7. Deference? Did the Court ultimately defer to the agency's interpretation of the statute? How did that affect the outcome of the litigation?

8. Scope of *Skidmore*: Although *Skidmore* was decided before *Chevron*," the Court continues to apply *Skidmore* today.The scope of *Skidmore* will be discussed more in Part IV of this chapter.

VIDEO LECTURE

Click here for a video lecture on *Skidmore v. Swift* by Professor Stephen Johnson.

IV. *Chevron v. NRDC*

For forty years, one of the most significant Supreme Court decisions addressing statutory interpretation or administrative law was the Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). It is the most frequently cited Supreme Court administrative law decision and perhaps the most frequently cited statutory interpretation decision in academic journals.[602] As noted at the beginning of this chapter,

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602 A 2014 study found that the case was cited in 11,538 secondary sources. *See* Chris Walker, *Most Cited Supreme Court Administrative Law Decisions* (Notice & Comment, Oct 9, 2014), archived at http://perma.cc/J26H-QVBW . A more recent review identified 15,000 judicial decisions and 18,000 law review articles and secondary sources citing the case on Westlaw. *See* Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 Ga. L. Rev. 757, 786 (2015); Cass R. Sunstein, Chevron *Step Zero*, 92 Va L Rev 187 (2006); William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer Is* Chevron *Step Two, Not Christensen or Mead*, 54 Admin L Rev 719 (2002); Thomas W. Merrill and Kristin E. Hickman, Chevron's *Domain*, 89 Georgetown L J 833 (2001); criticism of the decision and reform proposals, *see, e.g.,* Steve R. Johnson, *The Rise And Fall of* Chevron *in Tax: From the Early Days to King and Beyond*, 2015 Pepp. L. Rev. 19 (2015); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 829 (2010); Linda Jellum, *Chevron's Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 Admin. L. Rev. 725 (2007); praise for the decision, *see, e.g.,* John C. Cruden & Matthew R. Oakes, *The Enduring Nature of the* Chevron *Doctrine*, 40 Harv. Envtl. L. Rev. 189 (2016); and empirical studies of *Chevron's* deference, *see, e.g.* Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1 (2017); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. Chi. L. Rev. 823 (2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 322 (2004); Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 Yale

courts have long struggled to determine whether and when to defer to agency interpretations of statutes, in light of the inherent judicial power, per *Marbury v. Madison*, to say what the law is, and the APA's command that courts decide questions of law. Prior to *Chevron*, courts determined the amount of deference to give to agency statutory interpretations based on a multitude of factors, including whether Congress delegated lawmaking authority to the agency, whether the agency adopted the interpretation contemporaneous with the statute and applied it consistently over a long period of time, and the degree of reliance on the agency interpretation.[603] The Supreme Court replaced that multi-factor analysis with a seemingly straightforward two step analysis in *Chevron*.[604] That test proved to be less than straightforward in application and support for the doctrine eroded over time. *Chevron* and its evolution are traced in the following sections.

A. The *Chevron* Two-Step

Chevron involved interpretation of the term "stationary source" in the federal Clean Air Act. Under the statute, if a company constructed or modified certain "stationary sources" in parts of the country that were not meeting EPA's national pollution standards ("non-attainment areas"), the company would need to obtain a permit from EPA before making those changes and would have to comply with stringent technology-based limits on pollution from the source. *See* 42 U.S.C. § 7502(c) (Section 172(c) of the Clean Air Act). The Clean Air Act does not explicitly define the term "stationary source" and EPA had interpreted the term "stationary source" in various conflicting ways before it adopted the interpretation at issue in the landmark Supreme Court case. The Natural Resources Defense Council (NRDC) challenged the agency's interpretation of the term when the agency interpreted the statute, by regulation, to allow an entire plant to be treated as a "stationary source," as opposed to treating each individual smokestack or other source of pollution within the plant as a "stationary source." The agency adopted that interpretation as part of the deregulatory push of the Reagan Administration. A broad definition of the term allowed companies to make changes to plants without needing to obtain a permit for

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J. On Reg. 1 (1998); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717 (1997); Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984.

603 *See* Colin Diver, Statutory Interpretation in the Administrative State, 133 U.Pa. L. Rev. 549, 562 (1985).

604 The Court did not explicitly overrule the prior precedent or acknowledge any tensions between the two step and the prior precedent. See Thomas W. Merrill, The Story of Chevron: The Making of An Accidental Landmark, 66 ADMIN. L. REV. 253, 255-56 (2014). Apparently, the Court did not even recognize that the decision would have the broad impact that it ultimately did. *See* Thomas W. Merrill, *The Story of* Chevron U.S.A. v. Natural Resources Defense Council, Inc.: *Sometimes Great Cases Are Made Not Born, in* STATUTORY INTERPRETATION STORIES 165 (Eskridge, Frickey & Garrett eds., 2011). It is also interesting to note that, although *Chevron* was decided unanimously, only 6 Justices participated in the Court's decision. Justices Marshall and Rehnquist did not participate due to illnesses and Justice O'Connor recused herself due to a conflict of interest. *Id.* at 180-184.

the changes and without needing to comply with the more stringent technology-based standards that would otherwise apply to the construction or modification of the plant.

Before EPA adopted the regulatory definition of "stationary source" challenged by NRDC, the agency had taken the position that the Clean Air Act authorized it to treat an entire plant as a "stationary source" in regions of the country that were meeting EPA's national pollutant standards, but could ***not*** take that approach in "non-attainment" regions of the country. Thus, prior to EPA's adoption of the regulations challenged by EPA, the agency defined "stationary source" differently depending on whether the source was located in an areas of the country that met the agency's national pollution standards.

CHEVRON V. NATURAL RESOURCES DEFENSE COUNCIL

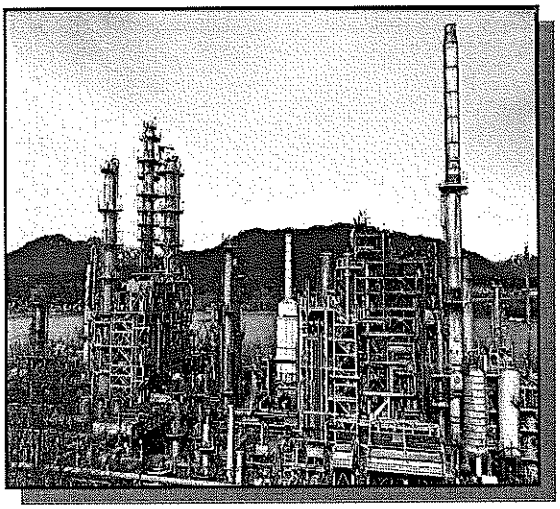
467 U.S. 837 (1984)

JUSTICE STEVENS delivered the opinion of the Court.

In the Clean Air Act Amendments of 1977, * * * Congress enacted certain requirements applicable to States that had not achieved the national air quality standards established by the Environmental Protection Agency (EPA) pursuant to earlier legislation. The amended Clean Air Act required these "nonattainment" States to establish a permit program regulating "new or modified major stationary sources" of air pollution. Generally, a permit may not be issued for a new or modified major stationary source unless several stringent conditions are met. * * * The EPA regulation promulgated to implement this permit requirement allows a State to adopt a plantwide definition of the term "stationary source."[2] Under this definition, an existing plant that contains several pollution-emitting devices may

Resources for the Case

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
The Story of Chevron – Prof. Thomas Merrill
Video Summary (Prof. Stevenson – South Texas College of Law)



Oil Refinery photo by http://www.flickr.com/photos/keepitsurreal/ - CC BY-SA 2.0

[2] "(i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act."
"(ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR §§ 51.18(j)(1)(i) and (ii) (1983).

install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant. The question presented by these cases is whether EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single "bubble" is based on a reasonable construction of the statutory term "stationary source."

I

The EPA regulations containing the plantwide definition of the term stationary source were promulgated on October 14, 1981. * * * Respondents[3] filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit pursuant to 42 U.S.C. § 7607(b)(1).[4] The Court of Appeals set aside the regulations. * * * The court observed that the relevant part of the amended Clean Air Act "does not explicitly define what Congress envisioned as a stationary source, to which the permit program . . . should apply," and further stated that the precise issue was not "squarely addressed in the legislative history." * * * In light of its conclusion that the legislative history bearing on the question was "at best contradictory," it reasoned that "the purposes of the nonattainment program should guide our decision here." * * * Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, * * * the court stated that the bubble concept was "mandatory" in programs designed merely to maintain existing air quality, but held that it was "inappropriate" in programs enacted to improve air quality. * * * Since the purpose of the permit program its "raison d'etre," in the court's view -- was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. * * * It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, * * * and we now reverse.

The basic legal error of the Court of Appeals was to adopt a static judicial definition of the term "stationary source" when it had decided that Congress itself had not commanded that definition. Respondents do not defend the legal reasoning of the Court of Appeals.[7] Nevertheless, since this Court reviews judgments, not opinions, * * * we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment on the validity of the regulations.

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[3] National Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and North Western Ohio Lung Association, Inc.

[4] Petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, American Petroleum Institute, Chemical Manufacturers Association, Inc., General Motors Corp., and Rubber Manufacturers Association were granted leave to intervene and argue in support of the regulation.

[7] Respondents argued below that EPA's plantwide definition of "stationary source" is contrary to the terms, legislative history, and purposes of the amended Clear Air Act. The court below rejected respondents' arguments based on the language and legislative history of the Act. It did agree with respondents contention that the regulations were inconsistent with the purposes of the Act, but did not adopt the construction of the statute advanced by respondents here. Respondents rely on the arguments rejected by the Court of Appeals in support of the judgment and may rely on any ground that finds support in the record. * * *

II

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 intent of Congress.[9] 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]

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."

