



ESSAY

May Chevron Be Waived?

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Introduction

Suppose that a private party sues an agency, arguing that the agency's regulation exceeds its statutory authority. Normally, a court would review the party's challenge under the well-known *Chevron*¹ doctrine, which directs judges to defer to reasonable agency interpretations of ambiguous statutory texts. But what happens if either the private party or the agency doesn't make an argument under *Chevron*? Perhaps the agency doesn't defend its action by invoking deference, or perhaps the private party doesn't challenge that *Chevron* should apply.

Most courts faced with this scenario have said that the party or agency has "waived" *Chevron*.² In other words, judges assume that an agency interpretation does or does not warrant deference without independently inquiring into the correctness of that conclusion. More recently, however, some courts have said that the *Chevron* framework is not subject to waiver rules. Indeed, just last September, the Eleventh Circuit identified a circuit split on the issue, and the D.C. Circuit issued a decision that arguably creates an intra-circuit split on the question.³ Administrative law scholars have likewise flagged the issue as "novel" and "important."⁴

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1. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

2. We recognize that there are important differences between "forfeiture" and "waiver." See *United States v. Olano*, 507 U.S. 725, 733-34 (1993). But this Essay uses "waiver" as a shorthand for both concepts, as well as for the closely analogous concept of a "stipulation." See Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 40-42 (2014) (noting that the differences between these terms often do not matter).

3. See *infra* Part I.

4. Anya Bernstein, *Who Is Chevron For?*, 36 YALE J. ON REG.: NOTICE & COMMENT (Aug. 24, 2017), <https://perma.cc/3UP6-AJQB>; Aaron Nielson, *D.C. Circuit Review—Reviewed: A New Step for Chevron?*, 36 YALE J. ON REG.: NOTICE & COMMENT (June 16, 2017),

This Essay argues that courts should not allow either private parties or agencies to waive *Chevron*. First, *Chevron* waiver conflicts with the well-settled principle that litigants may not waive legal propositions. Specifically, parties may not instruct courts to ignore binding precedents, tell courts how to engage in statutory interpretation, or dictate to courts the correct standard of review. Thus, whether *Chevron* is best characterized as a precedent, canon, or standard of review, the parties should not control whether courts apply the deference framework. Indeed, this waiver principle serves an important purpose by ensuring that courts do not adopt erroneous interpretations of the law that could bind future litigants.

Second, *Chevron* waiver violates basic administrative law doctrines. Under *Chenery I*, for instance, courts must determine the lawfulness of agency action based on the agency's original action, not based on the post-hoc arguments of the agency's lawyers.⁵ By contrast, in *Chevron* waiver cases, courts evaluate agency action based on the representations made by the agency's lawyers. Likewise, *State Farm* imposes the same reason-giving requirement on initial agency action and subsequent changes in policy.⁶ But *Chevron* waiver allows an agency to effectively rescind a policy by having a court examine the prior agency action under a more demanding standard of review. This circumvention of regular agency decision-making has practical consequences—such as allowing subsequent administrations to scuttle disfavored policies by waiving the deference owed to a *prior* administration's regulatory actions.

Finally, *Chevron* waiver undermines separation-of-powers principles by interfering with the allocation of interpretive authority between the different branches. Congress and the judiciary—not private parties or agencies—should decide whether an agency action warrants deference.

This Essay proceeds as follows. Part I documents the ways in which federal courts have allowed parties to waive *Chevron*. In particular, we highlight the growing disagreement among circuit courts and especially the confusion in the D.C. Circuit. Part II explains why courts should not allow parties to waive *Chevron* as a matter of waiver doctrine, administrative law, and constitutional principle. Finally, Part III briefly addresses some of our argument's broader

<https://perma.cc/95AF-HRKS>; see also Aaron Nielson, *D.C. Circuit Review—Reviewed: A “Chenery I” Sort of Week*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 21, 2018), <https://perma.cc/R99G-8CZZ> (describing the “waiver issue . . . [as] fascinating”). In a recent student comment, Jeremy Rozansky argues that “*Chevron* waiver” violates at least some of *Chevron*'s underlying rationales. See Jeremy D. Rozansky, Comment, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1959 (2018). We agree with Rozansky's conclusion but argue that *Chevron* waiver also violates a broader array of legal principles from waiver doctrine, administrative law, and constitutional law.

