. at 638.
73. As support, the court cited to *Seacoast Anti-Pollution League v. Castle*, 572 F.2d 872, 876 (1st Cir. 1978) and *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1263 (9th Cir. 1977), both of which employed a presumption in favor of formal procedures when the statutory language was ambiguous.
admit any such person as a party to such proceeding.” Thus, because the provision did not contain the “magic words,” clear congressional intent to trigger formal adjudicatory procedures was required.

To discern Congress’s intent, the court examined the Act’s “threadbare” legislative history and concluded that it lacked evidence of a clear congressional intent for the material license amendments to require formal adjudicatory procedures. The court reasoned that whether a formal hearing was mandated by § 189(a) depended on whether the activity was governed by the first or second sentence of § 189(a). The first sentence of § 189(a) required the NRC to grant a hearing only if requested by an interested person in any proceeding involving the granting, suspending, or revoking of a license or permit. Congress did not indicate in this sentence, however, whether the hearing should be a formal one. Indeed, the court noted, Congress showed little concern with the type of procedures required by the hearing provision in the first sentence; instead, Congress was primarily concerned with nuclear facilities and reactor licenses rather than materials licenses. Thus, the first sentence of § 189(a) did not mandate formal adjudicatory procedures.

The second sentence of § 189(a), however, reflects a concern for procedure, distinguishing between the types of licenses by providing that the NRC shall automatically hold a hearing on certain applications for a nuclear facility construction permit, even absent a request for a hearing. While Congress again left the type of hearing to be held undefined, the court concluded that formal procedures were required under the second sentence. Although the agency had promulgated a regulation specifying that a formal hearing is “required by the Act” when the Act mandates a hearing, even absent a request for one, the court nevertheless held that formal procedures were not statutorily mandated in this instance because the materials license amendment fell under the first sentence of § 189(a).

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75. City of West Chicago, 701 F.2d at 638 n.2 (citing the Atomic Energy Act § 189(a), 42 U.S.C. § 2239(a) (2006)).  
76. Id. at 641.  
77. Id. at 641–42.  
78. Id. at 642–43.  
79. Id. at 642.  
80. Id.  
81. Id.  
82. See id.  
83. Id. at 639.  
84. Id. at 642.  
85. Id. at 639; 40 C.F.R. § 2.104 (1982).  
86. City of West Chicago, 701 F.2d at 642. The court also held that the NRC’s informal hearing met minimum constitutional due process requirements. The court held that “generalized health,
Consequently, the West Chicago court effectively created the broad rule reflected in the circuit split: in an adjudication, there should be a presumption against formal procedures absent evidence of clear congressional intent to the contrary.\textsuperscript{87} In both adopting this rule and in supporting its specific holding, the court distinguished cases involving specific fact-finding by an agency, which the court noted fall squarely within the mainstream of traditional adjudications for which formal procedures should be used.\textsuperscript{88}

\textsuperscript{87} Id. at 641. The City also argued that a notice of hearing was required by the NRC regulations even absent a request. \textit{Id.} at 639–40. The court, however, deferred to the NRC’s interpretation of the Act as requiring formal procedures only when they were specifically requested. \textit{Id.} The court reasoned that the determination of whether public interest requires a hearing was left to the NRC’s discretion and held that the NRC could reasonably have concluded that the public interest did not require a hearing, as the receipt of off-site materials would not damage public health. \textit{Id.} The court further held that the NRC’s interpretation of its own regulations was not plainly erroneous or inconsistent with the text of the regulations. \textit{Id.} at 641. In deferring to the agency’s interpretation of its own regulations, the court relied on the Seminole Rock doctrine. \textit{Id.; see also} Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (declaring that an agency’s construction of its own regulation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”). Although a discussion of the Seminole Rock doctrine is beyond the scope of this Article, it raises an interesting issue of whether the level of deference is the same or higher than under Chevron. \textit{See infra} note 220.

\textsuperscript{88} City of West Chicago, 701 F.2d at 643–44. The court distinguished the Ninth Circuit’s decision in Marathon Oil Co. v. EPA, 564 F.2d 1251 (9th Cir. 1977), and an earlier Seventh Circuit decision, United States Steel Corp. v. Train, 556 F.2d 822, 833 (7th Cir. 1977) (holding that formal procedures were required).
Despite its reliance on the Supreme Court’s bright-line rule for formal rulemaking procedures in Florida East Coast Railway, the Seventh Circuit’s reasoning has been criticized, and no other circuits have expressly adopted its approach.

2. The First Circuit: Seacoast Anti-Pollution League v. Costle

The primary reason that other courts have not favored the Seventh Circuit’s approach is that they recognize the fundamental distinction between rulemaking and adjudication as one that is relevant to the formality of procedures necessary. Rulemakings often focus on broad policy questions that do not lend themselves well to treatment in adversarial proceedings, while adjudications often focus on specific factual disputes, which are better suited to formal procedural mechanisms. Given this important distinction, these courts reason that when the statute is ambiguous, courts should be more protective of individual rights in adjudications. “Hearing” requirements in adjudicatory statutes thus should more often trigger formal APA procedures than should similar or identical language in rulemaking statutes.

The First Circuit best articulated this distinction in Seacoast Anti-Pollution League v. Costle. At issue in Seacoast was whether §§ 316 and 402 of the Federal Water Pollution Control Act of 1972 required formal adjudication. This Act, commonly known as the Clean Water Act (CWA), prohibits discharge of any pollutant (including heated water) unless the point source operator has obtained a discharge permit.

The Public Service Company of New Hampshire (PSCO) had applied to the EPA for permission to discharge heated water into an estuary that runs into the Gulf of Maine. Because PSCO’s proposed cooling

89. See City of West Chicago, 701 F.2d at 641, 644. For a discussion of Florida East Coast Railway, see supra notes 57–58 and accompanying text. 90. See, e.g., Howarth, supra note 32, at 1044–1047. See also Part V.B infra. 91. One district court in the Seventh Circuit, deciding a case post-Chevron, cited to City of West Chicago, but the Seventh Circuit has not revisited the issue. See Sibley v. U.S. Dep’t of Educ., 913 F. Supp. 1181, 1186 n.3 (N.D. Ill. 1995) (citing City of West Chicago and Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989)) as support for the court’s conclusion that as long as “on the record” language is not present, an agency can reasonably conclude that formal procedures are not required). See infra Part III.B.1 for a discussion of Chemical Waste Management.

92. The Ninth Circuit first articulated this distinction in Marathon Oil, 564 F.2d at 1261.

93. See, e.g., id. at 1263; Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978).

94. See Marathon Oil, 564 F.2d at 1261, 1263–64; Seacoast, 572 F.2d at 876.

95. 572 F.2d at 876.

96. Id.

97. Id. at 874 (citing 33 U.S.C. §§ 1331, 1362(6)).

98. Id.
system did not meet the EPA standards, PSCO simultaneously applied for a discharge permit under § 402 of the CWA and an exemption from the EPA standards pursuant to § 316 of the CWA. Under § 316(a), PSCO would be qualified for an exemption allowing for a lower standard if, after “an opportunity for public hearing,” it could demonstrate that the EPA standards were “more stringent than necessary” to meet the CWA’s goals of protecting aquatic life. In response to PSCO’s application, the EPA held an informal hearing and subsequently authorized PSCO’s system.

But this did not conclude the matter because a citizen group, Seacoast Anti-Pollution League, then requested a formal “on the record” hearing regarding PSCO’s application. The EPA granted Seacoast’s request and held public adjudicative hearings before an Administrative Law Judge (ALJ), who recommended granting the permit. The EPA Regional Administrator reversed the ALJ’s initial decision and denied PSCO’s application. PSCO appealed this decision, and a new Administrator appointed six in-house advisors to a technical review panel, which ultimately found that PSCO, with one exception, had met its burden of proof and should be granted a permit. Seacoast requested a hearing on the exception (the issue of “backflushing”), on which the Administrator had requested PSCO to submit further information and offered the parties a chance to comment on PSCO’s submission, but Seacoast’s request was denied. The EPA’s final decision followed the panel’s recommendations, prompting Seacoast to appeal to the First Circuit.

On appeal, Seacoast argued that §§ 316 and 402 of the CWA required a formal adjudicatory hearing under the APA. Although neither

99. Id.
100. Id. at 874–75. Thermal variance procedures outlined in the CWA are incorporated into § 402 permits under § 316(a). See 33 U.S.C. § 1326(a) (2006).
101. Seacoast, 572 F.2d at 875. Section 316(a) of the CWA provides for exemptions where appropriate. 33 U.S.C. § 1326(a) (2006). The standard to protect aquatic life under this section is that which is necessary “to assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water.” Id.
102. Seacoast, 572 F.2d at 874.
103. Id. at 875.
104. Id.
105. Id.
106. Id. The panel found that the permit should be granted under an exception to the EPA standards. Id.
107. Id. The Administrator had stated that he would hold a hearing on any new information submitted by PSCO if any party requested one and could satisfy certain threshold conditions. Id.
108. Id.
109. The court noted that there was some dispute about whether the hearing was a proceeding under § 402 or § 316, but concluded that this distinction was not relevant and treated the hearing as a
one of these sections contains "on the record" language, the court held that this precise language was not required for adjudications. Rather, the court announced that the issue turned on the substantive nature of the hearing Congress intended to provide.

The court noted three factors that were relevant to the nature of the hearing. First, the EPA's decision involved specific factual findings about the effects of heated water discharges from a specific point source, and these facts formed the basis for granting a permit to a specific applicant. Second, because of the need to make specific factual findings, this decision was not a general policy decision. Third, the rights of an individual party—the specific applicant—were directly impacted. Thus, the court reasoned, because factual questions in permit hearings will often be disputed, an adversarial hearing employing formal adjudicatory procedures would help to ensure reasoned agency decisionmaking as well as meaningful judicial review. The court concluded that the hearing in this case was "exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended."

Like the Seventh Circuit, the First Circuit articulated a broad rule in the form of a presumption. Unlike the Seventh Circuit, however, the First Circuit explicitly created the opposite presumption—one in favor of formal procedures. Reasoning that the legislative history and judicial treatment of the APA supported such a presumption, the court held that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record. Because the court did not find evidence that Congress intended, either in the statutory text or the

§ 316 proceeding. Id. Interestingly, however, the court then agreed with the Ninth and Seventh Circuits' conclusion that the APA does not apply to § 402. See id. at 876.

110. Both § 316(a) and § 402(a)(1) use the language "after opportunity for public hearing." Id. at 875 n.3; CWA § 316(a), 33 U.S.C. § 1326(a) (2006); CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1) (2006).

111. Seacoast, 572 F.2d at 876. In doing so, the court reasoned that in Florida East Coast Railway, the Supreme Court rejected such an extreme reading in the context of rulemaking. Id.

112. Id.

113. Id.

114. Id. The court stressed that while general policy considerations may affect the decision, the decision will not itself make general policy. Id.

115. Id.

116. Id.

117. Id.

118. Id. at 877.

119. Id. The court further noted that the purpose of § 554's language was to exclude governmental functions, like the loan program administration, which have never involved an adjudicative procedure. Id.

120. Id.
legislative history of the CWA, that informal procedures be used in § 316 hearings, it determined that formal procedures were required.\textsuperscript{121}

Seacoast and West Chicago thus present “dueling presumptions”\textsuperscript{122} subject to rebuttal by evidence of contrary congressional intent: the Seacoast court proposed a presumption that any statutory language calling for a “hearing” triggers formal adjudication,\textsuperscript{123} while the West Chicago court seemed to presume that the Florida East Coast Railway\textsuperscript{124} rule compelling informal procedures in most cases applies equally to rulemakings and adjudications.\textsuperscript{125} Although the Seacoast court was aware of the Supreme Court’s decision in Florida East Coast Railway, the court nonetheless reached a different outcome based on the distinction between rulemaking and adjudication.\textsuperscript{126}

The court reasoned that that this distinction was critical because hearings serve very different functions in rulemakings and adjudications. In rulemakings, the court reasoned, the agency hears “legislative” facts in the sense that the witnesses are not the only source of evidence on which the agency must base factual findings.\textsuperscript{127} Moreover, the agency may

\textsuperscript{121} Id. at 878. The court performed no further statutory analysis and dispensed with the legislative history in a footnote. See id. at 878 n.10. In its analysis of the legislative history, the court focused on Congress’s use of “on the record” language in several sections of the CWA, which primarily pertained to rulemaking. See id. The court reasoned that the absence of this language in sections relating to adjudications indicated the “logical presumption that adjudications will be denied on the record unless otherwise specified whereas rule makings need not be unless so specified.” Id.

The court also evaluated the hearing’s compliance with the APA’s formal procedures and remanded the case to the EPA for a determination of whether cross-examination would have been useful. Id. at 880. Because of the Supreme Court’s ruling in Vermont Yankee barring judicial hybrid rulemaking, the court was not free to order cross-examination or any other specific procedures. See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978).

\textsuperscript{122} This term is borrowed from Gary Lawson. LAWSON, supra note 34, at 234.

\textsuperscript{123} Seacoast, 572 F.2d at 877.

\textsuperscript{124} See supra notes 57–58 and accompanying text for discussion of this case.

\textsuperscript{125} LAWSON, supra note 34, at 234.

\textsuperscript{126} Seacoast, 572 F.2d at 876, 877 n.9 (citing United States v. Fla. E. Coast Ry., 410 U.S. 224, 245 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972)). The court specifically noted that the Supreme Court limited its holding to rulemaking in these cases. Id. at 877 n.9.

\textsuperscript{127} Id. at 877. Professor Kenneth Culp Davis has explained the distinction between “legislative facts” and “adjudicative facts” as follows:

Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.

1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958). Professor Davis has asserted that formal procedures are required when the matter turns on “adjudicative facts” rather than “legislative facts” because:
decide not to adopt in its final rule the witnesses' information or viewpoint. The court also relied on the Attorney General's Manual of 1947 as further support for its reasoning. Written contemporaneously with the enactment of the APA and reflecting the APA's legislative history, the Manual draws a similar distinction between rulemaking and adjudication:

It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing. With respect to rule making, it was concluded, supra, that a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record," but rather as merely requiring an opportunity for expression of views. That conclusion was based on the legislative nature of rule making, from which it was inferred, unless a statute requires otherwise, that an agency hearing on proposed rules would be similar to a hearing before a legislative committee, with neither the legislature nor the agency being limited to the material adduced at the hearing. No such rationale applies to administrative adjudication.

The court's holding, including the presumption it creates, is strongly supported by the Manual, which continues:

In fact, it is assumed that where a statute specifically provides for administrative adjudication . . . after opportunity for an agency hearing, such specific requirement for a hearing ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing. Of course, the foregoing discussion is inappli-

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Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts.