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

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, * * * and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." * * *

In light of these well-settled principles, it is clear that the Court of Appeals misconceived

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[9] The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. * * * 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. * * *

the nature of its role in reviewing the regulations at issue. Once it determined, after its own examination of the legislation, that Congress did not actually have an intent regarding the applicability of the bubble concept to the permit program, the question before it was not whether, in its view, the concept is "inappropriate" in the general context of a program designed to improve air quality, but whether the Administrator's view that it is appropriate in the context of this particular program is a reasonable one. Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make. * * *

VII

* * * We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress. * * *

Legislative History

In addition, respondents argue that the legislative history and policies of the Act foreclose the plantwide definition, and that the EPA's interpretation is not entitled to deference, because it represents a sharp break with prior interpretations of the Act.

Based on our examination of the legislative history, we agree with the Court of Appeals that it is unilluminating. * * * We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments.

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. * * * Indeed, its reasoning is supported by the public record developed in the rulemaking process, * * * as well as by certain private studies. * * *

Our review of the EPA's varying interpretations of the word "source" -- both before and after the 1977 Amendments -- convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly -- not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is

flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute. * * *

Policy

The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency and in the 32 jurisdictions opting for the "bubble concept," but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.[38]

In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests, and is entitled to deference: the regulatory scheme is technical and complex, * * * the agency considered the matter in a detailed and reasoned fashion, * * * and the decision involves reconciling conflicting policies. * * * Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In

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[38] Respondents point out if a brand new factory that will emit over 100 tons of pollutants is constructed in a nonattainment area, that plant must obtain a permit pursuant to § 172(b)(6), and, in order to do so, it must satisfy the § 173 conditions, including the LAER requirement. Respondents argue if an old plant containing several large emitting units is to be modernized by the replacement of one or more units emitting over 100 tons of pollutant with a new unit emitting less -- but still more than 100 tons -- the result should be no different simply because "it happens to be built not at a new site, but within a preexisting plant." ...

such a case, federal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."

We hold that the EPA's definition of the term "source" is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth.

"The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends. . . ."

The judgment of the Court of Appeals is reversed.

It is so ordered.

Questions and Comments

1. **The bubble:** Under the Clean Air Act, at the time of the decision, construction of a new major "stationary source" or "modification" of a major "stationary source" in an area of a state that was not meeting air quality standards ("nonattainment") required a permit and compliance with stringent technology-based air pollution limits. Not every change in a "stationary source," however, constituted a "modification." A change only constituted a "modification" if it resulted in the emission of a new pollutant or an increase in emissions of existing pollutants. Therefore, as noted in footnote 38 above, therefore, by defining "stationary source" to include an entire plant, an industrial facility could avoid the permitting and new technology requirements of the statute by replacing existing parts of a factory that are emitting pollution with new parts, as long as the new parts emitted the same or less pollution as the existing parts, since the facility would not be "modifying" a source. If, however, each part of the facility that emitted pollution were defined as a separate "source," the construction of a new part would be construction of a "stationary source" which could (if it were a major stationary source) trigger the permitting and new technology requirements, regardless of whether any other portions of the facility were being retired. Why do you think that NRDC opposed the bubble concept, and why did Chevron favor it?

2. **The agency's process:** What process did the agency use to interpret the statute in this case? If the agency's decision in the case was a "rule," was it a "legislative rule" or "non-legislative rule"? The answer to that question became important as courts tried to determine when to apply *Chevron* to review agency interpretations of statutes.

3. **The two step:** The Court created a two-step test that was frequently used to review agencies' legal interpretations of statutory terms. At Step One, Justice Stevens suggests that courts must ask "whether Congress has directly spoken to the precise question at issue." Is the Court applying a clear statement test at Step One? If so, is the Court's review limited to the language of the statute, or can it consider the legislative history or

purpose of the statute as well? Note that Justice Scalia, in a ***concurring opinion*** in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987), criticized the Supreme Court's reliance, in that case, on traditional tools of statutory interpretation at Step One, and wrote that "courts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent." Is his position a faithful interpretation of *Chevron*? Although it is edited out above, the *Chevron* Court examined the text and structure of the Clean Air Act, and the legislative history of the statute and concluded, at Step One, that the statute was ambiguous regarding whether "stationary source" could include an entire plant, as EPA defined the term.

4. **Step Two:** If a court determines, at *Chevron* Step One, that the statute is silent or ambiguous on the statutory interpretation question, when should a court uphold the agency's interpretation of the statute? Can the court reject the agency's interpretation because the court disagrees with the policy interpretation adopted by the agency? Why did the *Chevron* Court uphold EPA's interpretation of the Clean Air Act at Step Two of its analysis? Note that one of the reasons identified by EPA for the broader definition of "stationary source" challenged in the case was EPA's desire to reduce confusion in the regulated community by adopting a consistent definition of "stationary source" that applied nationwide.

5. **Agency change in position:** The Court noted that EPA did not always interpret the term "stationary source" to encompass the "bubble concept" and that the agency had previously interpreted the term to apply to separate units within a plant. Does the agency's change in position make its decision unreasonable at Step Two? Would the result have been the same if the agency had changed its interpretation several times prior to adopting the regulations that were challenged in this case? Would the result have been the same if the agency did not explain why it had changed its interpretation of the term "stationary source"?

6. **Step two v. arbitrary and capricious:** Since *Chevron* Step Two focuses on the "reasonableness" of an agency's interpretation, some courts and academics treated Step Two as an application of the "arbitrary and capricious" standard of review under the APA. *See, e.g.* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 959 (2007); Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1264-67 (1997); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 84 (2007). Other courts and academics argued that the two analyses are distinct (and, thus, not redundant). *See* Linda D. Jellum, THE LEGISLATIVE PROCESS, STATUTORY INTERPRETATION, AND ADMINISTRATIVE AGENCIES 648 (ed. Carolina Academic Press, 2016); *Catskill Mountains Chapter of Trout Unlimited, Inc v. EPA*, 846 F.3d 492, 521 (2d Cir. 2017). When courts treated the two standards as discrete, they often utilized traditional tools of statutory interpretation at *Chevron* Step Two (as well as Step One) to identify a range of interpretations that may be reasonable under the statute and upheld the agency's interpretation as long as it fits within than range. *See* John F. Manning &

Matthew Stephenson, LEGISLATION AND REGULATION: CASES AND MATERIALS, 4TH ED., 1111 (Found. Press 2021); Jellum, *supra*, at 647.

7. Ratification of agency decisions under *Chevron* – Step One v. Step Two: Empirical studies found that courts upheld agency interpretations of statutes under *Chevron* at a rate of 70% or higher. *See, e.g.,* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 28–29 (2017) (finding that agencies prevailed on 71.4% of interpretations in statutory interpretation cases); David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 170 (2010) (finding an "overall agency validation rate" of 69%) Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 Yale J. On Reg. 1 (1998) (finding that agencies prevailed in 73% of the cases decided in federal courts between 1995 and 1996 involving *Chevron* review). There is, however, a significant difference between the rate at which courts upheld agency interpretations at Step One of *Chevron* and at Step Two. At Step One, studies found that courts upheld agency interpretations at a rate of 40% or lower. *See* Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017) (finding federal appellate courts upheld agencies 39% of the time); Christopher H. Schroeder & Robert L. Glicksman, Chevron, State Farm, *and EPA in the Courts of Appeals During the 1990s*, 31 ELR 10371 10377 (2001) (finding federal courts upheld EPA determinations 40.9% of the time during the 1990s). At Step Two, on the other hand, courts upheld agency interpretations at a rate of 93% or higher. *See* Barnett & Walker, supra at 33 (finding federal appellate courts uphold agency interpretations 93.8% of the time); Schroeder & Glicksman, *supra* at 10377 (finding federal courts upheld EPA determinations 92.6% of the time). Thus, realistically, if a court was going to ignore an agency's interpretation of a statute, the only way to do that was to find that the statute was clear and that the agency's interpretation conflicted with the clear statute. If, on the other hand, a court approved of an agency's interpretation, it could uphold it either by finding that the statute was clear and the agency's interpretation was consistent with Congress' intent ***or*** it could find that the statute was ambiguous and the agency's reading of the statute was a reasonable interpretation. Critics of *Chevron* argued that judges had substantial discretion to reach the result that they desired through the use of traditional tools of statutory interpretation at Step One. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 521 (1989) (Justice Scalia was a long-time supporter of *Chevron*, rather than a critic, but parted ways with the majority of the Court regarding the proper application of the doctrine).

8. Fluidity in the structure: Although the *Chevron* Court crafted a two-step analysis, courts were not always diligent in applying the test in that rigid structure. Occasionally, courts began their discussion of a statute at Step Two or conflated the two-step analysis into a single step. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals,* 15 Yale J. on Reg. 1, 30-31 (1998). For further examination of the structure of the *Chevron* analysis, *see* Cary Coglianese, Chevron's *Interstitial Steps*, 85 Geo. Wash. L. Rev. 1339, 1374-86 (2017); Richard M. Re, *Should* Chevron *Have Two Steps?*, 89 Ind. L.J. 605 (2014).

