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# Beyond *Chevron*: An Analysis of Idaho's Intermediate Deference Doctrine and Its Hypothetical Application in Federal Courts

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# BEYOND *CHEVRON*: AN ANALYSIS OF IDAHO'S INTERMEDIATE DEFERENCE DOCTRINE AND ITS HYPOTHETICAL APPLICATION IN FEDERAL COURTS

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## INTRODUCTION

Nearly four decades have passed since the Supreme Court established the well-known two-step test for judicial deference to agency interpretations of law in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[1] According to the *Chevron* Court, an agency's interpretation of a statute that the agency is charged with admin–istering receives "considerable weight" if Congress has not addressed the precise question at issue and the agency's interpretation is a permissible construction of the statute.[2] *Chevron* now faces an uncertain future and mounting criticism, including three Justices openly challenging the doctrine.[3] In fact, Congress recently made

1. 467 U.S. 837 (1984).

2. *Id.* at 842–44.

3. *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power . . . ."); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas,

multiple attempts to replace *Chevron* deference with *de novo* review.[4] And some suggest that while judicial deference serves a critical function, federal courts' application of the doctrine requires clarification or reform.[5]

If the Court ultimately rejects *Chevron*, as some critics advocate,[6] it must still identify how federal courts should approach agency interpretations that have the force of law as well as those that do not.[7] Justifications for abandoning *Chevron*, or "great-weight" deference, include challenges to its constitutionality, allegations of systematic judicial bias, and its inconsistent application.[8] Some challenges to *Chevron* call for *de novo* review of all agency interpretations, restoring the judiciary to its constitutionally mandated position of independent judicial review under Article III.[9]

But even before *Chevron*, courts deferred to agencies to some extent.[10] In the nineteenth century, the judiciary was more concerned

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J., concurring) ("*Chevron* deference raises serious separation-of-power questions."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2014) ("In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."); *see also* Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (suggesting that the majority's application of *Chevron* is "an abdication of the Judiciary's proper role in interpreting federal statutes").

4. *See, e.g.*, Regulatory Accountability Act of 2017, S. 951, 115th Cong. § 4(e) (2017); Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 107 (2017); Separation of Powers Restoration Act of 2017, S. 1577, 115th Cong. § 2 (2017); Separation of Powers Restoration Act of 2017, H.R. 76, 115th Cong. § 2 (2017).

5. *See, e.g.*, Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight"*, 112 COLUM. L. REV. 1143 (2012) (suggesting a reformulation of the *Chevron* doctrine to clarify the respective roles of courts and agencies in statutory interpretation); Kavanaugh, *supra* note 3, at 2154 (advocating for the elimination of *Chevron*'s threshold "clarity versus ambiguity decision"); Linda Jellum, Chevron*'s Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007) (criticizing federal courts' application of *Chevron* Step One); Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867 (2015) (advocating for greater clarity of the *Chevron* doctrine).

6. *See* Phillip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1249–51 (2016).

7. *See infra* text accompanying notes 126–39.

8. *See generally* Hamburger, *supra* note 6; Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937 (2018) (summarizing and challenging the main arguments against *Chevron* deference).

9. *See, e.g.*, Hamburger, s*upra* note 6.

10. *See* Strauss, *supra* note 5, at 1154–55.

with courts engaging in "executive" and "administrative" decisions than it was with agencies encroaching on courts' Article III powers.[11] The growth of the administrative state gave rise to what became known as the appellate-review model, under which federal courts reviewed agency decisions just as they would review a trial court's decisions.[12] *De novo* review "failed to achieve a differentiation of functions, produced delay, and was duplicative and wasteful."[13] Courts also recognized that agencies often had knowledge and expertise superior to their own.[14] Rejecting *Chevron* in favor of *de novo* review rejects an entire history of why courts deferred to agencies in the first place. But the options are not only *Chevron* deference or *de novo* review. For nearly thirty years, Idaho courts have experimented with a unique four-prong test for reviewing agencies' statutory interpretations. This Note analyzes that test and envisions its hypothetical application in the federal court system as *Chevron*'s potential replacement.

When one thinks of Idaho, one likely thinks of its potato fields or its vast stretches of forest. What does not likely come to mind is the judicial-deference test of this mountainous, northwestern state. No scholarship in the last decade has engaged Idaho's deference doctrine,[15] and the recent spotlight has been on states abandoning deference for *de novo* review.[16] Most states afford either some form of "great-weight" deference or no deference at all to agency interpretations.[17] But the

11. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 980 (2011).

12. *Id.* at 940, 953.

13. *Id.* at 974.

14. *Id.* at 999.

15. *See* Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977 (2008).

16. *See, e.g.*, Amanda Reilly, *Will States Follow Arizona in Assault on* Chevron*?*, E&E NEWS (May 9, 2018), https://www.eenews.net/stories/1060081237 [https://perma.cc/RM8T-UG42]; Mark Chenoweth, *Florida Voters Join* Chevron *Revolt and Strike a Blow Against Judicial Bias*, FORBES (Nov. 8, 2018), https://www.forbes.com/sites/markchenoweth/2018/11/08/florida-voters-join-chevron-revolt-and-strike-a-blow-against-judicial-bias/#3feed3c04fe6 [https://perma.cc/KB89-V595]; Seyfarth Shaw LLP, Chevron *Deference Under Attack at State Level*, JDSUPRA (Apr. 19, 2018), https://www.jdsupra.com/legalnews/chevron-deference-under-attack-at-state-21357/ [https://perma.cc/9684-LMPN]; Jonathan Wood, *17 States: The Time Has Come to Reconsider* Chevron *Deference and This is the Case to Do it With*, PAC. LEGAL FOUND. (July 6, 2018), https://pacificlegal.org/17-states-the-time-has-come-to-reconsider-chevron-deference-and-this-is-the-case-to-do-it-with/ [https://perma.cc/F8ED-CQH8].

17. *See, e.g.*, Ass'n of Cal. Ins. Co. v. Jones, 386 P.3d 1188, 1196 (Cal. 2017) (affording "great weight and respect" to agency constructions); State *ex*

trend of the last two decades has been for states to abandon great-weight-deference regimes in favor of *de novo* review for some of the same reasons critics challenge *Chevron*.[18] Idaho, on the other hand, rejects such all-or-nothing approaches, instead employing a pragmatic, four-prong test that balances the complexity of the administrative state with the judiciary's independent-review responsibility.[19]

In formulating its four-prong test, the Idaho Supreme Court consulted its own case history, the deference principles of the other forty-nine states, and *Chevron* itself.[20] In surveying its own history of judicial deference, the court summarized its initial respect for agency expertise and long-standing agency constructions, its increasing reliance on judicial deference, and its eventual rejection of great-weight deference.[21] While federal administrative law may be undergoing a similar transition,[22] Idaho is one step ahead. After briefly abandoning its deference doctrine for no deference at all the Idaho judiciary returned to its well-established justifications for judicial deference,

*rel.* Crowl v. Del. Cty. Bd. of Elections, 43 N.E.3d 406, 408 (Ohio 2015) (affording "great deference"); Goldberg v. Bd. of Health of Granby, 830 N.E.2d 207, 213 (Mass. 2005) (applying a *Chevron*-like deference doctrine); Entergy La., LLC v. La. Pub. Serv. Comm'n, 221 So. 3d 801, 805 (La. 2017) (agency interpretations of statutes receive no deference); Neilson Co. (US), LLC v. Cty. Bd. of Arlington Cty., 767 S.E.2d 1, 4 (Va. 2015) ("[A] court never defers to an administrative interpretation . . . ."); *see also* sources cited *infra* note 18.

18. *See, e.g.*, H.B. 2238, 53rd Leg., 2nd Sess. (Ariz. 2018) ("Section 12-910, Arizona Revised Statutes is amended to read: . . . the court shall decide all questions of law . . . without deference to any previous determination that may have been made . . . by the agency"); FLA. CONST. art. V, § 21 ("In interpreting a state statute or rule, a state court . . . may not defer to an administrative agency's interpretation . . . and must instead interpret such statute or rule de novo."); Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 914 N.W.2d 21, 40, 54 (Wis. 2018) (rejecting a three-tiered deference principle of "great weight," "due weight," and no deference at all in favor of de novo review); King v. Miss. Military Dep't, 245 So. 3d 404, 407–08 (Miss. 2018) (abandoning a deference principle of "*de novo* but deferential review" for de novo review with no deference); SBC Mich. v. Pub. Serv. Comm'n 754 N.W.2d 259, 271–72 (Mich. 2008) (declining to adopt *Chevron* deference because "the unyielding deference to agency statutory construction required by *Chevron* conflicts . . . with the separation of powers principles"); Graham v. Dokter Trucking Grp., 161 P.3d 695, 700–01 (Kan. 2007) (declining to award "great judicial deference" to agency determinations of questions of law on undisputed facts).