Id.

128. Seacoast, 572 F.2d at 877.
129. Id. at 877–78.
130. Id. (quoting ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42–43 (1947)).
cable to any situation in which the legislative history or the context of the pertinent statute indicates a contrary congressional intent.\textsuperscript{131}

The First Circuit’s approach is persuasive for three main reasons. First, adjudications tend to present more fact-oriented issues than do rulemakings, which tend to focus more on broad issues of policy.\textsuperscript{132} Second, the issues that are characteristic to adjudications may be more amenable to formalized procedures than the issues that are characteristic of rulemakings.\textsuperscript{133} Thus, as a functional matter, one might be more inclined to find that formal procedures are required for adjudications than for rulemakings. Third, adjudications affect individual rights differently than rulemaking because adjudication has an immediate and concrete effect.\textsuperscript{134} Rulemaking, like legislation, is entitled to far less due process protection than adjudication because rules are generally applicable and prospective.\textsuperscript{135}

Thus, although Seacoast’s presumption is not perfect,\textsuperscript{136} it nonetheless offers a more sound solution to the question of when formal procedures are triggered than the Seventh Circuit’s opposite presumption. Until recently, Seacoast’s presumption was the most common approach, followed by courts in several other circuits, including the Second, Fifth, Ninth and, for a period of time, the D.C. Circuit.\textsuperscript{137}

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\textsuperscript{131} Id. at 878 (quoting ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42–43 (1947)) (emphasis added by Seacoast court).

\textsuperscript{132} Id. at 876.

\textsuperscript{133} Id. at 878.

\textsuperscript{134} Id. at 876.

\textsuperscript{135} See supra Part II.A & note 37 regarding the constitutional distinction between rulemaking and adjudication as articulated by a pair of pre-APA Supreme Court cases; compare Londoner v. City and County of Denver, 210 U.S. 373, 385–86 (1908) (holding that the Due Process Clause was violated because there was no hearing prior to a special assessment of a tax against certain property owners for the cost of paving a street upon which the lands abutted), with Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 445 (1915) (holding that there was no Due Process Clause violation for an increase of the valuation of all taxable property in Denver).

\textsuperscript{136} See infra Part V.B.

\textsuperscript{137} See, e.g., Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1444 n.12 (D.C. Cir. 1984) (noting that statutory language calling for a “hearing” presumptively required formal procedures); Buttrey v. United States, 690 F.2d 1170, 1174–75 (5th Cir. 1982) (upholding the Army Corps of Engineers’ refusal to grant a formal hearing in a CWA permit proceeding because congressional intent indicated that formal hearings were not required); United States v. Indep. Bulk Transp., 480 F. Supp. 474, 479, 481 (S.D.N.Y. 1979) (holding that Congress did not intend to require formal procedures in a Coast Guard adjudication because the factual issues were not complex); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) (holding that formal procedures apply, even absent “on the record language,” when the “substantive character of the proceedings involved” was such that “special procedural safeguards” were needed).
B. All Aboard the Chevron Train?

The D.C. Circuit has faced the issue of what triggers formal adjudicatory procedures more frequently than any other circuit; yet, perhaps as a result, it did not conclusively decide on an approach for over a decade. At different points in time, the D.C. Circuit adopted the *West Chicago* and the *Seacoast* approaches. But in 1989, the D.C. Circuit faced the issue once again and rejected both approaches because a key event in administrative law history had occurred in the interim: the Supreme Court’s decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*

This 1984 decision “dramatically expanded the circumstances in which courts must defer to agency interpretations of statutes.” In *Chevron*, the Court held that courts must defer to an agency’s reasonable interpretation of ambiguous language in statutes administered by that agency. The pre-*Chevron* world, by contrast, operated largely on a system of presumptions under which the court retained discretion regarding when to defer to an agency’s interpretation. Thus, it is not surprising that the courts in *West Chicago* and *Seacoast* both set up presumptions about when formal procedures for adjudication are required, albeit opposite ones.

Yet, the idea that a court should defer to an agency on a question of law was not new in 1984; it pre-dates the APA’s enactment. Before *Chevron*, however, courts were generally considered to have such a duty only when Congress expressly delegated authority to an agency “to define a statutory term or prescribe a method of executing a statutory provision.” Otherwise, it was generally understood that courts could “substitute judgment on agency interpretations that could be characterized as

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138. See U.S. Lines, Inc. v. Fed. Mar. Comm’n, 584 F.2d 519, 536 (D.C. Cir. 1978) (holding that formal procedures were not required because “[w]hile the exact phrase ‘on the record’ is not an absolute prerequisite to application of the formal hearing requirements, the Supreme Court has made clear that these provisions do not apply unless Congress has clearly indicated that the ‘hearing’ required by statute must be a trial-type hearing on the record”).
139. See Union of Concerned Scientists, 735 F.2d at 1444 n.12 (noting that “when a statute calls for a hearing in an adjudication the hearing is presumptively governed by ‘on the record’ procedures”).
141. Merrill & Hickman, supra note 27, at 833.
142. 467 U.S. at 843-44.
144. See Merrill & Hickman, supra note 27, at 833.
145. Id. at 833 & n.2 (quoting United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982) and Rowan Cos. v. United States, 452 U.S. 247, 253 (1981)). Courts could, however, still invalidate administrative interpretations that were contrary to the plain meaning of the statute. Diver, supra note 143, at 562.
‘questions of law,’” and deference to such interpretations depended on multiple factors that courts evaluated on a case-by-case basis. Deference, therefore, was discretionary rather than mandatory.

*Chevron* broadened the scope of mandatory deference from express delegations of interpretive authority to include instances of “implied delegation” when Congress is silent or leaves language ambiguous in a statute that an agency is charged with administering. In *Chevron*, the Court announced that such statutory gaps and ambiguities are implied delegations requiring deference. The Court then articulated the famous *Chevron* “two-step” analysis: the court must first ask whether Congress clearly addressed the precise question at issue, and, if not, the court then must defer to the agency’s reasonable interpretation. This expansion of the scope of mandatory deference had the effect of narrowing the range of judicial discretion regarding deference, thus altering the relationship between courts and agencies.

147. See Merrill & Hickman, supra note 27, at 833. See also Merrill, supra note 26, at 969, 972–75 (describing three categories of factors: (1) factors addressed to whether Congress intended courts to defer to an agency’s interpretation of a statutory provision, including distinguishing between legislative rules stemming from a specific delegation of authority and interpretive rules, defined as executive interpretations not backed by specific delegated authority; (2) factors addressed to the attributes of the particular agency decision at issue, including agency expertise; whether the administrative interpretations were longstanding and/or uniform; whether the interpretations were supported by a reasoned analysis; and whether multiple agencies agreed or disagreed about the correct interpretation of the statute; and (3) factors thought to demonstrate congruence between the outcome reached by the agency and congressional intent regarding that specific issue); Diver, supra note 143, at 562 & n.95 (listing factors such as contemporaneous agency construction, longstanding agency construction, public reliance on agency interpretation, interpretation involving a matter of “public controversy,” agency expertise, agency’s rulemaking authority, agency action necessary to implement a statute, congressional awareness of agency interpretation and subsequent failure to repudiate it, and agency application of a statute to its proposed action). See also discussion infra Part IV.
148. See Merrill & Hickman, supra note 27, at 833; see also Merrill, supra note 26, at 1032 (discussing the difference between the mandatory deference model, which applies to “interpretations backed by express delegations of regulatory authority from Congress,” and the discretionary deference model, which applies when there is no express delegation).
150. *Chevron*, 467 U.S. at 844. The Court then further explained the reasons for delegation. Id. at 865–66. See infra Parts IV and V for a discussion of these reasons.
151. Id. at 842–43.
152. See Merrill & Hickman, supra note 27, at 834; Cass R. Sunstein, Chevron Step Zero, 92 VA. L. REV. 187, 188–89, 198 (2006) (stating that *Chevron* “establish[ed] a new approach to judicial review of agency interpretations of law” that is now the “undisputed starting point for any assess-
While *Chevron* was not necessarily viewed as particularly revolutionary at the time, the D.C. Circuit, as the primary venue for federal administrative law cases, recognized the decision’s significance and undertook a third, *Chevron*-based approach to determining what triggers formal adjudicatory procedures.


Facing the issue for the first time since *Chevron* was decided, the D.C. Circuit expressly disavowed circuit precedent that had arguably adopted the *Seacoast* approach and instead employed the *Chevron* two-step analysis. In *Chemical Waste Management v. U.S. EPA*, the court held that EPA regulations, which established informal procedures for administrative hearings concerning the issuance of corrective action orders under § 3008(h) of the Resource Conservation and Recovery Act (RCRA), were a reasonable interpretation of RCRA and were facially consistent with due process.

The court first analyzed whether Congress had spoken to the precise question at issue. Under RCRA, operators of hazardous waste sites must obtain permits, but facilities that existed before 1980 may operate as interim facilities pending agency action on their permit applications. Section 3008 of RCRA allows the EPA to suspend or revoke permits, and subsection (b) requires that the EPA “promptly conduct a public hearing” if one is requested within thirty days of a suspension.

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153. *See* Merrill, *supra* note 26, at 976; Sunstein, *supra* note 152, at 197–98 (noting that Justice Scalia and Justice Breyer had very different understandings of *Chevron’s* impact).

154. 873 F.2d 1477 (D.C. Cir. 1989).


159. *Id.* § 6928.

160. *Id.* § 6928(b).
The EPA regulation at issue implemented RCRA’s public hearing provision.\textsuperscript{161} Under this regulation, formal procedures applied only to actions involving the suspension or revocation of a permit, or an assessment of civil penalties,\textsuperscript{162} because these proceedings involved specific fact-finding regarding whether someone had violated legal standards and whether sanctions were appropriate.\textsuperscript{163} Informal procedures applied only to actions requiring facility managers to conduct investigations.\textsuperscript{164}

The court held that the statutory language alone failed to show Congress had directly spoken to the precise question at issue.\textsuperscript{165} First, the court noted that subsection (b) requires a “public hearing,” but does not clearly indicate whether Congress intended the utilization of formal or informal procedures for such hearings.\textsuperscript{166} Next, the court noted that the EPA had not previously interpreted the phrase to necessarily or always require formal adjudication; the EPA had decided to base the type of hearing on the nature of the issue raised.\textsuperscript{167} Finally, the court explained that it could break from past circuit precedent favoring formal proceedings.\textsuperscript{168} In doing so, the court stressed that Seacoast predated Chevron, which mandates deference to reasonable agency interpretations.\textsuperscript{169}

The court then moved to step two of the Chevron analysis and held that the EPA’s regulation allowing for informal hearing procedures was a reasonable interpretation of the “public hearing” requirement.\textsuperscript{170} At this

\textsuperscript{161} See 40 C.F.R. § 22 (1988).
\textsuperscript{162} See id. § 24.01(b)(1)-(2).
\textsuperscript{163} Chem. Waste Mgmt., 873 F.2d at 1482.
\textsuperscript{164} Id. at 1479.
\textsuperscript{165} Id. at 1480–81.
\textsuperscript{166} Id. at 1480; see 43 Fed. Reg. 34738 (Aug. 4, 1978). Although Congress amended RCRA in 1984, it did not clarify the type of procedures intended. Chem. Waste Mgmt., 873 F.2d at 1481.
\textsuperscript{167} Chem. Waste Mgmt., 873 F.2d at 1481. Interestingly, analyzing the consistency of an agency interpretation is a factor that courts took into account before Chevron was decided. See Merrill, \textit{supra} note 26, at 973. It is now a factor under so-called Skidmore deference, discussed infra in Part IV.B.
\textsuperscript{168} Chem. Waste Mgmt., 873 F.2d at 1481.
\textsuperscript{169} Id. at 1482. The court also noted that a Ninth Circuit decision following a presumption in favor of formal proceedings also predated \textit{Chevron}. See \textit{id.} (citing Marathon Oil v. EPA, 564 F.2d 1253 (9th Cir. 1977)).
\textsuperscript{170} Id. at 1483. The court applied the arbitrary or capricious standard of review and required a reasoned explanation for the EPA’s interpretation. \textit{Id.} at 1482. Scholars and courts have long questioned what scope of review applies at \textit{Chevron’s} step-two reasonableness inquiry and whether it differs from APA § 702(a)(2)’s arbitrary or capricious standard. The Supreme Court has not provided clear guidance on this issue. Consequently, commentators continue to debate the issue. See, e.g., Gary S. Lawson, \textit{Reconceptualizing Chevron and Discretion: A Comment on Levin and Rubin}, 72 CHI.-KENT L. REV. 1377, 1377–78 (1997) (arguing that step two of \textit{Chevron} “concerns the validity (reasonableness) of the agency’s outcome, while the arbitrary or capricious standard . . . further regulates the process by which the agency reached its decision” and that “[t]he two tests work in tandem”); Ronald M. Levin, \textit{The Anatomy of Chevron, Step Two Reconsidered}, 72 CHI.-KENT L. REV. 1253, 1254–55 (1997) (proposing that both steps of the \textit{Chevron} analysis should be consoli-
step in the analysis, the court examined two arguments by the petitioners that the EPA’s interpretation was not reasonable. First, the petitioners challenged the EPA’s claim that the factual issues could be resolved through written and oral statements and that oral testimony through formal procedures was not necessary. The court noted that, although formal procedures may be more suited for factual issues, the agency has discretion to adequately tailor informal procedures to meet the needs of each case. The court found that the EPA had adequately explained in its regulation that subsection (h) cases will present fewer factual issues than other types of RCRA compliance cases, and thus commonly disputed factual issues will arise less often. Moreover, the court reasoned, those factual issues that do arise in this context will primarily be technical or policy matters that generate little need for an assessment of witness demeanor or credibility, which are better assessed in formal proceedings.

Second, the petitioners challenged the EPA’s argument that informal procedures will result in speedier agency responses to hazardous waste releases. The court agreed with the petitioners, but indicated that while the “EPA cannot rely upon the need for swift adjudication to justify its use of informal hearing procedures,” the agency in this case

dated into one arbitrariness review); Seidenfeld, supra note 26, at 87 (proposing a “syncopated Chevron” in which “the first beat of the Chevron two-step” is downplayed and “the second beat” is emphasized “by requiring reviewing courts to scrutinize more carefully the reasonableness of agencies’ statutory interpretation”); Laurence H. Silberman, Chevron—The Intersection of Law & Policy, 58 GEO. WASH. L. REV. 821, 827–28 (1990) (arguing that Chevron’s second step is “not all that different analytically from the APA’s arbitrary and capricious review. In either the second step of Chevron or in arbitrary and capricious review” because in both types of review the court asks “whether the agency considered and weighed the factors Congress wished the agency to bring to bear on its decision”); Gary Lawson, Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions, 48 RUTGERS L. REV. 313, 341–44 (1996) (describing the different ways to view step two of the Chevron analysis).

