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## In Search of *Skidmore*

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## IN SEARCH OF *SKIDMORE*

Peter L. Strauss\*

“How terribly strange to be seventy”<sup>1</sup>

Ever since 1827, the U.S. Supreme Court has repeatedly observed that when a court is interpreting a statute that falls within the authority of an administrative agency, the court in reaching its own judgment about the statute’s meaning should give substantial weight to the agency’s view.<sup>2</sup> Repeated again and again over the years in varying formulations, this proposition found its apotheosis in *Skidmore v. Swift & Co.*,<sup>3</sup> a unanimous opinion authored by Justice Jackson in 1944. His opinion took the proposition to be so obvious that no citation was required. Justice Jackson’s typically incisive and memorable formulation stuck. It found its way into administrative law casebooks—also without reference to its many predecessors. It has since been universally known as *Skidmore* deference, treated as if it were simply his remarkable invention.

Four years earlier, the proposition had found expression in *United States v. American Trucking Ass’ns*,<sup>4</sup> a case often considered the dawn of post-New Deal reliance on legislative history. The Court made clear that the question before it was one for it to decide, reiterating the oft-cited proposition of *Marbury v. Madison*: “The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.”<sup>5</sup> But how was it to perform this “exclusively judicial function”?

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\* Betts Professor of Law, Columbia University. My profound thanks go to Peter Shane and Christopher Walker, who have capped their efforts in organizing this symposium with a remarkable initial essay providing its readers with an overview of the whole. See Peter M. Shane & Christopher J. Walker, *Foreword: Chevron at 30: Looking Back and Looking Forward*, 83 *FORDHAM L. REV.* 475 (2014). I hope I may be forgiven, as one of the elders at the symposium, for having so concentrated on two cases from 1944 whose relationship seems to me to capture exactly the considerations of judicial role underlying *Chevron*, the 1984 opinion whose notoriety and thirtieth birthday provided the occasion for this intellectual feast. That my views on *Chevron* may differ from some of those who joined me at table should surprise no one who has followed the torrent of opinions and scholarship that have sprung from that decision.

1. SIMON & GARFUNKEL, *Old Friends*, on BOOKENDS (Columbia Records 1968).

2. *Edwards’ Lessee v. Darby*, 25 U.S. 206, 210 (1827). For this history, see generally Peter L. Strauss, “*Deference*” is Too Confusing—Let’s Call Them “*Chevron Space*” and “*Skidmore Weight*,” 112 *COLUM. L. REV.* 1143 (2012).

3. 323 U.S. 134 (1944).

4. 310 U.S. 534 (1940).

5. *Id.* at 544.

Five pages further on in its opinion, explaining the weight it was giving to agency views in doing so, the Court remarked:

The [two responsible agencies] . . . as we have said, have both interpreted Section 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve “contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.” Furthermore, the Commission’s interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions’ enactment to Congress.<sup>6</sup>

This passage states three reasons for this recognition of the weight a court should give an agency view: the agency’s arguably better view as sometime drafter; its obligations as the body responsible for putting the scheme in motion; and, implicit “in any case,” the fact of its continuous and comprehensive view of (and responsibilities for) a statutory scheme that would reach the courts only occasionally and in what would likely be quite unrepresentative contexts.

In the same year as *Skidmore*, 1944, the Court took the further step of placing a question that one might readily characterize as an issue of statutory interpretation *outside* the “exclusively judicial function.” In *NLRB v. Hearst Publications, Inc.*,<sup>7</sup> it found, additionally, that the statute it was interpreting had conferred on an administrative agency the primary responsibility for determining, from a policy perspective, the meaning of a statutory term that lacked fixed content.<sup>8</sup> The National Labor Relations Act<sup>9</sup> applied to “employees.”<sup>10</sup> While surely there were individuals who *must* be regarded as employees (paid hourly wages, lacking managerial responsibilities) and others who could *not* be so regarded (corporate executives, occasional individual contractors), there was a middle ground open to argument. The Court found, first, that Congress could not have intended “employee” to be governed in the administration of a national statute by the use of varying state law.<sup>11</sup> It found, second, that “employee” had no uniform meaning in federal statutes. What remained, the Court concluded, was that giving precise meaning to “employee” under this statute, within the middle ground whose existence it had determined, must be a function of national labor policy.<sup>12</sup> But Congress had made the formulation of national labor policy the responsibility of the National Labor Relations Board (NLRB). While courts remained responsible to oversee the legality and reasonableness of the Board’s judgments, this valid delegation of authority to the Board carried with it the corollary that courts could not

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6. *Id.* at 549 (quoting *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933)).