19. *See* J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206 (Idaho 1991).

20. *Id.* at 1212–19.

21. *Id.* at 1214–17.

22. *See supra* notes 3–9 and accompanying text.

settling on an intermediate doctrine that it has consistently employed for nearly thirty years.[23]

This Note explores Idaho's intermediate approach in four parts. Part I explains the background and substance of Idaho's four-prong test. Part II analyzes how Idaho courts apply each prong, comparing each prong to its closest *Chevron* counterpart. Part III briefly addresses how the four-prong test would fit into the federal deference regime, specifically addressing the deference doctrines of *Skidmore v. Swift & Co.*,[24] *Auer v. Robbins*,[25] and *National Cable and Telecommunications Association v. Brand X Internet Services*.[26] In *Skidmore*, the Court held that courts should afford deference to agency interpretations to the extent that, "lacking [the] power to control," the interpretation has the "power to persuade."[27] After *Chevron*, courts came to apply *Skidmore* to agency interpretations that lack the force of law.[28] In *Auer*, the Court held that an agency's interpretation of its own regulation should control unless the regulation is unambiguous.[29] And under *Brand X*, an agency's construction of a statute trumps a court's prior interpretation unless the statute is unambiguous.[30] Part III anticipates how Idaho's four-prong test could either incorporate or render obsolete these federal doctrines. And Part IV suggests an improvement to Idaho's test, specifically arguing that courts should apply each prong in a particular order.

## I. IDAHO'S FOUR-PRONG TEST

Idaho's four-prong test arose out of the same situation that *Chevron* faces today. In *Idaho Fair Share v. Idaho Public Utilities Commission*,[31] the Idaho Supreme Court abandoned a deference regime of "great weight" in favor of one of "free review" (i.e., de novo review).[32] Despite "myriad cases stat[ing] that the construction given a statute by an

23. *Simplot*, 820 P.2d at 1219.

24. 323 U.S. 134 (1944).

25. 519 U.S. 452 (1997).

26. 545 U.S. 967 (2005).

27. *Skidmore*, 323 U.S. at 140.

28. *See infra* text accompanying notes 171–85.

29. *See infra* text accompanying notes 186–204.

30. *See infra* text accompanying notes 205–08.

31. 751 P.2d 107 (Idaho 1988).

32. The term "free review" is unique to Idaho. *Id.* at 109–10. As applied by the Idaho judiciary, it refers to independent judicial review, or what other states and the federal courts refer to as de novo review. *See* A&B Irrigation Dist. v. Idaho Dep't of Water Res., 301 P.3d 1270, 1272 (Idaho 2012).

administrative agency is entitled to great weight," the court found "cogent reasons for straying from the Commission's reading of the statute and recognizing that the construction of a statute is [a] matter of law for the judiciary."[33] The court then proceeded to apply the free-review standard.[34] The *Fair Share* court did not broadly declare that it was abandoning great-weight deference generally; rather, it found "cogent reasons" to "apply the standard of free review to the Commission's interpretation."[35]

Three years later, in *J.R. Simplot Co. v. Idaho State Tax Commission*,[36] the Idaho Supreme Court read *Fair Share* as a complete departure from great-weight deference.[37] At issue in *Simplot* was whether the income of Simplot's foreign subsidiaries could be combined with that of its domestic subsidiaries for the purpose of computing its "Idaho taxable income."[38] Simplot's foreign subsidiaries had no taxable income as defined by the Idaho Tax Code. The Tax Commission, however, argued that the Idaho tax law did not answer "whether foreign source income [could] be included in the 'preapportionment tax base' of a multinational corporation."[39] Specifically, it argued that it could use the foreign-source income to calculate the amount of income apportionable to Idaho even if it did not consider the foreign-source income as "taxable."[40] The Commission further argued that the provision controlling the apportionment calculation was a specific statutory provision and, therefore, it should outweigh the more general provision defining "taxable income."[41]

The district court initially favored Simplot's construction of the law, calling the Commission's interpretation "a strained and harsh interpretation on a series of statutes that otherwise have a plain, obvious, and rational meaning."[42] The Idaho legislature, however, had previously passed a law that allowed corporations with foreign subsidiaries to choose whether they wanted to exclude their foreign-source income from the apportionment process.[43] The district court found that Simplot's position—that its foreign-source income was, by

33. *Idaho Fair Share*, 751 P.2d at 109–10.

34. *Id.* at 110.

35. *Id.* at 109–10.

36. 820 P.2d 1206 (Idaho 1991).

37. *Id.* at 1211–12.

38. *Id.* at 1207.

39. *Id.* at 1208–09.

40. *Id.* at 1209.

41. *Id.* at 1208–09.

42. *Id.* at 1209.

43. *Id.* at 1210.

definition, not "taxable income"—would render the new law superfluous. The district court denied Simplot relief on this basis.[44]

Simplot appealed the district court's decision to the Idaho Supreme Court.[45] The supreme court rejected the district court's legal theory, noting that the legislature is not required to make significant changes when it enacts legislation.[46] Nevertheless, the court noted that it was still free to affirm the district court's judgment if it could be supported by some other correct legal theory.[47] The court began its analysis with the Commission's interpretation of the Idaho Income Tax Act, noting that Idaho had "long followed" great-weight deference until *Fair Share*, when the court "substantially limited this rule."[48] The court suggested that the free-review standard undermined its precedent of affording deference to agencies' statutory interpretations.[49] As the *Simplot* court saw it, free review allowed the court to ignore an agency's interpretation whenever the court disagreed with it.[50] Seeking to resolve Idaho's "tenuous and uncertain" rule of judicial deference, the court surveyed other states' deference regimes, the majority of which had shifted towards free review.[51] The *Simplot* court was also unpersuaded by a return to great-weight deference, finding that those tests led to inconsistent results, "leaving the impression that their administrative agency interpretations are entitled to judicial deference only when those interpretations are correct."[52] The court further commented, "a rule that an agency construction will be followed only when it is correct is no rule at all."[53]

The court then turned to its own case history, identifying five primary rationales for deferring to agencies. First, "the rule ensures repose when important interests have 'grown up' in reliance on an interpretation in existence for a number of years."[54] Second, "an agency interpretation represents a 'practical' interpretation" because "statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation."[55] Third,

44. *Id.* at 1209–10.

45. *Id.* at 1210.

46. *Id.*

47. *Id.*

48. *Id.* at 1210–11.

49. *Id.* at 1212.

50. *Id.* at 1211–12.

51. *Id.* at 1212.

52. *Id.* at 1213.

53. *Id.*

54. *Id.* at 1215.

55. *Id.*

"the legislature is charged with knowledge of how its statutes are interpreted," and "[b]y not altering the statutory text the legislature is presumed to have sanctioned the agency interpretation."[56] Fourth, "when [an agency's construction] is formulated contemporaneously with the passage of the statute in question," that construction "is entitled to additional weight" because "the agency may have insight into legislative intent at the time of enactment."[57] And fifth, some agencies have more specialized expertise.[58]

The *Simplot* court also briefly acknowledged *Chevron* deference and its underlying rationale of agency expertise.[59] Finally, the court concluded that it should not apply free review to agency interpretations. Rather, the court held that a "four-prong test" was the proper way to determine the appropriate level of judicial deference that an agency interpretation deserves. The four prongs are as follows: (1) whether the agency has been "entrusted with the responsibility to administer the statute at issue";[60] (2) whether the agency's construction is reasonable;[61] (3) whether the statutory text "expressly treat[s] the precise question at issue";[62] and (4) "whether any of the rationales underlying the rule of deference are present."[63] If an agency interpretation satisfies all four prongs, the court must give the agency's construction "considerable weight."[64] If the interpretation fails under Prong Four, it is left to its "persuasive force."[65] While the *Simplot* court did not expressly say what level of deference, if any, is appropriate when an agency construction fails on Prongs One, Two, or Three, Idaho courts uniformly apply free review in those cases.[66]

56. *Id.* at 1216.

57. *Id.*

58. *Id.*

59. *Id.* at 1218.

60. *Id.* at 1219.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1219–20.

66. *See, e.g.*, Farrell v. Whiteman, 200 P.3d 1153, 1160 n.2 (Idaho 2009) (affording no deference because the interpretation failed Prong Three); A&B Irrigation Distrib. v. Idaho Dep't of Water Res., 301 P.3d 1270, 1272 (Idaho 2002) (affording no deference because the interpretation failed Prong One); N. Snake Groundwater Distrib. v. Idaho Dep't of Water Res., 376 P.3d 722, 729 (Idaho 2016) (affording no deference because the interpretation failed Prong Three).