5. SEC v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 95 (1943).

6. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

implications for how courts could approach the question of waiver when parties fail to raise methodological arguments.

I. *Chevron* Waiver

Most federal courts (as well as scholars⁷) have assumed that both private parties and agencies can waive *Chevron* deference.⁸ Imagine, for instance, that a private party challenges an agency's interpretation of a statute. If the party fails to contest that *Chevron* should apply, then courts will often say that the party has waived the argument against applying *Chevron* to its case. The party might fail to argue that the agency action lacks the "force of law" under *Chevron* step zero,⁹ or that the agency's interpretation is "unreasonable" under step two.¹⁰ And if the party fails to challenge *Chevron* at all, then the court will just assume that *Chevron* applies.¹¹ Likewise, if an agency fails to invoke *Chevron*, then courts will often say that the agency has waived its prerogative to invoke the deference regime.¹²

7. See, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2154 (2002); Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT'L REV. L. & ECON. (forthcoming 2019) (manuscript at 9-10), <https://perma.cc/79KP-PEBH>.

8. As an initial matter, we should distinguish between two types of waiver. First, litigants may waive *Chevron* in a broad sense by failing to challenge or defend an agency interpretation of a statute in the first place. See, e.g., *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319 n.2 (5th Cir. 2003); *Linemaster Switch Corp. v. U.S. EPA*, 938 F.2d 1299, 1308-09 (D.C. Cir. 1991). In these cases, litigants have waived the statutory claim or defense. By contrast, litigants may also waive *Chevron* in a narrow sense by challenging or defending the agency interpretation but failing to argue whether *Chevron* applies to that interpretation. In these cases, litigants have waived the interpretive argument. This Part focuses on this latter, narrower sense of waiver, and we think this narrower focus makes sense. As we discuss, one of the harms of waiving interpretive arguments is that it can impose "legal externalities" on the courts and other litigants. See *infra* Part II.A. When a litigant fails to raise a claim or defense, it does not prejudice another party who wants to raise such an argument in her case. By contrast, the failure to make interpretive arguments can cause the court to adopt the wrong interpretation of the law that could implicate other parties by virtue of the rules of stare decisis.

9. See, e.g., *Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1054 n.8 (9th Cir. 2010); *Kikalos v. Comm'r*, 190 F.3d 791, 796 (7th Cir. 1999); *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Env'tl. Prot.*, 31 F.3d 18, 26 (1st Cir. 1994); *Wis. Cent. Ltd. v. United States*, 194 F. Supp. 3d 728, 733 (N.D. Ill. 2016), *rev'd on other grounds*, 138 S. Ct. 2067 (2018).

10. See, e.g., *Dutcher v. Matheson*, 840 F.3d 1183, 1203-05 (10th Cir. 2016); *id.* at 1208 n.3 (Lucero, J., concurring); *Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 909-10 (D.C. Cir. 2002); *City of Duluth v. Nat'l Indian Gaming Comm'n*, 89 F. Supp. 3d 56, 65 (D.D.C. 2015).

11. See, e.g., *Nan Ya Plastics Corp., Ltd. v. United States*, 810 F.3d 1333, 1346-47 (Fed. Cir. 2016).

12. See, e.g., *Neustar, Inc. v. FCC*, 857 F.3d 886, 893-94 (D.C. Cir. 2017); *Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008). The Supreme Court has likewise noted in passing "that it would be quite inappropriate to defer to an interpretation which has been abandoned by the policymaking agency itself." *Estate of Cowart v. Nicklos*

But not all courts treat *Chevron* as a waivable argument.¹³ Last September, in *Martin v. Social Security Administration, Commissioner*, the Eleventh Circuit identified a circuit split over “whether ‘step zero’ of *Chevron* is waivable.”¹⁴ The court noted that some circuits treat “an objection to the *Chevron* framework [as] a non-jurisdictional argument that parties may waive,” while other circuits “analogiz[e] *Chevron* deference to a standard of review that the court must independently assess.”¹⁵

