ESSAY

"DEFERENCE" IS TOO CONFUSING—LET'S CALL THEM "*CHEVRON* SPACE" AND "*SKIDMORE* WEIGHT"

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This Essay suggests an underappreciated, appropriate, and conceptually coherent structure to the Chevron *relationship of courts to agencies, grounded in the concept of "allocation." Because the term "deference" muddles rather than clarifies the structure's operation, this Essay avoids speaking of* "Chevron *deference" and* "Skidmore *deference." Rather, it argues, one could more profitably think in terms of* "Chevron *space" and* "Skidmore *weight."* "Chevron *space" denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its allocated authority.* "Skidmore *weight" addresses the possibility that an agency's view on a given statutory question may in itself warrant the respect of judges who are themselves unmistakably responsible for deciding the question of statutory meaning.*

*"*Skidmore *weight" has an underappreciated pedigree. For almost two centuries, American courts have given agency views of statutory meaning considerable weight in deciding for themselves issues of statutory meaning.* "Chevron *space" reflects our more recent understanding and acceptance that Congress may validly confer on executive agencies the authority to act with the force of law, so long as the legality of their action within the boundaries of their authority can be judicially assured. Within its congressionally authorized space, the agency is the prime actor. From a court's independent conclusion that Congress has delegated authority to an agency—a conclusion that may even be informed by* Skidmore *weight given to the agency's own understandings of its authority—it follows ineluctably that the reviewing court is to act, not as decider, but as overseer.*

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INTRODUCTION

Administrative law scholars have leveled a forest of trees exploring the mysteries of the *Chevron* approach contemporary judges take to reviewing law-related aspects of administrative action.[1] Without wishing to deny for a moment that judicial practice has been inconstant[2]—influenced by the importance of the matter, by the accessibility of the issues to nonexpert judges, by politics, and by the earned reputations of differing agencies—this Essay suggests that there is an underappreciated, appropriate, and conceptually coherent structure to the *Chevron* relationship of courts to agencies, a structure whose basic impulse may be captured by the concept of "allocation." Understanding judicial review of administrative action as a consequence of and in relationship to congressional delegations of authority to administrative agencies—allocations of role as between agency and court—reveals a relatively simple and coherent structure for the law-related side of the conventional model of judicial review as it has developed over the years.

To lay the groundwork for this understanding, this Essay begins with a short account and critique of an article on the history of American approaches to judicial review of agency action published here last spring by my colleague, Thomas Merrill.[3] After briefly addressing the question of judicial review of agency fact-finding, another setting in which achieving coherence has proved difficult, it turns to the effort of reconciling the judiciary's "exclusive" responsibility for statutory interpretation with congressional delegations to agencies of the authority to create legal regimes within the space allocated to them by their governing statutes. In doing so, it will explore a tension that has animated much of the judicial and academic discussion between *Chevron* and an earlier decision addressing the relationship of courts and agencies in interpreting statutes, *Skidmore v. Swift & Co.*[4] Both opinions describe the relationship they are address-

1. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). A March 2012 Lexis search of law reviews and journals for "Title(Chevron) and 467 US 837" returned 183 entries; a search of the same database for "Chevron pre/5 two-step or two step!," 609 entries. By contrast, "Title(State Farm) and 463 US 29" returned only one entry; "State Farm and (Automobile Manufacturers or Automobile Mfrs.) and 5 U.S.C. 706(2)(A)," fourteen entries.

2. See, e.g., 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, 1090 (2008) (arguing in most cases courts "rel(y) on ad hoc judicial reasoning"); 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, 59–60 (1998) (concluding existing models of *Chevron* doctrine do not predict actual outcomes); Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2075 (1990) (noting *Chevron* "raises at least as many questions as it answers").

3. Thomas W. Merrill, Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939 (2011) [hereinafter Merrill, Origins].

4. 323 U.S. 134 (1944).

ing as "deference," a term courts have commonly used in describing the court-agency relationship in regard to statutory interpretation. As will be seen, neither decision was an innovation. Like "discretion,"[5] however, "deference" is a highly variable, if not empty, concept. It is sometimes used in the sense of "obey" or "accept," and sometimes as "respectfully consider." Instead of "*Chevron* deference," this Essay will urge the use of "*Chevron* space"; instead of "*Skidmore* deference," "*Skidmore* weight."

"*Chevron* space" denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority. The whole idea of "agency" is that the agent has a certain authority, a zone of responsibility legislatively conferred upon it. What that zone is requires defining—more on this to come[6]—but within that zone, within its "*Chevron* space," the whole point of the empowering legislation is to allocate authority to the agency. Faced with the exercise of such authority, the natural role of courts, like that of referees in a sports match, is to see that the ball stays within the bounds of the playing field and that the game is played according to its rules. It is not for courts themselves to play the game. From a finding of law that Congress has validly allocated authority to a noncourt body, it follows ineluctably that that other body has the authority to decide the issues allocated to it, subject to such judicial supervision as oversight entails. Courts are, of course, ultimately responsible for deciding questions of law, but one such question is: "How much authority has validly been allocated to this agency?" The answer to that question is an element of the law the court is ultimately responsible to find *and obey*.

"*Skidmore* weight" addresses the possibility that an agency's view on a given statutory question may in itself warrant respect by judges who themselves have ultimate interpretive authority. Congress sometimes creates administrative bodies to which it allocates not responsibility for direct, legally effective action, but rather duties to provide guidance and to invoke judicial enforcement. The Labor Department's Wage and Hour Division, which is responsible for the guidance concerning the Fair Labor Standards Act that was in play in *Skidmore*, is typical. It does not find facts or seek internally to enforce the Act. It can, however, bring injunctive enforcement actions in court and issue advice to enquiring businesses about the Act's bearing on their concerns. Writing about the

5. Compare the differing uses of "discretion" in 5 U.S.C. § 701(a)(2) (2006) (precluding review of matters committed to agency discretion) and § 706(2)(A) (inviting review of agency action for abuse of discretion). Consider also the variety of meanings courts give the latter provision's use of "discretion" as a description of the standard of review, when it is applied to refusals to engage in rulemaking, see Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4 (D.C. Cir. 1987), to informal adjudications, see Camp v. Pitts, 411 U.S. 138, 142 (1973), and to high-consequence rulemakings, see Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983).

6. See infra Part III.A.2.

agency's functions in the late 1960s, Judge Harold Leventhal emphasized these characteristics of the division and found that it was issuing about 750,000 letter rulings per year, of which about 10,000 came signed by the Administrator.[7] Even agencies that Congress *has* empowered to act with legal force sometimes choose not to exercise that authority, but rather to guide—to indicate desired directions without undertaking (as they might) to compel them. In all of these contexts, *precisely because* the agency has not been authorized to act definitively, or if so authorized has not chosen to do so, the courts may ultimately be responsible for decisions on issues about which guidance has been given. Ought they, then, simply ignore such views as the agency may have expressed? Courts will encounter the questions involved only sporadically, haphazardly, and without any underlying responsibility for the statutory scheme. In contrast, the agency may constantly be issuing guidance about the integrated body of its constituent statutes. Its responsibility is to assist in their implementation in a coherent, intelligent way. The agency may have helped to draft the statutory language, and was likely present and attentive throughout its legislative consideration. Its views about statutory meaning may have been shaped in the immediate wake of enactment, under the enacting Congress's watchful eye. All of these are reasons for courts, in reaching their decisions, to accord these views "*Skidmore* weight." It is not only that agencies have the credibility of their circumstances, but also that they can contribute to an efficient, predictable, and nationally uniform understanding of the law that would be disrupted by the variable results to be expected from a geographically and politically diverse judiciary encountering the hardest (that is to say, the most likely to be litigated) issues with little experience with the overall scheme and its patterns.

Seeing the difference in this way—*Chevron* space as a consequence of delegation and *Skidmore* weight as an element of independent judicial judgment—helps to rationalize what might otherwise appear to be an inconsistency in the two usages. Within their delegated "space," agencies are permitted to change their views from time to time, and while the changes must be explained to establish their reasonableness in ordinary policy-review terms, the fact of change does not deprive the new view of its *Chevron* effect.[8] But if an agency's views vacillate over time, that detracts from, if it does not entirely eliminate, any *Skidmore* weight to which they might otherwise be entitled.[9] *Chevron* imagines the agency as a poli-

7. Nat'l Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 699 (D.C. Cir. 1971).

8. See, e.g., Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1097 (D.C. Cir. 2001) (accepting NLRB interpretation although agency had reversed itself multiple times).

