"Deference" is Too Confusing – Let's Call Them "Chevron Space" and "Skidmore Weight"

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October 10, 2011
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Administrative law scholars have leveled a forest of trees exploring the mysteries of the Chevron approach contemporary judges take to reviewing law-related aspects of administrative action. Without wishing to deny for a moment that judicial practice has been inconstant – influenced by the importance of the matter, by the accessibility of the issues to non-expert judges, by politics, and by the earned reputations of differing agencies – I write this short comment to suggest that there is an underappreciated, appropriate, and conceptually coherent structure to the Chevron relationship of courts to agencies, a structure whose basic impulse may be captured by the concept of “allocation.”

“Contemporary” is an important qualification to the topic sentence of the preceding paragraph. My colleague Thomas Merrill has just published a striking account of the emergence of our appellate review model during the Progressive era and up to the New Deal, as America’s industrialization catalyzed paradigm shifts in the way Americans thought about the uses of government and judges resisted the resulting statutory changes. The resulting allocation of what might simply have been judicial business to alternative, “administrative” bodies, he persuasively argues, prompted the development of an appellate review model quite distinct from anything in prior American law, or other parts of the common-law world. His analysis draws particularly on judicial shifts in approach to the work of the Interstate Commerce Commission in the wake of a statute reflecting “an upsurge in public dissatisfaction with aggressive judicial review of [its] decisions.” Renouncing its prior willingness to decide matters de novo, to

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3 Betts Professor of Law, Columbia Law School.
4 A Lexis search of law reviews and journals for (Title(Chevron) and 467 US 837) returned 184 entries; a search of the same data base for Chevron pre/5 (two-step or two step!), 587. By contrast, (Title(State Farm) and 463 US 29) returned only 1 entry; State Farm and (Automobile Manufacturers or Automobile Mfrs.) and 5 U.S.C. 706(2)(A), 15.
8 Lochner v. New York, 198 U.S. 45 (1908) is the conventional canon, but consider also Johnson v. Southern Pac. Co. 117 F. 462 (8th Cir. 1902), rev’d 196 U.S. 1 (1904), a stalking horse for this phenomenon in Hart & Sacks, The Legal Process (Eskridge and Frickey, eds., 1994); the legislative-judicial struggles over labor injunctions during this period; and the distrust of courts that strongly influenced the creation of worker compensation tribunals (Louis Jaffe & Nathaniel Nathanson, Administrative Law Cases and Materials 133-36 (1961)).
9 Merrill, at 953; the statute was the Hepburn Act of 1906, Ch. 3591, 34 Stat. 584.
substitute judicial for administrative judgment, yet still engaged, the Court developed the contemporary model as an essentially political reaction to that statute. Courts might be yet further weakened if they could not come up with an acceptable formula for what the Senate had been unable to resolve in months of weary debate.

“Allocation,” in my judgment, is just the right key. It occurred with increasing frequency and range as the century progressed, and one readily sees how it unlocks other puzzles as well. Previously, the work of administrators, unless somehow analogized to the function of a special master, was subject to correction, if at all, simply for ultra vires illegality; courts feared that to do more, as he shows us, might taint the judicial function with executive administration, forbidden by Article III’s devolution of only the judicial power on federal courts. Faced both with broad and increasing congressional allocations of responsibilities to administrative agencies and with explicit statutory responsibilities to supervise their resulting actions, courts came to the view that these delegations could be tolerated if and only if the responsibility of review was accepted. Agencies must be subject to judicial controls that reached into their assessment of factual and law-applying issues – not to displace their responsibilities, but to assure their responsible, rational exercise. In 1946, the Administrative Procedure Act would embody this change. The issue thus has remained one of “allocation,” but with that allocation understood to have been purchased with the coin of continuing judicial control. “Congress has been willing to delegate its legislative powers broadly – and courts have upheld such delegation,” Judge Harold Leventhal once perspicaciously remarked, “because there is judicial review to assure that the agency exercises the delegated power within statutory limits.”

Professor Merrill, appearing to regret these developments, concludes with the wistful concession that “the appellate review model is so deeply entrenched in American political culture that it is impossible to imagine wrenching free from its influence. The best that can be expected is that the courts, especially the Supreme Court, will continue to whittle away at the scope of judicial authority over questions of policy, leaving courts the functions of policing the boundaries of administrative action.” “Policing the boundaries,” though, suggests a judicial role more limited than avoiding “judicial authority over questions of policy” necessitates. Proper respect for legislative allocations, we would both agree, requires that judges abjure engagement with policy decisions allocated to agencies; a court must understand that it is “not empowered to substitute its judgment for that of the agency” where an agency, not a court, is the designated player. But (as in sporting events) if the courts are to be referees and not players – overseers and not deciders – their function may nonetheless include supervising an agency’s play within its

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10 Prof. Merrill at one point in his essay evokes a relatively early judicial reaction to the breadth of authority that had been delegated to the Federal Trade Commission, that is readily understood as a response to delegation concerns.


12 Ethyl Corp. V. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976). One may note that Judge Leventhal is also the acknowledged progenitor of “hard look review” – an approach which, whatever its impact on agency behaviors, Congress has shown no sign of repudiating.

13 At 1003.


designated boundaries, as well as declaring when it has overstepped them. Granted that judges, like anyone, may be tempted to stray from their proper roles, nonetheless permitting them to consider the relationship between the facts known to the agency and its conclusions in addition to the “boundary” question of ultra vires, does not authorize them to decide questions of policy. Today’s administrative review model embraces both elements of refereeing, and in this short essay that embrace is not seen as problematic.