## II. COMPARING *SIMPLOT* AND *CHEVRON*

### *A. Prong One: Is the agency entrusted with the authority to administer the statute?*

Under Prong One, the court asks whether "the agency has been entrusted with the responsibility to administer the statute at issue."[67] If the answer is yes, the agency is "'impliedly clothed with power to construe' the law."[68] In *Simplot*, the court generally stated that the Tax Commission was "impliedly clothed with power to construe" the statutes at issue, but it did not reference the specific statutory provisions from which the Tax Commission derived this authority.[69]

Of the four prongs, Prong One receives the least analysis in subsequent cases. Courts typically do no more than briefly declare that the agency does or does not have the authority to construe the statute, as in *Simplot*.[70] For example, in *Pearl v. Board of Professional Discipline*,[71] the Board had the authority to construe the statute at issue because it had statutory authority to "establish pursuant to the administrative procedure act rules and regulations for the admin–istration of this chapter."[72] In *A&B Irrigation Distribution v. Idaho Department of Water Resources*,[73] however, the Director of the Department of Water lacked the authority to administer the statute at issue because the Director could point to no legislative directive granting such authority. Instead, the Director argued that it had authority to interpret the statute under the Idaho Administrative Procedure Act (IAPA).[74] But the Director pointed only to the provision of the IAPA that mandated that the Director comply with the IAPA.[75] The court concluded that "[a] legislative directive that [the Depart–ment] comply with the IAPA cannot reasonably be construed as dele–gating to [the Department] the responsibility for administering the

67. *Simplot*, 820 P.2d at 1219.

68. *Id.* (quoting Kopp v. State, 595 P.2d 309, 312 (Idaho 1979)).

69. *Id.* at 1220 (quoting *Kopp*, 595 P.2d at 312).

70. *See, e.g.*, Westway Constr., Inc. v. Idaho Transp. Dep't, 73 P.3d 721, 729–30 (Idaho 2003); Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 156 P.3d 524, 527 (Idaho 2007); Canty v. Idaho State Tax Comm'n, 59 P.3d 983, 988 (Idaho 2002); Herrmann v. Idaho, 403 P.3d 318, 321 (Idaho Ct. App. 2017).

71. 44 P.3d 1162 (Idaho 2002).

72. *Id.* at 1168 (quoting IDAHO CODE § 54-1806(2) (2018)).

73. 301 P.3d 1270 (Idaho 2012).

74. *Id.* at 1272.

75. *Id.*

IAPA."[76] The court then exercised free review to decide the appropriate statutory construction.[77]

Idaho courts sometimes conflate Prong One with Prong Two or Three, but this is not common practice.[78] For example, in *North Snake Groundwater Distribution v. Idaho Department of Water Resources*,[79] the Director of the Department of Water Resources lacked the authority to interpret a specific statutory term because the Idaho legislature already defined that term in the statute.[80] Thus, the court gave no deference to the Director's interpretation, referencing *Simplot*.[81] But the *North Snake* court conflated the issue of the agency's authority with whether the statutory text answers the precise question at issue, which the court addresses under Prong Three. Most Idaho courts look to the agency's authorizing statute to determine whether it has authority to interpret the statute at issue, as in *Pearl* and *A&B Irrigation*.[82] But in some cases, the answer is so obvious that the court fails to cite to the authorizing statute and generally concludes the agency has the authority to administer the statute.[83]

Although *Chevron* deference is described as a two-step test, courts really engage in three inquiries.[84] The first is what some refer to as "*Chevron* Step Zero," which emerged from the Supreme Court's holding in *United States v. Mead Corp.*[85] *Chevron* Step Zero requires the court to determine whether Congress delegated to the agency the authority to promulgate rules carrying the force of law, and whether the agency did so.[86] Only when the answer to both questions is "yes" may the court

76. *Id.*

77. *Id.* at 1272–74.

78. *See, e.g.*, Pearl v. Board of Professional Discipline, 44 P.3d 1162, 1168 (Idaho 2002) (correctly applying Prong One to determine that the agency has authority to administer the statute).

79. 376 P.3d 722 (Idaho 2016).

80. *Id.* at 729.

81. *Id.* at 728–29.

82. *Pearl*, 44 P.3d at 1162; *A&B Irrigation Distrib.*, 301 P.3d at 1272; *see also* Duncan v. State Bd. of Accountancy, 232 P.3d 322, 325 (Idaho 2010); Hood v. Idaho Dep't of Health & Welfare, 868 P.2d 479, 481–82 (Idaho 1994).

83. *See, e.g.*, Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 156 P.3d 524, 527 (2007); Canty v. Idaho State Tax Comm'n, 59 P.3d 983, 988 (Idaho 2002); Herrmann v. Idaho, 403 P.3d 318, 321 (Idaho Ct. App. 2017).

84. Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

85. 533 U.S. 218 (2001).

86. *Id.* at 226–27.

continue to *Chevron* Step One.[87] If the answer is "no," then the court's deference analysis proceeds under *Skidmore v. Swift & Co.*[88] or *Auer v. Robbins.*[89] Agencies act with the force of law through adjudication, notice-and-comment rule making, or another comparable indication of Congress's intent.[90] While *Chevron* Step Zero appears similar to *Simplot*'s Prong One, it differs in at least one important respect. *Simplot*'s Prong One asks only whether the agency has authority to do whatever it did, not whether the agency acted with the force of law. In fact, Idaho has no secondary deference test for interpretations lacking the force of law. Rather, Idaho courts focus on whether the agency action interprets a statute, regulation, or informal rule.[91]

Prong One also differs from *Chevron* Step One. *Chevron* Step One asks whether the legislature expressly or implicitly granted the agency authority to construe the law, asking specifically whether "Congress has directly spoken to the precise question at issue."[92] The *Chevron* court emphasized that Congress can implicitly delegate to the agency interpretive authority via ambiguous statutory language.[93] In *Simplot*, the agency derives its authority to administer the statute only from the agency's authorizing statute, not ambiguity in the text.[94] In fact, notwithstanding Prong Three, the *Simplot* court did not recognize implicit delegation through ambiguity as a justification for deferring to agencies.[95] Instead, the *Simplot* court appreciated the permanence of the administrative state and the utility of agencies in the administration of the law.[96] It premised agency deference on the idea that the court

87. *Id.*

88. *See infra* Part III.A. (explaining that *Skidmore* deference applies when agency interpretation fails *Chevron* Step Zero by the agency acting without the force of law).

89. *See infra* Part III.B. (explaining that in *Auer* the Court held that an agency's interpretation of its own rules should be given deference unless it is clearly inconsistent with the rules).

90. *Mead Corp.*, 533 U.S. at 227.

91. While Idaho courts do not employ this terminology, they distinguish between agency interpretations that are promulgated through the procedural requirements of the Idaho Administrative Procedure Act and those that are not. *See* State v. Besaw, 306 P.3d 219, 225 (Idaho Ct. App. 2013).

92. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

93. *Id.* at 844–45.

94. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1219 (Idaho 1991).

95. *Id.*

96. *See id.* at 1211.

can no longer interpret and apply the law without some aid from agencies.[97]

Indeed, Idaho courts recognize that the Idaho legislature delegates authority to an agency through the agency's administering statute.[98] When "charged with the duty of administering an act," the agency "is impliedly clothed with the power to construe it."[99] Thus, "[t]he court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue."[100] Only if the agency has received this authority will it be "'impliedly clothed with the power to construe' the law."[101] This language originates in *Kopp v. State*.[102] In *Kopp*, the Idaho Supreme Court found that the Department of Law Enforcement had broad powers to carry out provisions of Idaho's Retail Sale of Liquor by the Drink Act based on the fact that the Department is responsible for administering and enforcing the Act.[103] The court further held that the Department's interpretation of the Act was entitled to "great weight."[104] But the *Kopp* court made no finding that the legislature had implicitly delegated interpretive authority to the Department because the Act's text was ambiguous. In fact, while noting that it had never interpreted the provision of the Act at issue, the court restated the parties' competing interpretations but never expressly declared the statute to be ambiguous.[105] After consulting the Act's legislative history, the court concluded that the Department's interpretation was correct.[106] The *Kopp* court cited numerous cases for the "impliedly clothed" language, none of which suggest that the legislature implicitly delegates interpretive authority to agencies through ambiguity in statutes.[107] Because the power to construe the law is a "necessary precedent to administrative action,"[108] delegation to agencies

97. *Id.*

98. *See infra* text accompanying notes 99–108.