The D.C. Circuit has likewise issued conflicting decisions on the issue. Most recently, in *SoundExchange, Inc. v. Copyright Royalty Board*, the court considered a case in which the agency did “not invoke—or even cite—*Chevron* in its briefing.”¹⁶ Nevertheless, the panel concluded that the agency had not waived the *Chevron* framework, reasoning that:

[I]f an agency manifests its engagement in the kind of interpretative exercise to which review under *Chevron* generally applies—i.e., interpreting a statute it is charged with administering in a manner (and through a process) evincing an exercise of its lawmaking authority—we can apply *Chevron* deference to the agency’s interpretation even if there is no invocation of *Chevron* in the briefing in our court. After all, “it is the expertise of the agency, not its lawyers,” that ultimately matters.¹⁷

Notably, *SoundExchange*’s reasoning sidestepped the question of whether *litigation* conduct can waive *Chevron* by referring to the *regulatory* conduct in the administrative proceedings. By looking to the agency’s underlying reasoning, the panel focused less on the agency-waiver question and more on what Daniel Hemel and Aaron Nielson have called “*Chevron* Step-One-and-a-Half.”¹⁸ Under that doctrine, the court asks “whether the agency itself recognized that it was dealing with an ambiguous statute.”¹⁹

Drilling Co., 505 U.S. 469, 480 (1992). But the Justices have never squarely addressed the question.

13. See *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260, 286 (4th Cir. 2018); *Mushtaq v. Holder*, 583 F.3d 875, 876 (5th Cir. 2009).

14. 903 F.3d 1154, 1161 (11th Cir. 2018) (per curiam).

15. *Id.* & nn.48-49 (citing cases). In *Martin*, the Eleventh Circuit did not decide “whether the parties can agree to bypass *Chevron* step zero” because it concluded that the agency prevailed under either approach. *Id.* at 1162.

16. 904 F.3d 41, 54 (D.C. Cir. 2018).

17. *Id.* (quoting *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 n.3 (D.C. Cir. 2006)). In *SoundExchange*, the court found that the agency had “amply manifest[ed] the requisite [interpretive] engagement” by recognizing that the statute was potentially “ambiguous,” and thus applied *Chevron*. *Id.* at 54-55.

18. Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760-61 (2017).

19. *Id.* at 760. Indeed, in *SoundExchange*, the court relied on its decision in *Peter Pan Bus Lines*, which Hemel and Nielson identify as the “clearest statement of how the *Chevron* Step-One-and-a-Half doctrine fits into the broader *Chevron* framework.” *Id.* at 785. Likewise, the court appears to have responded directly to a question posed in Hemel and Nielson’s article.

We think that *SoundExchange's* approach is sound, but it seems hard to reconcile with prior D.C. Circuit decisions. In *Global Tel*Link v. FCC*, for instance, the court concluded that it made “no sense . . . to determine whether the disputed agency positions . . . warrant *Chevron* deference” when the “agency no longer seeks deference.”²⁰ And in *Neustar, Inc. v. FCC*, the court reasoned that the “FCC’s *brief* . . . did not invoke this standard with respect to rulemaking” and thus concluded that the agency had “forfeited any claims to *Chevron* deference.”²¹ Unlike *SoundExchange*, these cases seem to evaluate the agency’s litigation conduct to determine whether the agency waived *Chevron*. The D.C. Circuit has also held that private parties challenging an agency’s interpretation may waive an objection to *Chevron* deference.²²

In short, lower courts are in disagreement about *Chevron* waiver and have yet to offer a clear account of whether private parties or agencies may waive *Chevron*.

II. Against *Chevron* Waiver

This Part discusses three questions related to *Chevron* waiver. First, do the procedural rules governing (and limiting) party control of litigation allow parties to waive the *Chevron* framework? Second, do other administrative law doctrines uniquely preclude agencies from waiving *Chevron* deference? Finally, do the constitutional values that underlie *Chevron* allow private parties or agencies to shift the allocation of interpretive authority between the different branches?

A. Waiver Doctrine

Litigants are allowed to control many aspects of their case, such as by forfeiting or waiving legal claims or by stipulating to certain propositions. Waiver rules, as Justice Scalia said, are “not a mere technicality,” but rather are “essential to the orderly administration of justice.”²³ Among other things, these rules allow trial judges (who have greater familiarity with the facts of the case) to address claims in the first instance, give appellate judges the benefit of the trial judge’s opinion and thorough briefing by the parties (thus reducing

Compare id. at 816-17 (considering whether courts should have a “magic words’ approach”), with *SoundExchange*, 904 F.3d at 54 (rejecting a “magic words’ requirement”).