I. Judicial engagement with administrative findings of fact

While the bulk of this essay is concerned with judicial review of issues of interpretation, not fact-finding, it may be useful briefly to address the possible confusion between standards of review, and the permissibility of a review relationship regarding factual findings. It can hardly be surprising that, once they have moved from themselves finding the facts following one or another of the available verbal formulae,\textsuperscript{16} courts analogize to the standards they apply in other review settings – that a rational (fact-grounded) basis for judgment cannot be imagined (constitutional review of economic legislation), that a jury of reasonable persons could not plausibly have reached this conclusion on the evidence offered it, or that a trial judge’s jury-independent finding of fact was “clearly erroneous.” While hardly mathematically precise, all these formulae recognize that the reviewing judge is to accept judgments by others that she might not have reached on her own – that is, she must accept findings in whose truth she has less than the 50% confidence \textit{de novo} decision would connote. Their variance reflects differences in the institutions whose judgments she is reviewing. Thus, she has less of an obligation to accept jury findings than legislative findings (for which an imagined factual basis will do); but she has more of an obligation to accept jury findings than to accept the independent factual findings of a trial judge sitting without a jury.

Administrative law’s two fact review standards – “arbitrary and capricious” and “unsupported by substantial evidence on the record as a whole” might seem to have a similar less/more relationship – “substantial evidence,” like “clearly erroneous,” requiring greater proximity to 50% confidence in the correctness of the outcome. Their judicial treatment, however, has been thoroughly confused. On the one hand, the Court has treated “substantial evidence” as marginally, perhaps imperceptibly less demanding than “clearly erroneous”\textsuperscript{17} and found in it an expression of congressional “mood” for more intense factual scrutiny.\textsuperscript{18} On the other, Justices have described both arbitrary-capricious review and substantial evidence review as analogous to the review of jury verdicts, as if there were no difference in intensity between them.\textsuperscript{19}

Perhaps the more vexing question has been whether a mere review relationship is permissible at all – whether the allocation of fact-finding responsibilities to an agency does not violate the Constitution’s assignment of the judicial power – all of it – to Article III judges. If there would

\\textsuperscript{16} Proof by a preponderance of the evidence (50.0001% persuaded), by clear and convincing evidence (considerably (?) more than that), or beyond a reasonable doubt (virtually certain).

\textsuperscript{17} Dickinson v. Zurko, 529 U.s. 150 (1999)

\textsuperscript{18} Universal Camera Corp. V. NLRB, 340 U.S. 474 (1951); compare Industrial Union Dep’t, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C.Cir. 1974).

\textsuperscript{19} Allentown Mack Sales and Service v. NLRB, 522 U.S. 359 (1984); cf. ADAPSO v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984)(Scalia, J.)
be no need for courts to be involved – if Congress could constitutionally allocate authority to executive branch actors without at all engaging the judiciary – there could be no such objection should Congress choose nonetheless to create a cause of action testing agency results. That “case or controversy” would be proper judicial business, to be carried out as Congress has instructed. But suppose a setting in which judicial participation is not simply up to Congress to choose, in which the assignment could not constitutionally be made absent judicial involvement? As Professor Merrill relates, when that question came before the Court in Crowell v. Benson, 20 at the end of the period his essay considers. In Crowell, the Court solved the problem by treating the agency concerned, the United States Employees’ Compensation Commission, as a judicial adjunct, comparable to a special master. That commission, like the workers’ compensation boards created in the states in large part to avoid judicial resistance to changes in the common law treatment of workplace injury, served only to determine the facts of a worker’s claim to compensation from his employer under the statutory scheme, and (as generally today in relation to agency action) courts were given only limited authority to review its conclusions of facts. Here was a remedy Congress was not constitutionally free to create without the participation of judges; but the special master analogy, treating the USECC as if it were acting within Article III, rescued the measure.

Limitations on the judicial adjunct analogy have twice proved fatal to congressional assignments of authority to United States bankruptcy judges. Bankruptcy judges unquestionably act within the aegis of the judicial branch – today, like U.S. Magistrates, appointed by the judiciary itself, but lacking the full protections of tenure and financial security required for the Article III judiciary. Twice the Court has held, once in a fractured opinion that produced only a judgment of the Court 21 but just this past Term by a simple majority, 22 that Congress had unconstitutionally allocated a degree of authority to them that could properly be assigned only to an Article III judge.

The USECC, moreover, was essentially a single-function body – it only adjudicated, so that the metaphor of a special master was readily available. In a way not seriously explored, matters become the more complex with adjudications by full function agencies that resolve essentially private disputes – the National Labor Relations Board, the SEC or the CFTC enforcing their statutes or regulations on consumer complaint that may lead to the assessment of a fine. The Court has recently and properly characterized the full range of authority Congress has conferred on these agencies – to adopt regulations, to bring proceedings to enforce their rules and statutes, and in the first instance to decide whether violations have occurred – as executive authority. 23 Unlike bankruptcy judges, these agencies cannot plausibly be located within the judicial branch; characterization as a judicial adjunct is simply unavailable. Nor can one imagine the judgment that, for these matters, Congress would be free entirely to omit judicial involvement – completely to substitute agencies for courts. The arrangements are accepted only because agency outcomes are not self-enforcing, because ultimately a court will assess their propriety under the prevailing standards of review. Adequate judicial review, the Court has held, is the condition of accepting

20 285 U.S. 22 (1932).
these allocations of quasi-judicial function.\textsuperscript{24}

In the end, in my judgment, the acceptability of congressional allocations of some decisional authority, whether exercised by trial-type or by legislation-like processes, will come down to the same question – the adequacy of judicial controls to assure legality. Congress’s delegation of quasi-legislative or quasi-judicial authority is conditioned, as Judge Leventhal wisely observed, on Congress’s provisions for judicial review – on, that is, the appellate review model. It is not that the provision for review is simply a voluntarily undertaken precaution by Congress; the constitutional validity of the allocation of agency authority turns on a court’s capacity to assure legality in its exercise.