99. Kopp v. State, 595 P.2d 309, 312 (Idaho 1979).

100. *Simplot*, 820 P.2d at 1219.

101. *Id.* (quoting *Kopp*, 595 P.2d at 312).

102. *Kopp*, 595 P.2d at 312.

103. *Id.*

104. *Id.*

105. *Id.* at 311–12.

106. *Id.* at 313.

107. *See id.* at 312 (citing Okla. Real Estate Comm'n v. Nat'l Bus. & Prop. Exch., Inc., 238 F.2d 606, 610 (10th Cir. 1956); Clark County Sch. Dist. v. Local Gov. Emp. Mgmt. Relations Bd., 530 P.2d 114, 117 (Nev. 1974); Wash. Twp. of Nemaha Cty. v. Hart, 215 P.2d 180 (Kan. 1950); Bodison Mfg. Co. v. Cal. Emp't Comm'n, 109 P.2d 935, 939 (Cal. 1941)).

108. *Id.*

is implicit only in the sense that an agency's authority to *administer* the law implies that it has the authority to *interpret* the law.

### *B. Prong Two: Is the agency's construction a reasonable interpretation of the statute?*

For Prong Two, the *Simplot* court noted that Idaho courts consistently found deference inappropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no weight or consideration."[109] In its analysis of the Tax Commission's interpretation, the *Simplot* court generally concluded that the Commission's construction was reasonable "in the face of a statute that does not directly address the question at issue."[110] While the Commission overlooked the statutory definition of "taxable income," it was not unreasonable for the Commission to conclude that a more specific provision controlled over the more general definition.[111]

In determining whether an agency's construction is reasonable, Idaho courts look to whether the agency's construction is consistent with the statutory text, the legislature's intent, and practices common to the relevant industry.[112] For example, in *Pearl*, a physician argued that the Idaho Medical Practices Act required the Board of Professional Discipline of the State Board of Medicine to hold its disciplinary hearings with a panel of licensed physicians instead of a non-physician hearing officer.[113] The Act granted the Board the authority to hold a disciplinary hearing with a panel of licensed physicians.[114] But the Act also allowed non-physician hearing officers to conduct evidentiary hearings.[115] In no way did the Act restrict the hearing officers' authority. Thus, the court found that it was reasonable for the Board to conclude that the hearing officer could issue a recommendation based on its evidentiary-hearing findings.[116] Likewise, in *Hamilton v. Reeder Flying Services, Inc.*,[117] the court found reasonable the Industrial

109. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1219 (Idaho 1991) (quoting State v. Omaechevviaria, 152 P. 280, 281 (Idaho 1915)).

110. *Id.* at 1220.

111. *Id.*

112. *Id.* at 1214, 1219.

113. Pearl v. Bd. of Prof. Discipline, 44 P.3d 1162, 1167 (Idaho 2002).

114. *Id.*

115. *Id.*

116. *Id.* at 1168; *see also* Floating Patio, LLC v. Idaho State Police, No. CV 2016 4100, 2017 Ida. Dist. LEXIS 24, at *16–17 (Idaho Dist. Ct. Apr. 20, 2017) (finding the agency's interpretation to be reasonable when the statute provided that undefined words should be given their ordinary and commonly understood meanings, and the agency applied the dictionary definition of a term not defined in the statute).

117. 21 P.3d 890 (Idaho 2001).

Commission's interpretation that the term "employed" meant the moment when fertilizer pilots took their first flight of the season, not when the employer "employed" them in the ordinary sense of the word.[118] The court found the interpretation reasonable in light of the Commission's long-standing custom, the legislature's intent, and the practical effect a contrary interpretation would have on the industry.[119]

Prong Two, like *Chevron*'s Step Two, allows the court to engage in a full consideration of a statute's meaning,[120] looking to the outer bounds of the text. Under *Chevron* Step Two, the court looks to whether the agency's construction is a permissible reading of the statute.[121] If the answer is "yes," the court defers to the agency's interpretation.[122] But a reasonable interpretation is not enough under *Simplot*'s Prong Two: the interpretation must still satisfy all three other prongs, and the five rationales under Prong Four must weigh in favor of deference.[123] Thus, an interpretation that receives *Chevron* deference because it is a reasonable construction of an ambiguous statute may not always receive deference under *Simplot*.

### *C. Prong Three: Does the text answer the precise question at issue?*

For Prong Three, the *Simplot* court explained that an agency's construction cannot contradict the clear expressions of the legislature.[124] Although Prong Three employs nearly the same language as *Chevron* Step One—"whether Congress has directly spoken to the precise question at issue"[125]—*Simplot* differs in practice. When Idaho courts apply each prong in numerical order, reaching Prong Three third, the court must engage in the reasonableness inquiry under Prong Two before determining whether the text answers the precise question at issue.[126] As discussed further in Part IV, this difference speaks to the linguistic limitations of *Chevron* Step One. A court can ask whether the language treats the precise question at issue, but the answer may

118. *Id.* at 895.

119. *Id.* at 893–94.

120. *See* Pappas, *supra* note 15, at 1004.

121. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

122. *Id.* at 843–44.

123. *See* Pappas, *supra* note 15, at 998–99.

124. J.R. Simplot, Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1219 (Idaho 1991) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (quoting *Chevron*, 467 U.S. at 842–43).

125. *Chevron*, 467 U.S. at 842; *see also Simplot*, 820 P.2d at 1219 (framing Prong Three as asking whether the question has "a precise statutory answer").

126. *See* Pappas, *supra* note 15, at 998.

depend more on a judge's interpretive approach than the language of the statute itself.[127] When a court frames *Chevron* Step One as an inquiry into whether the statute has a plain meaning and limits that inquiry to the words of the statute (e.g., under a strict constructionist or textualist approach), the court is more likely to find the statute does have a plain meaning than if the court employed a purposivist approach.[128] *Chevron*'s plain-meaning inquiry usually devolves into a "clearly preferred"-meaning inquiry depending on how the court frames Step One, making deference to the agency less likely.[129] Under *Simplot*, the court must first approach the statute with a wide lens, asking whether the agency's construction is reasonable. Then, within the context of that reasonableness inquiry, the court looks to whether the statutory text already answers the question at issue.[130] This framework guides the court's analysis away from a textualist approach towards a more purposivist approach.

Yet Prong Three is still susceptible to the same linguistic manipulation as *Chevron* Step One. When Idaho courts stray from the exact language of Prong Three, they typically do so by asking whether the statute is ambiguous,[131] potentially making Prong Three's outcome dependent on the court's preferred method of statutory interpretation. Although Prong Two guards against this manipulation by requiring the court to analyze the reasonableness of the interpretation first, some Idaho courts address the prongs out of order, beginning and ending the inquiry with Prong Three.[132] When the court addresses the prongs out of order and frames Prong Three in terms of whether the statute is ambiguous, the four-prong test could result in less deference to agencies, just as with *Chevron*.

In *Farber v. Idaho State Insurance Fund*,[133] the Idaho Supreme Court did just that. Without analyzing Prongs One or Four, the court held that the agency's interpretation deserved no deference because the interpretation failed Prongs Two and Three.[134] Under Prong Three, the court asked whether the statute was ambiguous.[135] But this was likely because of the case's procedural posture. The plaintiff appealed the

127. *See infra* text accompanying notes 212–19.

128. *Id.*

129. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 991 (1992).

130. *Simplot*, 820 P.2d at 1219.

131. Farber v. Idaho State Ins. Fund, 208 P.3d 289, 296 (Idaho 2009); Hamilton v. Reeder Flying Serv., 21 P.3d 890, 895 (Idaho 2001).

132. *Farber*, 208 P.3d at 293–94.

133. *Id.* at 289.

134. *Id.* at 296.

135. *Id.*

district court's finding that the statute was ambiguous.[136] Neither party brought an argument under *Simplot* at the district-court level, and the State Insurance Fund raised it before the supreme court only as an alternative argument.[137] The supreme court first addressed the district court's finding that the statute was ambiguous, disagreeing with the district court.[138] Then, upon addressing the Fund's alternative argument under *Simplot*, the supreme court concluded that the Fund's interpretation failed Prong Three because the statute was not ambiguous and it precisely treated the question at issue.[139]

But Idaho courts typically address the prongs in numerical order.[140] In *Simplot*, the court briefly addressed Prong Three third, finding that the legislature had not "directly address[ed] the question . . . of whether foreign source income can be included in the preapportionment tax base . . . for the purpose of computing Idaho taxable income."[141] Idaho courts' Prong Three analyses are usually brief,[142] likely because this prong is not issue determinative, and because the court has already analyzed whether the interpretation is reasonable under Prong Two.[143] If the agency's interpretation survives Prong Two as a reasonable interpretation, then it is unlikely that the language of the statute treats the precise question at issue, unless the agency's answer comports with what the statute requires. And sometimes, as in *Farber*, Idaho courts look to whether the statutory language is unambiguous before determining whether the agency's construction is entitled to deference under *Simplot*.[144] In these cases, the agency's construction receives little

136. *Id.* at 292.