7. 322 U.S. 111 (1944).

8. *Id.* at 124–25.

9. 29 U.S.C. § 152 (2012).

10. *See Hearst*, 322 U.S. at 124–25.

11. *See id.*

12. *See id.*

properly substitute their own judgment about the precise application of the statutory term to particular circumstances for that of the Board. Within the middle ground, assigning meaning to “employee” was thus a responsibility of the Board, not the courts.

*Hearst*, too, joined the administrative law pantheon, although law school teaching materials long questioned whether it could be reconciled with *Packard Motor Car Co. v. NLRB*,<sup>13</sup> a decision that seemed oblivious to the NLRB’s judgment about meaning. In *Packard*, the statute defined an “employer” as “any person acting in the interest of an employer, directly or indirectly.”<sup>14</sup> The question for the Court was whether any employee who in some respects served as a foreman could ever be considered a statutory “employee” under the labor laws, or rather must always be considered an “employer.”<sup>15</sup> The NLRB’s judgment had wavered over time—coming down on the side of “employee” status for the 1100 foremen involved in *Packard*, but seemingly adopting another view in other cases. Whether the NLRB had reached an impermissible interpretation of the Labor Act was, the Court declared, a “naked question of law,” on which the agency’s view counted for naught.<sup>16</sup>

Reconciliation is possible if one understands the question as one of boundary definition—could workers who were “foremen” ever be statutory employees? Put this way, it is a question to which *Skidmore* might have been relevant, but not *Hearst*. While the Justices agreed with the Board that *Packard*’s foremen might possibly be characterized as “employees,”<sup>17</sup> they were deciding not who was an employee, but where the boundary for the Board’s permissible determination of that question lay. The extent of the Board’s authority presented an irreducibly judicial question, in *American Trucking*’s terms was “exclusively a judicial function.” The thing to note is that the Board’s vacillation on the issue provided a standard reason, under the cases captured in *Skidmore*, for the Court to disregard its views.

Seventy years ago, then, *Skidmore* and *Hearst* combined to frame two propositions: first, that when courts are interpreting statutes, they may sometimes have reason to give weight to agency views; and second, that to the extent Congress empowers an agency to act using language of uncertain meaning, it may also empower the agency reasonably to determine that meaning within the resulting ambit of uncertainty, subject not to judicial redetermination but to judicial oversight of its judgment for reasonableness.

Four decades later, Justice Stevens authored *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>18</sup> the opinion whose thirtieth birthday is the occasion for this symposium. Written for a unanimous (although short-handed) Court whose Justices seemed to have had no

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13. 330 U.S. 485 (1947).

14. *Id.* at 488 (citing National Labor Relations Act, 29 U.S.C. § 152).

15. *See id.* at 486.

16. *Id.* at 493.

17. *Id.* at 497–98.

18. 467 U.S. 837 (1984).

thought that they were doing anything momentous,<sup>19</sup> it can be understood to have universalized *Hearst*. *Chevron*, that is, created a presumption that to the extent any statute conferring authority for its administration on a particular agency lacked a fixed meaning, the room its terms left open had the effect that the *Hearst* Court had found to be explicit in the NLRA's use of the term "employee." The uncertainties were to be regarded as delegations to those agencies of a responsibility reasonably to choose among the possibilities the statutory language offered. If the Justices found nothing momentous or controversial in this, of course they were wrong. *Chevron* has become the most cited of all opinions in the administrative law canon, and it seems as well to have generated the largest body of scholarly literature.

One quails at the thought of adding further to so many views of the elephant, but a surprise in the decision last Term in *City of Arlington v. FCC*<sup>20</sup> incites it. The surprise? In Justice Scalia's majority opinion and Chief Justice Roberts's dissent for himself and Justices Kennedy and Alito, 184 years of what we have recently been calling *Skidmore* deference simply disappeared. Save once in Justice Breyer's lonely concurrence in the result,<sup>21</sup> there is not a mention of the concept—indeed, its relevance is effectively denied—in opinions signed by eight of the Justices.