\textit{II. Reconciling an “exclusive” responsibility for statutory interpretation with delegations}

Now, then, to the matter at hand – an effort to suggest that there is a relatively simple and coherent structure for the law-related side of the conventional model, as it has emerged over the years, grounded in the concept of “allocation.” To do this, the following paragraphs will attempt to steer clear of commonly used review concepts that may muddle rather than clarify the structure’s operation. Thus, insofar as is humanly possible, the paragraphs following will avoid the term “deference.” Like “discretion,” “deference” is a highly variable, if not empty, concept. It is sometimes used in the sense of “obey” or “accept,” sometimes as “respectfully consider.” Instead of “\textit{Chevron deference}” and “\textit{Skidmore deference},” I hope to persuade you to think instead in terms of “\textit{Chevron space}” and “\textit{Skidmore weight}.”

“\textit{Chevron space}” denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints, its \textit{allocated} authority. The whole idea of “agency” is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it. What that zone is requires defining – more on this to come – but within that zone, within what we shall call its \textit{Chevron space}, the whole point of the empowering legislation is to allocate authority to the agency. Faced with the exercise of such authority, the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field, and that the game is played according to its rules; it is not for them themselves to play the game. If they find a constitutionally valid allocation of authority to another body, it simply follows that that other body has the authority to decide the issues allocated to it, subject to such supervision as oversight entails. Courts are, of course, ultimately responsible for deciding questions of law; but one such question is how much authority has validly been allocated elsewhere, and the answer to that question is an element of the law the court is ultimately responsible to find and obey.

“\textit{Skidmore weight}” addresses the possibility that an agency’s view on a given statutory question may in itself warrant respect by judges who are themselves unmistakably responsible to decide the question. Congress sometimes creates administrative bodies to which it allocates not responsibility for direct, legally effective action, but rather a duty to provide guidance and to

\begin{footnote}{24} E.g., CFTC v. Schor, 478 U.S. 873 (1986). \textit{Schor} approved a sort of pendant jurisdiction over state law counterclaims closely related to a consumer’s effort to enforce CFTC law against a broker. It is striking that the only issue of concern to the Court was the counterclaim. The Court did not notice its easy assumption that Congress could authorize a private individual to invoke the jurisdiction of an administrative agency in an action to collect money damages from another private person for his violation of (regulatory) law.\end{footnote}
invoke judicial enforcement. The Labor Department’s Wage and Hour Division, responsible for the guidance concerning the Fair Labor Standards Act that was in play in Skidmore, is typical; it does not find facts or seek internally to enforce the Act, but it can bring injunctive enforcement actions in court; and it issues advice to enquiring businesses about the Act’s bearing on their concerns – 750,000 letter rulings per year in the late ‘60s, of which about 100,000 came signed by the Administrator.25 Other agencies, ones that Congress has empowered to act with legal force, sometimes choose not to exercise that authority but rather to guide – to indicate desired directions without undertaking (as they might) to compel them. In all of these contexts, just because the agency has not been authorized to act definitively, or if so authorized has not chosen to do so, the courts may ultimately be responsible for decision on issues about which guidance has been given. Ought they, then, simply to ignore such views as the agency may have expressed? Courts will encounter the questions involved only sporadically, haphazardly, and without any underlying responsibility for the statutory scheme. In contrast, the agency may constantly be issuing guidance about statutes to which it relates constantly, as a whole, and with respect to which it is expected to assist implementation in a coherent, intelligent way. It may have helped to draft the statutory language, and was likely present and attentive throughout its legislative consideration. Its views about its meaning may have been shaped in the immediate wake of enactment, under the enacting Congress’ watchful eye. All of these are reasons why the courts, in reaching their decisions, might accord these views “Skidmore weight.” It is not only that they have the credibility of their circumstances, but also that they can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest (that is to say, the most likely to be litigated) issues with little experience of the overall scheme and its patterns.

Suppose that Congress has created some “Chevron space” for a responsible agency, and a court finds itself compelled by private litigation to decide a matter falling within that space. Congress has given the FCC responsibility for defining the difference (if any, in our information age) between telecommunications services and data services, whether offered over land wires or wirelessly. Yet private litigation may require a court to essay the same definition. If this happens, is that court’s decision more than provisional? As between the parties to a dispute, the New Jersey Supreme Court or the Second Circuit deciding a point of New York law must, as best it can, finally resolve the particular dispute thrust upon it; yet, in doing so, it will have no illusion that it is settling New York law on the point. Definitively fixing New York law is the business of the New York courts. Similarly, in the supposed case, Congress has allocated definitive resolution (within the bounds of its Chevron space) to the FCC. The situations seem quite the same.26

A. Laying the Foundations

(1) Weight


Skidmore v. Swift & Co., a Jackson opinion of 1944, is the conventional citation for the proposition that, at least in some circumstances, courts are obliged to take agency views about statutory meaning into account. The Administrator of the Department of Labor’s Wage and Hour Division had set forth views about the application of the Fair Labor Standards Act to such circumstances as appeared in the case, which the courts below simply ignored in concluding that the Act’s language did not permit its application.

“There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. ... The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. ... They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

The last paragraph of the quoted text is the matter invariably quoted when invoking Skidmore weight.