137. *Id.* at 295.

138. *Id.* at 293–94.

139. *Id.* at 296. *But see* Williams v. Idaho State Bd. of Real Estate Appraisers, 337 P.3d 655, 662 (Idaho 2014) (finding the Board's interpretation reasonable and thus entitled to deference under *Simplot*'s four-prong test).

140. *See, e.g.*, Herrmann v. Idaho, 403 P.3d 318, 321–22 (Idaho Ct. App. 2017); Hamilton v. Reeder Flying Serv., 21 P.3d 890, 893 (Idaho 2001); Garner v. Horkley Oil, 853 P.2d 576, 578–79 (Idaho 1993); Preston v. Idaho State Tax Comm'n, 960 P.2d 185, 187–89 (Idaho 1998); A & B Irrigation Dist. v. Idaho Dep't of Water Res., 301 P.3d 1270, 1272 (Idaho 2012); Kuna Boxing Club Inc. v. Idaho Lottery Comm'n, 233 P.3d 25 (2009); Canty v. Idaho State Tax Comm'n, 59 P.3d 983, 988–90 (Idaho 2002).

141. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1220 (Idaho 1991).

142. *See, e.g.*, *Canty*, 59 P.3d at 987; *Hamilton*, 21 P.3d at 895; *Garner*, 853 P.2d at 577.

143. *See* Pappas, *supra* note 15, at 1006.

144. *Farber*, 208 P.3d at 293–95.

analysis under Prong Three because the court has already determined whether the statutory language is clear.[145]

### *D. Prong Four: Do the rationales traditionally justifying deference weigh in favor of deference?*

Prong Four permits the court to ask whether it makes sense to defer to the agency. The *Simplot* court incorporated the five rationales underlying Idaho's deference regime into this prong: reliance, practicality, legislative acquiescence or endorsement, contemporaneity, and specialized expertise.[146] *Simplot* does not require all rationales to be present; rather, the test requires the court to balance the absence or presence of each rationale, which the court does not have to weigh equally. The absence of one or more of the rationales may constitute a "cogent reason" for refusing to defer to an agency's interpretation.[147] The *Simplot* court specified that the absence of even one rationale, if weighed heavily enough, could be a sufficient reason for denying deference to the agency interpretation.[148] And the court could weigh the presence of only one rationale strongly enough for it to award the agency's interpretation "considerable weight" deference.[149] If, after analyzing the five rationales, a court finds that there are no compelling reasons to depart from the agency's interpretation, then the court must give "considerable weight" to the agency's construction.[150] If balancing the rationales reveals compelling reasons for denying deference to the agency, then the court may still defer to the agency's construction to the extent of its "persuasive force."[151]

The *Simplot* court noted that under its pre-*Fair Share* deference doctrine, courts could generally claim that "cogent reasons" existed for denying deference without specifying what those reasons were.[152] Now, the court retains some flexibility, but it must explain its analysis in terms of Prong Four's five rationales. A court cannot claim that "cogent reasons" exist for rejecting the agency interpretation without explaining those reasons.[153]

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145. *See Canty*, 59 P.3d at 987–89 (looking first to the language of the statute, then applying in order the four prongs, and finding that the statute does not answer the precise question at issue).

146. *See supra* notes 44–48 and accompanying text.

147. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1219 (Idaho 1991).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1219–20.

152. *Id.* at 1211–12.

153. *Id.* at 1219.

In *Simplot*, the court held that the Tax Commission's interpretation was not entitled to considerable deference after balancing the five rationales because all five rationales were absent.[154] There was no reliance interest in Simplot's interpretation of the tax law given the recent legislation. And the court found that the Tax Commission's interpretation was no more practical than Simplot's;[155] if anything, Simplot's interpretation was more practical than the Commission's. The legislature could not have acquiesced to the Commission's interpretation because the 1985 Idaho Income Tax Act included express language that denied any legislative intent as to the construction of prior versions of the Act,[156] and legislative inaction is not a reliable source of legislative intent.[157] The Tax Commission did not issue its interpretation contemporaneously with the tax law because the Idaho tax law was most recently revised in 1979, and the disputed interpretation arose out of deficiency notices issued in 1984.[158] As for the last rationale—agency expertise—even though the Tax Commission was an expert in Idaho taxation, the Commission did not employ its expertise in construing the statute. It prepared no regulations or written instructions. It communicated its interpretation only by issuing notices of deficiency determinations years after the taxes had been filed.[159] On this point, the court also noted that the Tax Commission did not "exhaust[] its thinking" on the interpretation prior to the instant litigation.[160] Because not one of the five rationales justified the Commission's interpretation, the court held that there were "cogent reasons" to deny "considerable weight" to the agency's interpretation.[161] Finally, with the agency's construction left to its "persuasive force," the court rejected that construction, calling it a "strained" reading of an otherwise straightforward statute.[162]

While Prong Four lacks similarity to *Chevron* in all respects, it resembles the factors courts employed pre-*Chevron*. Thomas Merrill categorizes the pre-*Chevron* factors into three groups: (1) those addressing Congressional intent; (2) factors addressing attributes of the agency's decision; and (3) those demonstrating congruence between the

154. *Id.* at 1220.

155. *Id.*

156. *Id.* at 1221.

157. *Id.*

158. *Id.* at 1222.

159. *Id.*

160. *Id.* at 1223.

161. *Id.*

162. *Id.*

agency's interpretation and Congress's intent.[163] When analyzing factors in the first grouping, courts looked to whether Congress had specifically delegated authority to an agency.[164] For factors in group two, the court considered whether an agency exercised its expertise, whether its interpretation represented a consistent interpretation, and whether the interpretation was the fruit of reasoned analysis.[165] Courts analyzed group three's factors by considering whether the agency's construction was contemporaneous with the passage of the statute or whether Congress had ratified the agency's construction.[166] The *Chevron* Court also looked to similar rationales for deferring to agencies: filling gaps left by Congress, reconciling conflicting policies, and giving due weight to an agency's expertise.[167] More recently, in *Kisor v. Wilkie*,[168] the Supreme Court articulated similar factors for consideration when deciding whether to defer to an agency's interpretation of its own regulation (i.e., *Auer* deference).[169] This suggests that the rationales for deference identified in *Simplot* are consistent with those imbedded in the U.S. Supreme Court's history of judicial deference. As Merrill notes, the Court has employed some of the above factors for over 150 years, and they may "reflect[] deep-seated judicial intuitions about the kinds of considerations that ought to bear on the decision to defer."[170]

## III. FITTING INTO THE DEFERENCE PUZZLE

This section examines how *Simplot* would fit into the federal administrative landscape, specifically addressing *Skidmore v. Swift & Co.*, *Auer v. Robbins*, and *National Cable and Telecommunications Association v. Brand X*. If the Supreme Court abandons *Chevron* deference, it will raise a plethora of questions about how the court should continue to apply *Skidmore* and *Auer* deference, if at all, and whether *Brand X*'s holding still applies.

163. Merrill, *supra* note 129, at 973.

164. *Id.*

165. *Id.* at 973–74.

166. *Id.* at 974.

167. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984).

168. 139 S. Ct. 2400 (2019).

169. *See id.* at 2416–17 (directing courts to consider "markers" for identifying when *Auer* deference is appropriate, including whether the interpretation is authoritative, whether the interpretation implicates the agency's substantive expertise, and whether the interpretation reflects the agency's "fair and considered judgment").

170. Merrill, *supra* note 129, at 975.

### *A.* Skidmore v. Swift & Co.

Under *Skidmore v. Swift & Co.*,[171] courts may defer to agency interpretations, with the weight of deference depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[172] While *Chevron* first left courts confused about the status and applicability of *Skidmore* deference,[173] *United States v. Mead Corp.*[174] clarified that *Skidmore* applies when an agency interpretation fails *Chevron* Step Zero; or in other words, when an agency acts without the force of law.[175] Even though Idaho's four-prong test does not ask whether the agency acted with the force of law, its framework still allows for federal courts to apply *Skidmore* deference at two junctures.