Courts are similarly uncertain. See, e.g., Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995) (acknowledging that Chevron’s step two and arbitrary or capricious review “overlap at the margins” but attempting to carve out separate spheres based on whether the relevant inquiry “is rooted in statutory analysis and is focused on discerning the boundaries of Congress’ delegation of authority to the agency”); Animal Legal Def. Fund, Inc. v. Glickman, 204 F.3d 229, 235 (D.C. Cir. 2000) (“The explanation that renders the Secretary’s interpretation of the statute reasonable also serves to establish that the final rule was not arbitrary and capricious.”); Am. Petroleum Inst. v. EPA, 216 F.3d 50, 57 (D.C. Cir. 2000) (stating that “the second step of Chevron analysis and State Farm arbitrary and capricious review overlap, but are not identical”); Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393, 410 (5th Cir. 1999) (“Arbitrary and capricious’ review under the APA differs from Chevron step-two review, because it focuses on the reasonability of the agency’s decision-making processes rather than on the reasonability of its interpretation.”).

171. Chem. Waste Mgmt., 873 F.2d at 1482.
172. Id. at 1483.
173. Id. at 1482.
174. Id.
had provided a reasonable explanation for its choice of informal procedures based on the number and nature of factual issues in a typical case.\textsuperscript{175}

2. Interlude: National Cable & Telecommunications
Ass'n v. Brand X Internet Services

Despite the significance of \textit{Chevron} and its progeny over the years, no circuit had expressly followed the D.C. Circuit's lead until just recently. As discussed below, in April 2006, the First Circuit abandoned its longstanding presumption in favor of formal procedures and adopted the \textit{Chevron} approach.\textsuperscript{176} In announcing this shift, the First Circuit relied on the Supreme Court's 2005 ruling in \textit{National Cable & Telecommunications Ass'n v. Brand X Internet Services}.\textsuperscript{177} It was predominantly this decision that led the First Circuit to fundamentally shift its approach from one where the court is the primary interpreter of statutory language to one in which the court is required to defer to reasonable agency interpretations.\textsuperscript{178} While \textit{Brand X} does not address interpretations of

\textsuperscript{175} Id. at 1483. The court also held that the procedures were consistent with due process requirements. Id. at 1485. The court evaluated the procedural due process requirements under the \textit{Mathews v. Eldridge} standard. Id. at 1483-84 (applying Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). Looking to the private interest, the court noted that the petitioner could only point to the possibility of costly investigations and corrective measures. Id. Given that the majority of cases would not involve great cost or corrective measures, the court found only a minimal private interest. Id. Regarding the risk of an erroneous deprivation of interest, the petitioner raised two potential issues: (1) substantive standards to guide the EPA's decisionmaking in hearings were arguably missing because the EPA had not yet developed standards for corrective action; and (2) procedural standards were lacking in relation to the EPA's role as both an investigatory and adjudicative body and in relation to the fact that the Presiding Officer would not be able to handle intricate technical issues. Id. at 1484-85. With regard to the first issue, the court held that the EPA had sufficient guidance, looking to three other sources that the EPA had indicated could provide guidance until standards were adopted. Id. at 1484. With regard to the second issue, there was no showing that those serving as adjudicators exhibited any risk of actual bias or prejudgment or that an ALJ would be any better at addressing the technical issues. Id. at 1484-85. Finally, in examining the government's interest, the court considered the savings of costs that would have to be expended with full adjudicatory hearings and an increased ability to enforce subsection (h). Id. at 1485.

\textsuperscript{176} Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 17-18 (1st Cir. 2006). See infra Part III.B.3 for a discussion of this case.

\textsuperscript{177} 545 U.S. 967 (2005). See infra Part III.B.3 for discussion of the First Circuit's doctrinal shift.

\textsuperscript{178} See discussion infra Part III.B.3. Although the First Circuit also cited \textit{Chevron}, it had honored its \textit{Seacoast} precedent for many years after \textit{Chevron} was decided. However, the First Circuit had previously suggested that \textit{Seacoast}'s "vitality in the post-	extit{Chevron} era" needed to be considered. See Citizens Awareness Network v. United States, 391 F.3d 338, 348 n.4 (2004). The \textit{Citizens Awareness} court followed \textit{Seacoast}, but stated that while the type of hearing required by a statute turns [upon] congressional intent, \textit{Chevron} adds a new dimension, requiring that the agency's reasonable interpretation be accorded
procedural provisions directly, it is a critical decision regarding a court’s use of precedent under the *Chevron* doctrine that affects the traditional approaches to the interpretive issue.

In *Brand X*, the Supreme Court examined the relationship between the stare decisis effect of an appellate court’s statutory interpretation precedent and the *Chevron* deference due to an administrative agency’s subsequent, but contrary, interpretation. The Federal Communications Commission (FCC) had issued an order declaring that cable modem service was not a “telecommunications service” under the Communications Act. The Ninth Circuit held that the FCC could not permissibly construe the Communications Act to exempt cable companies providing Internet service from Title II regulation. Rather than analyze the permissibility of that construction under the deferential framework of *Chevron*, the Ninth Circuit grounded its holding in the stare decisis effect of its own precedent: in *AT&T Corp. v. Portland*, the court had held that cable modem service was a “telecommunications service” under the Communications Act. The court held that its interpretation in *Portland* was the correct one and vacated the FCC’s order.

The Supreme Court disagreed. Echoing its decision in *Chevron*, the Court reiterated that “[f]illing [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.” It held that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”

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defersence if there is any ambiguity as to that intent. To what extent (if at all) this reality erodes *Seacoast’s* rationale is a question we leave for another day.

*Id.* See supra Part III.A.2 for a discussion of *Seacoast.*


180. *Id.* at 978; *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4822 (2002).

181. *Brand X*, 545 U.S. at 979.

182. *Id.*

183. 216 F.3d 871, 880 (9th Cir. 2000). However, an important distinction between *Portland* and *Brand X* is that *Portland* was not reviewing an administrative proceeding, and the FCC was not a party to that case. *Brand X*, 545 U.S. at 979–80.

184. *Brand X*, 545 U.S. at 979; see also *Brand X Internet Servs v. FCC*, 345 F.3d 1120, 1130–32 (9th Cir. 2003).

185. *Brand X*, 545 U.S. at 980.

186. *Id.* at 982. The Court went on to state: “The better rule is to hold judicial interpretations contained in precedents to the same demanding *Chevron* . . . standard that applies if the court is reviewing the agency’s construction on a blank slate.” *Id.*
Thus, the Court demanded that courts “reexamine pre-Chevron precedents through a Chevron lens.” Specifically, the Court reasoned that:

A contrary rule would produce anomalous results. It would mean that whether an agency’s interpretation of an ambiguous statute is entitled to Chevron deference would turn on the order in which the interpretations issue: If the court’s construction came first, its construction would prevail, whereas if the agency’s came first, the agency’s construction would command Chevron deference. Yet whether Congress has delegated to an agency the authority to interpret a statute does not depend on the order in which the judicial and administrative constructions occur.

Moreover, the Court reasoned, the Ninth Circuit’s rule “would ‘lead to the ossification of large portions of our statutory law,’ by precluding agencies from revising unwise judicial constructions of ambiguous statutes.” It concluded that “[n]either Chevron nor the doctrine of stare decisis requires these haphazard results.”

Justice Scalia forcefully dissented. He argued that allowing an agency to override what a court believes to be the best interpretation of a statute makes judicial decisions subject to reversal by executive officials. Citing Chicago & Southern Air Lines v. Waterman S.S. Corp. for the proposition that “[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government,” Justice Scalia protested that the majority’s position was probably unconstitutional because of what it would effectively allow: “Even when the agency itself is party to the case in which the Court construes a

187. Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 17 (1st Cir. 2006).
188. Brand X, 545 U.S. at 983.
190. Id. at 983.
191. See id. at 1005–20 (Scalia, J., dissenting). Amusingly, Justice Scalia ended his dissent on an up note for those in this author’s position, concluding: “It is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators.” Id. at 1019.
192. Id. at 1016 (Scalia, J., dissenting).
193. 333 U.S. 103, 113 (1948). In Chicago & Southern Air Lines, the court of appeals held that it had jurisdiction to review an order of the Civil Aeronautics Board (CAB) awarding an overseas air route, but it needed to avoid any conflict with the President’s foreign-affairs powers. Id. The court concluded that its review of CAB’s actions would remain subject to approval or disapproval by the President. Id.
statute, the agency will be able to disregard that construction and seek \textit{Chevron} deference for its contrary construction the next time around."}^{194}

The majority defended its position by countering that "the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong."^{195} Rather, "the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes."^{196} In other arenas, the majority clarified, the court's prior ruling remains binding precedent.\textsuperscript{197}

3. First Circuit Redux: \textit{Dominion Energy Brayton Point, LLC v. Johnson}

In \textit{Dominion Energy},\textsuperscript{198} the First Circuit was once again faced with the issue originally addressed in \textit{Seacoast}: whether a permit issuance under the CWA requires formal procedures.\textsuperscript{199} Citing both \textit{Chevron} and \textit{Brand X}, the court announced that it was compelled to apply \textit{Chevron} deference to the EPA's interpretation rather than follow the longstanding circuit precedent established by \textit{Seacoast} twenty-eight years earlier.

Like \textit{Seacoast}, \textit{Dominion Energy} involved an electricity generator's application to the EPA for a renewal of its National Pollutant Discharge Elimination System (NPDES) permit and a thermal variance authorization under the CWA.\textsuperscript{200} After the EPA denied a thermal variance authorization to Dominion Energy, the company requested an evidentiary hearing with APA formal adjudication procedures.\textsuperscript{201}

Sections 316 and 402 of the CWA require the EPA, in issuing NPDES permits or authorizing a thermal variance, to offer an "opportunity for public hearing."\textsuperscript{202} The CWA does not define "public hearing," but, in \textit{Seacoast}, the First Circuit construed the term to mean an

\begin{quote}
\textsuperscript{194} \textit{Brand X}, 545 U.S. at 1017 (Scalia, J., dissenting).
\textsuperscript{195} \textit{Id}. at 983.
\textsuperscript{196} \textit{Id}.
\textsuperscript{197} \textit{Id}. This Article does not take a position on the validity of the majority's reasoning in \textit{Brand X}. That argument is reserved for another day and another article.
\textsuperscript{198} 443 F.3d 12 (1st Cir. 2006).
\textsuperscript{199} \textit{Id}. at 14–15; \textit{see also} \textit{Seacoast Anti-Pollution League v. Costle}, 572 F.2d 872, 878 (1st Cir. 1978), discussed supra Part III.A.2.
\textsuperscript{200} \textit{Dominion Energy}, 443 F.3d at 13. For thirty years, the withdrawals and discharges of water have been authorized by a series of NPDES permits issued by the EPA pursuant to § 402(a) of the CWA, 33 U.S.C. §§ 1251–1387. \textit{Id}. at 13. Thermal variance procedures outlined in the CWA are incorporated into the NPDES permits under § 316(a), codified at 33 U.S.C. § 1326(a). \textit{Id}. at 13.
\textsuperscript{201} \textit{Id}. at 13–14.
\textsuperscript{202} \textit{Id}. at 14. Whether Dominion requested an evidentiary hearing under § 402(a) or § 316(a) of the CWA had no legal effect, nor did whether Dominion was seeking a permit renewal rather than applying for a permit. \textit{Id}. at 14 n.2.
\end{quote}
“evidentiary hearing” in compliance with §§ 556 and 557 of the APA.\textsuperscript{203} In 1979, the EPA issued regulations adopting this understanding.\textsuperscript{204}

In 1995, however, the EPA changed course. Citing regulatory efficiency, the EPA adopted an amendment to this rule, eliminating formal evidentiary hearings from the permit process.\textsuperscript{205} In doing so, the EPA asserted that the CWA does not reflect any congressional intent to mandate evidentiary hearings as part of NPDES permit proceedings or to preclude informal adjudication in that context.\textsuperscript{206} Thus, after conducting a risk-benefit analysis, the agency decided that its informal proceedings satisfied the APA.\textsuperscript{207} Because this new rule allowed for only a written application process, the EPA denied Dominion Energy’s request for a formal hearing.\textsuperscript{208}

Relying on Seacoast as precedent that bound the court to disregard the agency’s contrary interpretation, Dominion Energy challenged the EPA’s new rule in the First Circuit.\textsuperscript{209} The Dominion Energy court discounted that reliance, reasoning that it ignored two important post-Seacoast changes in the legal landscape: Chevron and the EPA’s issuance of its new rule.\textsuperscript{210} The court then applied the rule from Brand X: if a court has not conclusively held that the statute is clear, then the reviewing court must defer to the agency’s reasonable interpretation.\textsuperscript{211} After determining that Seacoast did not hold that Congress clearly intended the term “public hearing” to mean an evidentiary hearing with formal procedures,\textsuperscript{212} the court held that the EPA’s new rule was a reasonable interpretation of the statute and thus was entitled to Chevron deference.\textsuperscript{213}

No other circuits have yet had the opportunity to face the same issue as the First Circuit did in Dominion Energy. The First Circuit’s shift in Dominion Energy may be the beginning of a trend that should end

\textsuperscript{203} Id.; see also Seacoast, 572 F.2d at 878.

\textsuperscript{204} Dominion Energy, 443 F.3d at 15 (citing Revision of Regulations, 44 Fed. Reg. 32,854, 32,938 (June 7, 1979)).

\textsuperscript{205} Id. (citing Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,900 (May 15, 2000) (to be codified at 40 C.F.R. pt. 124)).

\textsuperscript{206} Id.

\textsuperscript{207} Id.

\textsuperscript{208} Id.

\textsuperscript{209} Id. at 16. Specifically, Dominion relied on Seacoast for the proposition that the EPA has a “non-discretionary duty to convene an evidentiary hearing.” Id. Absent Chevron and the EPA’s change in position, this argument would be particularly persuasive in light of the fact that both Seacoast and Dominion dealt with the same statutory provisions—§§ 316(a) and 402(a) of the CWA. See id. at 13; Seacoast, 572 F.2d at 878.

\textsuperscript{210} Dominion Energy, 443 F.3d at 16.

\textsuperscript{211} Id. at 16–17.

\textsuperscript{212} Id. at 18.

\textsuperscript{213} Id. at 18–19.
before it gains support. To understand why, a more complete discussion of the **Chevron** doctrine and its underlying rationales is necessary.