9. Rationales for deference: In crafting a decision for a unanimous Court, Justice

Stevens identified several different reasons why deference to an agency's interpretation is warranted, including: (a) Congress intended that the agency should resolve the issue; (b) agencies have specialized expertise to resolve the issue; and (c) agencies are politically accountable through the democratic process. In addition to the rationales identified in the opinion, scholars argue that according deference to agencies' statutory interpretations provides uniformity that would not exist if courts across the country independently interpreted statutory language de novo. See Peter L. Strauss, *One Hundred and Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1124 (1987). Professors Robert Glicksman and Christopher Schroeder note that the Court set forth the new test at a time when there was a shift in the attitude towards agencies from distrust based on agency capture to confidence in the expertise and accountability of agencies. *See* Robert Glicksman & Christopher Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, 54 L. & Contemp. Probs. 249, 256-57 (1991). Justice Blackmun's papers suggest that the Court's deferential approach in *Chevron* was motivated, in part, by the Justices' difficulty in understanding the complexities of the Clean Air Act. *See* Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ELR 10637, 10663 (2005). In determining how far *Chevron* applies outside of the context in which the case arose, courts have struggled to determine whether one rationale carries more weight than others.

10. Ambiguity as a rationale for deference: Is ambiguity in a statute a reasonable basis for deferring to an agency's interpretation? Does it indicate legislative intent to delegate questions to agencies? Many academics and Justices have expressed skepticism that Congress intends to delegate authority to agencies by leaving ambiguity in statutes. *See, e.g.,* David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201,203 (2001); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). Justice Brett Kavanaugh and Professor Lawrence Solan argue that it is frequently unclear whether a statute is ambiguous, so courts should not rely on ambiguity as a trigger for *Chevron* or other "clarity doctrines" in statutory interpretation. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2144 (2016) (book review); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 Chi.- Kent L. Rev. 859, 859 (2004).

On the other hand, the empirical study of legislative drafters conducted by Professors Abbe Gluck and Lisa Schultz Bressman found that drafters were more familiar with the *Chevron* doctrine than most other canons and drafted statutes with the knowledge that courts would apply that canon. *See* Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 993-94 (2013). Bressman and Gluck also reported, though, that legislative drafters indicated that they frequently leave ambiguity in statutes for many reasons other than as indication of intent to delegate authority to agencies. *Id.* at 994-97. The drafters suggested that legislative history often provides stronger evidence of intent to delegate authority to agencies and that many types of issues, including major policy issues, are inappropriate for agency resolution even when a statute is ambiguous. *Id. See also* Lisa Schultz Bressman and Abbe R. Gluck, *Statutory*

Interpretation from the Inside - An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II, 66 Stan. L. Rev. 725, 771-73 (2014). Professor Jarod Shobe argues for a more nuanced reliance on ambiguity as a sign of intent to delegate. According to Shobe, Congress delegates less often to agencies during periods of divided government, so ambiguity in statutes enacted during periods of divided government should not be viewed as a signal of intent to delegate authority to agencies. *See* Jarrod Shobe, *Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative Process*, 85 Geo. Wash. L. Rev. 451, 457 (2017). Should the fact that agencies are involved in drafting a particular statute be relevant in deciding whether Congress delegates authority to them to decide ambiguous questions?

11. *Chevron* and judicial ideology: In light of the flexibility provided at Step One of *Chevron*, several academics have explored whether there was any correlation between the ideology of judges and their application of the *Chevron* analysis. In the context of environmental law, several academics concluded that judicial ideology correlated with decisions to uphold or invalidate agency action when judges apply *Chevron*. *See* Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. Colo. L. Rev. 767 (2008); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 34 (2006).

12. Judges' views on *Chevron*: An empirical study of all of the federal appeals court decisions applying *Chevron* between 2003 and 2013 found that there was considerable variation in the manner in which judges applied *Chevron* among the circuits, prompting the authors of the study to suggest that the Supreme Court should provide more guidance regarding the application of the doctrine. *See* Kent Barnett and Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 9, 71-72 (2017). A separate survey of forty-two federal appeals court judges disclosed that most of the judges, other than judges on the D.C. Circuit, were not fans of *Chevron,* but felt themselves bound to apply it. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1302 (2018)

13. Was *Chevron* a canon and did that matter? In recent years, courts and academics began to examine whether agencies "waive" *Chevron* deference if they do not assert it in defense of their decisions. In response, Professors Kristin Hickman and David Hahn have explored whether *Chevron* is a rule of decision, standard of review, or a canon of construction. *See* Kristin E. Hickman & R. David Hahn, *Categorizing* Chevron, 81 Ohio State L. J. 611 (2020). They argued that if *Chevron* is a canon, courts could readily ignore it and agencies could waive it because courts do not accord precedential value to canons of construction. *Id.* at 635-36, 649-50, 653. The Supreme Court addressed that issue, to an extent, in *Loper Bright* when it discussed the implications of overruling *Chevron*.

14. Adoption of *Chevron* in the states: *Chevron* involved judicial review of the decision of a federal agency and set forth a deference standard that applied to federal agencies. States were not bound to follow the Court's approach in *Chevron*. For many

years, most states retained de novo or broad review of agency statutory interpretation. *See* William N. Eskridge Jr., James J. Brudney, Josh Chafetz, Philip F. Frickey, & Elizabeth Garrett, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY, 6TH ED. 1071 (West Acad. Pub. 2020). Over the last two decades, though, many states adopted *Chevron* or an approach similar to *Chevron* to review agency statutory interpretation. *Id.* at 1071-72 (identifying states that have adopted or rejected *Chevron* and describing alternative deference regimes adopted in various states). However, Ohio, Arkansas, Delaware, Kansas, Michigan, Mississippi, and Wisconsin explicitly rejected the *Chevron* approach. *See* Alex Ebert, *Ohio Eliminates Agency Deference, Splitting With High Court,* Bloomberg Law News, Dec. 29, 2002.

Problem 7-3

In the last decade, 384 workers died from heat exposure in the United States. Most of the heat-related deaths occur in the agriculture, landscaping, construction, and trash collection industries.

In response to lobbying from several labor organizations that represent workers in the agriculture, landscaping, and construction industries, Senator Mark Sabbath introduced a bill, S.178, to require the Occupational Safety and Health Administration (OSHA) to set workplace safety standards for heat exposure in outdoor employment. While the bill was being considered, Senator Carrie Snowdon proposed an amendment that would require the agency to set workplace safety standards for heat exposure in employment, regardless of whether workers were working indoors or outdoors. Senator Sabbath responded, "Although many indoor jobs create a risk of heat illness, we need to move incrementally to address this problem. Most deaths today arise from heat exposure in outdoor jobs, so this bill only addresses those jobs." Senator Snowdon's amendment was defeated on the Senate floor. The issue raised by Senator Snowdon was also addressed in the Conference Committee report for the bill, which indicated, "'Outdoor places of employment', in this bill, include jobs that involve some indoor work as long as a substantial amount of the work occurs outdoors or the outdoor component of the work creates significant risk of heat illness."

S.178 was ultimately enacted as "The Heat Illness Prevention in Outdoor Places of Employment Act of 2021." Several provisions of the statute are reproduced below.

Problem 7-3 (continued)

Section 1. Findings

a. Health-related deaths in agriculture, construction, landscaping, oil and gas extraction and trash collection have risen dramatically over the last decade.

b. The likelihood of heat-related illness is influenced by many workplace conditions, including air temperature, heat from the sun and other sources, and workload severity and duration. Those conditions can contribute to heat-related illness regardless of whether employees are working outdoors or indoors.

Section 2. Purposes

a. It is the goal of this Act to protect employees from heat illness, including heat cramps, heat exhaustion, and heat stroke, in the workplace.

Section 3. Standards for heat in outdoor places of employment

a. The Administrator of OSHA shall, "after notice and opportunity for a public hearing", adopt occupational safety and health standards for heat in outdoor places of employment.

b. An "occupational safety and health standard" is "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."

Section 4. Enforcement Authority

a. Any person who violates an "occupational safety and health standard" established under this Act may be fined up to $5,000 for each violation. In addition, the Administrator of OSHA may order any person who is violating an "occupational safety and health standard" to comply with the standard.

Shortly after the statute was enacted by the U.S. Congress, OSHA issued a notice of proposed rulemaking to establish "occupational safety and health standards" for heat in outdoor places of employment. The proposed rule applied to outdoor activities in the agriculture, construction, landscaping, oil and gas, and trash collection industries. During the comment period on the proposed rule, the Transportation Workers Union submitted a comment, arguing that the rules should apply to transportation workers, including delivery drivers, as well as the industries identified in the proposed rule.

Problem 7-3 (continued)

When OSHA published the final rule in the Federal Register, it retained all of the requirements from the proposed rulemaking, but it expanded the scope of the rule to apply to workers engaged in transportation or delivery of agricultural products, construction materials, and other heavy materials. In the preamble to the final rule, the agency explained, "Data provided during the comment period regarding incidences of heat illness in the transportation and delivery of agricultural products, construction materials, and other heavy materials suggest that even though most of the work involved in those delivery activities occurs indoors, there are significant risks associated with packing and unpacking the trucks. Those activities occur outdoors, so it is appropriate to regulate transportation and delivery drivers in those industries."

Mammoth Home Improvement, a corporation that owns and operates hundreds of home improvement stores, would like to challenge the agency's decision to apply the final rule to workers engaged in the transportation and delivery of construction materials. After all, Mammoth argues, the delivery drivers spend most of their day in air-conditioned trucks. What standard would the court use to review the agency's legal determination that the statute authorizes regulation of workers engaged in the transportation and delivery of construction materials (an activity that occurs primarily indoors) and is the court likely to uphold the agency's determination under that standard? In addition to the information outlined above, it may also be helpful to know that Webster's dictionary defines "outdoors" as "done, situated or used outside" and the American Heritage Dictionary defines "outdoors" as "located in, done in or situated in the open air."