First, federal courts could apply *Skidmore* deference to agency interpretations of regulations or informal rules.[176] *Simplot* applies only to an agency's statutory interpretations, and Idaho courts employ the free-review standard when interpreting an agency's interpretations of regulations or rules.[177] Rather than asking at *Chevron* Step Zero whether an agency acted with the force of law, courts would identify the agency's interpretation as a construction of a statute, a regulation, or an informal rule. When the agency is construing a regulation or informal rule, the court would apply *Skidmore* deference.

Second, courts could apply *Skidmore* after Prong Four. Because an agency's construction deserves no deference when it fails at Prong One, Two, or Three, these prongs are the threshold issues for whether the interpretation deserves any deference at all. Once an interpretation survives the first three prongs, the remaining question is not *whether* to defer to the agency, but *how much* deference is appropriate. At this point, the agency's interpretation will receive at least some deference according to its "persuasive value" after the court analyzes Prong Four's five deference rationales. If the interpretation fails Prong Four, courts could then apply *Skidmore*. The only difference is that the decision about whether to apply *Skidmore* occurs at *Simplot* Prong Four rather than *Chevron* Step Zero.

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171. 323 U.S. 134 (1944).

172. *Id.* at 140.

173. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1237 (2007).

174. 533 U.S. 218 (2001).

175. Hickman & Krueger, *supra* note 173, at 1237.

176. This would supplant *Auer* deference. *See supra* notes 143–159 and accompanying text.

177. Mason v. Donnelly, 21 P.3d 903, 905 (Idaho 2001).

On the other hand, federal courts can determine quite quickly whether to apply *Chevron* or *Skidmore*.[178] One could argue that applying *Skidmore* after applying *Simplot*'s first three prongs and analyzing five different deference rationales under its fourth prong is far more analysis than necessary, if not completely superfluous. By the time a court has analyzed Prong Four's rationales and finds no compelling reasons for affording an agency great-weight deference, it has already fully assessed the persuasive value of the agency's interpretation. There are few cases in which an agency's interpretation fails Prong Four after having survived the first three; but when it does, it may receive no deference at all.[179]

But federal courts continue to apply a multi-factor analysis when determining whether to apply *Skidmore* or *Chevron*, as the Supreme Court did in *Barnhart v. Walton*.[180] Under *Barnhart*, courts may look to more than the formality of the procedures through which an agency issued an interpretation. Specifically, courts should consider the agency's interpretive method and the nature of the question at issue.[181] The *Barnhart* Court considered "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period."[182] The rationales of Prong Four do not represent every justification for deferring to an agency interpretation; the Idaho Supreme Court identified only those justifications supported by its own case history.[183] Incorporating *Skidmore* would allow federal courts to consider additional rationales to defer to an agency's interpretation the court finds somewhat persuasive, even if that interpretation is not entitled to great weight.[184]

178. *See, e.g.*, Grace v. Whitaker, 344 F. Supp. 3d 96, 122 (D.C. Cir. 2018) (finding that *Chevron* "clearly applies" to the Attorney General's interpretation of the INA); Student Loan Servicing All. v. District of Columbia, 351 F. Supp. 3d 26, 48 (D.C. Dist. 2018) (finding that the Department of Education's interpretation of the Higher Education Act "qualified as 'an agency's construction of the statute which it administers,' positioned squarely within the *Chevron* framework").

179. *See, e.g.*, Johnston v. Bureau of Crim. Identification, No. CV-2012-1442, 2012 Ida. Dist. LEXIS 20 at *10–12 (Idaho Dist. Ct. Dec. 11, 2012).

180. 535 U.S. 212 (2002) (applying *Chevron* to an agency interpretation promulgated through less formal means than notice-and-comment).

181. *Id.* at 222.

182. *Id.*

183. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1214–15 (Idaho 1991).

184. *See* Oceana, Inc. v. Ross, 363 F. Supp. 3d 67, 87 (D.C. Cir. 2019) (finding that agency guidelines deserved "considerable deference" even if not

Still, if applying *Skidmore* after Prong Four is superfluous, courts could reduce their *Skidmore* analysis to a one-sentence conclusion stating that, through its four-prong analysis, it finds that the agency's interpretation lacks persuasive force. Idaho courts already take a similar approach when an interpretation fails Prong Four.[185] And so eventually, courts might cease to apply *Skidmore* at all.

Despite these issues, the transition from *Chevron* to Idaho's four-prong test would raise fewer questions about *Skidmore*'s validity than would transitioning from *Chevron* to *de novo* review. If the Supreme Court abandons *Chevron* deference for *de novo* review but changes nothing with respect to *Skidmore* deference, lower federal courts would be left with a deference scheme in which an agency's interpretations promulgated with the force of law receive less deference than its guidelines and opinion letters that the courts find persuasive. The only way the Court could abandon *Chevron* without having to immediately address *Skidmore*'s validity would be to either apply *Skidmore* to all agency interpretations rather than resorting to *de novo* review or abandon *Skidmore* as well. With its capacity to incorporate *Skidmore*, Idaho's four-prong test resolves these inconsistencies and allows *Skidmore* to simply fade into the background, should courts find the additional analysis unnecessary.

### *B.* Auer v. Robbins

In *Auer v. Robbins*,[186] the Supreme Court reaffirmed its prior ruling in *Bowles v. Seminole Rock & Sand Co.*,[187] where the Court held that an agency's interpretation of its own regulation demands deference unless the interpretation is "plainly erroneous or inconsistent with the regulation."[188] The *Auer* Court deferred to the Secretary of Labor's interpretation of its own regulations regarding whether employees were entitled to overtime pay. Because the Secretary was interpreting its own regulation, the Court looked to whether the interpretation was "plainly erroneous or inconsistent with the regulation";[189] if it was not,

entitled to *Chevron* deference because "they were passed with extensive process and formality, are detailed and reflect [the agency's] considerable expertise . . . , and are routinely cited by courts as persuasive authority on the meaning of the [statute]"); Lewis v. Pension Benefit Guar. Corp., 314 F. Supp. 3d 135, 160–61 (D.C. Cir. 2018) (applying *Barnhart*'s factors to determine whether *Chevron* applies to the agency's action).

185. *See* Johnston v. Bureau of Crim. Identification, No. CV-2012-1442, 2012 Ida. Dist. LEXIS 20 at *10–12 (Idaho Dist. Ct. Dec. 11, 2012).

186. 519 U.S. 452 (1997).

187. 325 U.S. 410 (1945).

188. *Id.* at 414.

189. *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989).

the Secretary's interpretation controlled.[190] The Court found that the agency's construction "easily met" this standard because the language of the regulation "comfortably [bore] the meaning the Secretary assign[ed]."[191]

Like *Chevron*, *Auer* has received its share of criticism.[192] In fact, these criticisms were recently at the forefront in *Kisor v. Wilkie*,[193] in which the Supreme Court declined to overturn the doctrine.[194] While *Auer* may be described as the application of *Chevron* to an agency's interpretations of its own regulations,[195] it is an independent doctrine that reaffirms *Seminole Rock*, which pre-dates *Chevron* by nearly forty years.[196] Thus, it is at least conceivable that *Auer* could stand on its own in the absence of *Chevron* if the Court finds that the two doctrines are supported by different justifications.[197]

Whether *Auer* could exist in harmony with *Simplot*'s four-prong test depends on whether federal courts would analyze an agency's interpretations of administrative regulations or rules under *Simplot* or under a *de novo* standard. Idaho courts applied their version of *de novo*

190. *Id.*

191. *Id.*

192. *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616–19 (2013) (Scalia, J., dissenting in part and concurring in part) (urging the Court to reconsider *Auer* deference because "the power to write a law and the power to interpret it cannot rest in the same hands"); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996) (arguing that *Seminole Rock* deference should be replaced by "a standard that imposes an independent judicial check on the agency's determination of regulatory meaning").

193. 139 S. Ct. 2400 (2019).

194. *Id.* at 2407.

195. *Decker*, 568 U.S. at 617 (Scalia, J., dissenting in part and concurring in part).

196. *See supra* notes 186–88 and accompanying text.

197. *See* Manning, *supra* note 192, at 617–18 (suggesting that *Chevron* is premised on the principle that Congress delegates policy discretion to agencies through ambiguity, and *Seminole Rock* is premised on the idea of an agency's "superior political accountability, policymaking competence, and historical familiarity with the regulatory text"); *see also Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress."); *id.* at 2448 (Kavanaugh, J., concurring in the judgment) (agreeing with Chief Justice Roberts that the Court's ruling on *Auer* deference should not be read to implicate *Chevron* deference).

review—the free-review standard—to agency regulations and rules.[198] Thus, federal courts could apply *Simplot* to agency interpretations of statutes while continuing to apply *Auer* to agency interpretations of administrative regulations.