IV. THE BOUNDARIES OF **CHEVRON**'S DOMAIN

**Chevron** is now considered "a ubiquitous formula governing court-agency relations". The court must first ask whether Congress clearly addressed the precise question at issue, and, if not, the court then asks whether the agency’s interpretation is reasonable. **Chevron**’s two-step analysis appears to offer the advantages of simplicity and efficiency over the less predictable multi-factor approach to deference. But these advantages are somewhat illusory. The implementation of the **Chevron** two-step analysis has generated a substantial number of issues. While much of the early commentary focused on **Chevron**’s rationales and its two steps, lately courts and commentators have focused on "step zero" of **Chevron**: whether the **Chevron** doctrine should apply to agency interpretations in particular circumstances. A second, related issue that has drawn recent attention is the question of what level of deference, if any, should be given if a court determines that a particular agency interpretation is beyond **Chevron**’s domain.

This Part provides an overview of these issues and examines the application of **Chevron** to the interpretation of jurisdictional provisions and judicial review provisions, the two areas of interpretation most analogous to the interpretation of procedural provisions.

A. Determining **Chevron**’s Domain: **Chevron** Step Zero

Despite its breadth, **Chevron** does not require judicial deference to all agency legal interpretations. **Chevron**’s application is limited to "an agency’s construction of the statute which it administers." The first major limitation for **Chevron**’s application, therefore, is that the agency must be interpreting a statute. Agencies interpret many legal documents other than statutes, and in those contexts **Chevron** deference should not apply. For example, courts do not defer to agency interpretations of the

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216. See Diver, *supra* note 143, at 592–93. See *supra* note 147 for a description of these factors.
217. See *supra* note 26 and accompanying text.
218. See, e.g., Merrill & Hickman, *supra* note 27, at 836; Sunstein, *supra* note 152, at 191. See also *infra* note 250. Although the term "step zero" is now more common, I borrow it as originally used by Thomas Merrill and Kristin Hickman in **Chevron**’s Domain, supra note 27, at 836.
219. **Chevron**, 467 U.S. at 842.
220. Most notably, agencies frequently construe their own regulations. The leading decision concerning deference to agency regulatory construction is *Bowles v. Seminole Rock & Sand Co.*, 325
Constitution\footnote{221} or court decisions.\footnote{222} Agencies also should not receive \textit{Chevron} deference for their interpretations of contracts, deeds, and other legal instruments.\footnote{223}

The second major limitation is that \textit{Chevron} does not apply to all federal agency interpretations of statutes; it applies only to statutes that the agency “administers.”\footnote{224} Whether the agency administers the statute is usually not a difficult question. Agencies generally are said to administer statutes “for which they have some special responsibility,”\footnote{225} and they therefore are usually considered to administer the substantive provisions of the enabling statutes that they enforce.\footnote{226} But for general statutes—

\footnotesize{U.S. 410, 414 (1945) (declaring that an agency’s construction of its own regulation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”). For a detailed discussion of the Seminole Rock doctrine, see John F. Manning, \textit{Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules}, 96 COLUM. L. REV. 612 (1996) (discussing in detail critical analysis of this doctrine).}

\footnotesize{221. See David A. Strauss, \textit{Presidential Interpretation of the Constitution}, 15 CARDOZO L. REV. 113, 114–16, 123 (1993) (explaining that there are instances in which executive officials inevitably interpret constitutional provisions but concluding that they receive no deference from reviewing courts). The Court has, however, been willing to grant \textit{Chevron} deference to an agency’s interpretation relating to an international convention. See \textit{Japan Whaling Ass’n v. Am. Cetacean Soc’y}, 478 U.S. 221, 241 (1986) (granting \textit{Chevron} deference to Secretary of Commerce’s determination that it better served legislation implementing the International Convention for the Regulation of Whaling to accept Japan’s offer of an agreement to phase out whaling, rather than to certify Japan’s whaling activities to the President for possible sanctions).}


\footnotesize{223. See \textit{Lawson}, supra note 34, at 458–59. Although \textit{Chevron} deference should not extend to these instruments, \textit{e.g.}, Meadow Green-Wildcat Corp. \textit{v. Hathaway}, 936 F.2d 601, 605 (1st Cir. 1991) (holding that the Forest Service’s interpretation should not receive deference because permits should be treated like contracts), some courts have nevertheless granted deference in such contexts, \textit{e.g.}, \textit{Nat’l Fuel Gas Supply Corp. v. FERC}, 900 F.2d 340, 344 (D.C. Cir. 1990) (holding that the Federal Energy Regulatory Commission’s interpretation of gas supply contracts should receive \textit{Chevron} deference).}

\footnotesize{224. \textit{Chevron}, 467 U.S. at 842.}

\footnotesize{225. \textit{Lawson}, supra note 34, at 459. See \textit{Wagner Seed Co. v. Bush}, 946 F.2d 918, 920 (D.C. Cir. 1991) (addressing the meaning of “administer” and holding that the EPA was entitled to \textit{Chevron} deference because the President has delegated his statutory authority to the EPA); Am. Fed’n of Gov’t Employees \textit{v. Fed. Labor Relations Auth.}, 46 F.3d 73, 76 (D.C. Cir. 1995) (refusing to apply deference to FLRA’s interpretation of a statute that it was not charged with administering). \textit{See also} Kristin E. Hickman, \textit{The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference}, 90 MINN. L. REV. 1537, 1538 (2006) (noting that the Internal Revenue Service has a special responsibility with respect to tax laws). A problem can arise when multiple agencies share enforcement responsibility for administering a statute. \textit{See}, \textit{e.g.}, \textit{Rapaport v. U.S. Dep’t of the Treasury}, 59 F.3d 212, 216–17 (D.C. Cir. 1995) (holding that \textit{Chevron} does not apply and that the court should proceed de novo on statutory interpretation questions when more than one agency administers the statute).}

\footnotesize{226. There are several exceptions to this principle. The first exception is that \textit{Chevron} does not apply in the criminal context. Courts generally do not grant deference to the Department of Justice’s interpretation of federal criminal statutes despite that agency’s special responsibility for the enforcement of those statutes. See \textit{Crandon v. United States}, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (stating that criminal statutes are administered by courts, not agencies, because even}
like the APA, which are applicable to all agencies—no agency is considered to bear any special responsibility worthy of deference. 227

The primary reason that courts refuse to extend *Chevron* deference in these contexts relates to one of *Chevron*’s primary rationales: implied delegation. 228 Courts appear to view these contexts as areas where Congress has failed to delegate interpretive authority to the agency. 229 A secondary reason for declining deference in these contexts is grounded in concerns about institutional competency and separation of powers and focuses on the greater accountability and policymaking expertise of

though “[t]he Justice Department, of course, has a very specific responsibility to determine for itself what this statute means . . . we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference”); United States v. Harden, 37 F.3d 595, 599 n.2 (11th Cir. 1994) (“[T]he police and procedures of the United States Department of Justice and its interpretation of statutes are not binding upon the judicial branch of our Government.”). See also Sanford N. Greenberg, *Who Says It’s a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Create Criminal Liability*, 58 U. PITT. L. REV. 1, 62–63 (1996) (defending the refusal to extend *Chevron* deference to the interpretations of criminal statutes by the Justice Department because deference is only warranted when Congress has delegated administrative authority, and the Justice Department’s role under a criminal statute is purely executive). But see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489–92 (1996) (urging courts to apply *Chevron* deference to the Justice Department’s interpretations of criminal statutes).

The second type of exception is that *Chevron* does not apply when the statutory provision at issue does not directly implicate the agency’s regulatory mission. See, e.g., *Wagner Seed*, 946 F.2d at 920 (holding that the agency did not “administer” a statute and therefore refusing to apply *Chevron*).

The third type of exception can arise when multiple agencies share enforcement responsibility for administering a statute. Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1517 (2000) (recognizing this exception but arguing that a proponent of the common law metaphor might support granting *Chevron* deference in this context); Russell L. Weaver, *Deference to Regulatory Interpretations: Interagency Conflicts*, 43 ALA. L. REV. 35, 73 (1991) (noting that, “[i]n many instances where administrative authority is divided between two or more agencies, no single agency’s authority is necessarily superior. Courts have been unable to apply the deference rule in these situations”). See, e.g., *Rapaport*, 59 F.3d at 216–17 (holding that *Chevron* does not apply and that the court should proceed de novo on statutory interpretation questions when more than one agency administers the statute).

227. Noah, *supra* note 226, at 1517. See, e.g., Soc. Sec. Admin., Baltimore, Md. v. FLRA, 201 F.3d 465, 471 (D.C. Cir. 2000) (refusing to defer to the agency’s interpretation of a general statute because it was “not committed to the Authority’s administration”); Air N. Am. v. Dep’t of Transp., 937 F.2d 1427, 1436–37 (9th Cir. 1991) (holding that Congress had not directed the Department of Transportation to implement the APA and that, furthermore, delegation to administrative agencies would be nonsensical because the APA is meant to constrain agencies). Nor do agencies receive deference when interpreting the National Environmental Policy Act (NEPA), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4361 (2006)), which applies to all federal agencies. Alaska Ctr. for the Env’t v. West, 31 F. Supp. 2d 714, 721 (D. Alaska 1998) (holding that the Army Corps of Engineers’ interpretation of NEPA was not entitled to *Chevron* deference).


agencies over courts. Where policymaking expertise or accountability are not significant to the interpretive issue, it is less likely that Congress implicitly delegated interpretive authority to the agency. As discussed below, these reasons similarly support refusing to extend Chevron deference to agency interpretations of jurisdictional provisions, judicial review provisions, and procedural provisions.

B. Deference Beyond Chevron’s Domain: Skidmore “Respect”

If a court determines that Chevron does not apply because of a failure at step zero, the next question is what level of deference, if any, is available to an agency interpretation. The Supreme Court began to answer this question in 2000 through a series of decisions discussed below. Since that time, the Court has restricted Chevron’s reach and entitled the agency to “respect” only where the agency interpretation has “the power to persuade.” In doing so, the Court breathed life back into the pre-Chevron multi-factor discretionary approach to deference articulated in its 1944 decision, Skidmore v. Swift. Skidmore “respect” is now considered to be an intermediate deference standard that replaces the dichotomy between Chevron deference and no deference.

Skidmore v. Swift involved the Department of Labor’s interpretation of the Fair Labor Standards Act through an interpretive bulletin and

230. See id. at 1518–19 & n.173; Martin v. Occupational Safety & Health Review Comm’n, 499 U.S. 144, 153 (1991) (stating that “familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court”).


233. See id.

234. See Hickman, supra note 225, at 1552 n.68 (2006) (highlighting the fact that “some scholars use the term ‘Skidmore respect’ rather than ‘Skidmore deference’ in distinguishing the Skidmore approach from Chevron deference and tracking the language used by the Mead Court in its decision). See, e.g., Gregg D. Polsky, Can Treasury Overrule the Supreme Court?, 84 B.U. L. REV. 185, 198 n.80 (2004) (referring to the term “Skidmore deference” as an oxymoron because “the court never technically defers to the agency position under Skidmore even if the court ultimately adopts the position; the agency position is mere evidence considered by the court in its attempt to determine the single best interpretation”); Jim Rossi, Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron, 42 WM. & MARY L. REV. 1105, 1127, 1132–33 (2001) (alternately using the terms “Skidmore deference” and “Skidmore respect”). But see Merrill & Hickman, supra note 27, at 836 (suggesting that Skidmore is better regarded as a deference doctrine). Thorough consideration of whether Skidmore’s standard is a true deference doctrine is beyond the scope of this Article. For purposes of clarity, I refer to the Skidmore standard as “deference.”
informal rulings. The Court noted that there was no statutory provision as to what deference, if any, the Court should give to the agency’s interpretations in these forms and that the interpretation was not reached as a result of a formal adjudicatory hearing. But, the Court stated, the agency’s “policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.” Accordingly, the Court declared that the rulings, interpretations, and opinions of the agency under the statute, “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 Court identified the following factors as relevant to determining the appropriate level of deference: “the thoroughness evident in [the judgment’s] 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.” These factors were among the factors used by courts in the pre-Chevron world.

While most judges (particularly Justice Scalia) and commentators thought Skidmore had died a quiet death with the advent of the Chevron era, the Court revived its sliding scale of deference—including no deference—in the recent cases of Christensen v. Harris County and United States v. Mead Corp. Together, these cases articulated a dual system of deference: although certain agency interpretations do not warrant mandatory deference under Chevron, they may receive some level of deference depending on their “power to persuade” the court.

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236. Id. at 139.
237. Id.
238. Id. at 140.
239. Id.
240. For a description of other factors, see supra note 147 and accompanying text.
241. See Christensen v. Harris County, 529 U.S. 576, 589 (2000) (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia argued that “Skidmore deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations ... authoritative effect. ... That era came to an end with our watershed decision in Chevron.” Id. In United States v. Mead Corp., Justice Scalia dissented with even harsher words:

Skidmore deference is a recipe for uncertainty, unpredictability, and endless litigation. To condemn a vast body of agency action to that regime (all except rulemaking, formal (and informal?) adjudication, and whatever else might now and then be included within today’s intentionally vague formulation of affirmative congressional intent to “delegate”) is irresponsible.

242. 529 U.S. 576.
243. 533 U.S. 218.
244. See Merrill & Hickman, supra note 27, at 858 (stating that a second doctrine is needed because Chevron is “confined to situations in which an agency is exercising delegated power to bind
In *Mead*, the Court articulated a test that is now commonly known as the “force of law” test: to qualify for *Chevron* deference—in other words, to make it past step zero—Congress must intend to delegate authority to the agency to interpret the statute with “the force of law,” and the agency’s interpretation has been issued pursuant to that authority.\(^\text{245}\) The Court held that the Customs Department’s tariff classification rulings were best treated like “interpretations contained in policy statements, agency manuals, and enforcement guidelines,” which lie beyond *Chevron*’s domain.\(^\text{246}\)

In early 2006, the Court built on this precedent when it held that some agency interpretations are not even entitled to *Skidmore* deference. In *Gonzales v. Oregon*, the well-publicized case about the use of medical marijuana in Oregon, the Court held that the Attorney General’s interpretation of the federal Controlled Substances Act did not have the force of law.\(^\text{247}\) Moreover, the Court held that the Attorney General’s interpretation was not eligible for even *Skidmore* deference because he was interpreting a part of the statute that he did not administer.\(^\text{248}\) Accordingly, the Court afforded no deference at all to the Attorney General’s interpretation and invalidated the interpretive rule that made dispensing marijuana for medical purposes in Oregon a federal crime.\(^\text{249}\) The Court has thus carved out another type of issue that fails at *Chevron*’s step zero.