B. Scope of *Chevron* – Step Zero

Chevron involved judicial review of an agency's interpretation of a statutory term when the agency was given authority to make rules to implement the statute and the agency defined the term in a rule adopted pursuant to notice and comment rulemaking. Since the Court identified so many varied bases for deference in *Chevron*, and since the *Chevron* Court did not overturn other precedent outlining different deference rules for agency decisions, it was unclear, at the time, how broadly *Chevron* applied. The Court provided some clarity in a series of decisions decided a decade and a half after *Chevron*.

In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court was asked to decide whether a policy implemented by the Sheriff's Department in Harris County that required employees to use accrued compensatory time violated the Fair Labor Standards Act (FLSA). The Fair Labor Standards Administration, the agency that administered the FLSA, had issued an opinion letter setting forth its interpretation of the law, but the

Supreme Court refused to apply *Chevron* and determined that the County's actions did not violate the FLSA. *Id.* at 585-86.

The Court explained its decision to refrain from applying *Chevron* in the case as follows:

> Here, * * * we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant Chevron-style deference. * * * Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the "power to persuade."

Id. at 587. The Court concluded that the agency's letter was unpersuasive under *Skidmore.*

Christensen seemed to establish a bright line rule that ***non-legislative rules***, such as policy statements and guidance documents, were not entitled to *Chevron* deference, but were entitled to *Skidmore* deference. Beyond non-legislative rules, however, the scope of the exception to *Chevron* was not clear. After all, the *Christensen* Court cited several reasons for its decision to reject *Chevron*, including the ***informality of the procedures*** used by the agency to make its decision and the fact that the decision was not issued with the ***force of law***.

The Court addressed the scope of the *Chevron* exception again in the following year in United States v. Mead Corp., 533 U.S. 218 (2001). The Court's decisions in *Christensen* and *Mead* motivated academics to suggest that *Chevron* includes a third step that precedes the *Chevron* two-step. *See* Cass R. Sunstein, Chevron *Step Zero,* 92 Va. L. Rev. 187, 207-09 (2006). At ***Chevron Step Zero***, courts decide whether an agency's decision should even be analyzed under the *Chevron* two-step framework.

In *Mead,* the Court focused on whether a tariff classification ruling by the United States Customs Service should be reviewed under the *Chevron* framework. The agency had interpreted language in the Harmonized Tariff Schedule to require Mead to pay a tariff on the day planners that it sold. The Customs Service made the decision that was challenged in the case through a "letter ruling," which was an informal adjudication that was issued by regional offices of the agency, was not generally binding on third parties, and could be revoked or suspended without notice to anyone other than the recipient of the letter. The Court determined that *Chevron* did not apply, explaining,

> ...administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's

> power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify.

533 U.S. 218 at 227. While the Court held that *Chevron* did not apply, it concluded that the agency's interpretation was entitled deference under *Skidmore. Id.*

Although the Supreme Court, in *Mead,* eschewed creation of any bright-line test for application of *Chevron* based on the procedures used by agencies, in general, when agencies made decisions through formal rulemaking, formal adjudication, or notice and comment rulemaking, *Chevron* usually applied. When they made decisions through informal adjudication or non-legislative rules, *Skidmore* ***usually*** applied. Nevertheless, the lower federal courts were inconsistent in their application of *Chevron* in light of *Mead.* Professors Kent Barnett and Christopher Walker reviewed all of the published federal appellate court decisions between 2003 and 2013 that refer to the *Chevron* doctrine and they concluded that there was considerable variation among the circuits regarding the rate at which courts applied *Chevron* to review agency decisions. *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 7 (2017) (ranging from 60.7% in the Sixth Circuit to 88.6% in the D.C. Circuit). The variation in the application of *Chevron* by the courts was one of the justifications advanced by the *Loper Bright* Court when it determined that *stare decisis* should not prevent the Court from overturning *Chevron.*

When *Skidmore* deference and *Chevron* deference co-existed, *Skidmore* deference was generally understood to be a weaker form of deference than *Chevron.* In Barnett and Walker's review of federal appellate court decisions noted above, courts upheld agency interpretations under the *Chevron* analysis in 77.4% of the cases, whereas they upheld agency interpretations under *Skidmore* in only 56% of the cases.[605] Other academics found less significant gaps between the rates of judicial approval of agency action under the different deference regimes.[606]

As applied, there were some practical differences between the two deference regimes. First, courts were less likely to defer to agency statutory interpretations under *Skidmore* than *Chevron* when an agency had changed its interpretation of the statute over time. Similarly, if an agency's interpretation of a statute was of recent vintage, as opposed to a long-standing interpretation, that weakened the "consistency" factor in the *Skidmore* analysis, whereas it usually had little impact under *Chevron.* With respect to the other *Skidmore* factors, the "thoroughness" evident in an agency's consideration focuses, to

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[605] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 6 (2017).

[606] *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?,* 63 Admin. L. Rev. 77, 83-84 (2011) (reviewing several studies and finding an affirmance rate between 55.1% and 70.9% for *Skidmore* in the studies v. 64% to 81.3% for *Chevron*).

some extent, on the identity of the decisionmaker and the finality of the agency's decision. Decisions made by lower level agency officials that are tentative will carry little weight in a *Skidmore* court's weighing of the multiple factors of the test. *See, e.g.,* DeLaMota v. United States Department of Education, 412 F.3d 71 (2d. Cir. 2005). The *Skidmore* factor that focuses on the "validity" of the agency's reasoning appears to incorporate both a *Chevron* Step One style interpretation of the statute and a Step Two review of the reasonableness of the agency's interpretation. *Id.* In addition to the factors explicitly identified by the *Skidmore* Court, including the amorphous "power to persuade" factor, courts applying *Skidmore* frequently focus on the type of question an agency is resolving, evidence of Congress' intent to have the agency decide that question, and the degree of expertise the agency has in that area as factors to consider.

Problem 7-4

This Problem is based on "The Heat Illness Prevention in Outdoor Places of Employment Act of 2021" in Problem 7-3 (above), so the background facts regarding the statute are incorporated into this problem.

However, for purposes of this problem, instead of adopting the regulation described in Problem 7-1, assume that OSHA adopted a regulation that requires employers to limit the number of consecutive hours that employees can work in "outdoor activities." (The "maximum hours" rule.) OSHA did not, however, define "outdoor activities" in the regulation and did not identify, in the regulation, the industries that are covered by the statute.

When the Heat Illness Prevention statute was first enacted in 2021, OSHA posted a guidance document on its website ("the 2021 guidance document") that indicated that OSHA interpreted the statute to apply to outdoor activities in the agriculture, construction, landscaping, oil and gas, and trash collection industries. The guidance document explicitly provided, however, that the agency did not interpret the statute to apply to employees engaged in the transportation and delivery of products in those industries.

When OSHA adopted the regulation that required employers to limit the number of hours that employees can work in "outdoor activities," the agency removed the 2021 guidance document from its website. When the agency removed the guidance document from its website, Mammoth Home Improvement, a corporation that owns and operates hundreds of home improvement stores, was concerned that the agency would apply the "maximum hours" rule to its employees who were engaged in the transportation and delivery of construction materials. Mammoth contacted the regional office of OSHA to inquire about whether the agency planned to require employers like Mammoth to comply with the "maximum hours" rule.

Problem 7-4 (continued)

In response, a "public information" employee in the regional office of the agency sent a letter to Mammoth that indicated, "Based on the information that we have learned through oversight of workplace safety conditions over 50 years, we have determined that even though most of the work involved in the transportation and delivery of construction materials occurs indoors, there are significant heat-related risks associated with packing and unpacking the materials. Those activities often occur outdoors, so it is appropriate to regulate transportation and delivery drivers in those industries and we will apply the statutory safeguards to those workers." The agency employee did not acknowledge, in the letter, that the position taken in the letter was the opposite of the position taken in the 2021 guidance document. Not surprisingly, therefore, the employee did not explain why the agency no longer adhered to the prior guidance. Incidentally, a "public information" employee is a staff-level employee in OSHA regional offices, and the employee is not required to have letters that they send approved by any higher-level agency official. The letters are merely advisory and are not viewed by the agency as binding. Indeed, the statute does not even address the agency's authority to issue such letters.

Mammoth would like to challenge the agency's decision, in the letter, to apply the requirements of the statute in Section 3 to workers engaged in the transportation and delivery of construction materials. Assuming that a court would review the agency's legal determination that the statute authorizes regulation of workers engaged in the transportation and delivery of construction materials (an activity that occurs primarily indoors) under *Skidmore,* is the court likely to uphold the agency's determination under that standard?

CALI SECTION QUIZ

Before moving on to the next section, why not try a short quiz on the material you just read at www.cali.org/lesson/19764. It should take about 30 minutes to complete.

C. Expansion and Decline of *Chevron*

As the Supreme Court attempted to provide some clarity regarding the types of agency decisions that were entitled to *Chevron* deference, it faced another question regarding the scope of *Chevron.* Should a court defer to an agency's interpretation of a statute under *Chevron* when the agency adopts an interpretation of a statute that conflicts with an

interpretation of the statute endorsed by the court in a previous lawsuit? Or is the court bound by *stare decisis* to adopt the interpretation of the statute that it announced in the precedent case? In short, can the agency interpretation of the statute trump the court's interpretation?