But this would contravene the main justifications for adopting Idaho's four-prong test in the first place. *Auer* demands deference to agency interpretations of regulations that are not "plainly erroneous or inconsistent with the regulation," a standard the *Simplot* court rejected.[199] And the traditional justifications for *Auer* deference do not mirror those analyzed under *Simplot*'s Prong Four. Whereas the *Simplot* court identified reliance, practicality, legislative acquiescence, legislative contemporaneity, and agency expertise as the traditional justifications for deferring to agencies, *Auer* deference (or S*eminole Rock* deference) is mainly premised on political accountability and an agency's superior competence in interpreting its own text.[200]

Courts could resolve this inconsistency by analyzing different factors under Prong Four depending on whether the agency is interpreting a statute or a regulation. The Supreme Court directs courts to do as much in *Kisor v. Wilkie*. When analyzing whether to defer to an agency's interpretation of a regulation under *Auer* and *Seminole Rock*, a court must first determine whether the regulation is "genuinely ambiguous."[201] Then the court determines whether the agency's interpretation is a reasonable construction of the regulation.[202] Lastly, the court must inquire into whether "the character and context of the agency interpretation entitles it to controlling weight."[203] Declining to prescribe an "exhaustive test" for this inquiry, the *Kisor* Court instead identified three analytic "markers": (1) whether the agency's interpretation is authoritative; (2) whether the interpretation implicates the agency's expertise; and (3) whether the agency's interpretation reflects its fair and considered judgment.[204]

198. *See, e.g.*, Mason v. Donnelly Club, 21 P.3d 903, 908 (Idaho 2001) (applying "free review" to determine whether two-weeks constitutes a "short time" under the Department of Labor's regulation).

199. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1213 (Idaho 1991) ("While courts of some states continue to invoke the traditional rule giving great weight to the interpretations of agencies, they are equivocal in their application, leaving the impression that their administrative agency interpretations are entitled to judicial deference only when those interpretations are correct.").

200. *See* Manning, *supra* note 192, at 629–30; *Kisor*, 139 S. Ct. at 2412–14.

201. *Kisor*, 139 S. Ct. at 2414.

202. *Id.* at 2415–16.

203. *Id.* at 2416.

204. *Id.* at 2416–18.

But applying different factors depending on whether the court is analyzing a statute or regulation could lead to inconsistencies in the frequency with which courts defer to regulations as opposed to statutes. Courts could end up deferring to agency interpretations of one or the other more often without any real justification for doing so. Although both *Simplot* and *Auer* incorporate a factor analysis, their underlying policy justifications are fundamentally different. Based on these differences, *Auer* and *Simplot* are irreconcilable, and the Supreme Court would have to overrule both *Auer* and *Chevron* if it chose to adopt *Simplot*'s four-prong test.

### *C.* National Cable and Telecommunications Association v. Brand X Internet Services

In *National Cable and Telecommunications Association v. Brand X Internet Services*, the Supreme Court held that "[a] court's prior 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."[205] The Court reasoned that when Congress implicitly delegates interpretive authority to an agency via statutory ambiguity, judicial precedent cannot override an agency's interpretation.[206]

Because *Brand X* applies to agency interpretations that are entitled to *Chevron* deference, federal courts could reformulate the rule so that it applies to agency interpretations entitled to deference under *Simplot*. Courts would continue to defer to an agency's interpretation when it survives all four prongs. If the agency's interpretation survives Prongs One through Three, Prong Four's deference rationales allow the court to compare the agency's interpretation to the court's prior construction, providing the court with reasons to affirm the prior construction. If the judicial precedent is long-standing, then the court could argue that the reliance rationale is a compelling reason to refuse great-weight deference to the agency's interpretation. The court could also argue that the legislative-acquiescence rationale supports the court's interpretation; if Congress disagreed with the court's interpretation, it would have clarified the ambiguity. Or, if the agency has employed specialized expertise in developing its interpretation, the court may decide that it makes sense to adopt the agency's interpretation. Again, if the agency's interpretation is more practical than the court's, the court may choose to adopt the agency's interpretation. In this sense, the court can exercise independent judicial review. Because the court would choose to *adopt* the agency's interpretation, not necessarily *defer* to it, the agency would not override judicial precedent.

205. 545 U.S. 967, 982 (2005).

206. *Id.*

It is possible, however, that overturning *Chevron* would necessitate the end of *Brand X* as well. Because *Brand X* is premised on the main principle of *Chevron*—the presumption that Congress delegates authority to agencies via statutory ambiguity[207]—rejecting *Chevron* could unmoor *Brand X* from this foundational principle. A court would once again have to decide whether its prior construction trumps the agency's interpretation, which a court could hold under *Simplot*, as discussed above, or under *de novo* review.[208]

## IV. IMPROVING THE TEST

Although Idaho's four-prong test has some advantages over *Chevron*, it does not completely cure the statutory-interpretation problems that arise out of *Chevron* Step One. While Idaho courts most commonly apply the four prongs in numerical order,[209] there are instances in which a court has addressed the prongs out of order or resolved the case on Prong Three alone.[210] Asking whether the statute's text answers the precise question at issue demands more precision than our language is capable of, and how the court approaches this question can significantly alter the outcome of the case.[211] Assessing the reasonableness of an agency's interpretation prior to determining whether the statute answers the precise question at issue limits the extent to which the court's interpretive approach controls the outcome. Thus, if the Supreme Court is to adopt Idaho's four-prong test, it should clarify that courts are to apply the four prongs in numerical order, and that they should refrain from resolving the issue on Prong Three without first analyzing Prong Two.

As previously discussed, *Chevron*'s Step One and *Simplot*'s Prong Three ask the court to determine whether the statute's text answers the precise question at issue.[212] Under *Chevron*, agency constructions receive deference only when the court finds that the statute's text does

207. *See* Strauss, *supra* note 5, at 1172.

208. Whether applying the *de novo* standard to these constructions undermines the role of agencies is beyond the scope of this Note.

209. *See supra* note 140 and accompanying text.

210. *See* N. Snake Ground Water Dist. v. Idaho Dep't of Water Res., 376 P.3d 722, 729 (Idaho 2016); Farrell v. Whiteman, 200 P.3d 1153, 1160 n.2 (Idaho 2009).

211. *Compare* Farber v. Idaho State Ins. Fund, 208 P.3d 289, 296 (Idaho 2009) (finding the language of IDAHO CODE § 72-915 to be unambiguous), *with* Hamilton v. Reeder Flying Serv., 21 P.3d 890, 894–895 (Idaho 2001) (finding ambiguity in the word "employment" in IDAHO CODE § 72-212(9)).

212. *See supra* notes 124–25 and accompanying text.

not resolve the issue.[213] But when a judge or Justice is more likely to find that the meaning of the statute "is apparent from its text," she is less likely to defer to the agency's construction.[214] As Justice Scalia explained: "It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt."[215] Justice Scalia attributed this result to his textualist approach to statutory interpretation.[216] Critics of *Chevron* take issue with this outcome, arguing that *Chevron* ceases to be a rule at all if judges can circumvent its mandate by applying a strict constructionist approach.[217] Justice Kavanaugh has also argued that whether a statute is ambiguous is an unanswerable question because judges will always disagree, and ambiguity inquiries open the door for judges to insert their own policy preferences.[218] Furthermore, those who advocate for a purposivist interpretative approach object on the grounds that *Chevron*'s framework allows textualist judges to ignore a statute's legislative history.[219] Under *Simplot*, when addressing the prongs in numerical order, the court asks under Prong Two whether the agency's construction is reasonable before moving on to Prong Three.[220] Thus, the court begins its analysis under Prong Three with a wider lens after having considered factors beyond the text of the statute.[221]

The Idaho Supreme Court's analysis in *Hamilton v. Reeder Flying Service*[222] exemplifies how the order of Prong Two and Prong Three controls the outcome of the case. At issue on appeal was whether the deceased claimant, a pilot employed by Reeder, qualified for workers'

213. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

214. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989).

215. *Id.*; *see also* Kent Barnett et al., *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1465 (2018) (noting that although "conservative panels are more likely to agree with conservative statutory interpretations and less likely to agree with liberal ones, and liberal panels are less likely to agree with conservative statutory interpretations and more likely to agree with liberal ones," *id.* at 1495, "*Chevron* deference markedly curbs ideological behavior among reviewing circuit judges," *id.* at 1502).