9. See, e.g., Packard Motor Car Co. v. NLRB, 330 U.S. 485, 492 (1947) ("If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decision would leave us in the dark."). The

cymaker, appropriately responsive to the political views of the President in office at any given time. Indeed, Congress has created the agency's freedom to act within its space anticipating presidential oversight. *Skidmore*, on the other hand, is grounded in a construct of the agency as responsible expert, arguably possessing special knowledge of the statutory meaning a court should consider in reaching its own judgment. It thus serves as a political filter for agency authority where such authority was not delegated to an agency by the legislature. In considering how persistent a particular agency interpretation or finding has been, *Skidmore* treats variances occurring with the changing of the political guard as a negative, not a positive, factor. Under *Skidmore*, courts credit findings that are likely to be politically neutral, that may have lasted through a number of political changes. This is not just a matter of efficiency; it also respects the complex relationship amongst the legislature, executive, and judiciary.[10]

"*Chevron* space" also helps in understanding the disagreement in *National Cable & Telecommunication Ass'n v. Brand X Internet Services*.[11] There, eight members of the Court said that the Federal Communications Commission (FCC), in reaching a judgment within its allocated authority, had no need to regard itself as bound by the Ninth Circuit's prior judicial decision of the same issue in private litigation.[12] Justice Scalia, vigorously dissenting, characterized this as a violation of constitutionally requisite executive-judicial relations.[13] Suppose that Congress has created some "*Chevron* space" for a responsible agency, and a court finds itself compelled by private litigation to decide a matter falling within that space. Congress has given the FCC responsibility for defining the difference (if any, in our information age) between telecommunications services and data services, whether offered over land wires or wirelessly. Yet private litigation may require a court to essay the same definition. If this happens, is that court's decision more than provisional? As between the parties to a dispute, the New Jersey Supreme Court or the Second Circuit deciding a point of New York law must, as best it can, finally resolve the particular dispute thrust upon it; yet, in doing so, it will have no illusion that it is settling New York law on the point. Definitively fixing New York law is the business of the New York courts. Similarly, in the supposed case, Congress has allocated definitive resolution (within

Packard opinion was written by Justice Jackson, the author of *Skidmore*.

10. Thanks to my research assistant, Jonathan Marcus, for suggesting the thoughts expressed in this paragraph. While I am as confident as he that the political stability of views has been seen as a positive attribute of *Skidmore* weight, I cannot recall having seen the matter put quite this way previously.

11. 545 U.S. 967 (2005).

12. Id. at 983 (stating agency, as "authoritative interpreter," may choose a different construction than the court).

13. Id. at 1016–17 (Scalia, J., dissenting).

the bounds of its *Chevron* space) to the FCC. The situations seem quite the same.[14]

I. YESTERDAY AND TODAY

This piece is unapologetically limited to the approach contemporary judges take to the review of law-related aspects of administrative action. Professor Merrill's Article in these pages last spring[15] gave a striking account of the emergence of the American appellate review model during the Progressive era and up to the New Deal, as America's industrialization catalyzed paradigm shifts in the way Americans thought about the uses of government[16] and judges resisted the resulting statutory changes.[17] The resulting allocation of what might simply have been judicial business to alternative, "administrative" bodies, he persuasively argued, prompted the development of an appellate review model quite distinct from anything in prior American law or other parts of the common law world. His analysis drew particularly on judicial shifts in approach to the work of the Interstate Commerce Commission (ICC) in the wake of a statute reflecting "an upsurge in public dissatisfaction with aggressive judicial review of [its] decisions,"[18] but failing to come to rest on any definitive new standard. Renouncing its prior willingness to decide matters de novo (that is, to substitute judicial for administrative judgment), yet still engaged, the Court developed the contemporary model as an essentially political reaction to that statute.[19] Professor Merrill attributed this development to an underlying fear that courts might be yet further weakened

14. See generally Kenneth Bamberger, Provisional Precedent: Protecting Flexibility in Administrative Policymaking, 77 N.Y.U. L. Rev. 1272 (2002) (anticipating *Brand X*); Kathryn Watts, Adapting to Administrative Law's *Erie* Doctrine, 101 Nw. U. L. Rev. 997 (2007) (understanding *Brand X* in this fashion).

15. Merrill, Origins, supra note 3.

16. See generally John Fabian Witt, The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law 126–51, 187–207 (2004) (describing progression from free labor to social-insurance-oriented political traditions from late nineteenth century through New Deal).

17. Lochner v. New York, 198 U.S. 45 (1908), is the conventional canon, but consider also Johnson v. S. Pac. Co., 117 F. 462 (8th Cir. 1902) (resisting statutory modification of common law doctrine of assumption of risk for railroad workers injured by violation of federal safety appliance statute), rev'd, 196 U.S. 1 (1904) (used as stalking horse for this phenomenon in Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 1133–44, 1149–56 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)); the legislative-judicial struggles over labor injunctions during this period; and the distrust of courts that strongly influenced the creation of worker compensation tribunals, Louis Jaffe & Nathaniel Nathanson, Administrative Law Cases and Materials 133–36 (2d ed. 1961).

18. Merrill, Origins, supra note 3, at 953. The statute was the Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906).

19. Merrill, Origins, supra note 3, at 959, 963 (arguing Court responded to "the message encoded in the Hepburn Act" by developing doctrine "that would permit it to back off without losing face").

if they could not come up with an acceptable formula for what the Senate had been unable to resolve in months of weary debate.[20]

At root, that formula involved acceptance of Congress's increasing tendency to allocate primary responsibility for implementing new statutory schemes away from the courts and into administrative agencies. Previously, unless somehow they analogized it to the function of a special master, courts subjected the work of administrators to correction, if at all, simply for ultra vires illegality. Courts feared that to do more, as Professor Merrill demonstrated, might taint the judicial function with executive administration, as is forbidden by Article III's devolution of *only* the judicial power on federal courts.[21] Yet alongside its broad and increasing allocations of responsibilities to administrative agencies, Congress regularly and explicitly commanded the courts to supervise the resulting actions. Courts came to the view that these delegations could be tolerated if and only if the responsibility of review was accepted.[22] "Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation," Judge Leventhal once perspicaciously remarked, "because there is court review to assure that the agency exercises the delegated power within statutory limits."[23] Agencies must be subject to judicial controls that reach into their assessment of factual and law-applying issues, that is, not to displace their responsibilities, but to assure their responsible, rational exercise. In 1946, the Administrative Procedure Act (APA) would embody this change.[24] The issue thus has remained one of "allocation," but with that allocation understood to have been purchased with the coin of continuing judicial control.

Professor Merrill, appearing to regret this acceptance of factual and law-applying review responsibilities, concluded with the wistful concession that:

> [T]he appellate review model is so deeply entrenched in American political culture that it is impossible to imagine

20. Id. at 959.

21. Id. at 987–92 (discussing "fear of . . . drawing federal courts into matters regarded as being the province of the other branches of government").

22. FTC v. Gratz, 253 U.S. 421 (1920), a relatively early judicial reaction to the breadth of authority delegated to the Federal Trade Commission that Professor Merrill evokes, Merrill, Origins, supra note 3, at 970, is readily understood as a response to delegation concerns. There, in its assessment of the statute granting the FTC the power to institute proceedings against those it had reason to believe were engaging in "unfair methods of competition," the Supreme Court declared that the Court itself had final word on what constituted such practices. 253 U.S. at 427–29.

23. Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring). One may note that Judge Leventhal is also the acknowledged progenitor of "hard look review," see Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (Leventhal, J.)—an approach which, whatever its impact on agency behaviors, Congress has shown no sign of repudiating.