#### SOME FURTHER BACKGROUND TO THE DISCUSSION OF *CITY OF ARLINGTON*

An intermediate development that underscores the surprise should be mentioned. *Hearst* (that is to say, *Chevron*'s direct ancestor) and *Skidmore* appear side by side in *United States v. Mead Corp.*,<sup>22</sup> a case in which an agency (the Customs Bureau) had given uncertain statutory language a particular meaning, but without acting in the manner in which Congress had intended for its acts to be juris-generative—that is, authoritative for any case but the one before it. Justice Souter, writing for eight, thus treated the interpretive task as wholly the courts'—*Chevron* did not apply.<sup>23</sup> Nonetheless, in reaching its own judgment, in its own interpretation, he wrote, citing *Skidmore*, a court should observe the practice of centuries and accord appropriate weight to agency views.<sup>24</sup> Justice Scalia wrote a lonely and furious dissent—*Chevron*, he argued, had consigned *Skidmore* to the waste-bin of history.<sup>25</sup> There was no room for a second proposition about deference; it had to be all (that is, *Chevron*, which he would have applied) or nothing. The *Skidmore* formulation, he argued, was just too weak, an invitation to judicial manipulation.<sup>26</sup> Justice Souter's response to his fulminations is, for me, a classic:

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19. Thomas Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 398 (Peter L. Strauss ed., 2005).

20. 133 S. Ct. 1863 (2013).

21. See *id.* at 1876 (Breyer, J. concurring).

22. 533 U.S. 218 (2001).

23. *Id.* at 221.

24. See *id.* at 227–30.

25. See *id.* at 239–40 (Scalia, J., dissenting).

26. See *id.* at 241.

Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect *Chevron* deference.<sup>27</sup>

"Deference" is only one proposition concerning judicial review where one might observe a contrast between simplifications to a single standard, and tailoring to variety. This was hardly the first occasion on which Justice Scalia's preferences for categorical simplicity led him into what for many scholars of administrative law—as he once had been—were remarkable surprises.

As a court of appeals judge, Judge Scalia had similarly attempted to reduce to singular terms standards of review that were binary by statute, and even more complex in practice. *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*<sup>28</sup> required review both of an on-the-record adjudication, under the Administrative Procedure Act's (APA) "substantial evidence" test,<sup>29</sup> and of a rulemaking, subject to arbitrary and capriciousness review.<sup>30</sup> Ignoring both the standard textualist trope that different verbal formulations in a statute require different attributions of meaning, and the commonplace difference between appellate review of a district court judge's findings of fact ("clearly erroneous"?) and a jury's ("no reasonable juror could find"?), Judge Scalia asserted that it would be impossible to imagine or administer more than one standard of review of administrative findings of fact.<sup>31</sup> In its practical administration, even arbitrary and capriciousness review itself is highly variable.<sup>32</sup> Just as we treat "preponderance," "clear and

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27. *Id.* at 236–37 (majority opinion). Justice Souter adds:

It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule. But *Chevron* itself is a good example showing when *Chevron* deference is warranted, while this is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done.

*Id.* at 237 & n.18.

28. 745 F.2d 677 (D.C. Cir. 1984).

29. 5 U.S.C. § 706(2)(E) (2012).

30. *Id.* § 706(2)(A).

31. *Ass'n of Data Processing Serv. Org.*, 745 F.2d at 680–86.

32. *Compare* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (hard-look review of important rules), *with* Camp v. Pitts, 411 U.S. 138 (1973) (soft-

convincing,” and “beyond a reasonable doubt” as identifying different, if not logarithmically reducible zones of confidence in affirmative fact-finding, “no reasonable juror could find,” “arbitrary and capricious,” “unsupported by substantial evidence on the record as a whole,” and “clearly erroneous” can readily fit different places in the other half of the judicial scale of confidence in (another’s) fact-finding, between zero and “I find, de novo.” Justice Scalia’s contrary view—that the two administrative review standards are each identical to the jury review standard—ultimately is grounded in a 1939 opinion of the Supreme Court<sup>33</sup> enunciating the review standard that the Court later found the APA to have rejected, in what had been its most cited administrative law opinion before *Chevron, Universal Camera Corp. v. NLRB*.<sup>34</sup>