20. 866 F.3d 397, 407-08 (D.C. Cir. 2017). After the private party filed a petition for rehearing en banc, the panel amended its opinion with the following clarification: “We need not and do not decide whether we were required to follow *Chevron* Step Two even though the agency declined to defend its position before the court.” *Id.* at 417; see also Rozansky, *supra* note 4, at 1931-37 (describing the procedural history of the case).

21. 857 F.3d 886, 893-94 (D.C. Cir. 2017) (emphasis added).

22. See *Lubow v. U.S. Dep’t of State*, 783 F.3d 877, 884 (D.C. Cir. 2015).

23. *Freytag v. Comm’r*, 501 U.S. 868, 894-95 (1991) (Scalia, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

research costs), and prevent sandbagging and unfair surprises by the parties.²⁴ In short, waiver rules “are part of the ‘winnowing process’ of litigation, the ‘machinery by which courts narrow what remains to be decided.’”²⁵

But party control only goes so far. As the Supreme Court has explained, “[w]hen an issue or claim is properly before” a court, the judge “is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”²⁶ This principle—that parties may not forfeit, waive, or even stipulate to legal propositions—suggests a fundamental problem with *Chevron* waiver.²⁷ Scholars and judges may disagree about whether *Chevron* is a precedent, a standard of review, or an interpretive canon. But regardless of how the doctrine is characterized, *Chevron* should not be waivable.

First, consider the view that *Chevron* is a precedent. Abbe Gluck has extensively documented that lower court judges view themselves as bound by the *Chevron* framework as a matter of “methodological stare decisis.”²⁸ On this view, parties should not be able to waive *Chevron* because courts cannot ignore binding precedents, even if a party fails to raise the precedent in its briefing. In *Elder v. Holloway*, for instance, the Supreme Court held that lower courts had to conduct qualified immunity analysis “in light of all relevant precedents, not simply those cited to, or discovered by, the district court.”²⁹ And lower courts have subsequently read *Elder* as instructing courts not “to ignore relevant legal

24. *In re Sealed Case*, 552 F.3d 841, 852 (D.C. Cir. 2009) (Edwards, J., concurring).

25. See Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 281 (2015) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008) (internal quotation marks and internal citation omitted)).

26. *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); see also *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2101 n.2 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (“Parties cannot waive the correct interpretation of the law.”); *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (noting “that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right”). In a similar vein, the Supreme Court has noted that “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). In other words, both judges and parties may address new *interpretive arguments* on appeal, as distinct from new *claims*.

27. See Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1209 (2011); see also Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 474-76 (2009).

28. See, e.g., Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1989-90 & n.320 (2011); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1345 (2018) (“[W]hen asked . . . about *Chevron* deference—the interpretive rule that courts must defer to reasonable agency interpretations of ambiguous statutes—every interviewed judge told us this rule is binding even if they disagreed with it.” (emphasis omitted)).

29. 510 U.S. 510, 512 (1994).

authority simply because it was not considered in the court below.”³⁰ Thus, as Anya Bernstein has noted, although *Chevron* waiver cases “suggest[] that a litigant can tell a court to ignore precedent[,] *Chevron* doesn’t give the court that option.”³¹

Second, suppose that *Chevron* is a standard of review.³² Under this theory, *Chevron* is simply a court-agency analogue to the standards of review that govern the relationship between appellate and trial courts.³³ In the latter context, circuit courts would not “review a question of law for clear error just because both parties mistook it for a question of fact,” nor would they “review *de novo* a decision committed to a district court’s discretion just because the parties forgot to specify the standard of review.”³⁴ Indeed, lower courts “routinely hold that standards of review are not waivable.”³⁵ So too in the administrative law context, federal courts should not review agency actions *de novo* when Congress has (at least in theory) prescribed a more deferential standard of review.³⁶ Tellingly, those circuits that have held that *Chevron* is not subject to waiver rules have done so by “analogizing *Chevron* deference to a standard of review that the court must independently assess.”³⁷ Thus, if we think that *Chevron* is a standard of review, parties should also not be able to waive the deference regime.