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\(^\text{245}\) *Mead*, 533 U.S. at 226–27.

\(^\text{246}\) *Id.* at 234 (quoting *Christensen*, 529 U.S. at 587).


\(^\text{248}\) *Id.*

\(^\text{249}\) *Id.* at 925.
C. Issues on the Fringes of Chevron's Domain: Pushing the Boundaries

A number of issues lie on the fringes of Chevron’s domain because Supreme Court guidance is lacking. Gonzales and similar cases demonstrate that certain issues are not appropriate for Chevron deference and should instead receive Skidmore deference or no deference at all. While scholars have admirably attempted to resolve some of these issues, none have comprehensively addressed whether Chevron should apply to agency interpretations of the procedural provisions contained in their enabling statutes, particularly those provisions relating to the level of formality required for adjudication. The two areas most analogous to the interpretation of procedural provisions are the interpretation of jurisdictional provisions and the interpretation of judicial review provisions. To the extent courts have addressed questions surrounding these interpretations, most courts and commentators agree that Chevron deference is not appropriate.


The Court has not reached a consensus on whether Chevron applies to jurisdictional disputes. For example, in Gonzales v. Oregon, the Court refused to defer to an agency’s expansive definition of its own jurisdiction under an enabling statute. Yet, in a few other decisions, the Court has extended Chevron deference to agency interpretations that narrowed the reach of the agency’s jurisdiction. As a result, this question remains unsettled in the lower courts.

250. See, e.g., Merrill & Hickman, supra note 27, at 849–52 (addressing fourteen issues, including jurisdiction and procedural rules, which remain unresolved); Sunstein, supra note 152, at 222–28 (addressing numerous step-zero issues); Stanley, supra note 32, at 1093 (concluding that Skidmore deference should apply to agency interpretations of procedural provisions in the absence of “on the record” language); Noah, supra note 226, at 1516–29 (addressing jurisdictional issues).


253. See Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 452 (1999) (deferring to the agency’s position that it did not have “jurisdiction to review a fiscal intermediary’s refusal to reopen a reimbursement determination”); Reiter v. Cooper, 507 U.S. 258, 269 (1993) (grant-
Courts refusing to defer in this context find support in the theory of implied delegation on which *Chevron* rests—that Congress could not have intended to delegate to agencies the power to determine the scope of their own authority. They reason that independent federal courts, not the agencies themselves, should answer that question. In *Mississippi Power & Light*, Justice Brennan articulated the argument that independent federal courts should be the ones to address the scope of agency authority and urged that judgments about jurisdiction “have not been entrusted to the agency” by Congress and might well “conflict . . . with the agency’s institutional interests in expanding its own power.” In his view, Congress cannot be presumed to ask “an agency to fill ‘gaps’ in a statute confining the agency’s jurisdiction.”

Moreover, agencies do not possess special expertise in interpreting their jurisdictional limits. In contrast, courts do have expertise in jurisdictional matters. When formulating procedural laws, Congress recognizes this expertise and trusts the judgment of courts to interpret these laws and make necessary procedural decisions. A similar trust in the

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*Chevron* deference to the ICC’s determination that it did not have jurisdiction to award reparations; Massachusetts v. Morash, 490 U.S. 107, 116–19 (1989) (deferring to an agency interpretation denying the extension of ERISA to claims for vacation benefits). See also Sunstein, supra note 152, at 235–36 (arguing that an exemption for deference with regards to jurisdictional questions is vulnerable to criticism and that deference in this context is supported by *Chevron*’s rationales).

254. See, e.g., O’Connell v. Shalala, 79 F.3d 170, 176 (1st Cir. 1996) (explaining that “it is unclear whether deference is appropriate” when the question is whether there is rulemaking authority at all); Alaska v. Babbitt, 72 F.3d 698, 703–04 (9th Cir. 1995) (deferring on a jurisdictional issue involving the definition of “public lands”); Cavert Acquisition Co. v. NLRB, 83 F.3d 598, 610 (3d Cir. 1996) (deferring on a jurisdictional issue involving the definition of “employee”).

255. See, e.g., NRDC v. Abraham, 355 F.3d 179, 199 (2d Cir. 2004) (refusing to defer and stating that “it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power”) (citation omitted).

256. See Sunstein, supra note 152, at 235 (acknowledging this argument but arguing instead for *Chevron* deference to agency interpretations of jurisdictional questions). See Merrill & Hickman, supra note 27, at 912–14 (arguing for the application of *Skidmore* deference to jurisdictional questions when Congress would want the issue of scope of agency authority to be resolved as a matter of common law deference).


258. Id. See also Sunstein, supra note 152, at 235.

259. Sunstein, supra note 152, at 235.

260. See Noah, supra note 226, at 1522–29 (describing the expertise of courts with regard to jurisdiction as a reason why courts are better suited than agencies to determine jurisdictional matters and noting, as an example, that courts must routinely determine subject matter jurisdiction).

courts’ jurisdictional expertise when applied to the scope of agency jurisdiction is entirely reasonable. Accordingly, the judiciary should be the institution that makes these determinations.

The most problematic concern raised by agencies determining the limits of their own jurisdiction is one of self-interest. When given the opportunity, agencies tend to expand their jurisdiction beyond statutory limits.262 Broader jurisdiction results in more power to regulate, and power is something that most agencies would like to have.263 Thus, agencies seeking to expand their jurisdiction may not be acting in the best interest of the public, thereby rendering the agency’s interpretation of its jurisdictional limits suspect.

The argument that jurisdictional questions lie beyond *Chevron*’s domain, however, has two significant challenges. The first challenge is that the line between jurisdictional and nonjurisdictional questions is sometimes blurry.264 Indeed, Justice Scalia has argued that “there is no

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263. While agencies are “often prepared to accept less money with greater control than money with less control,” the “turf” issue of agency jurisdiction may be more complicated. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 179 (1989) (quoting MORTON H. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY 51 (1974)). Professor James Q. Wilson has argued that although agencies give high priority to turf, the statement that agencies always want to maximize their power is an oversimplification because, among other things, agency executives seek autonomy and bigger budgets, and broader jurisdiction may be accompanied by more complex tasks for which the agency is accountable, more rivals, and more constraints. *Id.* at 179–217. For example, an agency might use limited jurisdiction as a shield to avoid a hot-button political issue. *Id.* at 191–92 (noting that in trying to maximize autonomy, agencies want to avoid tasks that produce divided or hostile constituencies and tasks that may have a high political cost). See, e.g., Massachusetts v. EPA, 415 F.3d 50, 56 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 2960 (June 26, 2006) (EPA arguing that it does not have the statutory authority to regulate carbon dioxide under the Clean Air Act). See also James O’Reilly, Jurisdiction to Decide an Agency’s Own Jurisdiction: The Forgotten Take of the Hynson Quartet, 58 ADMIN. L. REV. 829 (2006).

discernible line between an agency’s exceeding its authority and an agency’s exceeding authorized application of its authority." The second challenge asserts that *Chevron*’s implied delegation rationale actually supports its application to jurisdictional questions because when agencies assert or deny jurisdiction over an issue, “it is either because democratic forces are leading it to do so or because its own specialized competence justifies its jurisdictional decision.” For instance, Justice Scalia has maintained, “Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction.”

Like the courts, scholars disagree on whether *Chevron* should apply to jurisdictional issues. Professor Cass Sunstein, formerly in favor of denying deference for jurisdictional issues, now agrees with Justice Scalia, while other scholars, most notably Professor Thomas Merrill, disagree and support denying deference—at least *Chevron* deference—for jurisdictional questions. Interestingly, Professor Lars Noah has noted that the asymmetry of the Supreme Court’s approach suggests that the Court is concerned with the undue expansion of agency powers. This theory conforms to the implicit delegation rationale of *Chevron*: it is implausible that Congress would have given agencies free reign to expand the scope of their powers. Most courts and commentators who

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vice’s self-interest in jurisdictional matter); Quincy M. Crawford, Comment, *Chevron Deference to Agency Interpretations that Delimit the Scope of the Agency’s Jurisdiction*, 61 U. CHI. L. REV. 957, 968–83 (1994) (arguing in favor of *Chevron* deference on jurisdictional questions).


266. Sunstein, supra note 152, at 235.


268. Compare Sunstein, supra note 26, at 2097–101 (arguing against deference on jurisdictional issues), with Sunstein, supra note 152, at 234–36 (discussing why arguments exempting jurisdictional issues from deference are vulnerable). See also Noah, supra note 226, at 1519–20, 1526 (noting Professor Sunstein’s shift in positions).

269. Merrill & Hickman, supra note 27, at 912 (arguing for *Skidmore* deference on jurisdictional questions). See also Noah, supra note 226, at 1528.

270. Noah, supra note 226, at 1521.

271. Id. at 1522 n.184. See Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999) (“It is presumptively unlikely that Congress intended to allow an agency to decide for itself whether an area of regulation is within its regulatory jurisdiction where the enabling legislation is silent on that authority.”). See also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) (refusing to grant deference to FDA’s assertion of jurisdiction over tobacco products because “it is plain that Congress has not given the FDA the authority that it seeks to exercise”).
support not extending *Chevron* deference to agencies’ interpretations of their own jurisdictional limits agree with this argument—Congress simply could not have intended to delegate this issue. A consensus is lacking, however, on the issue of whether any deference is warranted or whether *de novo* review is preferred in this context.  


Another questionable area for the application of *Chevron* deference involves the interpretation of provisions relating to judicial review. Two types of provisions come to mind: provisions establishing judicial review and provisions relating to the scope of review. Neither type has been addressed by the Supreme Court; however, the D.C. Circuit has refused to apply *Chevron* deference to agency interpretations of statutory provisions that establish the right of judicial review, reasoning that the agency has no expertise in this field.  

273 Given this rationale, it would be very surprising if courts decided to grant *Chevron* deference to agency interpretations of scope of review provisions because agencies similarly lack expertise in this field.

As with jurisdictional issues, the primary argument against deference for interpretations of judicial review provisions is the lack of implied delegation. According to this argument, Congress could not have intended to delegate to agencies the power to tell the court whether judicial review is available or what is the proper scope of that review.  

274 Because Congress usually relies on courts to determine these issues, this is a persuasive rationale.

The expertise rationale similarly fails to support granting deference to agencies in this context. Agencies are not experts on issues of judicial review; courts are. Moreover, issues of judicial review are not “gaps” in the statute that agencies should be filling. Judicial review provisions do not involve policymaking; they are “pure” issues of statutory

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272 See, e.g., *supra* notes 251–256.

273 See Murphy Exploration & Prod. Co. v. U.S. Dep’t of the Interior, 252 F.3d 473, 478–80 (D.C. Cir. 2001) (explaining that *Chevron* does not apply to the provisions of a statute establishing rights of judicial review). See also Ramey v. Bowsher, 9 F.3d 133, 136 n.7 (D.C. Cir. 1993) (“Interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.”); Reeb v. Econ. Opportunity Atlanta, Inc., 516 F.2d 924, 926 (5th Cir. 1975) (“The courts . . . have to make their own determination whether the district court has jurisdiction, rather than defer to the [agency] in the first instance.”).

274 See *Murphy Exploration*, 252 F.3d at 478–80; see also LAWSON, *supra* note 34, at 456 (suggesting that most would agree that courts would not give deference to agency interpretations of provisions relating to the judicial review in their enabling acts).
construction.\textsuperscript{275} For example, courts consistently refuse to grant deference to agency interpretations of the effective date of a statute.\textsuperscript{276}

Finally, concerns about agency self-interest counsel against deference. Agencies may be inclined to limit the availability of judicial review so that fewer agency actions could be reviewed. Likewise, agencies may be inclined to interpret a scope of review provision narrowly to allow for heightened deference. Such actions could raise separation of powers problems: an agency's ability to obstruct judicial review of its interpretations would be both an aggrandizement of its own authority and an encroachment on the power of the judicial branch.

Thus, these arguments weigh heavily against granting any type of deference to agency interpretations of judicial review provisions, even more so than with jurisdictional issues. Although there are fewer cases relating to judicial review provisions,\textsuperscript{277} the analogies drawn in this Part provide strong arguments for denying deference in contexts where \textit{Chevron}'s underlying rationales are lacking and where agencies are likely to act in their own self-interest rather than in the public's interest. These arguments are even more powerful in the context of adjudicatory procedural provisions, where individual substantive rights are at stake.

\begin{footnotesize}
\textsuperscript{275} See Bejjani v. INS, 271 F.3d 670, 679 (6th Cir. 2001), \textit{abrogated by} Fernandez-Vargas v. Gonzales, 126 S. Ct. 2422 (2006) ("\textit{Chevron} appears to speak to statutory interpretation in those instances where Congress delegated rule-making power to an agency and thereby sought to rely on agency expertise in the formulation of substantive policy.").

\textsuperscript{276} See, e.g., Pak v. Reno, 196 F.3d 666, 675 n.10 (6th Cir. 1999) (stating that "[d]etermining a statute's temporal reach . . . does not require agency expertise but, rather, presents a pure question of statutory interpretation for the courts to decide") (quotations and citation omitted); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1148 (10th Cir. 1999) (noting that the determination of a statute's temporal reach does not involve any "special agency expertise," and therefore determining the retroactivity of the statute "without affording any deference to the Attorney General"); Sandoval v. Reno, 166 F.3d 225, 239 (3d Cir. 1999) (avoiding the \textit{Chevron} issue but questioning whether \textit{Chevron} deference is appropriate in determining a statute's effective date because "issue[s] concerning a statute's effective date [do not] implicate[] agency expertise in a meaningful way"); Goncalves v. Reno, 144 F.3d 110, 127 (1st Cir. 1998) ("We think it is a significant question whether the determination of the application of the effective date of a governing statute is the sort of policy matter which Congress intended the agency to decide and thus whether the doctrinal underpinnings of \textit{Chevron} are present here."). See also INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) The Court stated, in response to the agency's argument that the Court should defer to the agency's interpretation regarding the retroactivity of the statute:

We only defer, however, to agency interpretations of statutes that, applying the normal "tools of statutory constructions" are ambiguous. Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for \textit{Chevron} purposes, no ambiguity in such a statute for an agency to resolve.

\textit{Id.} (internal citations omitted).

\textsuperscript{277} The dearth of cases in this area may support the notion that agencies understand that they will not receive deference on their interpretations of judicial review provisions and thus do not attempt to interpret these provisions, or at least do not seek deference for such interpretations.
\end{footnotesize}
V. THE ARGUMENT FOR DE NOVO, NOT DEFERENTIAL, JUDICIAL REVIEW

The Supreme Court has not directly addressed whether deference should be granted to agency interpretations of procedural provisions in enabling statutes. Consequently, as discussed above, courts have followed three different approaches in answering this question. This Part advocates for a fourth approach, which is more appropriate than those currently used by the courts.