In *Universal Camera*, the Court had found in the APA’s adoption of the “substantial evidence” test the expression of a congressional “mood” requiring closer review of agency fact-finding in cases to which the test applied.<sup>35</sup> Judge Scalia’s court, as others, had found that same “mood” in congressional statutes that required “substantial evidence” review of a particular agency’s rulemaking, albeit those rules were adopted under procedures that normally would invoke “arbitrary or capricious” review.<sup>36</sup> In 1999, the “substantial evidence” test would be associated with the more demanding “clearly erroneous” standard reviewing bench trial findings of fact in *Dickinson v. Zurko*.<sup>37</sup>

*Universal Camera* again received the back of Justice Scalia’s hand in 1998, when he authored the Court’s surprising<sup>38</sup> opinion—again involving factual review—in *Allentown Mack Sales and Service, Inc. v. NLRB*.<sup>39</sup>

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touch review of informal adjudication), *with Am. Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987) (ordinarily highly permissive review of refusal to accept rulemaking petition).

33. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939).

34. 340 U.S. 474 (1951).

35. *Id.* at 487.

36. *See generally Indus. Union Dept. AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991); *AFL v. OSHA*, 965 F.2d 962 (11th Cir. 1992).

37. 527 U.S. 150, 162–63 (1999) (“The court/agency standard . . . is somewhat less strict than the court/court standard. But the difference is . . . so fine that . . . we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.”).

38. *See, e.g.*, 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 11.2, at 775 (4th ed. 2002) (“The majority opinion is extraordinary in terms of its degree of departure from the Court’s traditional approach to the substantial evidence test.”); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1429 n.152 (2004) (“Some scholars point to the recent case of [*Allentown Mack*] as illustrative of a new era of intense examination of agency factfinding.” (citation omitted)); Note, *Judicial Review Gone Awry: The Supreme Court Rewrites the NLRB’s Unitary Standard in Allentown Mack Sales & Service, Inc. v. NLRB*, 77 N.C. L. REV. 1925 (1999).

39. 522 U.S. 359 (1998).

## CITY OF ARLINGTON

In *City of Arlington v. FCC* the underlying question was whether the FCC had the authority under its statute to define what would presumptively be “a reasonable period of time” for state or local governments to act on applications for the siting of wireless facilities.<sup>40</sup> The Court framed the issue for its decision as being whether the *Chevron* framework applied to its review of this question.<sup>41</sup> With Chief Justice Roberts in dissent, assignment of the majority opinion fell to the senior sitting Justice—Justice Scalia—and, given this opportunity, he assigned the opinion to himself. By sleight of hand, perhaps, he appears to have accomplished in *City of Arlington* the proposition for which he alone argued in *Mead*. In majority and dissent, for eight, deference means only one thing, *Chevron*. *Skidmore* and its many predecessors have disappeared.

That the *Chevron* framework would apply was to some extent a forgone conclusion—the FCC was acting formally, with evident juris-generative intent. The real question would be how the decision framing the FCC’s authority was allocated between agency and court—to what extent the Court would decide issues for itself (as in *Hearst* it had concluded that neither state law nor a general federal meaning of “employee” controlled, but rather a definition responsive to national labor policy, the assigned bailiwick of the NLRB), and to what extent it would simply review for “reasonableness” the exercise of an authority it had found to be assigned to another. Justice Scalia, for five, treated the first of these questions (what were the outer limits of agency authority) as if it were simply a matter of textual analysis: “Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”<sup>42</sup> Implicit here is that “the bounds of reasonable interpretation” are for judicial and not agency determination. And later, to the same effect: “The question in every case is, simply, whether the statutory text forecloses the agency’s assertion of authority.”<sup>43</sup> And, finally: “Where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow,” a matter to be determined “rigorously.”<sup>44</sup>

These are the questions of *Chevron*’s first step, and thus *these* questions are for the court, not the agency. They are, moreover, questions for a court applying “traditional tools of statutory interpretation”—tools which, until this day, would have included appropriate (that is to say, *Skidmore*) deference to agency views. Wholly missing from Justice Scalia’s opinion, however, was any suggestion that agency views would influence the decision how far ambiguity would fairly allow, what the statutory text forecloses, or what *are* the bounds of reasonable interpretation. Instead he takes the question to be whether agency views respecting its “jurisdiction” under an ambiguous statute are in any respect different from its other

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40. See 133 S. Ct. 1863, 1866–68 (2013).