In National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005), the Supreme Court resolved that question, holding:

> 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.

Id. at 982. In other words, if a court interpreted a statute in a particular way ***because the court found the statute to be clear***, an agency's later interpretation of the statute that conflicted with the court's interpretation would not be entitled to *Chevron* deference. However, if a court interpreted a statute in a particular way ***despite finding that it was ambiguous***, an agency could later interpret the statute in a way that conflicted with the court's interpretation and the court would need to review the agency's interpretation under *Chevron* rather than upholding its prior interpretation based on *stare decisis*. As some critics of the decision charged, the agency could, in essence, overrule the court's interpretation of the statute. The *Brand X* Court wrote that its decision was compelled by the underlying reasoning of *Chevron* that Congress implicitly delegates authority to agencies, rather than courts, to interpret a statute when there is an ambiguity in the statute. *Id.* at 982-983.

The Court's decision in *Brand X* marked a high-water mark for *Chevron*, but also led to increased criticism of the doctrine. In that way, *Brand X* helped to hasten *Chevron's* demise.

In addition to the *Chevron* Step Zero exceptions discussed in the prior section of this chapter, courts fashioned several other exceptions to *Chevron* before the Supreme Court overruled it in *Loper Bright.* For instance, it was generally understood that *Chevron* only applied to agency interpretations of statutes that an agency was authorized to enforce and administer. *See* Epic Systems Corp. v. Lewis, 584 U.S. 497, 519-520 (2018). Some courts also held that *Chevron* did not apply when an agency disavowed the doctrine. *See* Glob. Tel. Link v. FCC, 866 F.3d 397, 407-08 (D.C. Cir. 2017). Furthermore, *Chevron* did not apply when a court reviewed an agency's interpretation of its regulations, rather than interpretation of a statute. The standard of review that applies in those cases is discussed later in this chapter.

As courts fashioned more exceptions to *Chevron*, several Supreme Court Justices criticized the doctrine in concurring or dissenting opinions, *see, e.g.,* Burlington Northern Santa Fe Ry. v. Loos, 139 S. Ct. 893 (2019) (dissenting opinion of Justices Gorsuch and Thomas criticizing Chevron); Pereira v. Sessions, 138 S. Ct. 2105 (2018) (concurring opinion of Justice Kennedy and dissenting opinion of Justice Alito criticizing Chevron);

Michigan v. EPA, 576 U.S. 743 (2015) (concurring opinion of Justice Thomas criticizing Chevron); *City of Arlington v. Federal Communications Commission*, 569 U.S. 290, 312 (2013) (Roberts, dissenting) (Chief Justice Roberts expressing skepticism toward *Chevron*). In addition, prior to joining the Court, Justice Brett Kavanaugh criticized *Chevron* as having "no basis in the Administrative Procedure Act," orchestrating a "shift of power from Congress to the Executive Branch," being difficult to apply, and encouraging the Executive Branch to be aggressive when interpreting statutes. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150-51 (2016). In the article in which he raised those criticisms, though, he suggested that *Chevron* can still play a role in statutory interpretation and that courts should defer to agencies when interpreting broad and open-ended terms in statutes, but not when interpreting specific statutory terms or phrases. *Id.* at 2153-54.

As criticism to *Chevron* mounted, Congress also considered, but did not pass, legislation that would replace *Chevron* deference with *Skidmore* or de novo review. *See, e.g.*, Regulatory Accountability Act of 2017, S. 951, 115th Cong., § 4 (2017), *available at:* https://www.congress.gov/bill/115th-congress/house-bill/76/text (last visited July 9, 2024); Separation of Powers Restoration Act of 2017, S. 1577, 115th Cong. § 2 (2017), *available at*: https://www.congress.gov/bill/115th-congress/senate-bill/1577 (last visited July 9, 2024).

Before the Supreme Court overruled *Chevron,* federal courts were increasingly ignoring *Chevron* in cases where the doctrine should have applied without mentioning *Chevron* or justifying departure from *Chevron* based on an exception. *See* Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 53 Wake Forest L. Rev. 37 (2018); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 970, 982 (1992) ("the *Chevron* framework is used in only about half the cases that the Court perceives as presenting a deference question.").[607]

The last time that the U.S. Supreme Court upheld an agency interpretation of a statute based on *Chevron* was in 2016. *See Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016) (unanimous decision, including Justices Alito and Thomas).

V. The World After *Chevron*

On the penultimate day of the 2023-24 term, the Supreme Court overruled the *Chevron* doctrine in *Loper Bright Enterprises et al. v. Raimondo*, which is reproduced below.

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[607] *But see* Kent Barnett and Christopher J. Walker, *Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 9 (2017) (finding that lower federal courts were continuing to apply the doctrine with vigor).

Resources for the Case

Unedited Opinion (From Justia)
Oral Argument (From the Oyez Project)
Amicus Briefs (From ScotusBlog)
Impacts of Loper Bright (Prof. Richard Lazarus – Harvard Law School)
Atlantic Herring Fisheries Management Plan (from New England Fishery Mgmt. Council)

LOPER BRIGHT ENTERPRISES, ET AL. V. RAIMONDO

2024 U.S. LEXIS 2882 (2024)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Since our decision in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we have sometimes required courts to defer to "permissible" agency interpretations of the statutes those agencies administer— even when a reviewing court reads the statute differently. In these cases we consider whether that doctrine should be overruled.

I.

[In Part I of the opinion, the Court summarized the background of the consolidated cases and the procedural history of the cases. Both cases involved interpretation of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), codified at 16 U.S.C. §1801, et. seq. A provision of the law indicated that fishery management plans developed under the law could require that "one or more observers be carried on board" vessels "for the purpose of collecting data necessary for the conservation and management of the fishery." *Id.* §1853(b)(8). Pursuant to the law, the New England Fishery Management Council adopted a fishery management plan for the Atlantic herring fishery that required observers to be carried on board vessels in some circumstances. The MSA specifically identifies three groups of vessels that must pay for the costs associated with observers required under the law, but it does not include any provisions that address whether Atlantic herring fishermen may be required to pay for the costs associated with any observers that might be required under a fishery management plan developed under the law for the Atlantic herring fishery. For many years, the National Marine Fisheries Service (NMFS), an agency within the U.S. Department of Commerce, paid the costs for the observers but, in 2020, the NMFS promulgated a regulation that required the vessel operators to pay for the cost of observers that may be required under the plans.

Loper Bright Enterprises operates fishing vessels in the Atlantic herring fishery and, along with other businesses operating in the fishery, it brought a lawsuit in the U.S. District Court for the District of Columbia, challenging the regulations adopted by NMFS requiring operators to pay for the cost of observers. The district court upheld the regulation, finding that either the MSA authorized the regulation or the MSA was ambiguous, but the government's reading of the statute was reasonable under *Chevron* and should be upheld. The D.C. Circuit affirmed the decision, finding that there was some question

regarding Congress' intent, but that the agency's reading of the statute was reasonable under *Chevron.*

The companion case was brought in the U.S. District Court for the District of Rhode Island by Relentless, Inc. and other companies that operated in the Atlantic herring fishery. Like Loper Bright, they argued that the NMFS rule was not authorized by the MSA. The district court granted summary judgment to the government, deferring, under *Chevron*, to the government's reading of the statute. The First Circuit affirmed, finding that the NMFS rule was authorized by the statute. The court indicated that it was applying *Chevron's* two step framework, but it didn't explain which aspects of its analysis were relevant to which step of *Chevron* and it did not indicate whether it was ruling for the government at *Chevron* step one or step two.

The Supreme Court granted certiorari in both cases, limited to the question of whether *Chevron* should be overruled or clarified. Since Justice Jackson heard argument on the Loper Bright case while she served as a judge on the D.C. Circuit, she did not participate in that case on appeal, but participated in the appeal of the case brought by Relentless. The Court issued this single opinion for both cases.]

II.

A.

Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate "Cases" and "Controversies"—concrete disputes with consequences for the parties involved. The Framers appreciated that the laws judges would necessarily apply in resolving those disputes would not always be clear. * * * The Framers also envisioned that the final "interpretation of the laws" would be "the proper and peculiar province of the courts." The Federalist No. 78, at 525 (A. Hamilton). * * *

This Court embraced the Framers' understanding of the judicial function early on. In the foundational decision of *Marbury v. Madison*, Chief Justice Marshall famously declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177 (1803). * * *

The Court also recognized from the outset, though, that exercising independent judgment often included according due respect to Executive Branch interpretations of federal statutes. For example, in *Edwards' Lessee v. Darby*, 12 Wheat. 206 (1827), the Court explained that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." * * *

Such respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. *See United States v. Dickson*, 15 Pet. 141, 161 (1841) (Story, J., for

the Court); *United States v. Alabama Great Southern R. Co.*, 142 U. S. 615, 621 (1892); *National Lead Co. v. United States*, 252 U. S. 140, 145–146 (1920). That is because "the longstanding 'practice of the government'"—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'" *NLRB v. Noel Canning*, 573 U. S. 513, 525 (2014) * * * The Court also gave "the most respectful consideration" to Executive Branch interpretations simply because "[t]he officers concerned [were] usually able men, and masters of the subject," who were "[n]ot unfrequently . . . the draftsmen of the laws they [were] afterwards called upon to interpret." *United States v. Moore*, 95 U.S. 760, 763 (1878). * * *

"Respect," though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it. Whatever respect an Executive Branch interpretation was due, a judge "certainly would not be bound to adopt the construction given by the head of a department." *Decatur*, 14 Pet., at 515; see also Burnet v. Chicago Portrait Co., 285 U. S. 1, 16 (1932). Otherwise, judicial judgment would not be independent at all. As Justice Story put it, "in cases where [a court's] own judgment . . . differ[ed] from that of other high functionaries," the court was "not at liberty to surrender, or to waive it." *Dickson*, 15 Pet., at 162.