First, drawing on concerns identified in the context of interpreting jurisdictional and judicial review provisions, this Part argues against *Chevron* because mandatory deference is inappropriate for agency interpretations of enabling act procedural provisions. These concerns—implied delegation, expertise, self-interest and fairness—strongly indicate that courts, rather than agencies, should be the primary interpreters of procedural provisions. Second, this Part argues that, in the absence of legislative change, a nondeferential contextual approach to the interpretation of procedural provisions in enabling acts is more appropriate than a presumptive approach. It then proposes an analytical framework for this approach based on factors related to the goals served by procedural formalities.

A. Against *Chevron*

The first question that must be resolved is that of deference. Agency interpretations of their statutory procedural provisions should not be given *Chevron* deference for four reasons. First, *Chevron*'s implied delegation rationale does not fit in the procedural context. Second, interpreting procedural provisions is within the expertise of courts, not

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278. In *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), the Court commented on, but did not resolve, this issue. *Edelman* involved a federal employment discrimination claim, which requires that a plaintiff file with the Equal Employment Opportunity Commission (EEOC) "a charge . . . within one hundred and eighty days after the alleged unlawful employment practice occurred" and verify the charges. *Id.* at 111 & n.3 (citing 42 U.S.C. § 2000e-5(b), (e)(1) (1994)). Defendant Lynchburg College challenged Edelman's failure to verify the charges he filed with the EEOC within the time limit, arguing that his claim was therefore barred. *Id.* at 110–11. However, an EEOC regulation, 29 C.F.R. § 1601.12(b) (1997), expressly interpreted the statute to permit verification after the initial filing. *Id.* at 110 & n.2. In response to the defendant's challenge to the regulation, the Court upheld the regulation without deciding whether the regulation was entitled to *Chevron* deference. *Id.* at 114. Justice O'Connor, joined by Justice Scalia, concurred in the judgment but noted that she would have applied *Chevron* deference to the EEOC's procedural regulation because Congress explicitly delegated to the EEOC the authority to make procedural rules. *Id.* at 122–23 (O'Connor, J., concurring in the judgment) (internal citations omitted).

agencies. Third, agency self-interest and accompanying concerns about discretion and accountability weigh heavily against deference. Fourth, fundamental fairness concerns favor courts over agencies as the guardians of procedural protections.

1. Implied Delegation

The rationales underlying *Chevron* simply do not suit the context of interpreting procedural provisions. The primary rationale articulated in *Chevron* is that Congress has implicitly delegated to the agency the authority to fill "gaps" in the statutory scheme.\(^{280}\)

A comparison of the interpretation of procedural provisions to the interpretation of provisions related to agency jurisdiction and judicial review illustrates why the implied delegation rationale is lacking in these contexts. In each of these areas, it is hard to believe that Congress intended to convey authority to the agency to interpret these provisions with *Chevron* deference. While in the jurisdictional area the question is closer as to whether Congress would intend to delegate authority to the agency to address such issues,\(^ {281}\) issues relating to judicial review are highly unlikely to be subjects of delegation. For instance, courts do not defer to agency determinations that Congress has delegated to that agency the authority to act with the force of law through either rulemaking or adjudications.\(^ {282}\) Likewise, "it has never been maintained that Congress would want courts to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference, or should give *Chevron* deference to an agency's determination of what types of

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If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

*Id.* (citations omitted). See also Merrill & Hickman, *supra* note 27, at 870.

\(^{281}\) See *supra* Part IV.C. See also Sunstein, *supra* note 152, at 242 (discussing FDA v. Brown & Williamson Corp., 529 U.S. 120 (2000), and rejecting the argument that Congress would not delegate issues of great "economic and political significance" to agencies).

\(^{282}\) See Merrill & Hickman, *supra* note 27, at 910–11 & n.378 (citing Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946)) ("[A]n agency may not finally decide the limits of its statutory power. That is a judicial function."); Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."); Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 224 (1990) ("A cardinal principle of American constitutionalism is that those who are limited by law should not be empowered to decide on the meaning of the limitation: foxes should not guard henhouses.").
interpretations are entitled to *Chevron* deference."²⁸³ In these contexts, courts assume that they must first determine whether power has been delegated to an agency before they can be compelled to defer to the agency’s exercise of that power.²⁸⁴ Similarly, *Chevron* deference should not apply to the question of whether an agency action will be reviewed on the record.²⁸⁵

A key reason underlying the hesitance to defer to agencies on these issues reflects the view that Congress could not have intended to delegate the power to agencies to answer these questions because of the concern that agencies will tend to interpret them according to their own self-interest.²⁸⁶ While this concern is discussed in more detail below, it is intertwined with the concept of implied delegation because, given the “feast or famine” nature of the APA’s procedural packages,²⁸⁷ agencies will almost always favor informal procedures over formal procedures.²⁸⁸ Two other key reasons to treat this issue as outside of the scope of delegated power and reject the presumption that Congress has assigned primary interpretive authority to agencies in this context—institutional competence and fundamental fairness—are also addressed below.

²⁸⁴. *Id.* at 910–11. Professors Merrill and Hickman note that the scope-of-jurisdiction question arguably “does not concern whether Congress has given the agency the power to act with the force of law, but rather how far that power extends, in the sense of what subject matter is covered.” *Id.* at 911 n.379. Accordingly, they reason, “[t]his is more closely analogous to the question of whether a delegation of power has been cabin’d by an ‘intelligible principle,’ something the Court has found notoriously hard to enforce. However, even in its most lenient interpretations of the intelligible principle, the Court has exercised independent judgment.” *Id.* While the intelligible principle standard “may not be very constraining,” Professors Merrill and Hickman argue, “there is no doubt that the question whether this standard is satisfied is one the court must decide independently, rather than by deferring to the agency.” *Id.*
²⁸⁵. *See* Funk, *supra* note 18, at 896–97 & n.107 (asserting that “[t]he nature of judicial review of an agency action is solely a matter for courts to decide”).
²⁸⁶. *See supra* notes 262–263.
²⁸⁷. *See supra* Part II.A.
²⁸⁸. Seacoast, *West Chicago*, *Chemical Waste*, and *Dominion Energy* are evidence that agencies will normally choose informal adjudicatory procedures over formal procedures. *See supra* Part III. Just as the cumbersomeness of modern informal rulemaking has led agencies to promulgate more rules, policies, and guidance documents that are exempt from informal rulemaking procedures, we can expect more agencies to follow the EPA’s lead in *Dominion Energy* and reduce the procedures available to individuals appearing before the agency despite longstanding agency practice to the contrary for adjudications. *See* Levy & Shapiro, *supra* note 14, at 484–85, 487 (discussing informal rulemaking trends); Morrison, *supra* note 35, at 90–96 (outlining the significant procedural requirements on agencies conducting informal rulemakings); Rakoff, *supra* note 18, at 163–80 (discussing the growing tendency of agencies to use informal procedures). The movement away from formal rulemaking to informal rulemakings has similar parallels. *See supra* note 59.
2. Institutional Competence

The implied delegation rationale is related to a second rationale for
*Chevron* deference: the agency’s expertise and comparative advantages
over the court. A corollary to *Chevron*’s implied delegation rationale is
that agencies are the most appropriate source to resolve interpretive dis-
putes that “involve[] reconciling conflicting policies.”

The interpretation of procedural provisions should not be consid-
ered policymaking because it generally does not involve reconciling con-
flicting policies. Of course, agency experience might be relevant on some
questions of cost, such as the volume of cases handled and the possibility
of using procedural shortcuts to provide a party with substantial process
but at less expense than full formal procedures, thus making the level of
procedures a question related to policy. But statutory ambiguity in pro-
cedural provisions should not convert the issue of what procedures are
required into a policy decision for the agency. Applying *Chevron* in
this context would actually open up the interpretive process to political
influence, rendering legislative drafting less important and inviting the
potential for agency abuse of discretion.

For example, in *Dominion Energy*, the EPA cited efficiency as its
reason for changing from its longstanding use of formal adjudicatory
procedures to informal procedures under a provision of the CWA. Although in policymaking, efficiency is an appropriate consideration for
agencies, it should not be an appropriate consideration for agency inter-
pretations of procedural provisions. Efficiency may be relevant to
choices about procedure in the sense that from an efficiency viewpoint,
procedure is an attempt to maximize the sum of benefits over costs, that
is, to minimize the sum of error costs and decision costs. But the choice

289. See Molot, supra note 26, at 72 (discussing *Chevron* and the Court’s defense of its treat-
ment of ambiguity “by pointing to administrators’ comparative advantages over judges in filling
statutory gaps”); Herz, supra note 244, at 366 (“It is part of the *Chevron* insistence that agencies
have a comparative advantage over courts in filling in gaps (i.e., in policymaking) because of their
accountability.”). But see Krotoszynski, supra note 244, at 736–37 (referring to implied delegation
and agency expertise as two separate doctrines).


291. See Molot, supra note 26, at 74–75.

292. Id. at 74. For instance, a minority party could try to insert this procedural ambiguity in the
legislative process to enable an “unauthorized” rewriting of procedure should the party later gain
control of an agency’s administration.

293. *Dominion Energy* Brayton Point, LLC v. Johnson, 443 F.3d 12, 15 (1st Cir. 2006) (citing
Amendments to Streamline the National Pollutant Discharge Elimination System Program Regula-
122)).
about whether formal adjudicatory procedures are required is one that Congress should make in the first instance, not the agency.\textsuperscript{294}

Although court interpretations lack the flexibility of agency interpretations, such flexibility is not essential when interpreting procedural provisions. In policymaking, flexibility is viewed as a positive attribute because agencies can adapt to changed circumstances.\textsuperscript{295} Under \textit{Chevron} deference, courts have allowed agencies to change their interpretations so long as the agency provides adequate reasons for their change in policy.\textsuperscript{296} Like jurisdictional provisions and especially with judicial review provisions, however, interpretations of procedural provisions generally should not change over time without legislative action. Congressional intent with respect to these provisions does not change, so the only explanation for change is a revision in policy.

Accordingly, interpretations of procedural provisions do not require the exercise of agency discretion in response to changed factual circumstances, or a change in administrations.\textsuperscript{297} Although procedures may be viewed as another good that some administrations want to supply more of while others provide less, without congressional action the interpretation of procedural provisions should not serve as a vehicle for this type of political decision.\textsuperscript{298} While procedural protections may vary on a statute-by-statute basis, they should not vary in response to political change.

Furthermore, courts have important institutional advantages over agencies when construing statutes. For instance, because federal judges enjoy life tenure and salary guarantees, they are substantially insulated from politics and are thus generally able to avoid the pitfalls of self-interested behavior that agency officials may exhibit.\textsuperscript{299}

\textsuperscript{294} Because the APA lacks a set of procedures for informal adjudications, where formal procedures are not required the agency is free to take efficiency into account in tailoring informal adjudications to individual cases, so long as all other statutory and constitutional requirements are met.

\textsuperscript{295} See Sunstein, \textit{supra} note 152, at 246 (noting that “this flexibility is a primary benefit of \textit{Chevron} itself, allowing adaptation to new understandings of both facts and values”).

\textsuperscript{296} \textit{Id.} at 206 (citing examples); Merrill & Hickman, \textit{supra} note 27, at 855–86 & n.123 (citing examples and noting that under pre-\textit{Chevron} caselaw and \textit{Skidmore}, longstanding and consistent interpretations were granted more deference than new or fluctuating interpretations). \textit{See also} Hickman, \textit{supra} note 225, at 1549 n.46 (pointing to the fact that in \textit{Chevron}, the Court accepted the EPA’s change in regulatory definitions and deferred to the EPA’s new definition that was reached through note-and-comment rulemaking).

\textsuperscript{297} See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (describing this as the “whole point of \textit{Chevron}”).

\textsuperscript{298} Because agencies can adopt more procedures than the minimum statutory and constitutional procedures, they may decide to increase the procedures available, but they should not be able to decrease them from those required by APA §§ 554, 556, and 557 without a legislative change.

\textsuperscript{299} See Noah, \textit{supra} note 250, at 1528 n.201. \textit{See also} Thomas W. Merrill, \textit{Does Public Choice Theory Justify Judicial Activism After All?}, 21 HARV. J.L. & PUB. POL’Y 219, 229 (1997) (arguing that “it is plausible to believe that there is a range of controversies decided in the courts where the organizational capacities of the contending parties will have no effect on the outcome”).
Finally, agency expertise is a weak rationale for deference to agency interpretations of procedural provisions. As with the interpretation of jurisdictional and judicial review provisions, courts have more expertise in interpreting procedural requirements.\(^{300}\) And unlike jurisdictional issues, which may be hard to recognize, issues involving procedural provisions are distinct from substantive issues such that Congress, courts, and agencies can easily recognize them. In the procedural context, particularly procedures for adjudications, the agency does not have a comparative advantage relating to expertise. Indeed, it is the reverse; courts have long been the source of procedural requirements, interpreting such requirements in the Constitution and in statutes.\(^{301}\) Accordingly, courts are at least as well-equipped—if not better-equipped—than agencies to interpret procedural provisions. This conclusion lends additional support to the unlikelihood of implied delegation to agencies for interpretations of these provisions.

### 3. Agency Self-Interest

The third argument against deference in this context acknowledges concerns about agency self-interest and accountability, which are rooted in public choice theory. Public choice theory formally articulates a view that “has been held for a very long time by most people in the backs of their minds”: “the individual bureaucrat is not attempting to maximize the public interest very vigorously but is attempting to maximize his or her own utility just as vigorously as you and I.”\(^{302}\) Under *Chevron*, however, courts cannot adequately constrain this maximization of self-interest by agencies: “By stripping courts of primary interpretational authority where Congress has charged an agency with administration of a statute, *Chevron* simultaneously disarmed courts from being able to act in a consistently vigilant manner in policing the boundaries of agency power.”\(^{303}\)

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\(^{300}\) But see Einer R. Elhauge, *Does Interest Group Theory Justify More Intensive Judicial Review?*, 101 Yale L.J. 31, 80–87 (1991) (arguing that courts are not free from public choice problems because the same groups that have organizational advantages in legislatures and agencies will have organizational advantages in courts).