24. Pub. L. No. 79-404, § 10(e), 60 Stat. 237, 243–44 (1946) (codified as amended at 5 U.S.C. § 706 (2006)).

> wrenching free from its influence. The best that can be expected is that courts, especially the Supreme Court, will continue to whittle away at the scope of judicial authority over questions of policy, leaving courts the functions of policing the boundaries of administrative action.[25]

Yet a return to ultra vires analysis would repudiate Congress's repeated judgments as well as reduce agency connections to the rule of law. "Policing the boundaries" is a more limited judicial role than is necessary to avoid "judicial authority over questions of policy." Proper respect for legislative allocations, we would both agree, requires that judges abjure engagement with policy decisions allocated to agencies. A court must understand that it is "not empowered to substitute its judgment for that of the agency"[26] where an agency, not a court, is the designated actor. But (as in sporting events) if the courts are to be referees and not players—overseers and not deciders[27]—their function may nonetheless include supervising an agency's actions within its designated boundaries, as well as declaring when it has overstepped them. Though judges, like anyone, may be tempted to stray from their proper roles, permitting them to consider the relationship between the facts known to the agency and its conclusions in addition to the "boundary" question of ultra vires does not authorize them to decide questions of policy. Today's administrative review model embraces both elements of refereeing—policing the agency's boundaries and supervising its actions within them—and this short Essay does not find that embrace problematic.

II. JUDICIAL ENGAGEMENT WITH ADMINISTRATIVE FINDINGS OF FACT

Before moving on to consider judicial review of issues of interpretation, with which the bulk of this Essay is concerned, it may be useful briefly to address judicial review of agency fact-finding, an activity that clearly extends judicial review past the ultra vires function that Professor Merrill appears to prefer as the limit of judicial engagement with agency action. Reviewing fact-finding is a familiar function for courts in their relationships with trial judges, juries, and legislatures, and that suggests the importance of attending to possible confusion between the permissibility of a review relationship regarding factual findings and the standards of review to be applied. In reviewing economic legislation for constitutionality, courts regularly purport to determine whether a fact-grounded basis for judgment can be imagined; in reviewing jury verdicts, whether reasonable jurors could not permissibly have reached this conclusion on the evidence offered them; in reviewing a trial judge's jury-independent finding of fact, whether it was "clearly erroneous." While hardly mathemati-

25. Merrill, Origins, supra note 3, at 1003.

26. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

27. See generally Peter L. Strauss, Overseers or "The Deciders"—The Courts in Administrative Law, 75 U. Chi. L. Rev. 815 (2008).

cally precise, all these formulae recognize that the reviewing judge is to accept judgments by others that she might not have reached on her own. She must accept findings in whose truth she has less than the 50+% confidence de novo decisionmaking would connote. The standards' variance reflects differences in the institutions whose judgments she is reviewing. Thus, she has less of an obligation to accept jury findings than legislative findings regarding economic legislation, for which an imagined factual basis will do; but she has more of an obligation to accept jury findings than to accept the independent factual findings of a trial judge sitting without a jury. These variations have counterparts in the differing verbal formulae judges habitually apply in describing the initial fact-finding functions of judge or jury in civil or criminal litigation.[28]

It can hardly be surprising that, when they are reviewing agency fact-finding, courts analogize to the standards they apply in other review settings. Administrative law's two fact review standards ("arbitrary and capricious" and "unsupported by substantial evidence on the record as a whole") might seem to have a similar less/more relationship—"substantial evidence," like "clearly erroneous," requiring greater proximity to 50% confidence in the correctness of the outcome. Their judicial treatment, however, has been thoroughly confused. On the one hand, the Court has treated "substantial evidence" as marginally, perhaps imperceptibly, less demanding than "clearly erroneous"[29] and found in it an expression of congressional "mood" for more intense factual scrutiny.[30] On the other, Justices have described both arbitrary and capricious review *and* substantial evidence review as analogous to the review of jury verdicts, as if there were no difference in intensity between them.[31]

Perhaps the more vexing question has been whether a mere review relationship is permissible at all. Doesn't the allocation of fact-finding re-

28. Three common formulae are proof by a preponderance of the evidence (i.e., 50.0001% persuaded), by clear and convincing evidence (i.e., a fair bit more than that), or beyond a reasonable doubt (i.e., virtually certain).

29. See Dickinson v. Zurko, 527 U.S. 150, 162–63 (1999) (characterizing difference between "substantial evidence" and "clearly erroneous" standards as "a subtle one").

30. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951). To the same effect in a rulemaking context, see Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 472–76 (D.C. Cir. 1974), in which the court found that a statutory requirement of "substantial evidence" review of OSHA informal rulemaking requires a harder look than usual.

31. See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366–67 (1998) (equating substantial evidence review with whether "reasonable jury" could have arrived at Board's conclusion); cf. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677, 683–84 (D.C. Cir. 1984) (Scalia, J.) (holding "there is no *substantive* difference between" arbitrary-and-capricious and substantial evidence tests). It is striking that these decisions both rely on NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939), a decision handed down *before* the enactment of the APA and so presumably undercut by the shift in "mood" Justice Frankfurter discerned in *Universal Camera*, 340 U.S. at 487.

sponsibilities to an agency violate the Constitution's assignment of the judicial power—all of it—to Article III judges? If there were no need for courts to be involved—if Congress could constitutionally allocate authority to executive branch actors without engaging the judiciary at all—there could be no such objection, even should Congress choose nonetheless to create a cause of action testing agency results. That "case or controversy" would be proper judicial business, to be carried out as Congress had instructed. But suppose a setting in which judicial participation is not simply up to Congress to choose, in which the assignment to an agency of adjudicative authority could not constitutionally be made absent judicial involvement. As Professor Merrill relates,[32] that question came before the Court in *Crowell v. Benson*[33] at the end of the period his Article considers. The Court solved the problem by treating the agency concerned, the United States Employees' Compensation Commission (USECC), as a judicial adjunct comparable to a special master. Like the workers' compensation boards states had created, in large part to avoid judicial resistance to changes in the common law treatment of workplace injury, the USECC served *only* to determine the facts of a particular worker's claim to compensation from his employer under the statutory scheme. As is generally the case today in relation to agency action, courts were given only limited authority to review its conclusions of fact. Although the Court concluded that Congress was *not* constitutionally free to create such a regime without providing for some participation by judges, it rescued the measure by treating the USECC as if it were acting within Article III, using the special master analogy.[34]

The special master analogy has not invariably proved sufficient, even for institutions that, like the USECC, are single-function bodies that *only* adjudicate. Bankruptcy judges unquestionably act within the aegis of the judicial branch. Like U.S. Magistrates, they are appointed by the judiciary itself, but lack the full protections of tenure and financial security required for the Article III judiciary. Twice the Court has held (once in a fractured opinion that produced only a judgment of the Court[35] but just this past Term by a simple majority[36]) that Congress had unconstitutionally allocated a degree of authority to them that could properly be assigned only to an Article III judge.

Matters become more complex when one considers adjudications by full-function agencies that resolve essentially private disputes—the NLRB, the SEC, or the CFTC enforcing their statutes or regulations in response to private complaints that may lead to the assessment of a fine. In recent years, the Court has properly begun to characterize the full

32. Merrill, Origins, supra note 3, at 980–82.

33. 285 U.S. 22 (1932).

34. Id. at 56–61.

35. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

36. Stern v. Marshall, 131 S. Ct. 2594 (2011).

range of authority Congress has conferred on these agencies—to adopt regulations, to bring proceedings to enforce their rules and statutes, and in the first instance to decide whether violations have occurred—as *executive* authority.[37] Unlike bankruptcy judges, these agencies cannot plausibly be located within the judicial branch; characterization as a judicial adjunct is thus unavailable. Nor can one imagine the judgment that, for these matters, Congress would be free entirely to omit judicial involvement—completely to substitute agencies for courts. Congress's arrangements are accepted only because agency outcomes are reviewable on demand, so that ultimately a court will assess their propriety under the prevailing standards of review. Adequate judicial review, the Court has held, is the condition of accepting these allocations of quasi-judicial function.[38]

In the end, in my judgment, the acceptability of congressional allocations of *some* decisional authority, whether exercised by trial-like or by legislation-like processes, will come down to the same question—the adequacy of judicial controls to assure legality. Congress's delegation of quasi-legislative *or* quasi-judicial authority is conditioned, as Judge Leventhal wisely observed, on Congress's provision for judicial review—on, that is, the appellate review model.[39] It is not, as the "public right" formulation initially asserted, that the provision for review is simply a voluntary congressional precaution; the allocation of authority to the agency is valid if and only if there is judicial review to assure the legality of its exercise.