30. *United States v. Rapone*, 131 F.3d 188, 197 (D.C. Cir. 1997); *see also Felter v. Kempthorne*, 473 F.3d 1255, 1261 (D.C. Cir. 2007) (“[W]e have been careful to distinguish between failure to make an argument and failure to cite relevant legal authority . . .”).

31. Bernstein, *supra* note 4.

32. *See, e.g.,* Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1444-46 (2017); E. Garrett West, *A Youngstown for the Administrative State*, 70 ADMIN. L. REV. 629, 658-61 (2018).

33. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

34. *United States v. Williams*, 641 F.3d 758, 772 (6th Cir. 2011) (Thapar, J., concurring).

35. *Id.* at 773 (citing cases). Admittedly, some courts have assumed that certain standards of review (such as plain error) may be waived, but have done so without carefully considering the issue. *See id.* at 771-73 (citing cases and criticizing the waiver view). At least one Justice has flagged this question of whether a standard of review may be waived or is rather “an antecedent question” that courts should independently assess. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 n.1 (1995) (Thomas, J., dissenting).

36. *Cf. Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) (reasoning that the Antiterrorism and Effective Death Penalty Act’s standard of review is not waivable because “[i]t is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose”).

37. *Martin v. Soc. Sec. Admin., Comm’r*, 903 F.3d 1154, 1161 & n.49 (11th Cir. 2018) (*per curiam*) (citing cases).

Finally, consider the view that *Chevron* is just an interpretive canon.³⁸ Courts are notoriously inconsistent in their use of interpretive canons,³⁹ but judges and scholars have concluded that courts are *not* bound by parties' interpretive arguments.⁴⁰ Imagine, for example, that a party failed to invoke the plain meaning rule or to cite to legislative history in its briefing. That does not mean that a court would therefore be unable to consult a dictionary or the relevant conference report.⁴¹ Of course, courts may sometimes decide as "a prudential rule of convenience" not to address interpretive arguments not raised by the parties.⁴² But nevertheless, even when the parties agree on the legal issue presented, courts are not bound by the parties' presentation of the issue—lest the court be required to offer its opinion "on hypothetical Acts of Congress or dubious constitutional principles."⁴³

Indeed, this rule—that parties may not waive legal propositions—makes good sense. Courts interpret "the meaning of legal texts for the benefit of all,"⁴⁴ and thus the waiver of legal principles can impose "system-wide effects" or "legal externalities" on the broader public.⁴⁵ For instance, if a party's failure to cite a controlling decision causes the court to adopt "an erroneous construction" of the relevant law, then the decision could "adversely affect many other parties in a [similar] situation."⁴⁶

Of course, the significance of these legal externalities will vary from case to case. Erroneous interpretations of unique contract language probably won't harm third parties, but erroneous interpretations of the Constitution likely will. Thus, courts sometimes explicitly balance the costs of legal externalities against the benefits of waiver doctrine. In *Freytag v. Commissioner*, for instance, the Court reached an otherwise-waived constitutional argument because "the strong interest of the federal judiciary in maintaining the constitutional plan of

38. See, e.g., Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Test of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1734 (2010).

39. See, e.g., Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 126-27, 135 (2018).

40. See Frost, *supra* note 27, at 478, 510; Lawson, *supra* note 27, at 1209; see also James Durling & E. Garrett West, *Severing Unconstitutional Amendments*, 86 U. CHI. L. REV. 1, 5 n.27 (2018) (noting that courts are not limited by the parties' requested relief in determining whether a statute is severable).

41. See Bernstein, *supra* note 4 (expressing doubt that "an agency [could] waive the rule against surplusage, or the Dictionary Act's provision that the masculine usage implies the feminine").

42. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment).

43. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446-47 (1993).

44. Frost, *supra* note 27, at 453.

45. Lawson, *supra* note 27, at 1224-27.

46. *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1273 n.11 (3d Cir. 1993), *overruled on other grounds* by *United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161 (3d Cir. 2005) (en banc).

separation of powers” outweighed the harm caused by “disruption to sound appellate process.”⁴⁷ We think that *Chevron* waiver cases are more like constitutional cases than contractual disputes: An agency action will often articulate agency policy that binds nonparties, so a court’s decision to uphold or vacate such an action can impose significant legal externalities.