While in the preceding sentence Justice Jackson adverts to prior practice without citation, one can find in cases reaching back well into the 19th Century the proposition that settled administrative interpretations, or administrative interpretations contemporaneous with enactment, are “entitled to very great respect,” and ought not be disturbed if possibly within the meaning of statutory language, or “overruled without cogent reasons.” Such propositions

27 323 U.S. 134 (1944)
28 At 139.
31 United States v. Moore, 95 U.S. 760, 763 (1878).
were repeated time and again, in connection with public lands administration, tax administration, and ICC actions. Drawing on this long history, Justice Cardozo penned an influential proposition in a case involving the tariff laws:

True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. United States v. Moore, 95 U.S. 760, 763; Logan v. Davis, 233 U.S. 613, 627; Brewster v. Gage, 280 U.S. 327, 336; Fawcus Machine Co. v. United States, 282 U.S. 375; Interstate Commerce Commn. v. N. Y., N. H. & H. R. Co., 287 U.S. 178. The practice has peculiar weight when it involves a 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. Fawcus Machine Co. v. United States, supra.35

An ICC case decided seven years later ratifies this sense of Skidmore’s historic pedigree. In one breath, the majority opinion in United States v. American Trucking Ass’ns, Inc.36 invokes the Marbury v. Madison tradition of judicial supremacy in interpretation: “the interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.”37 In another breath, just a few pages further on, the Court acknowledged the place of agency views for courts performing this “exclusive” function:

In any case [well-established interpretations by responsible agencies] are entitled to great weight. This is particularly 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 Commision’s interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions’ enactment to Congress.”38

This way of framing the proposition well illustrates the “weight” stance that Skidmore would

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32 Logan v. Davis, 233 U.S. 613, 627 (1914) ("the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration, will not be disturbed except for very cogent reasons," citing numerous cases); Swendig v. Washington Water Power Co., 265 U.S. 322, 331 (1924).


35 Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933). The procedural claims at issue in the case would surely have succeeded in an adjudicatory context. The Court denied them, however, characterizing the tariff “hearings” as fundamentally legislative in character. It thus reasserted the fundamental distinction respecting procedural claims reflected in Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S.441 (1915). As an exercise in statutory interpretation, Justice Cardozo’s opinion is remarkable for the sophistication with which it evokes both legislative and administrative practice and understandings.

36 310 U.S. 534 (1940).

37 Id. at ___ (emphasis supplied).

38 Id. at ___.
come to characterize. The exclusive judicial function does not exclude agency views. Once a question of statutory interpretation has been put before a court, it is for the court to resolve the question of meaning. Among the matters indispensable for it to consider, however, are the meanings attributed to it by prior (administrative) interpreters, their stability, and the possibly superior body of information and more embrace responsibilities that underlay them. They may be entitled to great “weight” on the judicial scales. The Skidmore formulation was no innovation, then, but rather rephrased a set of long-established propositions in Justice Jackson’s memorable prose.

(2) Space

As legislation began to supplant the common law at the law’s base, the Progressive Era and then the New Deal, as remarked, increasingly engaged the courts with legislative business. Often enough, that legislation reacted against the common law’s laissez faire, fault-regarding foundations, and sought to provide greater protection for the common man against increasingly complex and sophisticated technology, markets, and corporations. With increasing frequency, as judges defending the common law and its premises proved resistant to these changes (and, as generalists, also showed themselves unlikely to be sound implementers of increasingly specialized and technical responses to society’s industrialization and its effects), this legislation also created administrative agencies responsible to administer the new legislative schemes. A dominant task for a judiciary thus challenged would be to fashion a role for itself that both accepted the reality of these new institutions (and the political will underlying them), and preserved core judicial functions – notably, exclusive responsibility for “the interpretation of the meaning of statutes, as applied to justiciable controversies.”

The Constitution’s text straightforwardly imagines Congress’s assignment of “powers” and “duties” of administration to executive branch actors. From the outset, Congress in making such assignments has allocated statutorily defined elements of discretion to the actors it has created. In the beginning, when as Professor Merrill relates only common law writs were available to review this discretion’s exercise, ultra vires analysis was about all there was to had – albeit that analysis was to be influenced, as has been seen, by a practice of giving significant “weight” to agency views. Marbury v. Madison, the pole star assertion of the “exclusive” judicial responsibility for interpretation, adamantly asserted the impropriety of any judicial supervision over the discretionary actions of the executive branch:

...[W]here the heads of departments are . . . to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable . . .

The province of the court is, solely, to decide on the rights of individuals, not to enquire

\[39\] U.S. Const. Art I, Sec. 8, cl. 18; Art. II, Sec. 2, cl. 1; see also Art. II, Sec. 3 (“take care that the laws be faithfully executed”; emphasis added)

\[40\] Error! Main Document Only. 5 U.S. (1 Cranch) 137 (1803).
how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.\footnote{Id. at 170.}

Willing acceptance of congressional assignments of review functions, however, early replaced “only” and “never.”

… \[W\]e think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which \textit{Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper}. … \[A\]s it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful.\footnote{Murray’s Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 284 (1855) (emphasis supplied).}

By 1930, the Court could cite a baker’s dozen additional cases for the proposition that

Legislative courts … may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.\footnote{Ex Parte Bakelite Corp., 279 U.S. 438, 451 (1929).}

\textit{Crowell v. Benson} was decided three years later, on the eve of the New Deal. Where Congress had assigned an executive and not a judicial function (for the latter, it was the “judicial adjunct” approach that saved the assignment),\footnote{See text at n. 20 above.} \textit{Crowell} reiterated, these “public right” formulations controlled.

The thing to notice in \textit{these} “public right” formulations is the assumption that Congress has no need whatever to provide for judicial engagement, although it may volunteer to do so. While the relationship between Article I “legislative courts” created by Congress (in the executive branch) and Article III courts remains a significant intellectual puzzle,\footnote{See, e.g., Chapter IV, Sec. 2 of Richard Fallon, John Manning, Daniel Meltzer and David Shapiro, Hart and Wechsler’s \textit{The Federal Courts and The Federal System} 324-383 (6th ed. 2009); see also Stern, Ex’r v. Marshall, Ex’r, n. 22 above, and accompanying text.} the assumption that public rights cases are ones in which judicial engagement is \textit{optional} clearly has been undermined by decisions like \textit{Schor}\footnote{N. 24 above.} as well as by judicial reasoning invoking a “due process” right to appellate review (however limited) of discretionary executive action,\footnote{E.g., \textit{Webster v. Doe}, 486 U.S. 592 (1988)} or premising the