216. Scalia, *supra* note 214, at 521.

217. *See, e.g.*, Kavanaugh, *supra* note 3, at 2140.

218. *Id.* at 2135–39.

219. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1423 (2017).

220. J.R. Simplot Co. v. Idaho State Tax Comm'n, 820 P.2d 1206, 1219 (Idaho 1991).

221. *Cf.* Bednar & Hickman, *supra* note 219, at 1423–24.

222. 21 P.3d 890 (Idaho 2001).

compen–sation benefits. The relevant provision of the Idaho Code stated that employers are exempt from providing benefits if "the employer files with, and has written approval by, the industrial commission prior to employing a pilot."[223] To receive approval from the Industrial Commission, pilots had to apply each season for accident insurance, and they had to send evidence of that insurance to the Commission for approval.[224] While the deceased claimant received accident coverage before taking his first flight of the season, he did not receive approval from the Commission until thirteen days after his first flight.[225] Reeder argued that it complied with the intent of the Idaho Code, and that the Commission had a twenty-seven-year-old custom according to which the exemption takes effect when the pilot submits his application for accident insurance along with his first premium payment.[226] Reeder further argued that the Commission condoned this practice by consistently granting approval long after pilots began their flying season.[227] At the administrative hearing, the Commission found that employers were exempt if the pilot had obtained accident insurance before the first flight of the season even if he or she had not yet received approval from the Commission. The claimant then appealed the Commission's decision.[228]

After finding under Prong One that the Industrial Commission had authority to administer the relevant statute, the court addressed Prong Two, whether the Commission's interpretation was reasonable.[229] The court began by stating "the application of a statute is an aid to construction when the public relies on the application over a long period of time," and then looked to the Commission's justifications for its interpretation.[230] First, because pilots would be covered by the necessary insurance before their first flights of the season even if they had not yet received Commission approval, the court found that the Commission's interpretation satisfied the statute's intent.[231] Second, the Commission's interpretation also minimized the expense incurred by employers because pilots would not have to wait for approval—sometimes until the middle of the flying season—to begin flying.[232]

223. *Id.* at 892.

224. *Id.* at 891–92.

225. *Id.* at 892.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 893.

230. *Id.*

231. *Id.*

232. *Id.*

Lastly, the Commission made no objection to this practice for twenty-seven years, giving employers the impression that the exemption was met as long as pilots obtained their insurance policies before their first flights.[233]

The court then addressed the statute's legislative history, finding that it supported the Commission's interpretation. The statute's statement of purpose specified that it was intended to "exempt pilots . . . from the Workmen's Compensation coverage provided they file with the Industrial Commission evidence of insurance coverage."[234] The statute provided no specific procedure according to which pilots must meet the requirements. The Commission's interpretation was also consistent with a recent amendment to the statute. Based upon the above findings, the court held that the Commission's interpretation was reasonable, satisfying Prong Two.[235]

Next, the court analyzed Prong Three, finding that the statute's language did not expressly treat the question at issue because it was susceptible to more than one interpretation. The court held that the statute's language could be interpreted as meaning either that the employer had to file proof of insurance before employing the pilot or that the employer had to file proof of insurance and obtain approval prior to employing the pilot.[236] The Commission argued that the phrase "prior to employing" could be interpreted as meaning prior to employing a pilot to fly or prior to the pilot's first flight of the season.[237] The court agreed with the Commission's findings with respect to the term "employment." Because the statute did not expressly address how one should construe the term employment, the Commission's interpretation passed Prong Three.[238]

The court then moved on to Prong Four, determining whether any of the traditional rationales justifying deference were present. The court concluded that the Commission's interpretation represented a well-established industry custom, and that interpreting workers' compensation statutes was the Commission's area of expertise.[239] These two rationales were sufficient to satisfy Prong Four, and the court deferred to the Commission's interpretation.[240]

If the court had addressed Prong Three before Prong Two, however, it may have been more likely to find that the statute already answered

233. *Id.*

234. *Id.*

235. *Id.* at 893–94.

236. *Id.* at 894.

237. *Id.* at 894–95.

238. *Id.* at 895.

239. *Id.*

240. *Id.*

the precise question at issue. In finding that the term "employment" was subject to more than one interpretation, the court considered that, for twenty-seven years, the Commission had consistently interpreted "employment" to mean the time during which a pilot is actually flying; whereas an ordinary reader of the statute may understand it to mean "the moment at which the employment contract is entered into."[241] If the court looked only at the language of the statute before considering whether the agency's interpretation was reasonable, it could have concluded that "prior to employing a pilot" clearly meant prior to entering into an employment contract with the pilot, answering the precise question at issue. As is the case with *Chevron*, a textualist court could find that the statute's language is clear, and thus deny the agency's construction any deference based solely on Prong Three. If Idaho's test is to replace *Chevron* and lead to more consistent results by eliminating a threshold ambiguity inquiry, courts must apply *Simplot*'s prongs in numerical order.

## Conclusion

Four decades ago, the Supreme Court sought to simplify its analysis of agency interpretations, holding that deference to an agency's statutory interpretation was no longer discretionary, but mandatory.[242] Today, critics challenge *Chevron* on multiple fronts, arguing that it violates Article III and that courts apply it so inconsistently that it ceases to be a coherent doctrine.[243] And although *Chevron* may be a "mutation produced by the pressures of litigation,"[244] agencies have become institutionalized as a significant component of our government. As Thomas Merrill recognizes, "[i]nstitutions are created, and become entrenched, in response to one set of imperatives . . . . By the time complications or objections come to the fore, the inertia of institutional change is too great to undo them."[245] Even if the Court rejects *Chevron*, it will still have to deal with an entire framework of administrative law. While some advocate for *de novo* review,[246] agency deference does not have to be an all-or-nothing matter.[247] Idaho's four-prong test is a viable alternative, both eliminating *Chevron*'s threshold ambiguity inquiry and permitting the court to engage in a more searching judicial review. Where *Chevron* mandates deference, Idaho's test permits courts to

241. *Id.*

242. Merrill, s*upra* note 129, at 971.

243. *See* Hamburger, s*upra* note 6, at 1189; Merrill, *supra* note 129, at 980.

244. Merrill, *supra* note 11, at 972.

245. *Id.* at 997.

246. *See* Hamburger, *supra* note 6, at 1249–50.

247. *See* Strauss, *supra* note 5, at 1146; Merrill, *supra* note 129, at 969–71.

reject an agency's interpretation of an ambiguous statute when the traditional justifications for deference are absent. Idaho courts defer when it makes sense to do so, such as when an agency employs specialized expertise, which is also a long-standing rationale for deference in the federal courts.[248]

Although the recent trend of state courts and legislatures abandoning deference for *de novo* review may suggest that federal courts should follow suit, some states exercise their independent judgment in the context of a *Skidmore*-like factor analysis, still considering various justifications for deferring to an agency's interpretation. For example, Alaska courts employ two standards of review when analyzing an agency's constructions of law.[249] The first—a rational basis test according to which the court defers as long as the interpretation is reasonable—applies to agency interpretations that implicate an agency's specialized expertise or fundamental policy decisions within the scope of the agency's discretion.[250] The second is an "independent judgment standard" under which the court interprets the statute *de novo*.[251] Alaska courts employ this standard when the issue does not implicate the agency's expertise.[252] California follows *Skidmore*, looking to "the thoroughness evident in [the agency'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."[253] And New Hampshire courts recognize that, while not controlling, an agency's interpretation is persuasive when the legislature has entrusted the agency with the primary authority to interpret the statute.[254]

While some still question the immediacy of *Chevron*'s impending demise,[255] beyond *Chevron* lies a plethora of theoretical models, state doctrines, and legislative directives waiting to fill its void. Careful thought is due to which of these options most appropriately accommodates not only the Constitution's separation of powers but the efficiency and effectiveness of the administrative state. While Idaho may seem an unlikely source of legal innovation, its unique four-prong

248. Merrill, *supra* note 129, at 973.

249. Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co., 746 P.2d 896, 903 (Alaska 1987).

250. *Id.*

251. *Id.*

252. *Id.*

253. Hoechst Celanese Corp. v. Franchise Tax Bd., 22 P.3d 324, 335 (Cal. 2001) (emphasis omitted) (quoting Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031, 1038–39 (Cal. 1998)).

254. Dep't of Revenue Admin. v. Pub. Emp. Labor Relations Bd., 380 A.2d 1085, 1086 (N.H. 1977).

255. *See, e.g.*, Bednar & Hickman, *supra* note 219, at 1397–98.

test is aptly suited for the federal administrative landscape, and is a viable alternative to *Chevron*.

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