In addition, *Chevron* waiver can impose system-wide costs that are internal to the judicial process (i.e., decision costs). For instance, under *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, “[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.”⁴⁸ But when courts allow parties to waive *Chevron*, difficult questions can arise about how to interpret a prior opinion that does not discuss the deference regime. Indeed, in recent decisions, the D.C. Circuit has had to speculate about *why* a prior decision failed to invoke the *Chevron* framework—that is, whether the prior panel had found the statute unambiguous or had found that the deference regime had been waived.⁴⁹ Thus, *Chevron* waiver also imposes real costs on the process of judicial decision-making.

B. Administrative Law

Chevron waiver also contravenes principles of administrative law by allowing agencies to undo their prior actions outside the normal administrative process.

Take the Supreme Court’s decision in *Chenery I*, which establishes that “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.”⁵⁰ The decision imposes a requirement of contemporaneous reason giving that requires courts to consider “both *who* articulates the legally sufficient basis to sustain the agency’s ultimate decision and *when* that justification comes.”⁵¹

Chenery I strongly implies that courts should not allow agencies to waive *Chevron* deference. If *post hoc justifications* cannot support an action’s

47. 501 U.S. 868, 878-79 (1991) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Harlan, J.)).

48. 545 U.S. 967, 982 (2005).

49. *See* *UC Health v. NLRB*, 803 F.3d 669, 677 n.3 (D.C. Cir. 2015) (noting that perhaps the Supreme Court failed to rely on *Chevron* in a prior decision because “the Court viewed the [agency’s] entitlement to *Chevron* deference as forfeited because the Board had neglected to request deference at the court of appeals”); *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 316 (D.C. Cir. 2015) (Srinivasan, J., concurring).

50. *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80, 95 (1943); *see also* *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 50 (1983) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action.”).

51. Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 961 (2007).

lawfulness, then post hoc *abdications* should not undermine it. The Court has said that “Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.”⁵² Thus, just as deference to “an agency’s convenient litigating position would be entirely inappropriate,”⁵³ so too would the refusal to defer. Indeed, *Chenery I* seems to have influenced (at least implicitly) the D.C. Circuit’s opinion in *SoundExchange*, where the court reviewed the agency’s reasoning in the Federal Register—not the briefs—to determine whether the agency had been “interpreting a statute it is charged with administering in a manner (and through a process) evincing an exercise of its lawmaking authority.”⁵⁴

Likewise, consider the Supreme Court’s decisions in *State Farm* and *Fox Television*, which impose the same reason-giving requirement on agencies for both “initial agency action and subsequent agency action undoing or revising that action.”⁵⁵ For example, if an agency wants to repeal a regulation, it must offer principled reasons for its changed position. But *Chevron* waiver allows agencies effectively (and indirectly) to avoid such reason giving. If agency lawyers may waive the very deference that would otherwise lead the court to uphold the initial agency action, then those lawyers can use the federal courts to “rescind” agency action by vacatur. Agencies need not offer reasons for policy changes if courts will undo the prior agency actions for them.⁵⁶

In her dissent in *Global Tel*Link*, Judge Pillard flagged this very concern. Specifically, she criticized the majority for “suggesting that agencies can relinquish judicial deference through such limited and belated maneuvers as refusing to defend portions of their briefs during oral argument,” thus “enabling agencies to end-run the principle that they must ‘use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance.’”⁵⁷

52. *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *see also SoundExchange, Inc. v. Copyright Royalty Bd.*, 904 F.3d 41, 54 (D.C. Cir. 2018) (“After all, ‘it is the expertise of the agency, not its lawyers,’ that ultimately matters.” (quoting *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 n.3 (D.C. Cir. 2006))).

53. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

54. *SoundExchange*, 904 F.3d at 54.

55. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *State Farm*, 463 U.S. at 42; *see also Merrick B. Garland, Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 512-25 (1985).