III. SUBSTITUTING "WEIGHT" AND "SPACE" FOR "DEFERENCE" IN DESCRIBING THE IMPACTS ON JUDICIAL FUNCTION OF AGENCY STATUTORY INTERPRETATIONS

A. *Laying the Foundations*

1. *Weight. — Skidmore v. Swift & Co.*,[40] a Jackson opinion of 1944, is the conventional citation for the proposition that, at least in some circumstances, courts are obliged to take an agency's view about statutory meaning into account when interpreting statutes the agency administers.

37. See, e.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (describing EPA rulemaking as exercise of executive power). Justice Stevens dissented from this characterization. Id. at 487 (Stevens, J., concurring in part, concurring in the judgment).

38. See, e.g., CFTC v. Schor, 478 U.S. 833 (1986). *Schor* approved a sort of pendent jurisdiction over state law counterclaims closely related to a consumer's effort to enforce CFTC law against a broker. Id. at 847, 857. It is striking that the only issue of concern to the Court was the counterclaim. The Court did not notice its easy assumption that Congress could authorize a private individual to invoke the jurisdiction of an administrative agency in an action to collect money damages from another private person for his violation of (regulatory) law.

39. See supra note 23 and accompanying text.

40. 323 U.S. 134 (1944).

The Administrator of the Department of Labor's Wage and Hour Division had set forth views about the application of the Fair Labor Standards Act to such circumstances as appeared in the case, which the courts below simply ignored in concluding that the Act's language did not permit its application.[41] The Court reversed, per Justice Jackson:

> There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. . . . The rulings of this Administrator . . . do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies . . . do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. . . . This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.
>
> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[42]

While the last paragraph of the quoted text is the matter invariably quoted when invoking *Skidmore* weight, note Justice Jackson's invocation of prior practice in the immediately preceding sentence. It is unsurprising that he felt no need to cite authority for this commonplace proposition. Cases reaching back well into the nineteenth century had reasoned that settled administrative interpretations, or administrative interpretations contemporaneous with enactment, are "entitled to very great respect,"[43] and ought not be disturbed if they are possibly within the meaning of statutory language,[44] or "overruled without cogent reasons."[45] These propositions, repeated time and again, may be found in cases in-

41. Id. at 136, 140.

42. Id. at 139–40.

43. Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

44. United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 39 (1832).

45. United States v. Moore, 95 U.S. 760, 763 (1877).

volving public lands administration,[46] tax administration,[47] and ICC actions.[48] Justice Cardozo had invoked them in writing an influential passage in a 1933 case involving the tariff laws:

> True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.[49]

Seven years later, *United States v. American Trucking Ass'ns* would ratify this sense of *Skidmore*'s historic pedigree.[50] In one breath, the majority invoked the *Marbury v. Madison* tradition of judicial supremacy in statutory interpretation: "The interpretation of the meaning of statutes, as applied to justiciable controversies, is *exclusively* a judicial function."[51] Yet in another breath, just a few pages further on, the Court invoked the significance of agency views for courts performing this "exclusively . . . judicial function":

> In any case [well-established interpretations by responsible agencies] are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persua-

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

47. See, e.g., Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931); Brewster v. Gage, 280 U.S. 327, 336 (1930).

48. See, e.g., ICC v. N.Y., New Haven & Hartford R.R. Co., 287 U.S. 178, 190 (1932).

49. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933) (citations omitted). The procedural claims at issue in this case would surely have succeeded in defeating the agency's action had they arisen in an adjudicatory context. The Court denied them, however, characterizing the tariff "hearings" as fundamentally legislative in character. Id. at 305. It thus reasserted the fundamental distinction respecting procedural claims reflected in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915). *Norwegian Nitrogen*, 288 U.S. at 308. As an exercise in statutory interpretation, Justice Cardozo's opinion is remarkable for the sophistication with which it evokes both legislative and administrative practice and understandings.

50. 310 U.S. 534 (1940).

51. Id. at 544 (emphasis added).

> siveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.[52]

This way of framing the proposition well illustrates the "weight" stance that *Skidmore* would later come to characterize. What is "exclusively a judicial function" does not exclude agency views. Once a question of statutory interpretation has been put before a court, it is for the court to resolve the question of meaning. Among the matters indispensable for it to consider, however, are the meanings attributed to it by prior (administrative) interpreters, their stability, and the possibly superior body of information and more embracive responsibilities that underlay them. They may be entitled to great "weight" on the judicial scales. No innovation, the *Skidmore* formulation rephrased in Justice Jackson's memorable prose a set of long-established propositions.[53]

2. *Space.* — In the Progressive Era and then the New Deal, legislation proliferated, increasingly engaging the courts with legislative business. Often enough, that legislation reacted against the common law's laissez-faire, fault-regarding foundations, and sought to provide greater protection for the common man against the Industrial Age's increasingly complex and sophisticated technology, markets, and corporations. As judges defending the common law and its premises proved resistant to these changes (and, as generalists, also showed themselves unlikely to be sound implementers of increasingly specialized and technical responses to society's industrialization and its effects), this legislation also created administrative agencies responsible to administer the new legislative schemes.[54] A dominant task for a judiciary thus challenged would be to fashion a role for itself that both accepted the reality of these new institutions (and the political will underlying them), and preserved core judicial functions—notably, what was "exclusively" their responsibility for "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies."[55]

The Constitution's text straightforwardly imagines Congress's assignment of "powers" and "duties" of administration to executive branch actors.[56] In making such assignments, Congress has from the outset allocated statutorily defined elements of discretion to the actors it has created. When only common law writs were available to review this discre-

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52. Id. at 549 (footnote omitted) (quoting *Norwegian Nitrogen*, 288 U.S. at 315).

53. For a persuasive discussion of the nature of *Skidmore* weight, arguing that it has not been *simply* a makeweight judicial disguise for conclusions independently reached, see Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1251–59, 1271 (2007).

54. See Louis L. Jaffe & Nathaniel L. Nathanson, Administrative Law: Cases and Materials 122–24 (4th ed. 1976); Peter L. Strauss, Legal Methods: Understanding and Using Cases and Statutes 398–99 (2d ed. 2005); Witt, supra note 16, at 188–89, 202–03.

55. *Am. Trucking*, 310 U.S. at 544.

56. U.S. Const. art. I, § 8, cl. 18; id. art. II, § 2, cl. 1; see also id. art. II, § 3 (charging Executive to "take care that the laws *be* faithfully executed" (emphasis added)).

tion's exercise, as Professor Merrill noted, ultra vires analysis of agency action was about all there was to be had (and that analysis was influenced, as has been seen, by a practice of giving significant "weight" to agency views).[57] How an agency might have used the discretion thus conferred on it was forbidden territory. *Marbury v. Madison*,[58] the pole star assertion of the "exclusive" judicial responsibility for interpretation, adamantly asserted the impropriety of *any* judicial supervision whatsoever over the discretionary actions of the executive branch:

> [W]here the heads of departments are . . . to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. . . .
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> . . . The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[59]

Half a century later, the Court would replace "only" and "never" with a willingness to accept congressional assignments of a judicial review function—but on an important condition:

> [W]e think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which *congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.* . . . [A]s it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful.[60]

The condition, that is, was that the involvement of the judiciary was wholly optional, not required. In 1929, the Court could cite a baker's dozen additional cases for the proposition that

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57. See Merrill, Origins, supra note 3, at 948–53 ("Review was often *narrow*, as when the court applying the prerogative writs asked whether the agency was acting within its jurisdiction or whether an officer had violated a nondiscretionary legal duty.").

58. 5 U.S. (1 Cranch) 137 (1803).

59. Id. at 166, 170.

60. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855) (emphasis added).