\begin{footnotesize}
\footnote{Id. at 170.}
\footnote{Murray’s Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 284 (1855) (emphasis supplied).}
\footnote{Ex Parte Bakelite Corp., 279 U.S. 438, 451 (1929).}
\footnote{See text at n. 20 above.}
\footnote{See, e.g., Chapter IV, Sec. 2 of Richard Fallon, John Manning, Daniel Meltzer and David Shapiro, Hart and Wechsler’s \textit{The Federal Courts and The Federal System} 324-383 (6th ed. 2009); see also Stern, Ex’r v. Marshall, Ex’r, n. 22 above, and accompanying text.}
\footnote{N. 24 above.}
\footnote{E.g., \textit{Webster v. Doe}, 486 U.S. 592 (1988)}
\end{footnotesize}
acceptance of congressional delegations of rulemaking authority on the existence of judicial review adequate to assure the legality of its exercise.\textsuperscript{48} It thus appears that judicial review of the exercise of discretion by the executive, in regulatory contexts, is not merely permissive; for that exercise to be constitutionally valid, it is commanded.

Even so, Congress has allocated the duties subject to review to agencies, not to courts. “The court is not empowered to substitute its judgment for that of the agency.”\textsuperscript{49} Suppose a court were to conclude that the ambiguity of statutory language reflected a congressional design to create a policy space within which resolutions should be achieved by the agencies on which it had conferred duties, not by the courts. An agency’s giving precise shape to imprecise language could as readily be called “interpretation” as “policy effectuation.” Is it necessarily, then, a part of the domain which, as to justiciable controversies, is “exclusively” for the courts?

The poster child for this question is, like \textit{Skidmore}, a 1944 decision of the Supreme Court, \textit{NLRB v. Hearst Publications, Inc.}\textsuperscript{50} \textit{Hearst} required the Court to review a judgment of the Labor Board that regular, full-time persons selling Hearst’s newspapers on the street were its “employees,” and hence subject to the provisions of national labor relations law. Independently reaching the conclusion that these workers were neither necessarily nor impermissibly to be so regarded, the Court explored for itself three possibilities for negotiating the intermediate space the word’s uncertainties offer. First, the term might be understood as invoking state law on the subject— but Congress would not have chosen for the regulation of interstate commerce an approach whose results might vary across neighboring states’ lines. Second perhaps “employee” is a term that has a consistent meaning in federal law, and Congress should be understood to have invoked that meaning— but, the Court found on considering a variety of statutes, it has no such consistent meaning. What’s left is the conclusion that meaning in the “space” between what the word must mean and what it cannot mean should be assigned with a view to national labor policy. And, of course, Congress had allocated the formulation of national labor policy, in relation to the concerns of the National Labor Relations Act, to the Labor Board and not to the courts. The task for the court was oversight— to see to it that the Board had stayed within its allocated space, and within that space had acted reasonably.

To be sure, this decision was doubtless a further element of the post-New Deal Court’s care to subordinate itself to Congress— to abjure the confrontational, legislation-resistant style that seemed to many to have characterized the era that ended with the “switch in time that saved nine.”\textsuperscript{51} Its acceptance of administrative “space” created by statutory imprecision is none the less striking for that. It did not surrender the “exclusive” judicial function of interpretation so much as to refine it: the Court determined, for itself, what the statute could (and could not) mean.\textsuperscript{52} Only what the language left open was allocated to the Board’s “reasonable”

\textsuperscript{48} E.g., Whitman v. American Trucking Assoc., 531 U.S. 457 (2001); and see text at n. 12 above.
\textsuperscript{50} 322 U.S. 111 (1944); \textit{Skidmore} appears in Volume 323.
\textsuperscript{51} See Daniel Ho and Kevin Quinn, Did a Switch in Time Save Nine?, 2 J. of Legal Analysis 69,(2009). Justice Roberts, the timely dissenter from Hearst, certain for himself that “newboys are not ‘employees’” and that “The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.” Justice Roberts was the last Justice sitting at the time to have been appointed before FDR’s election as President.
\textsuperscript{52} Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), often thought to be in tension with Hearst, is
determination – and that because, as the Court found for itself, allocating it there was what Congress must have intended to do. One readily supposes that recognition of such implications in Congress’s decision to create administrative actors reduces confrontation between the two branches, adding to the Court’s standing as a “faithful servant” of the political branches that had taken over the principal responsibility for the legal order from the 19th Century’s common law courts. Like the “switch in time,” signals of respect for Congress’s allocation of duties to administrative agencies and acceptance of Congress’s wish that the courts oversee their performance significantly reduced the interbranch friction that less than a decade earlier had so threatened the Court.

The Administrative Procedure Act, passed soon afterwards, worked no necessary change in this bifurcation of judicial role – with courts to deciding for themselves what were the possibilities of statutory meaning in statutes allocating authority to agencies, but then – within that “space” – policing agency behavior for reasonableness. To be sure, its Section 706, defining the scope of the judicial review for which the APA makes such generous provision, repeatedly emphasizes judicial responsibility for legal issues. The reviewing court is to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” It “shall … hold unlawful and set aside agency action … found to be … in excess of statutory jurisdiction, authority or limitations, or short of statutory right.” Yet, as in Hearst, among the “relevant questions of law” are whether statutory meaning is uncertain and, if so, whether congressional action has committed the areas of uncertainty thus judicially found to agency administration. Interpretation of statutory provisions can produce the understanding that Congress has taken precisely this course, as technological complexities, policy sensitivities, or similar considerations may suggest. “Excess of statutory jurisdiction … or short of statutory right” readily suggests some space between, in which the agency may exercise policy-making discretion. And Sec. 706(2) provides that such exercises of discretion are to be reviewed, in cases of high procedural formality, for “substantial evidence” support, and in all other cases to determine whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

B. Chevron and Beyond

The reader who has come this far has, one hopes, begun to understand why the Court was so unaware of the turmoil its unanimous decision in Chevron would stir up.53 To be sure, the problem has been to some extent the product of Justice Stevens’ infelicitous phrasing in summarizing the Court’s conclusions:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

readily seen to be just such a case. See text at n. 62 below.

intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.¹¹

９ The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Multiple citations omitted] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

¹¹ The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. [Multiple citations omitted.]