\(^{301}\) See supra Part IV.C

\(^{302}\) See infra note 260. Courts are the final word on procedural due process requirements under the Due Process Clauses of the Fifth and Fourteenth Amendments, and, consequently, a large body of caselaw and literature has developed around these requirements. See Adam M. Samaha, *Undue Process*, 59 Stan. L. Rev. 601, 603–04 & n.1 (2006) (noting that for the ten-year period of 1995–2005, a Westlaw search in the “JLR” database yielded more than 850 articles with “due process” in the title).


\(^{303}\) Merrill & Hickman, supra note 27, at 909.
Proponents of applying *Chevron* to agency interpretations of procedural provisions may argue from the standpoint of accountability: “*Chevron* posited that this value [accountability] supports a rule of deference because agency officials have connections to political institutions and through them to the general public that the judiciary does not.” While this is true, the political and fiscal pressures that agencies face outweigh their accountability on this issue; an agency’s discretion in interpreting procedural provisions is susceptible to inappropriate self-interest considerations. Thus, the federal courts’ role in upholding constitutional guarantees and their accompanying lack of political accountability make the judiciary the more appropriate institution to decide these issues.

A better argument for applying *Chevron* in this context rests on the notion of public participation as a check on agency discretion and accountability. For example, in *Dominion Energy*, the EPA reinterpreted the Clean Water Act’s procedural provisions through informal notice-and-comment rulemaking, an action that satisfied *Mead*’s force-of-law test. The public was thus provided with the opportunity to participate by filing comments to the proposed change. It is indeed possible that some members of the public, and even some permit applicants, might want fewer procedures because the APA’s formal procedures can be lengthy, cumbersome, and more costly; however, the risks of an agency acting out of self-interest and abusing its discretion in interpreting procedural provisions to avoid formal procedures are simply too great to rely on public participation as a check on such abuse.


305. Admittedly, courts may not be entirely free of public choice problems. See Elhaue, *supra* note 299, at 34 and accompanying text. *But see* Merrill, *supra* note 299, at 229–30 (agreeing that although courts are not “wholly immune from the logic of collective action,” there are situations when judicial policy making is “less susceptible to interest group distortions”); Jack M. Beerman, *Interest Group Politics and Judicial Behavior: Macey’s Public Choice*, 67 NOTRE DAME L. REV. 183, 223 (1991) (indicating that it is difficult to tell how public choice affects the judicial role).


307. In announcing the force of law test in *Mead*, the Court stated that *Chevron* deference would be appropriate where “Congress has delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” 533 U.S. 218, 226–27 (2001). The Court clarified that such delegation could be demonstrated if the agency had the power to engage in informal rulemaking under the APA. See *supra* Part IV.B for a discussion of *Mead*.
Proponents of applying *Chevron* deference might counter that any such risk is slight because the agencies themselves might have reasons to prefer formal procedures. First, because an agency is a “cost-plus” provider of services, the costs of procedural formality are externalized on those who have to deal with it. Thus, the bureaucrats will get paid regardless of the procedure the agency uses, so they may not mind engaging in formal adjudications. Second, agencies are repeat players in adjudications. Agencies therefore might favor procedural formalities because they gain an edge over all other players in mastering the complex rules. Third, formality has a facial value; it provides at least the appearance of legitimacy. Fourth, because the procedures may affect substantive rights, the agency may decide to err on the side of caution and follow formal procedures or adopt procedures short of the APA’s full formal procedures but above the statutory and constitutional minimum.\textsuperscript{308} Finally, an agency might want to employ formal procedures for a more self-interested or political reason, such as to slow down the implementation of an undesirable (in the agency’s or the White House’s view) program.\textsuperscript{309}

However, these motivations are largely theoretical; cases like *Dominion Energy* indicate that these motivations do not appear to greatly influence agency practice relating to procedural provisions.\textsuperscript{310} Moreover, these reasons are outweighed by the primary reason that agencies dislike increased formality: it decreases agency discretion, that is, the exercise of power. This reason is highlighted in the jurisdictional context, where agencies usually act in their self-interest by trying to expand their powers.\textsuperscript{311}

\textsuperscript{308} Cf. Merrill & Hickman, supra note 27. Professors Merrill and Hickman discuss procedural rules, which are exempt from informal rulemaking procedures and may be entitled to *Chevron* deference. *Id.* at 905–06. “[G]iven the vague line that divides procedural rules from substantive rules and the risk of invalidation if the agency guesses wrong,” they argue, the agency may opt to go through notice-and-comment procedures. *Id.* at 906. Yet under the current structure of the APA, Professors Merrill and Hickman note, there will be some procedural rules that will be binding because they have the force of law and thus are entitled to *Chevron* deference, “notwithstanding that some members of the public would like to comment on them before they are adopted but have been denied any such opportunity. The correspondence between the force-of-law criterion and public participation is strong, but it is not perfect.” *Id.*


\textsuperscript{310} See *Dominion Energy*, 443 F.3d at 18–19 (upholding EPA amendment to rule eliminating longstanding practice of formal procedures in permit adjudication). See supra notes 18–21 and accompanying text regarding why agencies have historically moved away from formal procedures to informal procedures.

\textsuperscript{311} See supra Part IV.C.1. The rationale for not deferring to agencies in the criminal context recognizes the similar incentives for prosecutorial agencies to interpret criminal statutes expansively. See Noah, supra note 226, at 1517–18. But see Wilson, supra note 263, at 196–217 (arguing that agencies do not always want to maximize their power because, among other things, some agencies
There is no reason to believe that they will not do the same when interpreting procedural provisions.\textsuperscript{312} Indeed, agencies have opposed formal procedures at every step, starting with the inclusion of these procedures in the APA.\textsuperscript{313} Even after the enactment of the APA, some agencies ignored the statute’s requirements.\textsuperscript{314} Agencies continue to avoid formal procedures when given the opportunity.\textsuperscript{315} Every decided case regarding agency interpretations of procedural provisions has involved an agency interpretation of statutory language to provide something less than formal adjudicatory procedures.\textsuperscript{316} If agencies expect courts to grant \textit{Chevron} deference to their interpretations of procedural provisions, we can expect more agencies to follow the EPA’s lead in \textit{Dominion Energy} and reduce the procedures available to individuals appearing before an agency despite longstanding agency practice to the contrary for adjudications.\textsuperscript{317} Thus, given these concerns regarding agency self-interest, the historical tension between deference to agencies and suspicion of agencies’ motivations\textsuperscript{318} in this context should be resolved in favor of de novo review.

4. Fundamental Fairness

The final argument against granting \textit{Chevron} deference to agency interpretations of procedural provisions is based on fundamental fairness

maximize leisure, or are afraid of having too much jurisdiction because they will be accountable for more things, or they do what the White House wants).

312. Some argue, however, that agencies are not so predictable. An agency might actually want to employ slower and more costly formal procedures because it wants to delay implementation of a program that it does not like, or that the White House does not like. See Levinson, supra note 309.

313. Funk, supra note 18, at 892 & n.86 (noting that agencies opposed the inclusion of formal requirements while Congress was considering the APA and citing legislative history demonstrating that much of the debate focused on formal adjudication).

314. Id. at 892 & n.87.

315. Id. at 892.

316. See, e.g., \textit{Dominion Energy Brayton Point, LLC v. Johnson}, 443 F.3d 12, 12 (1st Cir. 2006) (agency amended rule to eliminate longstanding practice of formal procedures in permit adjudication in the name of regulatory efficiency); \textit{Seacoast Anti-Pollution League v. Costle}, 572 F.2d 872, 875–77 (1st Cir. 1978) (agency argued for informal procedures); \textit{City of West Chicago v. NRC}, 701 F.2d 632, 638–41 (7th Cir. 1983) (same); \textit{Chem. Waste Mgmt., Inc. v. EPA}, 873 F.2d 1477, 1482–83 (D.C. Cir. 1989) (same). Granted, there is a sample bias to some extent because these reflect only the litigated cases. See supra Part II.A for a description of formal procedural requirements.

317. See Rakoff, supra note 18, at 163–80 (discussing the growing tendency of agencies to use informal procedures).

concerns grounded in due process principles. Formal adjudicatory procedures clearly meet due process requirements because they employ trial-type procedures.\textsuperscript{319} Anything less than formal procedures, however, is potentially subject to constitutional challenge. Informal adjudications, therefore, are particularly susceptible to due process claims.\textsuperscript{320} Although in the seminal 1970 case of Goldberg v. Kelly, the Supreme Court ordered an evidentiary hearing with a panoply of formal procedures,\textsuperscript{321} today due process often demands much less than a full evidentiary hearing.\textsuperscript{322}

A court determines what procedures satisfy due process under the three-part analysis articulated in Mathews v. Eldridge.\textsuperscript{323} First, the court must consider the nature of the private interest at stake.\textsuperscript{324} Second, the court must evaluate the risk of erroneous deprivation under the existing procedures.\textsuperscript{325} Third, the court must consider the government’s interest.\textsuperscript{326} The court then balances these interests and determines what process is due. In applying this framework, the Supreme Court has indicated that heavily factual issues are often those for which the risk of error is high.\textsuperscript{327} In such cases, oral presentations and the opportunity to confront and cross-examine witnesses are important procedures.\textsuperscript{328} These procedural safeguards serve as a check on agency discretion and reduce the risk of erroneous deprivation of a constitutionally protected interest.

Although a party could bring a due process challenge to an informal agency adjudication, the due process concerns raised are relevant to considering whether deference is appropriate in the procedural provision context. Fairness in this context is a critical concern because “structuring

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\textsuperscript{319} See supra Part II.A for a description of formal procedural requirements.

\textsuperscript{320} For example, the petitioners in City of West Chicago and Chemical Waste challenged the agencies’ informal adjudications on due process grounds but were not successful. See supra Part III for a discussion of these cases, and notes 86 and 175 for a description of the due process claims.

\textsuperscript{321} 397 U.S. 254, 264–71 (1970). At issue in Goldberg was the discontinuation of welfare benefits. Id. at 255. The Court noted that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.” Id. at 270.

\textsuperscript{322} Although Goldberg is still good law, the Court has retreated from ordering full evidentiary hearings. Informal “hearings” that provide some opportunity to be heard are often held to be sufficient. See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985) (holding that an informal hearing is sufficient); Goss v. Lopez, 419 U.S. 565, 582 (1975) (holding that public schoolchildren must generally receive an informal hearing before being suspended); Mathews v. Eldridge, 424 U.S. 319, 343 (1976) (holding that an informal hearing for termination of disability benefits meets due process requirements).

\textsuperscript{323} Eldridge, 424 U.S. at 343.

\textsuperscript{324} Id.

\textsuperscript{325} Id.

\textsuperscript{326} Id.

\textsuperscript{327} Id. at 344–45.

\textsuperscript{328} Id. at 343–44.
administrative adjudication confronts a crucial competition between bureaucratic management and individualized justice. Many agency adjudications involve important private interests or turn on questions of fact. Yet, as discussed above, when faced with a choice of whether to provide more or fewer procedures, agencies will typically act in their self-interest and choose fewer procedures. This will likely occur notwithstanding fairness concerns. Thus, even where the agency’s choice of procedures is likely to meet the minimum requirements of constitutional due process, the immediate and concrete effect on individual rights that an agency’s adjudicatory decision has counsels against judicial deference to agency interpretations in this context. Absent clear congressional intent, the courts’ role should be to ensure that the agency has observed the requirements of fundamental fairness.

Together, these four concerns—implied delegation, institutional competence, agency self-interest, and fundamental fairness—weigh heavily in favor of refusing to extend *Chevron* deference to agency interpretations of procedural provisions in enabling statutes.

Like *Chevron* deference, *Skidmore* deference does not make sense in this context, albeit for a more practical and less theoretical reason. *Skidmore* deference typically applies to an agency’s informal interpretations that lack the force of law. While some agency interpretations of procedural provisions may be informal, other interpretations have the force of law because they are presented in regulations promulgated pursuant to notice-and-comment rulemaking. Therefore, under Mead’s “force of law” test, the first set of interpretations—those made informally—would receive only *Skidmore* deference, whereas the second set—those having the force of law—would be entitled to receive *Chevron* deference. Some might argue that this is a desirable result because it fits Mead’s rationales. Despite the appeal of using this discretionary deference doctrine, such an incongruous result simply cannot be reconciled.

330. See Coughlin, supra note 318, at 92 (noting that one of the functions of judicial review is to guarantee that the requirements of fundamental fairness are met).
331. See supra Part IV.B.
332. For detailed discussions of Mead’s rationales, see Thomas Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 HARV. L. REV. 467 (2002). See also articles cited supra note 244–46 and accompanying text.
B. De Novo Contextual Review

Although Skidmore deference may seem like the best compromise, the above analysis indicates that procedural provisions must lie beyond both Chevron's and Skidmore's domains. The best answer, then, is to deny deference to agency interpretations of procedural provisions. An agency's familiarity with a statute and expertise in its application may well influence a court, "but the court must remain the final arbiter of statutory meaning." De novo review by the court is thus the most appropriate approach.

The conclusion that courts should not defer to agencies when interpreting procedural provisions requires a second level of inquiry: whether courts instead should utilize a presumption favoring formal or informal adjudicatory procedures. While presumptions are tempting because of their simplicity and efficiency, a case-by-case contextual approach is more appropriate.

Some commentators have argued for legislative change, with the primary movement embodied by the American Bar Association (ABA) Section on Administrative Law's recommendation that Congress amend the APA to codify Seacoast's presumption in favor of formal procedures absent clear congressional intent to the contrary. The First Circuit's recent shift away from Seacoast, however, somewhat weakens the ABA's proposal. The ABA should be commended, however, on its efforts to urge Congress to draft statutes carefully and to clearly indicate what type of adjudicatory procedures should be followed.

Professor Gary Eldes also urges legislative change, renewing the argument of Professors Pierce, Shapiro, and Verkuil that Congress should amend the APA to provide minimum criteria for informal

333. See, e.g., Merrill & Hickman, supra note 27, at 882, 887, 889–920 (arguing for Skidmore deference for a number of step-zero issues). For a discussion of Skidmore deference, see supra Part IV.B.

334. Another way to characterize this conclusion is as an argument to apply Skidmore, which provides for no deference, or de novo review, at one end of the sliding scale of deference. See supra Part IV.B; Skidmore v. Swift, 323 U.S. 134, 140 (1944).

335. Noah, supra note 250, at 1528.

336. See American Bar Association Resolution 113 (2005), available at http://www.abanet.org/jd/ncalj/pdf/res113.pdf. The ABA Resolution proposes the following legislative change: [In order to preserve the uniformity of process and of qualifications of presiding officers contemplated by the APA, Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary in any future legislation that creates the opportunity for a hearing in an adjudication, such a hearing shall be subject to 5 U.S.C. §§ 554, 556, and 557.