56. Of course, the agency could achieve the same result by refusing to defend the agency action at all. *See supra* note 8 (discussing broader notion of waiver); *cf. Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 532-35 (2012) (arguing that the Executive need not defend unconstitutional laws). But the fact that agencies have in the past only waived *Chevron* in the narrower sense—while still defending the agency action more generally—may suggest that there are greater political costs to refusing to defend than to refusing to ask for deference.

57. *Glob. Tel*Link v. FCC*, 866 F.3d 397, 425 (D.C. Cir. 2017) (Pillard, J., dissenting in part and concurring in part) (quoting *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1206 (2015)).

Chevron waiver runs into problems not just under blackletter administrative law, but also under the broader theories that motivate these doctrines. Specifically, *Chevron* waiver exacerbates principal-agent costs (if we assume a stylistic model in which the *acting agency* is the principal and the *subsequent defender* of the action is the agent). Elizabeth Magill and Adrian Vermeule have argued, for instance, that *Chenery I* “reallocate[s] power horizontally within agencies,” shifting that authority from agency lawyers to the agency’s political and technical staff.⁵⁸ Given this allocation, *Chevron* waiver wrongly preferences both lawyers (rather than political and technical staff) and subsequent administrations (rather than the current one). Indeed, in many instances, the lawyers will not work for the agency itself but for the Department of Justice, and the incentives of DOJ lawyers will not always align with those of the agency’s.⁵⁹

Chevron waiver also allows subsequent administrations to improperly scuttle past policies.⁶⁰ Scholars and courts might debate whether (or to what extent) political considerations should influence agency decision-making,⁶¹ but inter-administration changes in policy should be articulated by *agencies* (not government lawyers) through “the same procedures . . . as they used to” impose the agency action “in the first instance.”⁶² And because *Chevron* actually affects agency win rates (at least in the lower courts),⁶³ *Chevron* waiver allows subsequent administrations to change policies more easily. If the subsequent administration disagrees with the agency’s prior interpretation, it can simply waive *Chevron* and force the court to vacate an agency action that might involve a reasonable interpretation of an ambiguous statute.

58. See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1043-44 (2011) (emphasis omitted).

59. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 256 (1994); Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies’ Programs*, 52 ADMIN. L. REV. 1345, 1345 (2000).

60. Cf. Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 ADMIN. L. REV. 361, 391-94 (2018) (discussing the benefits and costs of inter-administration requests for voluntary remands).

61. Compare Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) (defending the role of “political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency’s rulemaking record”), with Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (describing and defending the judiciary’s “expertise-forcing” role under which courts “ensure that agencies exercise expert judgment free from outside political pressures”).

62. *Perez*, 135 S. Ct. at 1206.

63. Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 30 (2017).

C. Constitutional Concerns

Finally, *Chevron* waiver raises separation-of-powers concerns. As Amanda Frost has argued, “[c]hoosing an interpretive methodology is an essential component of judging that cannot be ceded to the parties.”⁶⁴ Whatever the exact contours of the judicial power, litigants should not be allowed to “manipulate the interpretive process through their litigation choices.”⁶⁵ Otherwise, litigants could “transform the federal courts from the third branch of government responsible for declaring the meaning of law into a private arbitration service working for the parties and no one else.”⁶⁶

This concern is especially salient when federal courts allow parties to control whether they afford agencies *Chevron* deference. *Chevron* purports to reflect Congress’s intended allocation of interpretive authority between agencies and the courts.⁶⁷ The doctrine assumes that “Congress . . . understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”⁶⁸ At the same time, the Court in *Chevron* reiterated that the “judiciary is the final authority on issues of statutory construction.”⁶⁹ The deference regime, therefore, balances the judiciary’s responsibility to say what the law is against the desirability of allowing expert, accountable administrative agencies to implement their statutory mandates.

Chevron waiver departs from this allocation of interpretive authority. Suppose, for instance, that the government’s lawyers fail to claim deference that would otherwise be due to the agency. In that case, the federal court would wrongly proceed to “substitute its own construction”⁷⁰ of the statute for that of the agency’s. Sometimes, of course, such analysis would be mostly harmless (if, say, the court determines that the agency’s reading is the best reading), but it could also lead the court incorrectly to vacate agency action. Likewise, if the private litigant (perhaps through neglect) fails to assert that *Chevron* doesn’t apply, then the court might give the agency more leeway than the statute allows,

64. Frost, *supra* note 27, at 510.

65. *Id.* at 478.