> [l]egislative courts . . . may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.[61]

Crowell v. Benson was decided three years later, on the eve of the New Deal.[62] Where Congress had assigned an executive and not a judicial function (for the latter, it was the "judicial adjunct" approach that saved the assignment),[63] *Crowell* reiterated that the "public right" formulations just quoted controlled.[64]

Again, the thing to notice in these early "public right" formulations is that the permissibility of judicial review is premised on the proposition that, in the cases being provided for, Congress has no need whatsoever to provide for judicial engagement, although it may volunteer to do so. While the relationship between Article I "legislative courts" created by Congress (in the executive branch) and Article III courts remains a significant intellectual puzzle,[65] the limitation of review in "public rights" cases to ones in which judicial engagement is *optional* clearly has been undermined. The constitutionality of the CFTC's action in *Schor* was sustained only because the adjudication scheme provided for adequate judicial review.[66] One finds the same in cases invoking a "due process" right to appellate review (however limited) of discretionary executive action,[67] or premising the acceptance of congressional delegations of rulemaking authority on the existence of judicial review adequate to assure the legality of its exercise.[68] It thus appears that judicial review of the executive's exercise of discretion, in regulatory contexts, need not merely be permissive; in at least some contexts, it is required. Even so, Congress has allocated the duties subject to judicial review to agencies, and not to the reviewing courts. "The court is not empowered to substitute its judgment for that of the agency."[69] Suppose a court were to conclude that the ambi-

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61. Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929) (enumerating cases).

62. 285 U.S. 22 (1932).

63. See supra text accompanying notes 32–34.

64. 285 U.S. at 50–51 (citing *Murray's Lessee*, 59 U.S. (18 How.) 272; *Ex parte Bakelite*, 279 U.S. 438).

65. See, e.g., Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System 324–83 (6th ed. 2009) (exploring contours of legislative court doctrine); see also Stern v. Marshall, 131 S. Ct. 2594, 2610 (2011) (same).

66. See supra note 38 and accompanying text (discussing *Schor*).

67. E.g., Webster v. Doe, 486 U.S. 592 (1988).

68. E.g., Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); see also supra text accompanying note 37.

69. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

guity of statutory language reflects a congressional design to create a policy space within which resolutions should be achieved by the agency on which it had conferred duties, not by the courts. An agency's giving precise shape to imprecise language could as readily be called "interpretation" as "policy effectuation." Is it necessarily, then, a part of the domain which, as to justiciable controversies, is "exclusively" for the courts?

While there were occasional earlier intimations,[70] the poster child for this question is, like *Skidmore*, a 1944 decision of the Supreme Court, *NLRB v. Hearst Publications, Inc.*[71] *Hearst* required the Court to review a judgment of the Labor Board that regular, full-time persons selling Hearst's newspapers on the street were its "employees," and hence subject to the provisions of national labor relations law. The Court first *independently* reached the conclusion that these workers were neither *necessarily* nor *impermissibly* to be so regarded. In doing so, it explored *for itself* three possibilities for negotiating the intermediate space created by the uncertainty of the word "employee." First, the term might be understood as invoking state law on the subject—but the Court thought Congress would not have chosen for the regulation of interstate commerce an approach whose results might vary across neighboring states' lines.[72] Second, perhaps "employee" should be understood to have a consistent meaning in federal law, a meaning that Congress had invoked—but, on considering a variety of statutes the Court found no such consistency of usage.[73] What remained was the conclusion that meaning in the "space" between what "employee" must mean and what it cannot mean was to be assigned with a view to national labor policy. But then, the Court reasoned, Congress had allocated the formulation of national labor policy, in relation to the concerns of the National Labor Relations Act, to the Labor Board and not to the courts.[74] The necessary implication of these independent judicial conclusions of law was that the task for the Court was oversight—to see to it that the Board had stayed within its allocated space, and within that space had acted reasonably.

To be sure, this decision was doubtless a further element of the post-New Deal Court's care to subordinate itself to Congress—to abjure the confrontational, legislation-resistant style that characterized the era that ended with the "switch in time that saved nine."[75] Its acceptance of ad-

70. Cf. Md. Cas. Co. v. United States, 251 U.S. 342, 349 (1920) ("It is settled by many recent decisions of this court that a regulation by a department of government, . . . the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.").

71. 322 U.S. 111 (1944).

72. Id. at 122–23.

73. Id. at 129.

74. Id. at 130.

75. See generally Daniel E. Ho & Kevin M. Quinn, Did a Switch in Time Save Nine?, 2 J. Legal Analysis 69 (2009). The first Justice Roberts, the timely switcher, was the lone dissenter from *Hearst*, certain for himself that "newsboys are not 'employees'" and that "[t]he

ministrative "space" created by statutory imprecision is nonetheless striking for that. The Court did not surrender the "exclusive" judicial function of interpretation so much as to refine it: It determined, for itself, what the statute could (and could not) mean.[76] Only what the language left open was allocated to the Board's "reasonable" determination—because, as the Court found, allocating it there was what Congress must have intended to do.[77] One readily supposes that recognition of such implications in Congress's decision to create administrative actors reduces confrontation between the two branches, adding to the Court's standing as a "faithful servant" of the political branches that had taken over the principal responsibility for the legal order from the nineteenth century's common law courts. Like the "switch in time," signals of respect for Congress's allocation of duties to administrative agencies and acceptance of Congress's wish that the courts oversee their performance significantly reduced the interbranch friction that less than a decade earlier had so threatened the Court.

The Administrative Procedure Act,[78] passed soon after *Hearst*, worked no necessary change in this bifurcation of judicial role—with courts deciding for themselves the possible meanings of statutes allocating authority to agencies, but then, within that "space," accepting the agency's responsibility and policing its exercise for reasonableness. To be sure, section 706, which defines the generous scope of judicial review under the APA, repeatedly emphasizes judicial responsibility for legal issues. The reviewing court is to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[79] It "shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority or limitations, or short of statutory right."[80] Yet, as in *Hearst*, among the "relevant questions of law" are whether statutory meaning is uncertain and, if so, whether congressional action has committed the judicially-found areas of uncertainty to agency administration. Interpretation of statutory provisions can produce the understanding that Congress has taken precisely this course, as technological complexities, policy sensitivities, or similar considerations may

question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question." 322 U.S. at 135–36 (Roberts, J., dissenting). Justice Roberts was the last Justice sitting at the time to have been appointed before Franklin Roosevelt's election as President.

76. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), often thought to be in tension with *Hearst*, is just such a case, in which the Court determined for itself what the statute meant. For a discussion of *Packard*, see infra text accompanying note 102.

77. 322 U.S. at 130–31.

78. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

79. 5 U.S.C. § 706 (2006).

80. Id.

suggest. "Excess of statutory jurisdiction . . . or short of statutory right" readily suggests some space between, space within which the agency may exercise policymaking discretion. And section 706(2) provides that such exercises of discretion are to be reviewed, to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[81]

B. Chevron *and Beyond*

The reader who has come this far has, one hopes, begun to understand why the Court was so unaware of the turmoil its unanimous decision in *Chevron* would stir up.[82] To be sure, the problem has been to some extent the product of Justice Stevens's infelicitous phrasing in summarizing the Court's conclusions:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[n.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.[n.11][83]

The relevant footnotes read:

> [n.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.
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> [n.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.[84]

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81. Id. § 706(2)(A).

82. For more, see another of Thomas Merrill's luminous works, The Story of *Chevron*: The Making of an Accidental Landmark, *in* Administrative Law Stories 358 (Peter Strauss ed., 2006).

83. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (footnote 10 omitted) (citations omitted).

84. Id. at 842–43, nn.9 & 11 (citations omitted).

"Precise question at issue" and "permissible" misleadingly suggest that judicial inquiry is limited to determining whether a statutory provision has a single, determinate meaning; and, if not, that the residual question is only whether the meaning given by the agency was a possible one—within the statute's linguistic parameters. On that reading, the judicial inquiry would end without concern for the reasonableness of the agency's judgment within the space statutory language afforded it. The two-step process, hardly an innovation,[85] would have been better expressed (as it now appears to have been understood[86]) as, first, whether the statutory language precludes the meaning attached to it by the agency and, second, whether in giving the statute the application it did within its "space," the agency had acted reasonably.[87] This framing of step one may be found in the first, case-supported sentence of the Court's footnote 9, confirmed by the use of "permissibly" in footnote 11. Step two, thus seen, is merely what section 706(2)(A) of the APA commands.[88]

Possibly, as Professor Kevin Stack has thoughtfully suggested to me, one could regard review of the agency's judgment within its *Chevron* space for reasonableness as still having an element of statutory interpretation to it. If the reviewing court ought not substitute its preferred interpretation for the agency's, still it may be able to say that a reading possible as a matter of syntax is unreasonable given the agency's responsibility reasonably to further statutory purposes. One might, for example, be able to rationalize *MCI Telecommunications Corp. v. AT&T*[89] in just this way. The FCC had understood its statutory permission to "modify" the requirements of rate-setting, conferred by its 1934 statute, to permit it almost entirely to excuse MCI from rate-setting at a time when the development of microwave transmission of telephony had virtually eliminated

85. In addition to *Hearst*, one can find it, for example, in the paragraphs describing judicial review of agency discretion in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410–11 (1971).