Id. The ABA recently reiterated its position to the U.S. House of Representatives. See supra note 33 and accompanying text.
hearings.\textsuperscript{337} These scholars propose adding a requirement that agencies “provide in all informal adjudications, other than those that rely upon physical inspection, the minimum procedural safeguards of notice, an opportunity to present views orally or in writing, a brief statement of reasons, and an impartial decisionmaker.”\textsuperscript{338} Such an amendment would be desirable because it would reduce the APA’s “feast or famine” dichotomy for adjudications, increasing fairness without compromising efficiency.\textsuperscript{339}

But “caution should be the watchword before amending the APA to prescribe significantly more precise procedures or review provisions.”\textsuperscript{340} Efforts to clarify or dictate the standard of review may end up confusing more than clarifying.\textsuperscript{341} Moreover, on a practical level, given Congress’s general reluctance to amend the APA,\textsuperscript{342} it is unlikely that Congress will revise it anytime in the near future.

In the absence of general legislative change, specific statutory clarity, or a resolution of the longstanding circuit split by the Supreme Court, courts need guidance. This Article seeks to provide that guidance by recommending a contextual approach.\textsuperscript{343} Although a contextual approach


\textsuperscript{338} Edles, supra note 32, at 817 (arguing against the ABA proposal).

\textsuperscript{339} Id. at 818.

\textsuperscript{340} William D. Araiza, In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA, 56 ADMIN. L. REV. 979, 1001–02 (2004) (arguing that the diversity of types of agency actions that exist today make it difficult to codify more precise statutory guidance with regard to both reviewability and deference standards). See also Craig N. Oren, Be Careful What You Wish For: Amending the Administrative Procedure Act, 56 ADMIN. L. REV. 1141, 1149–55 (2004) (discussing the history of congressional attempts to amend the APA). But see Andersen, supra note 146, at 961 (arguing for legislative change to the APA). Further, agreeing on how to draft a reasonably comprehensive set of rules governing adjudications would be difficult. Scholars have articulated different views on the precise rules they recommend. See, e.g., Asimow, supra note 33, at 1016–20 (distinguishing between “Type A” adjudications, which must be conducted in accordance with §§ 556 and 557 of the APA, and “Type B” adjudications, which include “an agency evidentiary proceeding required by statute, other than a Type A adjudication,” and drafting a model statute for the incorporation of this distinction); Howarth, supra note 32, at 1046–54 (supporting both Asimow’s and the ABA’s proposed amendments to the APA); Ronald J. Krotoszynski, Jr., Taming the Tail That Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication, 56 ADMIN. L. REV. 1057, 1069–75 (2004) (suggesting “minimal procedural safeguards in informal adjudications that significantly affect a particularized individual interest”).

\textsuperscript{341} See Araiza, supra note 340, at 999.

\textsuperscript{342} Congress has amended the APA very little since its enactment in 1946. It therefore seems unlikely that Congress will adopt the ABA’s proposal, especially in light of the recent First Circuit decision in Dominion Energy. See supra Part III.B.3 for a discussion of Dominion Energy.

\textsuperscript{343} See, e.g., Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (holding that due process “is flexible and calls for such procedural protections as the particular situation demands” and balancing the governmental and private interests affected) (emphasis added) (internal quotations and citations omitted).
may be somewhat less predictable and less uniform than a presumption, its advantages are significant. First, a contextual approach is ultimately more efficient because the court’s approach is tailored to each individual case and thus avoids unnecessary procedures and costs.\textsuperscript{344} Second, the flexible nature of a case-by-case approach avoids some of the concerns about the “ossification” of statutory interpretation and adjudicatory procedures.\textsuperscript{345} Third, this approach best reflects the reality in agency adjudications, which have been moving away from formal procedures in all circumstances since the 1960s.\textsuperscript{346} Finally, this approach is the most fair and protective of individual rights because it takes into account the nature of the issues in each case.

A presumption, in contrast, could be underinclusive or overinclusive and is therefore inefficient.\textsuperscript{347} The presumption in favor of informal procedures articulated in \textit{West Chicago}\textsuperscript{348} is based on two faulty assumptions about the APA’s adjudicatory procedures and, consequently, it is underinclusive. The first assumption is that the APA drafters intended the adjudicatory provisions to apply only in a limited subset of adjudicatory decisions by federal agencies.\textsuperscript{349} This assumption is not supported by history.\textsuperscript{350} The second assumption is that the APA’s formal procedures “will always require the agency to engage in a cumbersome, costly proceeding with all the procedural trappings of a civil trial.”\textsuperscript{351} This

\begin{footnotesize}
\begin{enumerate}
\item 344. Of course, the expenditure of judicial resources in a case-by-case approach also has some costs.
\item 345. See Edles, \textit{supra} note 32, at 813–14 (arguing that the ABA’s proposal of a presumption in favor of formal procedures would “ossify” the adjudication process by being unnecessarily burdensome and costly). For this reason, a contextual approach is also preferable to a legislative amendment. Legislation would literally codify whatever approach was selected. Two different risks flow from such a codification. First, statutory formulas may become too ossified, “hindering desirable administrative evolution.” See Araiza, \textit{supra} note 340, at 999. Second, statutory formulas “may fail to capture the full complexity of the issue they attempt to address, thus becoming empty vessels that find meaning only in judicial application.” \textit{Id.} (arguing that the key provisions of the APA have survived because they are worded broadly enough to accommodate changes in regulatory philosophy and the role of judicial review).
\item 346. Araiza, \textit{supra} note 340, at 999. \textit{See also} Rakoff, \textit{supra} note 18, at 163.
\item 348. See \textit{supra} Part III.A.1 for discussion of this case.
\item 349. Howarth, \textit{supra} note 32, at 1047.
\item 350. The legislative history of the APA, as well as the APA’s goal of achieving uniformity in administrative practice and procedure, favor the broad applicability of adjudicatory provisions. \textit{Legislative History of the Administrative Procedure Act}, S. Doc. No. 79-248, at 21–22 (2d session 1946). \textit{See also} Howarth, \textit{supra} note 32, at 1047–51 (discussing at length the reasons why the APA’s drafters intended the adjudicatory procedures to apply broadly); \textit{Attorney General’s Manual on the Administrative Procedure Act} 41–43 (1947) (describing situations in which adjudicatory hearings are held absent “on the record” language).
\item 351. Howarth, \textit{supra} note 32, at 1047.
\end{enumerate}
\end{footnotesize}
assumption is more accurate; however, procedural protections are hardly negative when individual rights are at issue.

The presumption in favor of formal procedures suggested by Seacoast is also flawed. Although it is more protective of substantive rights, it is also overinclusive, and thus less efficient, because it prescribes formal procedures for every encounter with ambiguous statutory language. Finally, presumptions are constraining. Neither the West Chicago nor the Seacoast presumption allows the court the ability to take the nature of the issue into account in each case.

As opposed to the bright-line rule of Chevron or a presumption, the contextual approach employs factors that provide guidance to courts. The analytical framework for review under this approach is two-tiered. The court should first conduct a de novo review of the statutory language and relevant legislative history. This is essentially the same analysis as Chevron’s step one. If, however, the type of procedures required is still unclear, the court should continue with its de novo review and consider two factors: the nature of the issue and the type of procedures traditionally used in resolving the issue. These factors are grounded in both caselaw and the goals of procedural formality, which include promoting accuracy in agency fact-finding; providing an opportunity to be heard to

352. Although agencies complain—and courts accept as true—the complaint that formal procedures are too costly and time consuming, “[t]here is no empirical support for such an indictment of APA adjudication.” Funk, supra note 18, at 892. APA §§ 554, 556, and 557 actually provide a good deal of flexibility to the agency, such as the ability to determine whether cross-examination is necessary, which can reduce the cost and delay of a proceeding. Id. at 892–93.

353. Admittedly, this is a normative argument that protecting individual rights is more important than the government’s interest in saving costs. In Jerry L. Mashaw’s terms, my position is one of “liberal legality” that features the protection of individual rights. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 1, 115 (Yale U. Press 1997) (an excellent and insightful discussion of modern administrative law from a public choice perspective). Others may disagree. See, e.g., Samaha, supra note 301 (examining whether the due process doctrine pays adequate attention to the costs of government decisionmaking). Under a Mathews v. Eldridge type of analysis, these interests would be balanced along with the risk of erroneous deprivation. See 424 U.S. 319, 335 (1976).

354. See supra Part III.A.2 for discussion of this case.

persons affected by agency decisions; enhancing agency decisionmaking; and facilitating judicial review by providing a record of agency decisionmaking.\(^{356}\)

The first factor that courts should consider in determining the appropriateness of requiring a formal APA adjudication is the nature of the issue. This concerns both the adversarial nature of the issue\(^ {357}\) and the significance of the issue. With regard to the adversarial nature of the issue, as in due process jurisprudence, those issues that require fact-finding on claims likely to be disputed are issues that should require formal adjudicatory procedures.\(^ {358}\) For example, when assessing witness demeanor is important, oral testimony and opportunity for cross-examination are crucial.\(^ {359}\) By contrast, when facts are less likely to be disputed or are technical or scientific matters, informal procedures are more appropriate.\(^ {360}\) Furthermore, when a court needs to make specific factual findings on disputed issues, the adjudication is less likely to be a general policy decision for which informal procedures may be more desirable.\(^ {361}\)

Similarly, the significance of the issue to the affected individual or entity is critical to examine. The more substantial the impact, the more important it is that the rights are protected by formal procedures.\(^ {362}\) For example, formal procedures are more necessary when the issues “involve substantial impact on personal liberties or freedom, orders that carry with them a finding of criminal-like culpability, an imposition of sanctions with substantial economic effect on a party or interested person, or a determination of discrimination under civil rights or analogous laws.”\(^ {363}\)

The second factor that courts should examine is “[w]hether the adjudication would be similar to, or the functional equivalent of, a current type of adjudication in which an administrative law judge presides.”\(^ {364}\) In other words, does the adjudication implicate interests traditionally pro-


\(^{357}\) See Dantran, Inc. v. U.S. Dep’t of Labor, 246 F.3d 36, 48 (1st Cir. 2001).

\(^{358}\) See supra notes 92–93, 327, and accompanying text.


\(^{360}\) See, e.g., City of West Chicago v. NRC, 701 F.2d 632, 646 (7th Cir. 1983).

\(^{361}\) See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978).

\(^{362}\) Again, this is consistent with due process jurisprudence. Compare Goldberg, 397 U.S. at 264–65 (finding that discontinuation of welfare benefits was an essential interest critical to survival that warrants a high level of procedures), with Mathews v. Eldridge, 424 U.S. 319, 340–41 (1976) (reasoning that discontinuation of disability benefits was not as essential as welfare benefits because disability benefits are not need-based).


\(^{364}\) Id.
ected by formal APA procedures? If so, formal procedures should be required.\textsuperscript{365} For example, the types of issues identified above would likely meet this factor. Although this approach rejects deference to agency legal interpretations, it can take the agency’s practice into account by asking whether the agency has traditionally provided formal procedures, and the agency’s reasoning for its choice of procedures would be a relevant consideration.\textsuperscript{366}

Requiring formal procedures for cases that meet these factors reflects the goals of procedural formalities: it encourages accuracy in agency fact-finding by allowing, among other things, oral testimony, cross-examination, and an impartial decisionmaker, which in turn enhances agency decisionmaking and constrains agency discretion, and it provides an opportunity for affected parties to be heard. Finally, by creating a record, formal proceedings also facilitate meaningful judicial review.

This contextual approach allowing for independent judicial judgment is the best solution in the absence of statutory clarity or legislative change.\textsuperscript{367} Courts have a duty to interpret statutes, and this is a duty with which they are very familiar.\textsuperscript{368} The performance of this duty is not a self-promoting struggle for power by the judiciary.\textsuperscript{369} Rather, it reflects the court’s appropriate role, given the many concerns raised by granting deference to agency interpretations of procedural provisions in their enabling statutes.

\textsuperscript{365} See, e.g., Dantran, Inc. v. U.S. Dep’t of Labor, 246 F.3d 36, 48 (1st Cir. 2001) (granting fee recovery for adversary adjudications of debarment “b]ecause the adjudication of debarment is required by statute, is adversarial in nature, appears intended by legislation to be covered by the APA, and implicates interests traditionally protected by APA procedures”).

\textsuperscript{366} See Edles, supra note 32, at 796–807. This factor also takes into account due process jurisprudence. See id. See also City of West Chicago v. NRC, 701 F.2d 632, 647 (7th Cir. 1983) (expressing concern, from a due process perspective, regarding whether there was adequate notice that agency was shifting from formal procedures to informal procedures).

\textsuperscript{367} Granted, this approach means that only two choices exist: formal or informal procedures. Unlike Mathews v. Eldridge’s balancing test, it does not allow for a balancing of interests that might result in procedures falling somewhere between formal procedures and those procedures which merely meet minimum constitutional due process requirements. This type of balancing, however, is not permissible under Vermont Yankee, see supra note 52, nor is it necessarily desirable because it could be considerably less predictable. Yet APA formal procedures do allow for some degree of flexibility by the decisionmaker, thus reducing the dichotomy between formal and informal adjudicatory procedures. See supra note 352.

\textsuperscript{368} See, e.g., Anval Nyby Powder AB v. United States, 927 F. Supp. 463, 469 (Ct. Int’l Trade 1996) (finding that the “court’s statutory obligation [under 28 U.S.C. § 2643(b) (1994)] to find the correct result limited the court’s ability to give special Chevron deference” to agency interpretation).

\textsuperscript{369} See id.
V. CONCLUSION

Many statutes lack a clear statement as to whether adjudications are subject to formal APA procedures. This ambiguity has caused confusion and controversy as courts have struggled with how to determine whether formal procedures are triggered in any particular case. Taking advantage of this ambiguity, many agencies have decided not to conduct adjudications subject to the protections of formal procedures. As agencies have moved away from formal procedures, another disturbing trend has appeared in the name of efficiency: the trend is now for courts to grant *Chevron* deference to agencies’ interpretations of the procedural provisions in their enabling statutes.

This trend should end before it gains further support. The rationales underlying *Chevron* deference—implied delegation and agency expertise—fail to support deference in this context. Moreover, such deference maximizes the opportunity for agency discretion and its accompanying concerns about self-interest while potentially decreasing fairness to regulated parties. Instead of deferring to agencies, courts should interpret statutory procedural provisions using a de novo contextual approach. This approach recognizes the courts’ expertise and institutional competence in interpreting statutory procedural provisions as well as the crucial need for procedural formalities to protect individual rights from agency self-interest and arbitrariness. It is the best way to ensure that rights are properly protected because “disputed matters of real substance will be settled by procedures of real dignity.”\(^7\)

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