66. *Id.* at 474. One of us has previously argued that Congress has broad authority to control how courts interpret statutes. See James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 YALE L.J.F. 27, 34-40 (2017). This Essay need not take a position on Congress’s power over judicial interpretation in arguing that litigants lack such a power. See Frost, *supra* note 27, at 478.

67. See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 202.

68. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996)); see also Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 175-80 (2012) (describing the separation-of-powers values that motivate *Chevron*).

69. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

70. *Id.* at 844.

which, in turn, might harm other private parties seeking to challenge the statute. Of course, in recent years, several Justices have questioned whether *Chevron* properly reflects the constitutional allocation of institutional authority.⁷¹ But so long as *Chevron* “remains good law,”⁷² it should be implemented in a way that accords with waiver doctrine and with other administrative law principles.

III. Beyond *Chevron* Waiver

We think that the foregoing analysis has implications not just for *Chevron* waiver, but also for waiver doctrine more broadly. Currently, some judges and scholars seem to treat the decision to address an argument that a party fails to raise as a binary question: Either an issue is or isn’t waived. But we think that such a decision is better viewed as falling along a spectrum. On one end, courts must always address certain questions—such as subject-matter jurisdiction—even if the parties have waived the issue.⁷³ On the other end, freestanding claims or defenses should be subject to traditional waiver rules, but courts may in rare circumstances excuse the waiver.⁷⁴ In between these two categories, however, there are plenty of legal arguments that don’t fall neatly into either category for the purposes of waiver doctrine. In this middle ground, courts tend to address (and we think should address) the arguments when the potential costs of addressing the arguments are outweighed by the benefits of doing so.

Consider methodological arguments. Such arguments aren’t subject to traditional waiver rules, but courts may sometimes decline to address them as “a prudential rule of convenience.”⁷⁵ For instance, last term in *Carpenter v. United States*, Justice Gorsuch criticized Carpenter for failing to advance an originalist theory of the Fourth Amendment—“perhaps his most promising line of argument”—and thus found that this argument had been “forfeited.”⁷⁶ Under existing precedent, Carpenter’s methodological argument probably wasn’t forfeited (in the traditional sense of the term). But Justice Gorsuch could still conclude that the costs of addressing the originalist theory without full briefing

71. See e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

72. *Pereira*, 138 S. Ct. at 2129 (2018) (Alito, J., dissenting).

73. See e.g., *United States v. Cotton*, 535 U.S. 625, 630 (2002).

74. See *United States v. Olano*, 507 U.S. 725, 731-35 (1993) (authorizing courts to address waived arguments under the standard for plain error in criminal cases).

75. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment); see also Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 FLA. ST. U. L. REV. 291, 302-04 (2014) (noting that courts are not required to address interpretive arguments not raised by the parties).

76. 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting).

(i.e., the significant effort of independent research, the risk of getting the wrong answer, etc.) outweighed the benefits of getting the law right in that case.

In short, when a party fails to raise an interpretive argument, courts should decide whether to address the argument not as a matter of waiver doctrine but as one of interpretive discretion. Courts should be *less* likely to find arguments waived as cross-system harms increase, but *more* likely to do so as the adjudicative costs for the courts increase. And given this framework, courts generally should address whether *Chevron* applies (independently of the litigant's briefing) because the cross-system harms to third parties of failing to address the deference regime seem much greater than the adjudicative costs to courts of doing so.⁷⁷

Conclusion

So long as *Chevron* remains good law, the doctrine should be implemented in a way that accords with waiver doctrine, with other administrative law principles, and with the separation-of-powers values that underlie the decision. Thus, courts should conclude that *Chevron* may not be waived.

77. In rare cases, it might make sense for the court not to address a deference regime, such as when addressing the issue would require the court to decide a novel and "complex issue" relating to administrative deference. See Jamie Durling & E. Garrett West, *Waiving Administrative Deference*, U. CHI. L. REV. BLOG (Nov. 13, 2018), <https://perma.cc/GFW4-Q9BW> (quoting *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 n.12 (9th Cir. 2016)).