86. See, e.g., Negusie v. Holder, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) ("The fact that Congress has left a gap for the agency to fill means that the courts should defer to the agency's reasonable gap-filling decisions, not that the courts should cease to mark the boundaries of delegated agency choice."); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989–97 (2005) ("That silence suggests, instead, that the Commission has the discretion to fill the consequent statutory gap.").

87. That is, in the terms captured by 5 U.S.C. § 706(2)(A) review. See generally *Overton Park*, 401 U.S. at 415–16 (utilizing two-step process); cf. Note, Justifying the *Chevron* Doctrine: Insights from the Rule of Lenity, 123 Harv. L. Rev. 2043, 2048–49 (2010) (seeing *Chevron* as accommodating policy advantages of agency interpretation and role of judiciary in ensuring clarity in the law).

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

89. 512 U.S. 218 (1994).

the natural monopoly created by the requirement for landlines that had been present when the statute was enacted. While the majority opinion rejecting this reading can be understood simply as considering what meanings "modify" could permissibly have in the context in which it was expressed[90]—the step one question—one could also understand it as a finding that the agency's linguistically permissible treatment of "modify" was inconsistent with the statutory purposes attributable to the Congress of 1934. Even if understood in the latter way, there would be no need to differentiate policy from interpretive judgments; the reasonableness question can be answered with equal force from either perspective.

In general, *Chevron*'s reasoning process is consistent with this softer understanding. It considers for itself, in great detail, whether the statutory term at issue in the case, "stationary source," has a meaning that precludes the understanding that the agency had reached (either because a necessary meaning had been denied, or an impermissible meaning assigned).[91] It equivocates whether the agency's action was "interpretation" strictu sensu or the implementation of a policy judgment permitted by the statutory language, one that could be revisited as changing circumstances might suggest. It is a well-recognized feature of conclusions agencies reach in their *Chevron* space, affirmed in the opinion itself, that they may be revised, even time and again,[92] as circumstances and reason are found to dictate. Understanding these agency judgments as policy judgments, not interpretations in the judicial sense, is underscored in *Chevron*'s closing passages, which address the preferability of political to judicial oversight for the programmatic character and level of detail involved in the "stationary source" issue.[93] The opinion addresses the reasonableness of the agency's approach by relating it to its statutory responsibilities and its understanding of the circumstances within which it was carrying them out.

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

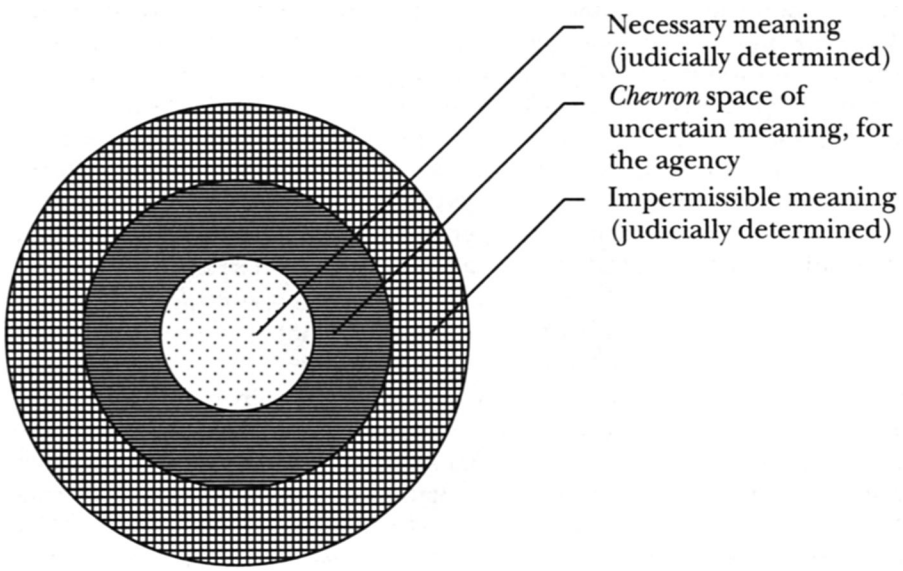
90. *Brand X*, 545 U.S. at 986–92.

91. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 859–66 (1984).

92. See, e.g., Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (noting "Board has 'changed its mind' several times in addressing this issue," but holding court must defer to choices made pursuant to policy determinations when they are "clear and reasonable").

93. 467 U.S. at 864–66.

DIAGRAMMING *CHEVRON* SPACE



The middle ring is the agency's range of administration, its "*Chevron* space." How wide that space is will vary, not only from statute to statute, but also with the predilection of judges to find statutory language more, or less, certain. For a self-confident textualist like Justice Scalia, as indeed he has asserted,[94] the middle ring may prove to be a good deal narrower than it will be for a Justice more likely to find room in statutory language, such as Justice Breyer. Its link to delegation issues, made explicit by Justice Stevens's closing passages, will influence its dimensions as well—contributing, in Justice Scalia's colorful expression, to a disinclination to find "elephants in mouseholes."[95]

The boundary-influencing, space-defining factor perhaps most important to note here is "*Skidmore* weight." *Skidmore* weight, as established above, is one of those "traditional tools of statutory construction" Justice Stevens refers to in footnote 9 of the *Chevron* opinion.[96] In the wake of *Chevron,* a fair amount of attention (often derogatory) was given to the question whether agency conclusions about the space available to their

94. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 520–21 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.").

95. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); see MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225–29 (1994) (declining to find meaning of "modify" was ambiguous); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

96. 467 U.S. at 843 n.9.

administration were themselves entitled to what has conventionally been called "*Chevron* deference." To say so—to conclude that courts have only an oversight function in relation to agency self-determinations about jurisdiction—would indeed be in sharp conflict with the proposition that "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is *exclusively* a judicial function."[97] But no such conflict is entailed when courts defining the extent of an agency's *Chevron* space give *Skidmore* weight to its judgments about the boundaries of its statutory authority. The lines defining an agency's *Chevron* space must be judicially determined, a determination that is, irreducibly, a statement of what the law is. But that unmistakably judicial determination should be informed by agency judgments in ways that have been conventional at least since 1827.[98]

1. *Cases Understandable as Judicial Determinations of Permissible or Impermissible Meaning.* — Law school teaching materials have long questioned whether *Hearst*, and later *Chevron*, could be reconciled with decisions that seemed oblivious to agency judgments about meaning. Typical of the former is *Packard Motor Car Co. v. NLRB*;[99] and of the latter, *INS v. Cardoza-Fonseca*.[100] But both cases can be seen to involve independent judicial determinations of the range of permissible statutory meaning; for such determinations, the question is whether the agency's judgment is entitled to *Skidmore* weight.[101]

Thus, in *Packard*, the statute defined an "employer" as "any person acting in the interest of an employer, directly or indirectly"; the question for the Court was whether any employee who in some respects served as a foreman could ever be considered a statutory "employee" under the labor laws, or rather must always be considered an employer.[102] The NLRB's judgment had wavered over time—in this case, coming down on the side of "employee" status for the 1,100 foremen involved. This was, the Court declared, a "naked question of law"[103]—that is, had the NLRB reached an impermissible interpretation of the Labor Act? It presented, then, an issue of boundary definition—*Skidmore*, and not *Hearst*. While

97. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 544 (1940) (emphasis added).

98. Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); see also supra notes 43–48 and accompanying text.

99. 330 U.S. 485 (1947).

100. 480 U.S. 421 (1987).

101. See Michael Herz, Deference Running Riot: Separating Interpretation & Lawmaking Under *Chevron*, 6 Admin. L.J. Am. U. 187, 199 (1992) (discussing arguments that "the judicial function is only to determine what authority has been conferred upon the agency" and noting "[w]here an agency acts pursuant to [that] delegated . . . authority, the task of interpretation is merely to define the boundaries of the zone of indeterminacy").

102. 330 U.S. at 486–89.