“Precise question at issue” and “permissible” suggest both that judicial inquiry is limited to determining whether a statutory provision has a single, determinate meaning; and, if not, that the residual question is only whether the meaning given it by the agency was a possible one – within the statute’s linguistic parameters – so that the judicial inquiry must end without concern for the reasonableness of agency judgment. The two-step process, we have seen, was hardly an innovation, but would have been better expressed (as it appears now to have been understood) as, first, whether the statutory language precludes the meaning attached to it by the agency – the different formulation to be found in the first, case-supported sentence of the Court’s footnote 9, and confirmed by the use of “permissibly” in footnote 11; and, second (as indeed the APA commands), whether in giving the statute the application it did, the agency had acted reasonably.

In general, Chevron’s reasoning process is consistent with this softer understanding. It considers for itself, in great detail, whether the statutory terms at issue in the case, “stationary source,” have a meaning that precludes the understanding of them that the agency had reached (either because a necessary meaning was denied, or an impermissible meaning assigned). It equivocates whether the agency’s action was “interpretation” strictu sensu, or the implementation of a policy judgment permitted by the statutory language, one that could be revisited as changing circumstances might suggest. It is a well-recognized feature of conclusions agencies reach in their Chevron space, affirmed in the opinion itself, that they may be revised, even time and again, as circumstances and reason are found to dictate. Understanding these agency judgments as policy judgments, not interpretations in the judicial sense, is underscored in

⁵⁴ One can find it, for example, in the paragraphs describing judicial review of agency discretion in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, (1971).

⁵⁵ See, e.g., Nat’l Cable and Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005); Negusie v. Holder, 555 U.S. 511 (2009) (“The fact that Congress has left a gap for the agency to fill means that the courts should defer to the agency’s reasonable gap-filling decisions, not that the courts should cease to mark the boundaries of delegated agency choice,” Stevens, J., concurring and dissenting).

⁵⁶ See Ronald Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253 (1997). Since 5 U.S.C. 706(2) requires courts to review not only for ultra vires issues, but also to determine whether agency action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” one wonders how any other conclusion is possible for a law-abiding court.

⁵⁷ E.g., Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F. 3d 1095 (D.C. Cir. 2001).
Chevron’s closing passages, which address the preferability of political to judicial oversight for the programmatic character and level of detail involved in the “stationary source” issue. The opinion addresses the reasonableness of the agency’s approach by relating it to its statutory responsibilities and its understanding of the circumstances within which it was carrying them out.

Seen in this way, Chevron’s sole innovation was to convert Hearst’s finding that (given the implausibility of other approaches) the range of possible meanings inherent in the Labor Act’s use of “employee” reflected an actual congressional creation of space for Labor Board judgment, into a presumption that any “space” created by congressional imprecision in creating agency duties of administration was, similarly, a commitment to the agency for judgment. This “space” model might be represented in the following diagram:

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Impermissible
meaning
(judicially determined)

Necessary
meaning
(judicially determined)

Chevron space
of uncertain
meaning, for
the agency

Impermissible
meaning
(judicially determined)
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The middle ring is the agency’s range of administration, its “Chevron space.” How wide that space is will vary, not only from statute to statute, but also with the predilection of judges to find statutory language more, or less, certain. For a self-confident textualist like Justice Scalia, as
indeed he has asserted, the middle ring may prove to be a good deal narrower than it will be for a Justice more likely to find room in statutory language, as Justice Breyer has proved to be. Its link to delegation issues, made explicit by Justice Stevens’ closing passages, will influence its dimensions as well – contributing, in Justice Scalia’s colorful expression, to a disinclination to find “elephants in mouseholes.”

The boundary-influencing, space-defining factor perhaps most important to note here is “Skidmore weight.” Skidmore weight, as established above, is one of those “traditional tools of statutory construction” Justice Stevens refers to in footnote 9. In the wake of Chevron, there was a fair amount of attention (often derogatory) to the question whether agency conclusions about the space available to their administration was itself entitled to what has conventionally been called “Chevron deference.” To say so – to conclude that courts have only an oversight function in relation to agency self-determinations about jurisdiction – would indeed be in sharp conflict with the proposition that “the interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function.”

No such conflict is entailed in according Skidmore weight to agency judgments about the extent of their Chevron space. The lines defining an agency’s Chevron space must be judicially determined – that element is, irredicibly, a determination of what the law is – but that unmistakably judicial determination should be informed by agency judgments in ways that have been conventional at least since 1827.

(1) Cases Understandable as Judicial Determinations of Permissible or Impermissible Meaning

Law school teaching materials have long questioned whether Hearst, and later Chevron, could be reconciled with decisions that seemed oblivious to agency judgments about meaning. Typical of the former is Packard Motor Car Co. v. NLRB; of the latter, INS v. Cardozo-Fonseca. But both cases can be seen to involve independent judicial determinations of the range of permissible statutory meaning, so that any issue is whether the agency’s judgment is entitled to Skidmore weight.