41. See *id.*

42. *Id.* at 1868.

43. *Id.* at 1871.

44. *Id.* at 1874.



conclusions how to act within the space its statute affords it, and concludes at length that they are not. Any views within “the bounds of reasonable interpretation” are voiced at *Chevron*’s second step and so are entitled to *Chevron* deference. How those bounds are to be set—in effect, how the questions of “authority” that remain for judicial determination differ from the questions of “jurisdiction” on which agency views are entitled to *Chevron* deference—is simply not addressed. The 184 years of precedent captured in *Skidmore* have disappeared.

The Chief Justice’s dissent, joined by Justices Kennedy and Alito, underscores Justice Scalia’s coup in removing *Skidmore* and its many predecessors from view. He expresses concern that the majority, by extending the *Chevron* framework to issues of “jurisdiction,” has compromised the constitutionally necessary authority of the courts to have the final, independent say what the law is. “An agency cannot exercise interpretive authority until it has it; *the question whether an agency enjoys that authority must be decided by a court, without deference to the agency*. . . . [A] court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.”<sup>45</sup> But in *American Trucking*, as we have seen, the Court had readily reconciled what we have until now known as *Skidmore* deference with the necessary authority of courts finally to say what the law is.<sup>46</sup> Its reasoning soon became *Skidmore*, not *Chevron*. One can readily agree with the dissent’s proposition that “[w]hether Congress has conferred such power is the ‘relevant question[] of law’ that must be answered before affording *Chevron* deference,”<sup>47</sup> without at all having to agree that “the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.”<sup>48</sup> Without *Chevron* deference, yes; without *Skidmore* deference, no.

If one puts aside the verbal tussling over “jurisdiction,” much if not all of the disagreement disappears. What are the boundaries of the agency’s authority, conferred by Congress, remains a judicial question, as it must be. Could recognizing the bearing of agency views at the initial stage of the *Chevron* inquiry ever make a difference? Justice Scalia calls up *FDA v. Brown & Williamson Tobacco Corp.*<sup>49</sup> and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*<sup>50</sup> (among many other cases) as two cases in which *Chevron* had been applied (as indeed it was) “to agencies’ construction of the scope of their own jurisdiction,” and in each of these cases to an “expansive construction of the extent of its own power [that] would have wrought a fundamental change in the regulatory scheme.”<sup>51</sup> But these were also cases in which the agency interpretations

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45. *Id.* at 1877, 1879–80 (Roberts, C.J., dissenting) (emphasis added).

46. See *supra* note 5 and accompanying text.

47. *Arlington*, 133 S. Ct. at 1880 (Roberts, C.J., dissenting).

48. *Id.* at 1877 (Roberts, C.J., dissenting).

49. 529 U.S. 120 (2000).

50. 512 U.S. 218 (1994).

51. *Arlington*, 133 S. Ct. at 1872 (majority opinion).

were “permissible” as a textual matter, as heated dissents amply demonstrated.<sup>52</sup> Why did that not suffice? Agencies operating within their judicially determined *Chevron* space may change their views from time to time; their decisions do not fix statutory meaning in the ways that court decisions do, and they are expected to vary in their views as changing circumstances warrant. And the agencies involved in these cases had ample reason to change their view of their governing texts. In the one case, evidence had emerged of cigarette companies covertly manipulating the nicotine content of their products to induce addiction; in the other case, the supplanting of land lines by microwave transmission had undercut the natural monopolies telephone companies had to that point enjoyed, and thus undercut as well the need for rate regulation.

The centuries-old judicial tradition of giving weight to agency views was premised on stability, participation in the legislative process, and superior knowledge of congressional purpose; changing views of statutory meaning would undercut it. If ordinarily agency views respecting their authority would be entitled to weight, in each of these cases the agency’s departure from its own long-established understandings of its powers signaled danger, not simply an expectable revision of policy to keep pace with changing times and social circumstances. While not mentioning *Skidmore* by name, the majority in these cases was able to stop its inquiry at the first step, on finding an impermissible meaning given earlier, stable agency views that commanded respect.