B.

The New Deal ushered in a "rapid expansion of the administrative process." *United States v. Morton Salt Co.*, 338 U. S. 632, 644 (1950). But as new agencies with new powers proliferated, the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment. During this period, the Court often treated agency determinations of fact as binding on the courts, provided that there was "evidence to support the findings." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51 (1936). * * *

But the Court did not extend similar deference to agency resolutions of questions of law. It instead made clear, repeatedly, that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies," was "exclusively a judicial function." * * * It also continued to note, as it long had, that the informed judgment of the Executive Branch—especially in the form of an interpretation issued contemporaneously with the enactment of the statute—could be entitled to "great weight." *American Trucking Assns.*, 310 U. S. 534, 549 (1940).

Perhaps most notably along those lines, in *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944), the Court explained that the "interpretations and opinions" of the relevant agency, "made in pursuance of official duty" and "based upon . . . specialized experience," "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance," even on legal questions. "The weight of such a judgment in a particular case," the Court observed, would "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."

On occasion, to be sure, the Court applied deferential review upon concluding that a particular statute empowered an agency to decide how a broad statutory term applied to specific facts found by the agency. For example, in *Gray v. Powell*, 314 U. S. 402 (1941), the Court deferred to an administrative conclusion that a coal-burning railroad that had arrangements with several coal mines was not a coal "producer" under the Bituminous Coal Act of 1937. Congress had "specifically" granted the agency the authority to make that determination. The Court thus reasoned that "[w]here, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched" so long as the agency's decision constituted "a sensible exercise of judgment." Similarly, in *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111 (1944), the Court deferred to the determination of the National Labor Relations Board that newsboys were "employee[s]" within the meaning of the National Labor Relations Act. The Act had, in the Court's judgment, "assigned primarily" to the Board the task of marking a "definitive limitation around the term 'employee.'" The Court accordingly viewed its own role as "limited" to assessing whether the Board's determination had a "'warrant in the record' and a reasonable basis in law."

Such deferential review, though, was cabined to factbound determinations like those at issue in *Gray* and *Hearst*. Neither *Gray* nor *Hearst* purported to refashion the longstanding judicial approach to questions of law. In *Gray*, after deferring to the agency's determination that a particular entity was not a "producer" of coal, the Court went on to discern, based on its own reading of the text, whether another statutory term—"other disposal" of coal— encompassed a transaction lacking a transfer of title. The Court evidently perceived no basis for deference to the agency with respect to that pure legal question. And in *Hearst*, the Court proclaimed that "[u]ndoubtedly questions of statutory interpretation . . . are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." At least with respect to questions it regarded as involving "statutory interpretation," the Court thus did not disturb the traditional rule. It merely thought that a different approach should apply where application of a statutory term was sufficiently intertwined with the agency's factfinding.

In any event, the Court was far from consistent in reviewing deferentially even such factbound statutory determinations. Often the Court simply interpreted and applied the statute before it. * * * Nothing in the New Deal era or before it thus resembled the deference rule the Court would begin applying decades later to all varieties of agency interpretations of statutes. Instead, just five years after *Gray* and two after *Hearst*, Congress codified the opposite rule: the traditional understanding that courts must "decide all relevant questions of law." 5 U.S.C. §706.

C.

Congress in 1946 enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." * * * In addition to prescribing procedures for agency action, the APA delineates the basic contours of judicial review of such action. As relevant here, Section 706 directs that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706. It further requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." §706(2)(A).

The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action, §706 (emphasis added)— even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential. See §706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); §706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").

In a statute designed to "serve as the fundamental charter of the administrative state," * * * Congress surely would have articulated a similarly deferential standard applicable to questions of law had it intended to depart from the settled pre-APA understanding that deciding such questions was "exclusively a judicial function," *American Trucking Assns.*, 310 U. S., at 544. But nothing in the APA hints at such a dramatic departure. * * *

The text of the APA means what it says. And a look at its history if anything only underscores that plain meaning. [The majority then cited provisions in the House and Senate Reports on the legislation and statements of legislators to support its reading of the statute according to the plain meaning.] Even the Department of Justice—an agency with every incentive to endorse a view of the APA favorable to the Executive Branch—opined after its enactment that Section 706 merely "restate[d] the present law as to the scope of judicial review." Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 108 (1947) * * * That "present law," as we have described, adhered to the traditional conception of the judicial function.

Various respected commentators contemporaneously maintained that the APA required reviewing courts to exercise independent judgment on questions of law. * * *

The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular

statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. *Skidmore*, 323 U. S., at 140. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning. *See ibid.; American Trucking Assns.*, 310 U. S., at 549.

In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term.[5] Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *Michigan v. EPA*, 576 U. S. 743, 752 (2015), such as "appropriate" or "reasonable."[6]

When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "'reasoned decisionmaking' " within those boundaries, *Michigan*, 576 U. S., at 750 (quoting Allentown Mack Sales & Service, Inc. v. NLRB, 522 U. S. 359, 374 (1998)); *see also Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29 (1983). By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

III.

The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.

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5 *See, e.g.,* 29 U.S.C. §213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added); 42 U.S.C. §5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*" (emphasis added).

6 *See, e.g.,* 33 U.S.C. § 1312(a); 42 U.S.C. §7412(n)(1)(A).

A.

In the decades between the enactment of the APA and this Court's decision in *Chevron,* courts generally continued to review agency interpretations of the statutes they administer by independently examining each statute to determine its meaning. * * *

Chevron, decided in 1984 by a bare quorum of six Justices, triggered a marked departure from the traditional approach. [The majority then outlined the two step test articulated by the Court in *Chevron*. After discussing the first step, the majority turned to the second step.] * * *

Without mentioning the APA, or acknowledging any doctrinal shift, the Court articulated a second step applicable when "Congress ha[d] not directly addressed the precise question at issue." In such a case—that is, a case in which "the statute [was] silent or ambiguous with respect to the specific issue" at hand—a reviewing court could not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." A court instead had to set aside the traditional interpretive tools and defer to the agency if it had offered "a permissible construction of the statute," even if not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." That directive was justified, according to the Court, by the understanding that administering statutes "requires the formulation of policy" to fill statutory "gap[s]"; by the long judicial tradition of according "considerable weight" to Executive Branch interpretations; and by a host of other considerations, including the complexity of the regulatory scheme, EPA's "detailed and reasoned" consideration, the policy-laden nature of the judgment supposedly required, and the agency's indirect accountability to the people through the President. * * *

Initially, *Chevron* "seemed destined to obscurity." The Court did not at first treat it as the watershed decision it was fated to become; it was hardly cited in cases involving statutory questions of agency authority. But within a few years, both this Court and the courts of appeals were routinely invoking its two-step framework as the governing standard in such cases. As the Court did so, it revisited the doctrine's justifications. Eventually, the Court decided that *Chevron* rested on "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." * * *

B.

Neither *Chevron* nor any subsequent decision of this Court attempted to reconcile its framework with the APA.

1

Chevron defies the command of the APA that "the reviewing court"—not the agency whose action it reviews—is to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added). It requires a court to ignore, not follow, "the

reading the court would have reached" had it exercised its independent judgment as required by the APA. And although exercising independent judgment is consistent with the "respect" historically given to Executive Branch interpretations, *Chevron* insists on much more. It demands that courts mechanically afford binding deference to agency interpretations, including those that have been inconsistent over time. Still worse, it forces courts to do so even when a pre-existing judicial precedent holds that the statute means something else—unless the prior court happened to also say that the statute is "unambiguous." *Brand X,* 545 U. S., at 982. That regime is the antithesis of the time honored approach the APA prescribes. * * *

Chevron cannot be reconciled with the APA, as the Government and the dissent contend, by presuming that statutory ambiguities are implicit delegations to agencies. * * * Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality. *Chevron's* presumption does not, because "[a]n ambiguity is simply not a delegation of law interpreting power. *Chevron* confuses the two." As *Chevron* itself noted, ambiguities may result from an inability on the part of Congress to squarely answer the question at hand, or from a failure to even "consider the question" with the requisite precision. In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question. And many or perhaps most statutory ambiguities may be unintentional. * * *

Courts, after all, routinely confront statutory ambiguities in cases having nothing to do with *Chevron*—cases that do not involve agency interpretations or delegations of authority. Of course, when faced with a statutory ambiguity in such a case, the ambiguity is not a delegation to anybody, and a court is not somehow relieved of its obligation to independently interpret the statute. Courts in that situation do not throw up their hands because "Congress's instructions have" supposedly "run out," leaving a statutory "gap." Courts instead understand that such statutes, no matter how impenetrable, do— in fact, must—have a single, best meaning. That is the whole point of having written statutes; "every statute's meaning is fixed at the time of enactment." * * * So instead of declaring a particular party's reading "permissible" in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity.

In an agency case as in any other, though, even if some judges might (or might not) consider the statute ambiguous, there is a best reading all the same—"the reading the court would have reached" if no agency were involved. It therefore makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible.

Perhaps most fundamentally, *Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. * * * [E]ven *Chevron* itself reaffirmed that "[t]he judiciary is the final authority on issues of statutory

construction" and recognized that "in the absence of an administrative interpretation," it is "necessary" for a court to "impose its own construction on the statute." *Chevron* gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day— is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.