Thus, in Packard, the question was whether any employee who served as a foreman in some respects could ever be considered a statutory “employee” under the labor laws, or rather must always be considered an “employer,” statutorily defined to include “any person acting in the interest of an employer, directly or indirectly.” The NLRB’s judgment had waivered over time – in this case, coming down on the side of “employee” status for the 1100 foremen involved. This was, the Court declared, a “naked question of law” – i.e., had the NLRB reached an impermissible interpretation of the Labor Act? It presented, then, an issue of boundary definition – Skidmore, and not Hearst. While the Justices agreed with the Board, they accorded its


60 Id. at ___ (emphasis supplied).

61 Edwards’ Lessee v. Darby, 25 U.S. 206, 210 (1827); see n. 29 above, and associated text.


judgment no weight in reaching their conclusion – and, indeed, the Board’s vacillation on the issue provides a standard reason, under Skidmore, for their not doing so.

In Cardozo-Fonseca, the question was whether in considering two different Immigration Act provisions under which an otherwise deportable alien might seek discretionary relief, the Immigration and Naturalization Service had permissibly construed the differing language of the two standards to have identical meaning. One referred to a “well-founded fear” of persecution in the alien’s home country; the other permitted relief if it was “more likely than not that the alien would be subject to persecution.” For the majority, Justice Stevens writing,

The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "any gap left, implicitly or explicitly, by Congress," the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See Chevron ... But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.64

For Justice Scalia, who has consistently resisted double standards – whether for deference to agencies’ interpretations65 or for review of their factual findings66 -- this may have been “flatly inconsistent” with Chevron, making “deference a doctrine of desperation.”67 Yet, again, what the Court was doing was limning the boundaries of the agency’s discretion; the agency’s impermissible approach to the two statutory provisions, treating them as identical, signaled the absence of any Skidmore weight. Justice Stevens reiterated his view in a 2009 concurrence68 – again drawing fire from Justice Scalia.

(2) Has the Agency Exercised its Authority Within Its Space?

To say that a statute creates Chevron space for an agency is not to say that all agency activity serves to perform such “Duties”69 as Congress has thus conferred upon it. Two related characteristics of Skidmore largely differentiated it from the long line of cases on which it drew: the case involved private litigation to enforce a federal statute, not the review of agency action as such; and the agency interpretation of that statute (to which Justice Jackson indicated weight might attach) was the product of informal agency advice-giving, not the rulemaking or adjudication by which agencies generally act to affect legal rights. Decision of the dispute over meaning, then, was inevitably for the courts; the agency had indicated its understanding, but not in a manner that had any legal effect. Nothing other than weight could have been relevant.

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64 At 448
66 Assoc. of Data Processing Org’s, Inc. v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984).
67 480 U.S. at 454.
68 Negussie v. Holder, n. 55 above.
69 U.S. Const. Art. II, Sec. 2.
**Chevron**, per contra, by its second-step commitment to oversight of the reasonableness of agency action, entails that agency action will be before the court for review, and that the agency will have acted in a manner characterized by legal effect.

All of this was effectively captured by the Court, first in *Christensen v. Harris County* and then, definitively, in *United States v. Mead Corporation*. In *Mead*, the Customs Service, which might have adopted a challenged tariff classification by notice-and-comment rulemaking, had instead acted by an informal ruling letter. This letter required Customs Service personnel to act in accordance with its terms with respect to the particular importation matter at issue, but could be modified or revoked at any time “without notice to any person, except the person to whom the letter was addressed”; “no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.” This one-time, informal advisory transaction, the Court concluded, was not agency behavior within its *Chevron* space – not an exercise of Congress’s delegation to the Customs Service of authority to adopt regulations that, if valid, would bind the world including itself; since it was not “administrative action with the effect of law,” then, to the extent it entailed the agency’s understanding of its constituent statute, only *Skidmore* weight was relevant for a reviewing court.

Justice Scalia’s lone and furious dissent reflected his refusal to recognize any difference between *Skidmore* weight and *Chevron* space. *Skidmore*, he contended, had been cast on the judicial waste pile. So long as there had been an “authoritative” agency interpretation of an ambiguous statutory provision, *Chevron* controlled. It was a matter of indifference to him whether that interpretation had been promulgated pursuant to a statutory delegation – that is, in a manner Congress would have intended to carry the force of law. Strikingly, in support of his conclusion that the interpretation at issue was “authoritative,” he was prepared to credit post-decision rationalizations created by government attorneys, to ignore the agency’s clear statement that its individuated ruling letter had no staying power whatever.

The closing portion of Justice Souter’s opinion for the remainder of the Court remarked, not without reason, that 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.

The possible simplicity of the Court’s decision, which predominantly looked for either legislative rulemaking or formal adjudication as the indicator that an agency had acted in its

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70 529 U.S. 576 (2000).
72 19 C.F.R. 177.9(c) (2000).
74 At least one of Justice Scalia’s arguments – a fear that the resulting judicial interpretations would lead to ossification of law Congress meant to leave flexible – is at best question-begging. As the subsequent decision in Nat’l Cable & Telecomm. Ass’n v. Brand-X Internet Services, 545 U.S. 967 (2005) would hold, over another lone fulmination by Justice Scalia, any judicial decision in an agency’s *Chevron* space has the same qualities as a decision in the diversity jurisdiction under Erie RR. V. Tomkins, 304 U.S. 64 (1938) – it decides the case but does not fix statutory meaning. See Kenneth Bamberger, n. 26 above.
Chevron space, was put to the test in Barnhart v. Walton. In Barnhart, the same eight Justices treated as having occurred in the Social Security Administration’s Chevron space an interpretation that had not been adopted by regulation, but that had appeared in many rulings and official manuals over many years. Mightn’t that behavior be regarded as having the force of law, in the sense of having become part of the agency’s common law on the subject, that a court would not permit it to abandon without formal action and explanation? Decades earlier, in a tax case arising under similar circumstances, the Court remarked that IRS interpretations had “acquired the force of law.” Yet this was not saying, as courts might say of their own acts of statutory interpretation, that the resulting ascription of meaning to statutory language would ordinarily require congressional action to change. Agency actions in Chevron space are open to reasoned re-examination. The “force of law” observation simply affirmed a norm courts should respect if it was a reasonable treatment of ambiguous statutory language, a norm open to the agency to change as reason or changing circumstances might warrant.