103. Id. at 493.

the Justices agreed with the Board, they accorded its judgment no weight in reaching their conclusion, and, indeed, the Board's vacillation on the issue provided a standard reason, under *Skidmore*, for their not doing so.[104]

In *Cardoza-Fonseca*, the question was whether, in considering two different Immigration Act provisions under which an otherwise deportable alien might seek discretionary relief, the Immigration and Naturalization Service had permissibly construed the differing language of the two standards to have identical meaning. One provision referred to a "well-founded fear" of persecution in the alien's home country; the other permitted relief if it was "more likely than not that the alien would be subject to persecution."[105] For the majority, Justice Stevens wrote,

> The narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts. There is obviously some ambiguity in a term like "well-founded fear" which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "'any gap left, implicitly or explicitly, by Congress,'" the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. See [*Chevron*]. But our task today is much narrower, and is well within the province of the Judiciary. We do not attempt to set forth a detailed description of how the "well-founded fear" test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.[106]

For Justice Scalia, who has consistently resisted double standards—whether for deference to agencies' interpretations[107] or for review of their factual findings[108]—this may have been "flatly inconsistent" with

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104. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon . . . its consistency with earlier and later pronouncements . . . .").

105. 480 U.S. at 423.

106. Id. at 448 (citations omitted).

107. United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (arguing majority "opinion ma[de] an avulsive change in judicial review of federal administrative action").

108. Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys., 745 F.2d 677 (D.C. Cir. 1984). For the panel, then-Judge Scalia wrote,

> [I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter, separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings the factual support must be found in the closed record as opposed to elsewhere.

Id. at 688–90; see also supra note 31.

Chevron, making "deference a doctrine of desperation."[109] Yet, again, what the Court was doing was limiting the boundaries of the agency's discretion. The agency's approach to the two statutory provisions, treating them as identical, signaled its error in interpreting its authority; its inconsistent approach to the issue over the years[110] signaled the absence of any *Skidmore* weight to its judgment. Justice Stevens reiterated his view in a 2009 concurrence, again drawing fire from Justice Scalia.[111]

2. *Has the Agency Exercised Its Authority Within Its Space?* — To say that a statute creates *Chevron* space for an agency is not to say that all agency activity serves to perform such "[d]uties"[112] as Congress has thus conferred upon it. Two related characteristics of *Skidmore* largely differentiated it from the long line of cases on which it drew: The case involved private litigation to enforce a federal statute, not the review of agency action as such; and the agency interpretation of that statute (to which Justice Jackson indicated weight might attach) was the product of informal agency advice-giving, not the rulemaking or adjudication by which agencies generally act to affect legal rights.[113] Decision of the dispute over meaning, then, was inevitably for the courts; the agency had indicated its understanding, but not in a manner that had any legal effect. Nothing other than weight could have been relevant. *Chevron*, per contra, by its second-step commitment to oversight of the reasonableness of agency action, entails that agency action will be before the court for review, and that the agency will have acted within its "space" in a manner characterized by legal effect.

All of this was effectively captured by the Court, first in *Christensen v. Harris County*[114] and then, definitively, in *United States v. Mead Corp.*[115] In *Mead*, the Customs Service, which might have adopted a challenged tariff classification by notice-and-comment rulemaking, had instead acted by an informal ruling letter. This letter required Customs Service personnel to act in accordance with its terms with respect to the particular importation matter at issue, but those terms could be modified or revoked at any time "without notice to any person, except the person to whom the letter was addressed"; "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."[116] This one-

109. *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring).

110. Id. at 446 n.30 ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.").

111. Negusie v. Holder, 555 U.S. 511, 528 (2009) (Stevens, J., concurring in part and dissenting in part); id. at 525 (Scalia, J., concurring); see also infra note 129.

112. U.S. Const. art. II, § 2, cl. 1.

113. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

114. 529 U.S. 576 (2000).

115. 533 U.S. 218 (2001).

116. 19 C.F.R. § 177.9(c) (2000) (amended 2002).

time, informal advisory transaction, the Court concluded, was not agency behavior within its *Chevron* space—not an exercise of Congress's delegation to the Customs Service of authority to adopt regulations that, if valid, would bind the world including itself; since it was not "administrative action with the effect of law," then, to the extent it entailed the agency's understanding of its constituent statute, only *Skidmore* weight was relevant for a reviewing court.[117]

Justice Scalia's lone and furious dissent reflected his refusal to recognize any difference between *Skidmore* weight and *Chevron* space.[118] *Skidmore*, he contended, had been cast on the judicial waste pile. So long as there had been an "authoritative" agency interpretation of an ambiguous statutory provision, *Chevron* controlled.[119] It was a matter of indifference to him whether that interpretation had been promulgated pursuant to a statutory delegation—that is, in a manner Congress would have intended to carry the force of law. Strikingly, in support of his conclusion that the interpretation at issue was "authoritative," he was prepared both to credit postdecision rationalizations created by government attorneys[120] and to ignore the agency's clear statement that its individuated ruling letter had no staying power whatsoever.[121]

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117. 533 U.S. at 229–31, 234–35. To be sure, as Professor Ronald Levin pointed out, what the Customs letter provoked was an actual refusal of entry to the goods involved, save upon payment of the duty to which Mead Corp. was objecting—and in this respect the Customs inspectors were undoubtedly acting within Customs's delegated authority. See Ronald M. Levin, *Mead* and the Prospective Exercise of Discretion, 54 Admin. L. Rev. 771 (2002); see also David J. Barron & Elena Kagan, *Chevron*'s Nondelegation Doctrine, 2001 S. Ct. Rev. 201, 212 (noting Justice Scalia's argument for why "the interpretation contained in the Customs ruling letter" qualified for "*Chevron* deference"). Nonetheless, Customs officials had not acted to "make law" for the world generally or even for its agents save in this sole instance—placing its action in the shadow world of "guidance," where actions are frequently taken well down in an agency's bureaucratic hierarchy and judicial review frequently is unavailable. Cf. Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 803–05 (2001) (discussing tiered analysis of agency action and impact of guidance material). Had Customs given any signal of the enduring quality of its action, perhaps the outcome would have been different. Cf. Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971) (finding letter constituting deliberative action at highest level of agency final and thus permitting review).

118. 533 U.S. at 239 (Scalia, J., dissenting).

119. Id. at 241 (emphasis omitted).

120. See id. at 258 (arguing Solicitor General's brief does not constitute post hoc rationalization). But see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971) ("The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely '*post hoc*' rationalizations, which have traditionally been found to be an inadequate basis for review." (citation omitted)); Burlington Truck Lines v. United States, 371 U.S. 156, 168–69 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action."); SEC v. Chenery Corp. (Chenery I), 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

121. See 533 U.S. at 223 (describing ruling letter's lack of continuing authority).

At least one of Justice Scalia's arguments—a fear that the resulting *judicial* interpretations would lead to ossification of law Congress meant to leave flexible[122]—is at best question-begging. As the subsequent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* would hold, over another lonesome fulmination by Justice Scalia, any judicial decision in an agency's *Chevron* space has the same qualities as a decision in the diversity jurisdiction under *Erie Railroad Co. v. Tompkins*[123]—it decides the case but does not fix statutory meaning.[124] The closing portion of Justice Souter's opinion for the remainder of the Court in *Mead* remarked, not without reason, that "Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety."[125]

To be sure, as my casebook colleague Professor Todd Rakoff reminded me, Justice Souter wrote his opinion in *Mead* in "deference" terms, characterizing *Chevron* as incorporating "an additional reason for judicial deference" on top of *Skidmore*.[126] This approach may have contributed to the confusing and (in my judgment) unnecessary "Step Zero" Professor Cass Sunstein ascribed to *Mead*.[127] Writing about "the two-tiered analysis of equal protection claims," *Chevron*'s author observed that it "does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."[128] Using "deference" as a multilevel concept has the same problem. The "*Skidmore* weight, *Chevron* space" regime, it is here suggested, *is* that single standard, one that *could* be applied in a reasonably consistent fashion and without any need to invent additional "steps."[129]

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

122. Id. at 247–48 (Scalia, J., dissenting).

123. 304 U.S. 64 (1938).

124. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005); see Bamberger, supra note 14, at 1310–11 (discussing "provisional precedent" eventually adopted in *Brand X*).

125. *Mead*, 533 U.S. at 236 (footnote omitted).