2

The Government responds that Congress must generally intend for agencies to resolve statutory ambiguities because agencies have subject matter expertise regarding the statutes they administer; because deferring to agencies purportedly promotes the uniform construction of federal law; and because resolving statutory ambiguities can involve policymaking best left to political actors, rather than courts. * * * But none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent.

Beginning with expertise, we recently noted that interpretive issues arising in connection with a regulatory scheme often "may fall more naturally into a judge's bailiwick" than an agency's. *Kisor*, 588 U. S., at 578. We thus observed that "[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Chevron's* broad rule of deference, though, demands that courts presume just the opposite. Under that rule, ambiguities of all stripes trigger deference. * * *

But even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency. Congress expects courts to handle technical statutory questions. "[M]any statutory cases" call upon "courts [to] interpret the mass of technical detail that is the ordinary diet of the law," and courts did so without issue in agency cases before *Chevron.* Courts, after all, do not decide such questions blindly. The parties and amici in such cases are steeped in the subject matter, and reviewing courts have the benefit of their perspectives. In an agency case in particular, the court will go about its task with the agency's "body of experience and informed judgment," among other information, at its disposal. *Skidmore*, 323 U. S., at 140. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control." *Skidmore*, 323 U. S., at 140. * * *

For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive

Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Nor does a desire for the uniform construction of federal law justify *Chevron*. Given inconsistencies in how judges apply *Chevron*, *see infra*, it is unclear how much the doctrine as a whole (as opposed to its highly deferential second step) actually promotes such uniformity. In any event, there is little value in imposing a uniform interpretation of a statute if that interpretation is wrong. We see no reason to presume that Congress prefers uniformity for uniformity's sake over the correct interpretation of the laws it enacts.

The view that interpretation of ambiguous statutory provisions amounts to policymaking suited for political actors rather than courts is especially mistaken, for it rests on a profound misconception of the judicial role. It is reasonable to assume that Congress intends to leave policymaking to political actors. But resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back on." Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences. Indeed, the Framers crafted the Constitution to ensure that federal judges could exercise judgment free from the influence of the political branches. *See The Federalist*, No. 78, at 522–525. * * *

That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has. But to stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA. By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging.

3

In truth, *Chevron*'s justifying presumption is, as Members of this Court have often recognized, a fiction. * * * So we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that "where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is 'inapplicable.'" *United States v. Mead Corp.*, 533 U. S. 218, 230 (2001). [The majority then outlined the various exceptions to the application of *Chevron* developed by the Court over four decades.] Confronted with this byzantine set of preconditions and exceptions, some courts have simply bypassed *Chevron*, saying it makes no difference for one reason or another. And even when they do invoke *Chevron*, courts do not always heed the various steps and nuances of that evolving doctrine. In one of the cases before us today, for example, the First Circuit both skipped "step zero," and

refused to "classify [its] conclusion as a product of *Chevron* step one or step two"—though it ultimately appears to have deferred under step two.

This Court, for its part, has not deferred to an agency interpretation under *Chevron* since 2016. *See Cuozzo Speed Technologies, LLC v. Lee,* 579 U. S. 261, 280 (2016). But *Chevron* remains on the books. So litigants must continue to wrestle with it, and lower courts—bound by even our crumbling precedents — understandably continue to apply it. The experience of the last 40 years has thus done little to rehabilitate *Chevron.* It has only made clear that *Chevron's* fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies. At best, our intricate *Chevron* doctrine has been nothing more than a distraction from the question that matters: Does the statute authorize the challenged agency action? And at worst, it has required courts to violate the APA by yielding to an agency the express responsibility, vested in "the reviewing court," to "decide all relevant questions of law" and "interpret . . . statutory provisions." §706 (emphasis added).

[In Part IV of its opinion, the majority concluded that *stare decisis* was not a barrier to overruling *Chevron* because *stare decisis* "is not an 'inexorable command' and the stare decisis considerations most relevant *** - the quality of [the precedent's] reasoning, the workability of the rule it established, and reliance on the decision," * * * all weigh in favor of letting *Chevron* go." The majority argued that the Court need not wait for Congress to legislate to eliminate *Chevron* because the Court created the doctrine and should correct its own mistakes. In light of the fact that so many cases were decided by the Supreme Court and lower courts in reliance on *Chevron,* the majority directly addressed the impact of its decision on those cases. The majority wrote, "By [overruling *Chevron*], however, we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful - including the Clean Air Act holding of *Chevron* itself - are still subject to statutory *stare decisis* despite our change in interpretive methodology."]

Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.

Because the D. C. and First Circuits relied on *Chevron* in deciding whether to uphold the Rule, their judgments are vacated, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments

1. **The statutory interpretation question:** *Loper Bright* was a classic *Chevron* scenario in that it involved a challenge to a legislative rule adopted by an agency to interpret an ambiguous provision in a statute. While the Magnuson-Stevens Fishery Conservation and Management Act (MSA) explicitly identified certain groups of vessels that had to pay for observers required by the Act, it was silent regarding whether other operators of vessels could be required to pay for observers. The National Marine Fisheries Service (NMFS) interpreted the statute, by regulation, to allow the agency to require the operators of vessels in the Atlantic herring fishery to pay for the observers. Both the D.C. Circuit and the 1st Circuit applied *Chevron* in the companion cases challenging the agency's regulation.

2. **Article III:** Chief Justice Roberts begins his opinion with a discussion of Article III and the powers assigned to courts under the Constitution. Does he believe that application of the *Chevron* doctrine is consistent with Article III?

3. **The world before *Chevron*:** What weight did the majority argue courts accorded to agency interpretations of statutes prior to *Chevron*? Was there deference on any matters? How does the majority characterize judicial review under *Skidmore, Gray v. Powell*, and *NLRB v. Hearst*? Justice Kagan, in her dissent, argued that courts were deferring to agencies' legal interpretations in cases like *Gray v. Powell* and *NLRB v. Hearst* when they deferred to agencies' conclusions on "mixed questions of fact and law," so that those cases were natural precursors to *Chevron* deference.

4. **The APA:** Why does the majority conclude that the plain meaning of the text of Section 706 precludes *Chevron* deference? What standard does the majority suggest courts should apply when reviewing agencies' interpretations of statutes in most cases? What significance does the majority give to the language used to set the standard for judicial review of agency actions in Sections 706(2)(A) and 706(2)(E)? Justice Kagan points out, in dissent, that Section 706(2)(F) provides for courts to review agency decisions de novo in certain situations. How might that be used to determine whether courts can defer to agencies' interpretations of legal questions under Section 706?

5. **The APA as codifying existing caselaw:** The majority and Justice Kagan, in dissent, agreed that the APA was intended to codify existing caselaw regarding the manner in which courts interpreted statutes in light of agency interpretations of statutes. However, they disagreed regarding the state of the caselaw as it existed at the time of the enactment of the APA. As noted above, the majority felt that courts did not accord agencies any deference on questions of law before the enactment of the APA, while Justice Kagan argued that courts were according *Chevron*-style deference in those cases decades before *Chevron* was decided.

6. **Relevance of agency interpretations after *Loper Bright*:** While the majority holds that *Chevron* deference is inconsistent with the APA, it identifies two ways that agency interpretations may be useful in interpreting a statute. What were the two ways

and how is a court's analysis different under each? Note that the format of the agency's decision (legislative rulemaking, non-legislative rulemaking, informal adjudication, adjudication) no longer has much influence on the weight accorded to an agency interpretation, except to the extent that the format might be relevant in the *Skidmore* analysis. *See, e.g.,* Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference after Loper Bright*, forthcoming in N.Y.U. L.Rev. (2025). Although the majority suggested that it is appropriate for courts, in exercising independent judgment, to consider agency interpretations of statutes as a tool consistent with Skidmore, it is unclear to what extent courts will continue to do so. *Compare* Jack M. Beerman, *Chevron Deference is Dead, Long Live Deference, 2023-2024 Cato Sup. Ct. Rev. 31* (suggesting that lower courts may be reluctant to apply *Skidmore*, other than in a weak manner) and Thomas W. Merrill, *The Demise of Deference - And the Rise of Delegation to Interpret*, 138 Harv. L. Rev. 227 (2024) (discussing why courts might conclude that *Skidmore* is optional and not mandatory) with Patrick Jacobi and Gabriella Mickel, *Skidmore in the Post-Loper Bright Era of Environmental Law*, *forthcoming in* 55 Envtl L. (2025) (outlining an empirical review of federal court decisions post-*Loper-Bright* that have applied a strong version of *Skidmore*).

7. Explicit delegation – Reasoned decision-making: Why does the majority reject the *Chevron* presumption that Congress intended to delegate interpretive power to agencies when it left ambiguities in statutes? Note the contrast between the majority's discussion of implicit delegation and explicit delegation. How does the court's role, as described by the majority, in reviewing statutes when Congress expressly delegates authority to the agency to interpret the statute differ from *Chevron* Step Two? Does the majority provide a clear test for determining when Congress expressly delegates authority to an agency to interpret a statute?