Justice Scalia was the author of *MCI* and joined *Brown & Williamson*. So he agrees that the boundaries of agency authority are not movable over time, that the space, the authority, an agency has, remains a matter for judicial determination and for determination not simply as a matter of “permissible” textual meaning. That determination, as Justice Stevens wrote in *Chevron*, is to be made employing the “traditional tools of statutory interpretation.”<sup>53</sup> And few of those tools are more traditional than the one that was first voiced by the Court in 1827, repeatedly invoked over the ensuing years, and captured by Justice Jackson’s formulation in *Skidmore*.

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52. At issue in *MCI* was the FCC’s statutory authority to “modify” its rate regulation. 512 U.S. at 220. As a dissent made clear, “modify” would bear the FCC’s meaning. *Id.* at 239–42 (Stevens, J., dissenting). For the majority, however, considering the state of telecommunications technology in the 1930s, when the statute was enacted, the meaning the FCC now wished to give it was unsustainable—it was for Congress, not the Commission, to effect such a change in FCC rate regulation, however understandable the change might be in light of technological changes and the current fashionability of deregulation. *See id.* at 231 (majority opinion). In *FDA v. Brown & Williamson*, the FDA had adopted new regulatory measures in relation to tobacco products, relying on both increased evidence of the risks to human health created by their use and commercial behavior by manufacturers manipulating and concealing the addictive qualities of nicotine, whose pleasurable effects give humans the reason to use it. *See generally* 529 U.S. 120 (2000). Statutory definitions of “drug” readily reached nicotine and of “device,” cigarettes. But the agency’s long-held view that it had no regulatory authority over tobacco products unless benefits to health were claimed, repeatedly expressed to Congress, were an essential element of the Court’s conclusion that the FDA had acted outside its statutory authority. *See id.* at 161.

53. *Chevron*, 467 U.S. at 843 n.9.

The ostensible renunciation of long-established precedent is not the only mischief to be found in Justice Scalia's opinion. In emphasizing that the *Chevron* Step Two question is whether an agency interpretation is "permissible"—that is, it would seem, simply within the textual bounds of the authority the Court finds Congress to have given it—his opinion diverts attention from, if it does not entirely repudiate, the judiciary's statutory responsibilities under the APA. Just as choosing to emphasize *Chevron*'s somewhat misleading diction about "precise meaning" has concealed from some judges using it the judiciary's responsibility to establish the boundaries of the ambiguity within which agencies may act, quoting *Chevron*'s use of "permissible" without considering the opinion's considerable attention to the reasonableness of the Environmental Protection Agency's choice at issue in that case obscures the APA's command to judicial oversight of agency action. 5 U.S.C. § 706(2)(A) requires courts in *every* review of agency action controlled by the APA to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"—that is to say, reasonable.

Cherry-picking language from earlier opinions without attention to the context in which it was used is a familiar enough judicial failing.<sup>54</sup> Language in Justice Steven's opinion in *Chevron* does tend to elide the possible difference between those interpretations that are merely "permissible" and those that are also "reasonable"—not just possible, but also well explained, well related to the materials known to the agency, based on appropriate factors and not based upon inappropriate ones. Yet the detail and care of the *Chevron* opinion makes clear that this prescription had been followed, notwithstanding the opinion's occasional misleading diction. Justice Souter's opinion in *Mead*, describing *Chevron*, twice equates its second step with Section 706(2)(A) review—as indeed one would think it must. A court could hardly ignore that statutory command and conclude that mere permissibility, without regard to reasonableness, suffices. But "permissible" appears again and again in Justice Scalia's discussions of *Chevron*, and "reasonable" does not. Quoting only that diction, his opinion concludes: "If . . . the agency's answer is based on a permissible construction of the statute," that is the end of the matter.<sup>55</sup> For all that appears, and despite Section 706(2)(A), the reasonableness of its judgment is of no concern.

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54. Cf. Adam Liptak, *Steady Move to the Right*, N.Y. TIMES, June 28, 2013, at A1 ("Chief Justice Roberts has proved adept at persuading the court's more liberal justices to join compromise opinions, allowing him to cite their concessions years later as the basis for closely divided and deeply polarizing conservative victories.")

55. *Arlington*, 133 S. Ct. at 1868.