126. Id. at 229.

127. Cass R. Sunstein, *Chevron* Step Zero, 92 Va. L. Rev. 187, 213–16 (2006).

128. Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring); see also Jamal Greene, The Rule of Law as a Law of Standards, 99 Geo. L.J. 1289, 1290 (2011) (discussing multilevel deference analysis).

129. That Justice Stevens, author of the passage just quoted, came to see his opinion in *Chevron* in just this light is suggested by his opinion in *Negusie v. Holder*, 555 U.S. 511, 531 (2009) (Stevens, J., concurring in part and dissenting in part) ("The fact that Congress has left a gap for the agency to fill means that courts should defer to the agency's reasonable gap-filling decisions, not that courts should cease to mark the boundaries of delegated agency choice." (footnote omitted)).

put to the test in *Barnhart v. Walton*.[130] In *Barnhart*, the same eight Justices treated an interpretation that had *not* been adopted by regulation, but that had appeared in many rulings and official manuals over many years, as having occurred in the Social Security Administration's *Chevron* space.[131] Might not that behavior be regarded as having the force of law, in the sense of having become part of the agency's common law on the subject, such that a court would not permit the agency to abandon it without formal action and explanation?[132] Decades earlier, in a tax case arising under similar circumstances, the Court remarked that IRS interpretations had "acquired the force of law."[133] Yet this was not saying, as courts might say of their own acts of statutory interpretation,[134] that the resulting ascription of meaning to statutory language would ordinarily require congressional action to change. Agency actions in *Chevron* space are open to reasoned reexamination. The "force of law" observation simply affirmed a norm courts should respect if it was a reasonable treatment of ambiguous statutory language, a norm open to the agency to change as reason or changing circumstances might warrant.[135]

3. *And If an Agency Has Not Yet Exercised Its Authority on an Issue Within Its Chevron Space, What Is the Impact of a Judicial Decision of That Issue?* — If a statute's creation of *Chevron* space is to be understood as the commitment to the agency involved of the responsibility for its administration, that understanding could not be defeated by the happenstance that an issue falling within it happened first to be presented in litigation in court.

130. 535 U.S. 212 (2002).

131. Id. at 219–20 (discussing reasonableness of agency's "longstanding interpretation").

132. See Shaw's Supermarkets, Inc. v. NLRB, 884 F.2d 34, 36 (1st Cir. 1989) (requiring agency to explain significant departure from its prior position).

133. Cammarano v. United States, 358 U.S. 498, 510 (1959).

134. Neal v. United States, 516 U.S. 284, 295–96 (1996) (insisting congressional action is required to change Court's interpretations of statutes). Note, however, that this proposition holds with force only at the level of the Supreme Court, which decides relatively few statutory questions annually. See Peter L. Strauss, One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Administrative Action, 87 Colum. L. Rev. 1093, 1121 (1987) (understanding *Chevron* as means for promoting uniform national law under agency administration). Moreover, even in the judicial context (as, for example, in *Skidmore* itself), some decisions involving applications of statutes are best characterized as law-applying, not "interpretation" per se. No principle prevents a court from identifying ambiguities in a statute lying wholly outside the ambit of any agency's responsibility for administration as themselves demarking what is in effect *Chevron* space, committed to the courts for reasoned application in the circumstances of the particular time and place.

135. Helvering v. Reynolds, 313 U.S. 428, 432 (1941) (holding that even reenactment of the underlying statute without change "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change"); Helvering v. Wilshire Oil Co., 308 U.S. 90, 101 (1939) (holding that denying this flexibility "would deprive the administrative process of some of its most valuable qualities—ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations"). Thus, here we find the idea of *Chevron* space four decades earlier.

A century ago, the Supreme Court recognized, in the rate-setting context, that judges might be well-advised to refer certain matters to the responsible agency rather than themselves decide them.[136] The doctrine of "primary jurisdiction" the Court thus recognized, though different in its details, confirms the importance of judicial respect for valid congressional assignments of decisional responsibility to others. And its relationship to *Chevron*'s teaching has not gone unnoticed:

> Although the doctrine of primary jurisdiction was originally rooted in the notion that agencies have greater expertise, experience, and flexibility than courts in dealing with regulatory matters, as well as in a desire for uniform application of the law, . . . abstention in favor of agencies charged with resolving conflicting statutory policies also promotes the proper relationships between courts and administrative agencies. This follows naturally from *Chevron*, which explained that deference to agencies was appropriate not only because of agency expertise but also because Congress is presumed to delegate the policy choices inherent in resolving statutory ambiguities to the agency charged with implementation of the statute.[137]

In 1994, in affirming a lower court judgment that certain fees were "reasonable" within the meaning of a statute left to the administration of the Department of Transportation, the Supreme Court not only regretted the failure of the parties to have involved the Secretary, whose judgment it said would have warranted *Chevron*'s application,[138] but also affirmatively stated, in a footnote citing *Chevron*, that

> [i]t remains open to the Secretary, utilizing his Department's capacity to comprehend the details of airport operations across the country, and the economics of the air transportation industry, to apply some other formula (including one that entails more rigorous scrutiny) for determining whether fees are "reasonable" within the meaning of the AHTA; his exposition will merit judicial approbation so long as it represents "a permissible construction of the statute."[139]

Were there any doubt that decisions with an agency's delegated *Chevron* space are *its* responsibility, without necessary regard to prior judicial decision of the point, that was settled by *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[140] The Ninth Circuit had once held, in litigation not involving the FCC, that certain Internet services were "telecommunications," not "information" services;[141] when

136. Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907).

137. Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1344 (D.C. Cir. 1989) (citations omitted), vacated on other grounds, 498 U.S. 1117 (1991).

138. Nw. Airlines, Inc. v. Cnty. of Kent, 510 U.S. 355, 366–67 (1994).

139. Id. at 368 n.14 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

140. 545 U.S. 967 (2005).

141. AT&T Corp. v. Portland, 216 F.3d 871, 878 (9th Cir. 2000).

the FCC subsequently reached the opposite conclusion, the Ninth Circuit, invoking this interpretation as precedent, reversed. Eight Justices agreed—Justice Scalia once again angrily dissenting—that the FCC's conclusion had been reasonably reached within its *Chevron* space.[142] The Ninth Circuit had not acted improperly in deciding the earlier litigation, but given the nature of the question presented to it, it erred in later insisting on the FCC's obedience to this previously stated view:

> A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. This principle follows from *Chevron* itself. *Chevron* established a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."
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> . . . .
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> Since *Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency's decision to construe that statute differently from a court does not say that the court's holding was legally wrong. Instead, the agency may, consistent with the court's holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.[143]

The situation can be analogized quite precisely, as Professor Kenneth Bamberger did even before this decision,[144] to that faced by federal courts deciding in the diversity jurisdiction (or, for that matter, to that faced by *any* court led by conflict of laws principles to divine the law of another jurisdiction): The court's authority is limited to deciding the matter before it. If its decision has any precedential force at all, that force is limited to other courts within its hierarchical sphere of command and will be defeated as soon as the governing jurisdiction can be seen to have reached a differing, valid conclusion. Authority that Congress allocates to the FCC is the counterpart of the authority of New York courts over New York law. In any given case, the Second Circuit might have to decide some proposition of New York law or within the FCC's delegated authority. That court's decision, however, constitutes the law neither of New York nor of the FCC.

142. 545 U.S. at 986.

143. Id. at 982–83 (quoting Smiley v. Citibank, 517 U.S. 735, 740–41 (1996)).

144. Bamberger, supra note 14, at 1306–08 (discussing interaction of state and federal courts in interpreting unsettled state law issues).

CONCLUSION

Occam's razor can be a treacherous tool. Nonetheless, it is urged, a simple and rational synthesis of the leading cases can be made without difficulty, if one abandons the confusions of "deference" for the distinct qualities of "weight" and "space." Agency views of statutory meaning may often be entitled to considerable weight when judges come to decide for themselves issues of statutory meaning. American courts have recognized this proposition for almost two centuries.[145] More recently we have come to understand and accept that executive agencies may be vested by Congress with authority to act with the force of law, so long as the boundaries of that action can be judicially determined. In that space, the agency is the prime actor, and the very conclusion that Congress has delegated authority to it commands reviewing courts to act, not as deciders, but as overseers.

145. See supra notes 43–48 and accompanying text.