(3) And if an Agency has not yet Exercised its Authority on an Issue Within its Chevron Space, What is the Impact of a Judicial Decision of that Issue?

If a statute’s creation of Chevron space is to be understood as the commitment to the agency involved of the responsibility for its administration, that understanding could not be defeated by the happenstance that an issue falling within it happened first to be presented in litigation in court. A century ago the Supreme Court recognized, in the rate-setting context, that judges might be well-advised to refer certain matters to the responsible agency rather than themselves decide them. The doctrine of “primary jurisdiction” thus recognized, though different in its details, confirms the importance of judicial respect for valid congressional assignments of decisional responsibility to others. And its relationship to Chevron’s teaching has not gone unnoticed:

Although the doctrine of primary jurisdiction was originally rooted in the notion that agencies have greater expertise, experience, and flexibility than courts in dealing with regulatory matters, as well as in a desire for uniform application of the law, … abstention in

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See Shaw’s Supermarkets, Inc. v. NLRB, 884 F.2d 34 (1st Cir. 1989).

Camarano v. United States, 358 U.S. 498, (1959)

Neal v. United States, 516 U.S. 284 (1996). Note, however, that this proposition holds with force only at the level of the Supreme Court, which decides relatively few statutory questions annually. See Peter Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Administrative Action, 87 Colum.L.Rev. 1093 (1987)(understanding Chevron as a means for promoting uniform national law under agency administration). Moreover, even in the judicial context (as, for example, in Skidmore itself), some decisions involving statutes’ applications are best characterized as law-applying, not “interpretation” per se. No principle prevents a court from identifying ambiguities in a statute lying wholly outside the ambit of any agency’s responsibility for administration as itself embodying what is in effect Chevron space, committed to the courts for reasoned application in the circumstances of the particular time and place.

Helvering v. Wilshire Oil Co., 308 U.S. 90, 101 (1939)(Denying this flexibility “would deprive the administrative process of some of its more valuable qualities – ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations”); Helvering v. Reynolds, 313 U.S. 428, 432 (1941)(Even reenactment of the underlying statute without change “does not mean that the prior construction has become so embedded in the law that only Congress can effect a change”). Chevron space four decades early.

favor of agencies charged with resolving conflicting statutory policies also promotes the
proper relationships between courts and administrative agencies. This follows naturally from
Chevron, which explained that deference to agencies was appropriate not only because of
agency expertise but also because Congress is presumed to delegate the policy choices
inherent in resolving statutory ambiguities to the agency charged with implementation of the
statute.81

In 1994, in affirming a lower court judgment that certain fees were “reasonable” within the
meaning of a statute left to the administration of the Department of Transportation, the Supreme
Court not only regretted the failure of the parties to have involved the Secretary, whose judgment
it said would have warranted Chevron’s application,82 but also affirmatively stated, in a footnote
citing Chevron, that

It remains open to the Secretary, utilizing his Department's capacity to comprehend the
details of airport operations across the country, and the economics of the air transportation
industry, to apply some other formula (including one that entails more rigorous scrutiny) for
determining whether fees are "reasonable" within the meaning of the AHTA; his exposition
will merit judicial approbation so long as it represents "a permissible construction of the
statute." 83

Were there any doubt that decisions with an agency’s delegated Chevron space are its
responsibility, without necessary regard to prior judicial decision of the point, that was settled by
National Cable & Telecommunications Ass’n v. Brand-X Internet Services.84 The Ninth Circuit
had once held, in litigation not involving the Federal Communications Commission, that certain
Internet services were “telecommunications,” not “information” services;85 when the FCC
subsequently reached the opposite conclusion the Ninth Circuit, invoking this interpretation as
precedent, reversed. Eight Justices agreed – Justice Scalia once again angrily dissenting – that
the FCC’s conclusion had been reasonably reached within its Chevron space. The Ninth Circuit
had not acted improperly in deciding the earlier litigation; but given the nature of the question
presented to it, it erred in insisting on the priority of its prior view.

A court's prior judicial construction of a statute trumps an agency construction otherwise
entitled to Chevron deference only if the prior court decision holds that its construction
follows from the unambiguous terms of the statute and thus leaves no room for agency
discretion. This principle follows from Chevron itself. Chevron established a "presumption
that Congress, when it left ambiguity in a statute meant for implementation by an agency,
understood that the ambiguity would be resolved, first and foremost, by the agency, and
desired the agency (rather than the courts) to possess whatever degree of discretion the
ambiguity allows. ... Since Chevron teaches that a court's opinion as to the best reading of an
ambiguous statute an agency is charged with administering is not authoritative, the agency's
decision to construe that statute differently from a court does not say that the court's holding

81 Ayuda v. Thornburgh, 880 F.2d 1325, 1344 (D.C.Cir. 1989), vacated on other grounds, 498 U.S. 1117
83 Id. at 368 n. 14.
84 545 U.S. 967 (2005).
was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. 86

**Conclusion**

Occam’s razor can be a treacherous tool. Nonetheless, it is urged, a simple and rational synthesis of the leading cases can without difficulty be made, if one abandons the confusions of “deference” for the distinct qualities of “weight” and “space.” Agency views of statutory meaning may often be entitled to considerable weight when judges come to decide for themselves issues of statutory meaning. American courts have recognized this proposition for almost two centuries. 87 More recently we have come to understand and accept that executive agencies may be vested by Congress with authority to act with the force of law, so long as the boundaries of that action can be judicially determined. In that space, the agency is the prime actor, and the very conclusion that Congress has delegated authority to it commands reviewing courts to act, not as deciders, but as overseers.

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86 Id. at 982-83
87 Edwards’ Lessee, n. 29 above.