8. Implicit delegation: Some commentators have suggested that the Court's opinion allows courts to apply the deferential "reasoned decisionmaking" standard to agency interpretations of statutes where Congress has ***implicitly*** delegated the agency authority to interpret the statute, and not simply when Congress has ***explicitly*** delegated that authority. *See, e.g.,* Mila Sohoni, *Chevron's Legacy*, 138 Harv. L. Rev. Forum 66 (2025); Thomas W. Merrill, *The Demise of Deference - And the Rise of Delegation to Interpret*, 138 Harv. L. Rev. 227 (2024). Is that inconsistent with the Court's finding that ambiguity in a statute is not an implicit delegation of interpretive authority to an agency? If courts interpret *Loper Bright* to require the application of the "reasoned decisionmaking" standard to implied delegations of interpretive authority, many commentators suggest that the Court's decision might not change the degree of deference accorded to agencies in many cases from the deference they received under *Chevron*. *See, e.g.,* Adrian Vermeule, *The Old Regime and the Loper Bright Revolution*, forthcoming in Sup.Ct. Rev. (2025); Jack M. Beerman, *Chevron Deference is Dead, Long Live Deference*, 2023-2024 Cato Sup. Ct. Rev. 31; Merrill, *The Demise of Deference*, *supra*.

9. **Mixed questions of fact and law:** While the majority suggests that courts can accord respect to agency interpretations of statutes under *Skidmore* and should review agency interpretations of statutes under a reasoned decision-making standard when Congress delegates interpretive authority to the agency, there is another situation where courts are likely to provide deference to agency interpretations of statutes post *Loper-Bright.* In Part II.B. of the majority opinion, Justice Roberts acknowledged that before Congress enacted the APA, courts frequently deferred to agencies on "mixed questions of fact and law." Since the Court held, in Part III, that Congress intended to codify the pre-existing law when it enacted the APA, most commentators read the Court's opinion as providing for continued deference to agencies on "mixed questions of fact and law."

10. **Agency expertise, political accountability, and uniformity:** In her dissent, Justice Kagan defended *Chevron* deference on many of the traditional grounds asserted by the *Chevron* Court and subsequent courts and academics. Specifically, she argued that when Congress leaves an ambiguity in a statute, that ambiguity can be resolved either by courts or by agencies. Deferring to agencies, she argued, is preferable because (1) agencies have expertise in the subject matter of the statute and expertise developed from administering the statute that courts lack; (2) agencies are politically accountable, whereas courts are not; and (3) agencies can establish uniform interpretations of statutes. How does the majority address those arguments in defense of deference to agencies? Do you agree that judges do not make policy when interpreting ambiguities in statutes? Some commentators have suggested that the decision could spur an increase in ideological decision-making by courts. *See,* Cass R. Sunstein, *The Consequences of Loper Bright,* Harv. Pub. L. Work. Paper (July 1, 2024). To the extent that resolution of the statutory interpretation questions turns on issues of scientific or technical expertise, which judges lack, what options are available for courts other than *Skidmore* respect for agencies' views? *See* Sapna Kumar, *Scientific and Technical Expertise After Loper Bright,* 74 Duke L. J. 1569 (2025) (recommending Congressional authorization for neutral expert advisors for judges).

11. **The slow decline of *Chevron*:** The majority's disdain for *Chevron* is especially evident in Part III of the opinion. In Part III.B., the Court expresses frustration at being required to "mechanically afford binding deference to agency interpretations * * * that have been inconsistent over time [and] * * * to do so even when a pre-existing judicial precedent holds that the statute means something else." Later, the majority notes that it "spent the better part of four decades imposing one limitation on *Chevron* after another," that courts often bypassed *Chevron* because they couldn't figure out how or when it applied, and that courts often didn't understand the various steps of *Chevron*, as exhibited by the 1st Circuit's decision below. As noted earlier, the majority also pointed out that the Supreme Court hadn't relied on the doctrine to uphold an agency's interpretation of a statute since 2016.

12. ***Stare decisis*:** As noted earlier in this book, judicial interpretations of statutes, as opposed to interpretations of the Constitution, are usually accorded "super-strong" *stare*

decisis effect because Congress can more readily overturn a court's interpretation of a statute than it can overturn an interpretation of the Constitution. Why does the majority determine that it is appropriate to overturn the forty-year-old *Chevron* precedent? Did the Court apply the correct standard for stare decisis? *See* Thomas W. Merrill, *The Demise of Deference - And the Rise of Delegation to Interpret*, 138 Harv. L. Rev. 227 (2024). In her dissent, Justice Kagan described the precedent as "a cornerstone of administrative law," "part of the warp and woof of modern government," and the basis for thousands of judicial decisions. What effect will the Court's decision have on the thousands of cases that relied on *Chevron* to interpret statutes? Is it relevant that *Chevron* created a method of statutory interpretation? Does *stare decisis* usually apply to statutory interpretation methodologies? *See* Abbe R. Gluck, *Overruling Chevron Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 Harv. J. on Legis. 20 (2024).

13. Congressional inaction: Note that Justice Roberts defends judicial, rather than agency, resolution of statutory ambiguities by arguing that Congress can always amend a statute if it disagrees with the court's interpretation of the statute. That seems to indicate a faith in Congress' ability to overturn judicial decisions with which it disagrees. However, when analyzing whether it is appropriate to overturn *Chevron* despite the fact that Congress has not enacted legislation to overturn the precedent, the majority does not exhibit that same faith and holds that the Court does not have to wait for Congress to overturn *Chevron* because the doctrine was created by the Court itself. Some commentators have argued that the *Chevron* doctrine encouraged Congress to abdicate its responsibility to address issues in legislation detail because Congress could delegate that responsibility to agencies. *See, e.g.*, Daniel E. Walters, *Will Loper Bright Spur a Congressional Renaissance?*, Tex. A&M Univ. Law Leg. Stud. Res. Paper (April 12, 2024). In the wake of the Court's decision in *Loper Bright*, Congress could allow agencies to exert broad authority to interpret ambiguous language in statutes by including explicit delegations of such authority to the agencies in amendments to the statutes. Do you think that is likely? *See* Abbe R. Gluck, *Overruling Chevron Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 Harv. J. on Legis. 20 (2024) (constant updating of statutes is neither possible nor wise); Walters, *supra* (empirical study that compares legislative activity and deference regimes in states suggests that Congress is unlikely to increase the volume and detail of legislative activity in response to *Loper Bright*).

14. Additional opinions: Justice Thomas wrote a solo concurring opinion in *Loper Bright*, arguing that *Chevron* raised separation of powers concerns as a violation of Article II as well as Article III. Justice Gorsuch wrote a solo concurring opinion to set forth his views on *stare decisis* and the application of *stare decisis* to *Chevron*.

15. Anti-agency trend in the Roberts Court: *Loper Bright* is just one decision that is part of a broader trend in the Roberts Court, led by Justices Gorsuch, Thomas, and Alito, to reduce the power of administrative agencies. In the same week that the Court issued

its decision in *Loper Bright*, it issued a decision calling into question the power of agencies to enforce statutes administratively as opposed to judicially, *see* SEC v. Jarkesy, 2024 U.S. LEXIS 2847 (2024), and a decision effectively extending the statute of limitations for challenges to agency actions under the Administrative Procedure Act. *See* Corner Post Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 2024 U.S. LEXIS 2885 (2024). In addition, as noted earlier in this book, the Roberts Court has imposed new limits on the composition of agencies based on the Appointments Clause[608] and is reinvigorating the non-delegation doctrine.[609] In the same vein, the Court has expanded the use of the "major questions doctrine," discussed in the next part of this chapter, to limit the ability of agencies to carry out broad delegations of statutory authority. While conservatives applaud the Court's *Loper Bright* decision, as they initially applauded the Court's *Chevron* decision, commentators point out that courts no longer need to defer to agencies' conservative interpretations of progressive statutes. *See* Todd Phillips, Loper Bright and Restoring the Banking Laws' Progressive Values, 22 Berkeley Business Law Journal 1 (2025).

16. Additional questions raised by the Court's decision in *Loper Bright*: The Court's decision in *Loper Bright* could have significant ripple effects, many of which may not be confirmed for years. For instance, will the decision significantly limit the ability of agencies to change interpretations of statutes over time – something that was broadly accepted under *Chevron*, but viewed skeptically under *Skidmore*? *See, e.g.* Thomas W. Merrill, The Demise of Deference - And the Rise of Delegation to Interpret, 138 Harv. L. Rev. 227 (2024) (yes); Jack M. Beerman, Chevron Deference is Dead, Long Live Deference, 2023-2024 Cato Sup. Ct. Rev. 31 (yes). Will the decision encourage agencies to adopt more conservative readings of statutes, and will it spur increased challenges to agencies' decisions? Will courts uphold agencies' statutory interpretation less frequently than they did under *Chevron? See* Robin Kundis Craig, The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months, 109 Minn. L. Rev. 101 (2025) (finding, in rulemaking challenges decided in the lower federal courts in the first six months after *Loper-Bright*, that courts invalidated agency rules in 83.8% of the cases). Will agencies seek to avoid *Loper Bright's* "independent judgment" review by characterizing their decisions as questions of policy, subject to deferential "arbitrary and capricious" review, rather than questions of law? *See, e.g.,* Jack M. Beerman, Chevron Deference is Dead, Long Live Deference, 2023-2024 Cato Sup. Ct. Rev. 31; Lisa Schultz Bressman, The Ordinary Questions Doctrine, 92 Geo. Wash. L. Rev. 985 (2024). Does the reversal of the *Chevron* doctrine eliminate the need for the major questions doctrine, discussed next? *Compare* Adrian Vermeule, The Old Regime and the Loper Bright Revolution, forthcoming in Sup.Ct. Rev. (2025) (major questions doctrine remains vital) with Merrill, *supra* (retention of the doctrine is inconsistent with the reasoning of the decision).

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608 *See* Chapter 1, Part IV.A.

609 *Id.*, Part II.A.